

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN McCRAY,	§
	§ No. 677, 2011
Defendant Below,	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0208020744
	§
Plaintiff Below,	§
Appellee.	§

Submitted: April 24, 2012

Decided: May 3, 2012

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 3<sup>rd</sup> day of May 2012, upon consideration of the appellant’s brief filed pursuant to Supreme Court Rule 26(c), his attorney’s motion to withdraw,<sup>1</sup> and the State’s response thereto, it appears to the Court that:

(1) In July 2003, the defendant-appellant, Kevin McCray, entered a plea of guilty to three counts of Robbery in the First Degree and one count of Possession of a Firearm During the Commission of a Felony. Pending the sentencing hearing, McCray was interviewed in connection with the Superior Court’s pre-sentence investigation (“PSI”). He did not mention any

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<sup>1</sup> Counsel was appointed to represent the appellant in connection with his third motion for postconviction relief as well as the instant appeal.

mental health issues or any prior admission to a mental health facility at that time.

(2) At the time of McCray's sentencing hearing in December 2003, the Superior Court conducted a further colloquy with McCray concerning his guilty plea. Because it was learned during the PSI that McCray had committed an earlier robbery in 1985, which was a sentencing aggravator, McCray was permitted to withdraw his prior plea and plead guilty to two, rather than three, counts of Robbery in the First Degree plus one count of Possession of a Firearm During the Commission of a Felony. Due to his 1985 robbery conviction, McCray's two remaining robbery convictions were now subject to increased minimum mandatory sentences. McCray was sentenced to a total of 38 years of Level V incarceration, to be suspended after 26 years for decreasing levels of supervision. McCray did not file a direct appeal from his convictions.

(3) The record before us reflects that, while McCray was being prosecuted in Delaware, he also was facing federal charges stemming from robberies committed in New Jersey. As those cases were scheduled for trial in December 2004, McCray began to show signs of mental health problems. His counsel reported to the federal court that his mental condition had deteriorated. McCray's federal trial was postponed and, in January 2005, he

was evaluated by a psychiatrist, who concluded that he had chronic mental illness and was not competent to stand trial. McCray was transferred to a federal medical center where he refused to cooperate with further evaluation and treatment.

(4) During that time, McCray filed his first motion for postconviction relief in the Superior Court. The Superior Court denied the motion in August 2005. In October 2005, McCray re-filed the same motion, which was summarily dismissed in December 2005. In September 2008, McCray filed motions for a psychiatric evaluation and the appointment of counsel, which were denied in October 2008. McCray's third postconviction motion followed soon thereafter.

(5) When McCray appealed the Superior Court's denial of his motions for a psychiatric evaluation and the appointment of counsel, the Office of the Attorney General requested that the matter be remanded to the Superior Court with instructions that counsel be appointed and a psychiatric examination be ordered to assess McCray's competency to participate in his pending court proceedings. This Court granted the Attorney General's request by Order dated February 2, 2009.<sup>2</sup> On remand, counsel was

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<sup>2</sup> *McCray v. State*, Del. Supr., No. 543, 2008, Ridgely, J. (Feb. 2, 2009).

appointed to represent McCray and he was transferred to the Delaware Psychiatric Center for a competency evaluation.

(6) On May 31, 2011, after having conducted an interview, testing and a review of the record, Robert G. Thompson, a licensed psychologist with the Delaware Psychiatric Center, concluded that McCray was malingering and that there was “no compelling evidence to suggest that Mr. McCray was incompetent when he entered guilty pleas in 2003.” The psychologist also concluded that McCray was sufficiently competent to participate in postconviction proceedings. Both the Attorney General and McCray’s appointed counsel informed the Superior Court that McCray’s third postconviction motion was ripe for decision.

(7) In its decision denying McCray’s third motion for postconviction relief, the Superior Court found that McCray’s motion was untimely under Rule 61(i)(1) and procedurally barred under Rule 61(i)(3). Moreover, the Superior Court found that Rule 61(i)(5)’s interest of justice exception to the procedural bar was not implicated. As such, the Superior Court concluded, it was time for McCray to begin serving the sentence that was lawfully imposed upon him following his knowing and voluntary guilty plea in 2003.

(8) McCray’s 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 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 in order to determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>3</sup>

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

(10) McCray raises three issues for this Court's consideration. He claims that the Superior Court erred and abused its discretion when it a)

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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).

accepted his guilty plea while he was suffering from mental illness that rendered him incompetent to stand trial; b) denied his motion to withdraw his guilty plea on the ground of incompetency; and c) denied his third motion for postconviction relief, which was based on his counsel's failure to request an evaluation of his competency at the time of his guilty plea.

(11) All three of McCray's claims are grounded on the assumption that he was incompetent at the time he entered his guilty plea. The record does not support McCray's assumption. All the evidence in this case, bolstered by Dr. Thompson's opinion that McCray was competent when he entered his guilty pleas, supports the conclusion that McCray's guilty plea was knowing and voluntary. We therefore agree with the Superior Court's determination that there is no merit to McCray's third postconviction motion and that he now must begin serving the sentence that was imposed in 2003.

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