

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES E. ROSS,	§
	§
Defendant Below-	§ No. 589, 2005
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr. ID 0303007243
Plaintiff Below-	§
Appellee.	§

Submitted: May 17, 2006

Decided: July 6, 2006

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

ORDER

This sixth day of July 2006, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, James Ross (“Ross”), filed this appeal from a violation of probation sentencing order dated November 1, 2005. The VOP charge, which was filed in Kent County, was based on new criminal charges of assault in a detention facility. The Superior Court in Kent County deferred action on the VOP charge pending disposition of the new criminal charges. The new charges were tried in New Castle County, and Ross was acquitted. Nonetheless, the Superior Court judge in New

Castle County who had presided at Ross' trial found that Ross had violated the terms of his probation by failing to follow correctional officers' orders and sentenced him on the VOP charge to four years at Level V incarceration to be suspended immediately for one year at Level IV Home Confinement.¹ The Department of Correction continued to hold Ross at Level V apparently based on the administrative warrant that had issued from Kent County. On December 23, 2005, after Ross had filed this appeal from the VOP sentencing order, the Superior Court in Kent County dismissed the violation filed there based on the November 1, 2005 action of the Superior Court in New Castle County.

(2) Ross' counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Ross' counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Ross' attorney informed him of the provisions of Rule 26(c) and provided Ross with a copy of the motion to withdraw and the accompanying brief. Ross also was informed of his right to supplement his attorney's presentation. Ross has not raised any issues for this Court's consideration. His counsel, however, asserts that the appeal was filed

¹ The transcript of the VOP sentencing reflects that the Superior Court ordered Ross be held at Level V pending space availability at Level IV. The written sentencing order, however, reflects that Ross should be held at Level III pending space availability.

because the Department of Correction failed to release Ross immediately from Level V incarceration, as set forth in the Superior Court's written sentencing order of November 1, 2005, until December 23, 2005. The State has responded to the position taken by Ross's counsel and has moved to affirm the Superior Court's judgment.

(3) 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) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this 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.²

(4) This Court has reviewed the record carefully and has concluded that Ross' appeal is wholly without merit and devoid of any arguably appealable issue. To the extent counsel complains that Ross was held at Level V longer than he should have been under the Superior Court's November 1, 2005 order, we note that Ross filed a petition for habeas corpus, which the Superior Court dismissed. Ross did not appeal from that decision. Any alleged error by the Department of Correction in

² *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).

implementing the Superior Court's order is not a matter that is subject to review by this Court on appeal from the Superior Court's sentencing order.

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