IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEREL Q. FLAMER,	§	
	§	No. 289, 2001
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in
v.	§	for Sussex County in Cr.A.
	§	No. IS00-07-0044.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0006013779

Submitted: February 4, 2002
Decided: April 10, 2002

Before **VEASEY,** Chief Justice, **HOLLAND** and **STEELE,** Justices.

O R D E R

This 10th day of April 2002, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, the State's response thereto and the State's supplemental response, it appears to the Court that:

(1) In March 2001, a jury convicted Jerel Q. Flamer of Escape after Conviction. In June 2001, the Superior Court sentenced Flamer as an habitual offender to eight years at Level V imprisonment followed by six months at Level III probation. This is Flamer's direct appeal.

(2) Flamer's appellate counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c). Counsel asserts that, based upon a careful

and complete examination of the record, there are no meritorious issues to raise on appeal. Counsel raises three arguably appealable issues in the Rule 26(c) brief.

(3) By letter, counsel informed Flamer 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. Although informed of his right to supplement his counsel's presentation, Flamer did not respond to his counsel's Rule 26(c) letter. The State has responded to the issues raised by Flamer's counsel and has moved to affirm the Superior Court's judgment.

(4) 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. First, 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. Second, 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]

(5) The record reflects that on June 17, 2000, Flamer and two other inmates, David A. Hogue and George R. Goodlett, Jr., escaped from the Sussex

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[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).

Violation of Probation (VOP) Center in Georgetown. The three men rode together in a stolen car to Florida, where they were apprehended.

(6) Flamer was indicted for the offenses of Burglary in the Second Degree, Felony Theft, Conspiracy in the Second Degree, Misdemeanor Theft, Criminal Mischief and Escape after Conviction. At the conclusion of the trial, the Court granted Flamer's motion to dismiss the charges of Burglary in the Second Degree, Conspiracy, Misdemeanor Theft and Criminal Mischief. Of the remaining two charges, the jury convicted Flamer of Escape after Conviction and acquitted him of Felony Theft.

(7) In the Rule 26(c) brief, Flamer's counsel identifies the following arguably appealable issues: (i) the habitual offender statute as applied to Flamer is harsh; (ii) the State did not provide previously court-ordered mental health treatment to Flamer; and (iii) Flamer was entitled to a jury instruction on the lesser included offense of Escape in the Third Degree. None of the claims has merit.

(8) The first arguably appealable issue raised by counsel is that the habitual offender statute as applied to Flamer is harsh. In support of his argument, counsel refers to the trial judge's remarks at sentencing.[2] It is clear, however, that Flamer

[2]The judge stated:

was properly sentenced as a habitual criminal pursuant to 11 *Del. C.* § 4214(a). Under that statute, once the sentencing judge granted the State's properly filed habitual offender motion, the judge had no discretion to impose any sentence less than the statutory maximum for the Class D felony conviction of Escape after Conviction,[3] which is classified as a Title 11 violent felony.[4]

(9) The second arguably appealable issue raised by Flamer's counsel is that the State failed to provide Flamer with mental health treatment in accordance with a prior order issued by another Superior Court judge in a different case.[5] This claim, however, is not a basis for appellate relief. Flamer did not assert a mental

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> It does strike me that eight years is a lot for what Mr. Flamer did. And I know that comes on top of I think a six-year sentence that he just got on a violation of probation. So Mr. Flamer's situation, which was not quite so bad at the time, got bad and got bad in a big way. But the laws are what they are. I certainly more than anyone else am obligated to follow them faithfully, and that's what I've done here, notwithstanding my personal feeling that eight years is a little too much. But they are what they are and it's not my role to try to circumvent them by being a little too creative.

Hr'g. Tr., June 8, 2001, at 7-8.

[3]The statutory maximum for a Class D felony is 8 years at Level V. Del. Code Ann. tit. 11, § 4205(b)(4).

[4]Del. Code Ann. tit. 11, § 4201(c).

[5]*See State v. Flamer*, Del. Super., No. 30205512DI, Herlihy, J. (April 19, 1996) (adjudging Flamer guilty of VOP and sentencing him to prison, a half-way house, and mental health treatment).

illness defense at trial, and there has been no showing that Flamer was mentally ill on June 17, 2000, when he escaped from the Sussex VOP Center.

(10) The third arguably appealable claim raised by Flamer's counsel is that Flamer was entitled to a jury instruction on the lesser included offense of Escape in the Third Degree. Flamer, however, did not request that jury instruction at trial,[6] so the issue will be reviewed only for plain error.[7]

(11) It was not plain error for the trial judge to not, *sua sponte*, give a jury instruction on the lesser included offense of Escape in the Third Degree. The crime of Escape after Conviction requires proof that the defendant escaped from a detention facility "after entering a plea of guilty or having been convicted."[8] The crime of Escape in the Third Degree does not include the element of having pled guilty or been convicted of a crime.[9] The Superior Court was not required to instruct the jury on Escape in the Third Degree unless there was "a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and

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[6]Defense counsel did request an instruction on the lesser included offense of Escape in the Second Degree, but that request was denied.

[7]***Wainwright v. State,*** 504 A.2d 1096, 1100 (Del. 1986).

[8]Del. Code Ann. tit. 11, § 1253.

[9]*See* Del. Code Ann. tit. 11, § 1251 (providing that a person is guilty of escape in the third degree when the person escapes from custody, including placement in nonsecure facilities by the Division of Youth Rehabilitative Services).

convicting the defendant of the included offense."[10] In this case, it was not disputed that Flamer escaped from a detention facility after a criminal conviction.

(12) The Court has reviewed the record carefully and has concluded that Flamer's appeal is wholly without merit and devoid of any meritorious issues. We also are satisfied that Flamer's counsel has made a conscientious effort to examine the record and has properly determined that Flamer 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/ Myron T. Steele
Justice

[10]Del. Code Ann. tit. 11, § 206(c).