IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARCOS ROJAS,	§	
	§	
Defendant Below-Appellant,	§	No. 6, 2002
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr.A. No. IN00-02-1215
Plaintiff Below-Appellee.	§	
	§	

Submitted: June 3, 2002
Decided: July 26, 2002

Before **WALSH**, **HOLLAND** and **STEELE**, Justices

O R D E R

This 26th 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) The defendant-appellant, Marcos Rojas, pleaded guilty to Robbery in the First Degree. He was sentenced to 12 years incarceration at Level V, to be suspended after 8 years for 4 years at Level IV Plummer Center, in turn to be suspended after 6 months for 3 ½ years of probation. This is Rojas' direct appeal.

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

(4) Rojas raises two issues for this Court's consideration. He claims that: a) his constitutional rights were violated and his guilty plea was involuntary because the prosecutor did not honor a prior promise 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).

recommend a 4-year prison term; and b) his counsel provided ineffective assistance.

(5) On September 18, 2001, the day of trial, Rojas signed a guilty plea form and plea agreement, and entered a plea of guilty to Robbery in the First Degree. During the plea colloquy, the judge explained to Rojas that, in exchange for his guilty plea, the State would drop a pending carjacking charge and recommend a pre-sentence investigation, which Rojas said he understood. Rojas stated that no other promises had been made to him, as reflected in the guilty plea form and plea agreement, and also stated that he was satisfied with his counsel's representation.

(6) At the sentencing hearing on December 7, 2001, the State recommended a sentence of 10 years incarceration at Level V. Defense counsel objected, arguing that the State previously had promised to recommend a sentence of only 4 years incarceration at Level V.[2] The prosecutor agreed that he had discussed such a recommendation with defense counsel in the past, but disagreed that it was part of the plea agreement.

[2]Defense counsel based his argument on five e-mails that passed between him and the prosecutor between the dates of June 8, 2001 and September 6, 2001. An e-mail dated July 25, 2001 stated the following: "In that he [Rojas] is looking at 2 class B felonies (2-20 each) and in that there is the prior violent felony conviction will rachet (sic) the presumptive sentence up to 10 years[.] I will say 4 years, the 1st 2 being minimum/mandatory."

(7) Rojas' claim that his rights were violated and his guilty plea was involuntary due to the State's improper sentence recommendation is without merit. Even if the prosecutor had recommended a 4-year prison term, the Superior Court would not have been bound by that recommendation.[3] Indeed, there is nothing in the record to suggest that the judge would have imposed a different sentence even if there had been a recommendation of a 4-year prison term, rendering any alleged error harmless.[4]

(8) There was no error or abuse of discretion on the part of the Superior Court in imposing a 12-year prison term. While the sentence exceeded the Truth in Sentencing guidelines, the guidelines were not binding on the Superior Court judge.[5] The sentence was well within the statutorily-authorized limits[6] and, thus, provides Rojas no grounds for relief.[7]

(9) Rojas' claim of ineffective assistance of counsel is also unavailing. Claims of ineffective assistance of counsel will not be

[3]SUPER. CT. CRIM. R. 11(e) (1) (B).

[4]The sentencing judge clearly was aware of the communications between the prosecutor and defense counsel; nevertheless, he sentenced Rojas to a 12-year term.

[5]*Gaines v. State*, 571 A.2d 765, 766-67 (Del. 1990).

[6]DEL. CODE ANN. tit 11, §§ 832, 4205 (2001), authorizing as much as a 20-year prison term for Rojas' first degree robbery conviction.

[7]*Gaines v. State*, 571 A.2d at 766-67.

considered for the first time on direct appeal.[8] Accordingly, we will not review this claim in the first instance.

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

[8] *Duross v. State*, 494 A.2d 1265, 1267-68 (Del. 1985).