

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JIMMIE LEWIS,	§
	§ No. 64, 2005
Defendant Below-	§
Appellant,	§
	§ Court Below - Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr.A. Nos. IN03-06-0175 thru
	§ 0177
Plaintiff Below-	§
Appellee.	§

Submitted: July 25, 2005
Decided: September 29, 2005

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 29th day of September 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) The defendant-appellant, Jimmie Lewis, was found guilty by a Superior Court jury of Carjacking in the Second Degree, Felony Theft and Resisting Arrest. He was sentenced to a total of 8 years incarceration at Level V, to be suspended after 6 years for decreasing levels of probation. This is Lewis's direct appeal.

(2) Lewis's trial 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 devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(3) Lewis's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Lewis's counsel informed Lewis 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. Lewis also was informed of his right to supplement his attorney's presentation. Lewis responded with a brief that raises ten issues for this Court's consideration. The State has responded to the position taken by Lewis's counsel as well as the issues raised by Lewis and has moved to affirm the Superior Court's judgment.

¹ *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).

(4) Lewis raises ten issues for this Court's consideration. He claims that: (a) the evidence presented at trial was inconsistent and, therefore, insufficient to support his convictions; (b) the judge should have instructed the jury on the lesser-included offense of unauthorized use of a motor vehicle; (c) the judge permitted the introduction of evidence that was unduly prejudicial; (d) the judge engaged in actions that were prejudicial to his case; (e) his carjacking and theft convictions violate double jeopardy; (f) he was denied his right to counsel; (g) he was denied his right to be tried by a jury of his peers; (h) the prosecutor failed to produce the required documentation of his habitual offender status; (i) the judge failed to take account of his mental status during the trial; and (j) his civil rights were violated by prison guards.

(5) The evidence presented at trial was as follows. At around 12:30 a.m. on May 26, 2003, Patrick Geer was driving his car, a 1997 Ford Escort, in the City of Wilmington. As he drove east on 4th Street towards King Street, he saw Jimmie Lewis standing on the corner. When Geer stopped for a red light at the corner, Lewis asked him for a ride "up the hill," which Geer took to mean Meetinghouse Hill. Geer told Lewis he wasn't going in that direction. Nevertheless, Lewis opened the door on the

passenger side of the car and got in. Geer decided to do what Lewis asked and made a U-turn on 4th Street to go back up the hill.

(6) As they were driving, Lewis told Geer that he needed money and wanted the money in Geer's wallet. As they drove over the hill, Lewis told Geer to pull over and grabbed the steering wheel. Geer drove under the I-95 overpass towards the gas station at the Adams Four Shopping Center and stopped. Lewis started to fumble through his left pocket. Thinking Lewis might be armed, Geer got out and tried to flag down passing cars. He walked down the street towards the gas station, while Lewis continued to drive the car up 4th Street. At the gas station, Geer told the attendant to call 911. As Geer waited for the police to arrive, Lewis pulled up in the car, moved over to the passenger side, shouted something to Geer and then pulled away. The Wilmington police later took a statement from Geer at the gas station.

(7) The next morning, Officer Jose Santana, who was on routine patrol with his partner, Officer Godwin, located Geer's car at Harrison and Reed Streets, a few blocks from the gas station. They observed Lewis getting out of the car and turned back around. As they approached the car, they observed that Lewis was in the driver's seat attempting to leave. As the officers got out of their police vehicle, Lewis put the car keys in his pocket

and locked the driver's side door. As Lewis reached over to lock the passenger side door, Officer Santana grabbed the door and held it open. The officers then forcibly removed Lewis from the car and handcuffed him.

(8) Lewis, who testified on his own behalf, had a different version of the events leading up to his arrest. According to Lewis, he was traveling by train from Newark, New Jersey to North Carolina on the date of the incident. Prior to the Wilmington stop he became aware that his carry-on baggage was missing, so he got off at the Wilmington stop. He walked to 4th Street in search of a cab to go to a friend's house. At 4th Street, Geer stopped and asked him if he wanted a ride. Lewis said yes, believing that Geer was driving a "gypsy cab."

(9) As they were driving, Geer reached over and grabbed Lewis between his legs, saying that he was interested in having sex. Lewis refused. Geer told Lewis he would pay him \$100 to find someone who would be interested in having sex. Lewis drove off, leaving Geer at the gas station. He soon returned because he was not familiar with Wilmington, but Geer insisted that he continue his search. When Lewis finally returned to the gas station, Geer was gone. He waited twenty minutes and then decided to park the car. Lewis stayed with the car the rest of the night until the police woke

him the next morning. As he was raising his hands at the direction of the police, he accidentally hit the lock button of the door with his elbow.

(10) Lewis' first claim is that the evidence presented at trial was inconsistent and, therefore, insufficient to support his convictions. In reviewing a claim of insufficiency of the evidence, this Court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.² In so doing, we make no distinction between direct and circumstantial evidence.³ Moreover, it is for the jury to weigh the relative credibility of the witnesses and reconcile any conflicting testimony.⁴ Our review of the record in this case does not support Lewis's claim. There clearly was sufficient evidence presented at trial to support Lewis's convictions of Carjacking in the Second Degree,⁵ Felony Theft⁶ and Resisting Arrest.⁷

² *Barnett v. State*, 691 A.2d 614, 618 (Del. 1997).

³ *Skinner v. State*, 575 A.2d 1108, 1121 (Del. 1990).

⁴ *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).

⁵ Del. Code Ann. tit. 11, § 835(a) ("A person is guilty of carjacking in the second degree when that person knowingly and unlawfully takes possession or control of a motor vehicle from another person . . . by coercion, duress or otherwise without the permission of the other person.").

⁶ Del. Code Ann. tit. 11, § 841(a) ("A person is guilty of theft when the person takes, exercises control over or obtains property of another person intending to deprive that person of it or appropriate it.").

⁷ Del. Code Ann. tit. 11, § 1257 ("A person is guilty of resisting arrest when the person intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of the person . . .").

(11) Lewis claims that the judge committed error in his evidentiary rulings, by engaging in actions that were prejudicial to his case and by failing to instruct the jury on the charge of unauthorized use of a motor vehicle. We have reviewed the transcript of the trial and can find no erroneous evidentiary rulings by the judge. Nor can we discern any actions on the part of the judge that resulted in prejudice to Lewis's case. Finally, the transcript does not reflect any request for an instruction on unauthorized use of a motor vehicle. In fact, such an instruction would have been completely inconsistent with Lewis's testimony, which was that Geer had given him permission to drive his car. As such, we find no error or abuse of discretion on the part of the Superior Court in failing to give an instruction on unauthorized use of a motor vehicle.

(12) Lewis claims that his convictions of Carjacking in the Second Degree and Felony Theft violate double jeopardy because they prohibit the same conduct. However, the fact that two criminal statutes may be construed to prohibit the same conduct does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes.⁸ This Court has expressly recognized that, where the intent of the legislature to impose cumulative

⁸ *Cook v. State*, 600 A.2d 352, 355 (Del. 1991).

sentences is clear, multiple punishments are not constitutionally barred.⁹ The Delaware carjacking statute expressly states that “[n]othing in this section shall be deemed to preclude prosecution under any other provision of this Code.”¹⁰ Lewis’s consecutive sentences for Carjacking and Felony Theft are, thus, permissible, since the legislature clearly has provided for such multiple punishments.¹¹ We, therefore, find Lewis’s double jeopardy claim to be without merit.

(13) Lewis next claims that he was denied his right to counsel. The record reflects that the judge denied Lewis’s pretrial request to discharge his public defender and have another one appointed. It is well-settled that the right to counsel does not entail an absolute right to counsel of one’s choice.¹² We find no error or abuse of discretion on the part of the judge in denying Lewis’s request for new counsel and no merit to this claim.

(14) Lewis’s next claim is that he was denied his right to be tried by a jury of his peers. The basis for this claim is that most of the jurors were older than he and came from social and ethnic backgrounds different from his. Lewis does not articulate why he believes the jury did not render a fair and impartial verdict based upon the evidence presented at trial, which is

⁹ *LeCompte v. State*, 516 A.2d 898, 901 (Del. 1986).

¹⁰ Del. Code Ann. tit. 11, § 835(d).

¹¹ *LeCompte v. State*, 516 A.2d at 901.

¹² *In re Kennedy*, 472 A.2d 1317, 1331 (Del. 1984).

essential to his claim.¹³ In the absence of any facts supporting this claim, we find it to be without merit.

(15) Lewis claims that the prosecutor improperly failed to produce documentation of his habitual offender status. There is no factual basis for this claim, since the record reflects that the prosecutor initially filed a motion to have Lewis declared a habitual offender, with supporting documentation, but ultimately did not pursue that motion. Information concerning Lewis's prior criminal activity was contained in the presentence report, which was available to the judge in imposing sentence. When a sentence is within the statutory limits, 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.¹⁴ In the absence of any evidence that the judge either relied on impermissible factors or exhibited a closed mind in imposing sentence, we find no abuse of discretion on the part of the sentencing judge.

(16) Lewis claims that the judge did not take proper account of his mental status for purposes of trial, including continuing the trial so that he could be evaluated and considering his mental condition as a mitigating factor in sentencing. The record reflects that, on the morning of trial, Lewis claimed to be having a psychotic episode because he had forgotten to take

¹³ *Banther v. State*, 823 A.2d 467, 481 (Del. 2003).

¹⁴ *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).

his medicine. Defense counsel reported to the judge that Lewis had never mentioned mental health problems in any of their five pretrial interviews. The judge questioned Lewis directly about his mental health status and ordered trial to proceed pending the receipt of information from the prison. Defense counsel reported to the judge that Lewis had been prescribed two medications while in prison, one of which he refused to take, and that he originally had been placed in the “mental health pod,” but was now housed with the general population.

(17) The record further reflects that, following the trial and prior to sentencing, the Superior Court ordered Lewis transferred to the Delaware Psychiatric Center for further evaluation. The primary diagnosis in the report was that Lewis was malingering---that is, intentionally exaggerating his physical and psychological symptoms in order to avoid being sentenced to prison. The record simply does not support Lewis’s claim that the Superior Court failed to take account of his mental health status. To the contrary, the judge appropriately dealt with Lewis’s claims.

(18) Lewis’s final complaint deals with treatment he allegedly received at the hands of prison guards during the course of the trial. The record does not reflect any factual basis for Lewis’s claims of mistreatment

by guards. To the extent Lewis complains that his civil rights have been violated, his remedy is a separate civil action, not an appeal in this Court.

(19) This Court has reviewed the record carefully and has concluded that Lewis's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Lewis's counsel has made a conscientious effort to examine the record and has properly determined that Lewis 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/ Carolyn Berger
Justice