

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEREK DOWNING,	§
	§
Defendant Below-	§ No. 42, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. VN99-04-0506
Plaintiff Below-	§ VN99-04-0508
Appellee.	§ VN99-04-0511
	§ VN99-04-0514

Submitted: May 20, 2002

Decided: July 24, 2002

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

ORDER

This 24th day of July 2002, 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) On January 3, 2002, the defendant-appellant, Terek Downing, was found by the Superior Court to have committed violations of probation (“VOP’s”) in connection with four 1999 convictions for Burglary and Theft. He was sentenced to 2 years incarceration at Level V on each of the convictions, with

the first sentence to be suspended after 1 year for 6 months of Level IV work release and 6 months of Level III probation. This is Downing's direct appeal.

(2) Downing'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) Downing's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Downing's counsel informed Downing of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete hearing transcript. Downing was also informed of his right to

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).

supplement his attorney's presentation. Downing responded with a brief that raises one issue for this Court's consideration. The State has responded to the position taken by Downing's counsel as well as the issue raised by Downing and has moved to affirm the Superior Court's judgment.

(4) Downing raises one issue for this Court's consideration. He claims that the finding of a VOP was based improperly upon charges stemming from an October 16, 2001 robbery at Kosowski's Market at 600 South Heald Street in Wilmington, Delaware, for which he had not yet been tried.

(5) The transcript of the January 3, 2002 contested VOP hearing reflects the following. Detective James Diana of the Wilmington Police Department testified first for the State. He had worked for the department for 15 years and had been a detective for 4 years. His testimony was based upon his investigation of the robbery at Kosowski's Market. Detective Diana interviewed two employees at the store shortly after the robbery. The first had a cut over his left eye and a contusion on his forehead and stated that he had been pistol-whipped by one of the robbers. The second employee stated that at approximately 12:45 p.m. two men, each wearing dark clothing and bandannas covering the lower portion of their faces, entered the store. Each was armed with

a handgun. One of the men was approximately 6' or 6' 1" tall and the other was approximately 5'7" or 5'8" tall. The shorter man was armed with an Uzi-type handgun, silver on the top with a long black magazine. The taller man was armed with a small silver handgun with a black handle.

(6) According to the second employee, the shorter man beat the first employee with his handgun and ordered him to open the two registers on the counter. The taller man ordered the second employee to open a safe in an office at the front of the store. The first employee opened the registers and then the safe and was beaten again, this time by the taller man. After obtaining rolls of coins, currency and food stamps from the registers and safe, the two men left the store. The first employee watched them walk south on Heald Street and then cross the street towards D Street, where he lost sight of them.

(7) Detective Diana testified that, based on information from two other witnesses, the police were able to identify and interview the woman who drove the two men away from the scene. She identified herself as Downing's girlfriend. She stated that, on the date of the robbery, she picked up Downing and another man in her mother's car. She parked in the area of D and Townsend Streets, about a block and a half away from Kosowski's Market. Downing and the other

man got out of the car and said they would be right back. A few minutes later, they ran back to the car and told her to get out of there. Downing had a black bandanna in his hand. A subsequent inspection of the car revealed a roll of quarters, a roll of nickels, currency and a stack of food stamps. The employee who had been beaten later identified Downing as one of the robbers.

(8) On cross examination at the VOP hearing, Detective Diana testified that Downing was identified by means of a 6-picture photo line-up conducted two days after the robbery. Detective Diana confirmed, first, that there was no evidence that either of the robber's bandannas had slipped from their faces; second, that the second employee was not able to identify Downing from the photo line-up; and, third, that the employee who identified Downing did not say how he was able to make the identification, given that the robbers' bandannas remained on their faces during the incident. Observing Downing in the courtroom, Detective Diana confirmed that he was "substantially taller than 6 foot."

(9) Detective Diana further testified on cross examination at the VOP hearing about the two witnesses who had led the police to the driver of the getaway car. They had stopped for a red light in front of Kosowski's Market at

the time of the robbery. They sensed something was wrong when two men ran out of the store in an excited manner. They followed the men, who were African-American, and watched as they got into a car. They then followed the car south on Route 13, taking note of the car's tag number. When they saw a police officer standing outside New Castle County Police Headquarters on Route 13, they stopped and told him what they had seen. The tag number was disseminated to all law enforcement agencies. The getaway car, with Downing's girlfriend driving, was eventually stopped in Middletown, Delaware. She directed the police to a residence where they found a roll of quarters that the occupant stated had been given to her by Downing.

(10) The State next called Officer Amy Jensen as a witness at the VOP hearing. She was Downing's probation officer. She testified that Downing's probation was violated because he had been charged with Robbery in the First Degree, and other crimes, in violation of Condition 1 of his probation. He had also violated Condition 3 because he failed to report to his supervising officer, had violated Condition 5 because he failed to report a change of residence and had violated Condition 6 because he failed to obtain written approval from his supervising officer to own or possess a firearm, a violation based upon the

charges arising out of the robbery at Kosowski's Market. On cross examination, Officer Jensen acknowledged that she might have been out of the office on the date Downing was supposed to report to her. The defense presented no witnesses.

(11) Downing's claim that the Superior Court improperly found him in violation of his probation based upon the charges arising out of the robbery at Kosowski's Market is without merit. The Superior Court was within its discretion to find a VOP where the probationer merely had been charged with new criminal offenses,² and where it was undisputed that he had failed to comply with other conditions of his probation.

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

²*Mann v. State*, Del. Supr., No. 190, 2000, Steele, J. (Mar. 7, 2001).

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