

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN J. GRAY,	§	
	§	No. 55, 2006
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware in and
v.	§	Sussex County in Cr. ID No.
	§	0411015528.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: May 11, 2006  
Decided: July 12, 2006

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

**ORDER**

This 12<sup>th</sup> day of July 2006, upon consideration of the appellant's brief pursuant to Supreme Court Rule 26(c) and his defense counsel's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) On June 22, 2005, the appellant, John J. Gray, pleaded *nolo contendere* to Attempted Assault in the First Degree and a related weapon offense. As part of the same agreement, Gray pleaded guilty to Assault in the Second Degree and Endangering the Welfare of a Child.

(2) After a presentence investigation, the Superior Court sentenced Gray to a total of twelve years at Level V, including six years mandatory

incarceration, followed by probation. On November 10, 2005, Gray, through his defense counsel (hereinafter “Counsel”), filed a motion for modification of sentence pursuant to Superior Court Criminal Rule 35(b). Gray requested that the Superior Court suspend the non-mandatory portion of his Level V sentences upon his successful completion of court-ordered treatment and counseling programs.

(3) In a supplement to the motion, Gray expressed concern that the Superior Court’s presentence report included unsubstantiated information that was not disclosed to Gray prior to his sentencing.<sup>1</sup> By order dated January 6, 2006, the Superior Court denied the motion for modification of sentence as supplemented.

(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 Counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal.<sup>2</sup> Second the Court must conduct its own review

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<sup>1</sup>*See Moore v. State*, 887 A.2d 466 (Del. 2005) (vacating sentence that was imposed in part upon uncorroborated information not disclosed to the defendant).

<sup>2</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).

of the record and determine whether the appeal is so devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>3</sup>

(5) Counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. Counsel represents that she informed Gray in writing of the provisions of Rule 26(c) and provided Gray with a copy of the motion to withdraw, the accompanying brief, and the plea and sentencing transcripts. Counsel also informed Gray of his right to supplement her presentation.

(6) Gray has submitted several issues for this Court's consideration. By letter, Gray requests that Counsel amend the opening brief to explain why Gray behaved as he did during the underlying incident, particularly with respect to the attempted assault charge. In a separate writing, Gray asserts that he deserves a modification of sentence because he is a "model inmate" with no disciplinary write-ups and has successfully participated in a number of programs offered by the prison. Gray also expresses remorse for his mistakes and requests a chance to return to the community to resume his construction business and support his young daughter.

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<sup>3</sup>*Id.*

(7) “Delaware law is well established that appellate review of sentences is extremely limited. ‘Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature.’”<sup>4</sup>

(8) This Court will not interfere with the Superior Court’s denial of a motion for modification of sentence unless it is demonstrated that the sentence exceeded the maximum authorized by statute or resulted from an abuse of discretion.<sup>5</sup> The Superior Court abuses its discretion if it imposes a sentence on the basis of inaccurate or unreliable information.<sup>6</sup>

(9) In this case, the Superior Court did not err or abuse its discretion when denying Gray’s *timely* motion for modification of sentence.<sup>7</sup> Gray does not argue, nor does the record reflect, that the Superior Court imposed a sentence beyond the maximum allowed by law. Nor does Gray demonstrate

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<sup>4</sup>*Mayes v. State*, 604 A.2d 839, 842 (Del. 1992) (quoting *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989)).

<sup>5</sup>*Melody v. State*, 2003 WL 1747237 (Del. Supr.) (citing *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992)).

<sup>6</sup>*Id.*

<sup>7</sup>Contrary to the State’s contention, it appears that Gray’s motion for modification was timely filed on November 10, 2005, ninety days after his August 12, 2005 sentencing. *See* Super. Ct. Crim. R. 35(b) (providing that a motion for reduction of sentence must be made within ninety days after the sentence is imposed).

that the Superior Court imposed a sentence based on unreliable, inaccurate or undisclosed information.

(10) It appears from the record that Gray had access to the presentence report and an opportunity to comment on the report prior to sentencing. The report included the applicable aggravating factors suggested by the presentence investigator, a victim impact statement, and Gray's explanation for his conduct.

(11) The Court has reviewed the record carefully and has concluded that Gray's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Gray's counsel made a conscientious effort to examine the record and the law, and that she properly determined that Gray 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/ Carolyn Berger  
Justice