

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWIGHT W. PERKINS, JR.,	§
	§ No. 42, 2005
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Kent County
STATE OF DELAWARE,	§ Cr.A. Nos. VK99-09-0448; 0450
	§ VK95-10-0363; 0368
Plaintiff Below-	§
Appellee.	§

Submitted: June 27, 2005

Decided: August 16, 2005

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices

**ORDER**

This 16th day of August 2005, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In May 2000, the defendant-appellant, Dwight W. Perkins, Jr., pleaded guilty to Possession of a Deadly Weapon by a Person Prohibited, Felony Theft and Misdemeanor Theft. On the weapon charge, he was sentenced to four years at Level V, on the felony theft charge to two years at Level V, to be suspended for Level IV Crest followed by one year at Level III probation, and on the misdemeanor theft charge to one year at Level V, to

be suspended for one year at Level II probation. Perkins did not file a direct appeal from his convictions and sentences.<sup>1</sup>

(2) At a violation of probation (“VOP”) hearing in the Superior Court in January 2005, Perkins was found to have committed a VOP based on his admission, through his counsel, that he had not reported to his probation officer on a regular basis, had tested positive for marijuana and cocaine, and had not attended the Crest Aftercare program. His probation was revoked and he was sentenced to a total of four years incarceration at Level V, to be suspended after 2½ years for two years of probation.<sup>2</sup> This is Perkins’ direct appeal of his VOP sentences.

(3) Perkins’ counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally

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<sup>1</sup> It appears that the Superior Court subsequently modified Perkins’ sentence for Possession of a Deadly Weapon by a Person Prohibited to provide for the remainder of his Level V time to be served at Level IV Crest and Level III Crest Aftercare.

<sup>2</sup> The Superior Court sentenced Perkins for VOP’s in connection with his convictions of Felony Theft and Misdemeanor Theft as well as additional convictions of Robbery in the First Degree and Carrying a Concealed Deadly Weapon.

devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>3</sup>

(4) Perkins' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Perkins' counsel informed Perkins of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Perkins also was informed of his right to supplement his attorney's presentation. Perkins responded with a brief that raises six issues for this Court's consideration. The State has responded to the position taken by Perkins' counsel as well as the issues raised by Perkins and has moved to affirm the Superior Court's judgment.

(5) Perkins raises six issues for this Court's consideration, which may fairly be summarized as follows: a) the Superior Court abused its discretion by imposing sentences that were disproportional to the violations he committed; and b) his due process rights were violated at the VOP hearing. Because Perkins' claims were not raised below, we review them in this appeal for plain error.<sup>4</sup>

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<sup>3</sup> *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

<sup>4</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process).

(6) The Superior Court has broad discretionary power to revoke a defendant's probation.<sup>5</sup> The Superior Court's revocation of a defendant's probation is, accordingly, reviewed by this Court for abuse of discretion.<sup>6</sup> A sentencing decision by the Superior Court is initially reviewed by this Court to determine whether the sentence is within the statutory limits.<sup>7</sup> If so, this Court will not find an abuse of discretion unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind.<sup>8</sup>

(7) Perkins' first claim is that the Superior Court abused its discretion by imposing disproportionate sentences. He presents no evidence suggesting that his sentences were in excess of the statutory limits. Moreover, we have reviewed the transcript of the VOP hearing and it does not reflect that the Superior Court judge either relied on impermissible factors or exhibited a closed mind in sentencing Perkins. We, thus, find no error, plain or otherwise, on the part of the Superior Court with respect to Perkins' first claim.

(8) Perkins' second claim is that his due process rights were violated at the VOP hearing because "the proper adversarial procedures" were not followed. Perkins does not state specifically what the alleged

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<sup>5</sup> *Brown v. State*, 249 A.2d 269, 271-72 (Del. 1968).

<sup>6</sup> *Fuller v. State*, 844 A.2d 290, 291 (Del. 2004).

<sup>7</sup> *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992).

<sup>8</sup> *Id.*

procedural deficiencies were and the transcript of the hearing does not reflect any such deficiencies. A VOP hearing may be informal or summary in nature.<sup>9</sup> In this case, Perkins was represented by counsel at the VOP hearing. Perkins' counsel did not object to any of the Superior Court's procedures and admitted that Perkins had violated three conditions of his probation. Accordingly, we find no error, plain or otherwise, with respect to Perkins' second claim.

(9) This Court has reviewed the record carefully and has concluded that Perkins' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Perkins' counsel has made a conscientious effort to examine the record and has properly determined that Perkins could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland  
Justice

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<sup>9</sup> Del. Code Ann. tit. 11, § 4334(c) (2001).