IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMAR CAMPBELL,	§	
	§	
Defendant Below-Appellant,	§	No. 388, 2001
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr.A. Nos. IN99-12-1779
Plaintiff Below-Appellee.	§	IN99-12-1780
	§	

Submitted: May 7, 2002
Decided: June 27, 2002

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices

O R D E R

This 27th day of June 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, Jamar Campbell, was found guilty by a Superior Court jury of Possession with Intent to Deliver Cocaine and Possession of Cocaine Within 300 Feet of a Park. He was later sentenced, for the first conviction, to a minimum mandatory sentence of 15 years incarceration at Level

V[1] and, for the second conviction, to 3 years incarceration at Level V, to be suspended for decreasing levels of probation.

This is Campbell's direct appeal.

(2) Campbell'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.[2]

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[1]Campbell received this minimum mandatory term because he previously had been convicted of the same charge. DEL. CODE ANN. tit. 16, §§ 4751, 4763 (1995).

[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).

(3) Campbell's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Campbell's counsel informed Campbell 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. Campbell was also informed of his right to supplement his attorney's presentation. Campbell responded with a brief that raises several issues for this Court's consideration.[3] The State has responded to the position taken by Campbell's counsel as well as the issues raised by Campbell and has moved to affirm the Superior Court's judgment.

(4) Campbell raises nine separate issues for this Court's consideration, which may fairly be summarized as follows: a) his counsel provided ineffective assistance; b) the judge's questions to him were improper and prejudicial; c) the judge improperly permitted suggestive, perjured and hearsay testimony by the law enforcement witnesses; d) his arrest was illegal because the date of the crime contained on the indictment was incorrect; e) the physical evidence presented at

[3]In a letter filed in this Court on March 25, 2002, Campbell asserted that he had not been contacted by his attorney with respect to the appeal. Although Campbell originally provided no points for this Court to consider in connection with his attorney's Rule 26(c) brief filed on March 11, 2002, he was permitted additional time to provide such points.

trial had been tampered with; f) there was insufficient proof of the charges against him and g) the jury instructions were improper.

(5) At trial, Mark Herron, an officer with Probation and Parole, testified for the State. Herron stated that he had worked for Probation and Parole approximately 13 years. His job at the time of Campbell's arrest was to target repeat drug offenders in high-crime areas as part of Operation Safe Streets. On December 16, 1999, at about 1:30 a.m., he was on duty with his partner, Officer Douglas Baylor of the Wilmington Police Department. They were working with other members of the Operation Safe Streets team in a high-crime area located around 24th and Carter Streets in Wilmington, Delaware. Herron and Baylor were together in an unmarked police car as were Marty Lenhardt of Probation and Parole and Officer Brian Witte of the Wilmington Police Department.

(6) While riding in the area with Baylor at the wheel, Herron saw an individual later identified as Campbell standing with a woman on the sidewalk. They were holding their hands out toward each other and were looking down. They appeared to be "exchanging something." Officer Baylor said "[L]et's stop them." Baylor stopped the car and he and Herron got out. As they did so,

Campbell, who was about 3 feet away, began walking away from them, eastbound on 24th Street. Herron then saw Campbell toss an object into the street with his right hand. The object landed behind the right front wheel of a parked car. As Lenhardt and Witte arrived at the scene, parked their car and approached Campbell, Herron retrieved the object, which turned out to be a plastic bag containing a number of smaller plastic bags each of which contained a white, chunky substance. After giving the bag to Baylor, Herron and Baylor took Campbell into custody. The woman Campbell was seen with was not taken into custody.

(7) Officer Brian Witte also testified for the State. He stated that he had worked for the Wilmington Police Department for 6 years and was assigned to Operation Safe Streets. On December 16, 1999 at about 1:30 a.m., he was driving an unmarked police car in the area of 24th and Carter Streets with Marty Lenhardt in the passenger's seat. They received a call from Herron and Baylor asking them to stop a man walking eastbound on 24th Street. As they arrived on the scene, Witte spotted Campbell, exited his vehicle and stopped him. Herron told Witte that Campbell had "dumped something" and he had to go back to retrieve it. Witte then saw Herron go to a parked car about 10 feet away and

retrieve something from beneath it. Witte testified that the area where this occurred was about 240 feet from Price Run Park. He estimated the distance by walking between the area and the park and counting his steps. On cross examination, Witte confirmed that his report did not mention an exchange between a woman and Campbell and that he himself had not observed Campbell throw anything into the street. He further stated that he searched Campbell and found two fifty-dollar bills, two ten-dollar bills and one five-dollar bill, but no weapons or drug paraphernalia.

(8) The next witness for the State was Officer Douglas Baylor. He stated that he had worked for the Wilmington Police Department for 15 years and that his current assignment was with Operation Safe Streets. While driving an unmarked police car on December 16, 1999 at approximately 1:30 a.m. he observed two individuals near the corner of 24th and Carter Streets in the City of Wilmington. They were holding their hands out and looking down, indicating to Baylor that they were involved in a drug transaction. He pulled his car past the two individuals and stopped, and he and Herron got out. The man, later identified as Campbell, looked in their direction and began walking away from the woman, eastbound on 24th Street. Baylor did not see Campbell throw

anything into the street. Baylor stopped the woman, checked her for weapons and any outstanding warrants, and then released her. After Baylor arrived at the police station, he signed the plastic bag and the money into the evidence locker in the Records Division.

(9) Officer Thomas Dempsey testified next for the State. He stated that he had worked as an Assistant Narcotics Control Officer for the City of Wilmington Police Department's Drug, Organized Crime and Vice Unit for about 7 years and that his principal duty is chain-of-custody documentation. Specifically, his job is to collect drug envelopes from the drug locker, document them on the computer, and monitor their removal from the locker and their return to the locker. Dempsey testified to the general chain-of-custody procedures used at the police station and testified specifically about how the plastic bag in this case was handled. When it was brought to the police station it was placed in a drug-secure envelope containing information about the defendant and the investigating officer and an identification number. Whenever the envelope was removed from the locker for transmittal to the Medical Examiner or to court, the dates and times were noted, along with the initials of the individual responsible for the removal. The bag was opened only when the

Medical Examiner tested the substance inside and subsequently was re-sealed with tape.

(10) The next witness for the State was Dr. Kochu Madhavan, a senior forensic chemist at the Medical Examiner's Office. He testified that he had held that position for more than 25 years. He stated that an envelope with the plastic bag inside was brought to the Medical Examiner's Office from the police department by a police officer and received by an evidence specialist. A number was assigned to the envelope, which was placed in the evidence vault until it was opened for testing. After the envelope and plastic bag were opened and the testing was complete, the plastic bag was re-sealed with tape, re-inserted in the envelope and placed back in the evidence vault until a police officer came to retrieve it. Madhavan testified that he tested the white, chunky substance in the smaller plastic bags and determined that it was crack cocaine, with a total weight of 2.45 grams.

(11) The final witness for the State was Detective Michael Rodriguez of the City of Wilmington Police Department's Drug, Organized Crime and Vice Unit. Rodriguez testified that he had worked as an undercover officer in that unit for about 6 years. He further testified to his specialized training in the

investigation of drug cases. Rodriguez was qualified as an expert in the field of drug investigation without objection by the defense. He testified that the area around 24th and Carter Streets in the City of Wilmington is known for drug activity. He further testified that the amount of crack cocaine recovered in this case, the way it was packaged and the amount of money found on Campbell was consistent with the delivery, rather than the mere possession, of drugs.

(12) Campbell testified as the sole defense witness. He stated that he had been dropped off in Wilmington by a co-worker after they had finished work in Newark and was on his way to his aunt and uncle's house near 24th and Carter Streets at the time of his arrest. His own house, where he had lived for over 2 years, was 3 blocks away. Campbell testified that he did not know the woman he was seen talking to. He was walking down the street, she asked him for a light, which he did not have, and he continued walking. On cross examination, Campbell stated that his co-worker did not like the neighborhood and, therefore, had dropped him off a couple of blocks away from his house. He could not remember the name of the street where he was dropped off and had trouble recalling his uncle's last name.

(13) Towards the end of his testimony, Campbell stated that he was "never selling drugs." The attorneys then approached the bench for a sidebar conference as to whether that statement would allow the prosecutor to bring up Campbell's previous conviction for possession with intent to deliver cocaine. Before beginning the sidebar conference, the judge said to Campbell, " Let me ask a clarification question. You were never selling drugs that evening?" to which Campbell replied, "Not at all." The judge then asked, "Ever?" to which Campbell replied, "No. No. I didn't sell no drugs. I had no drugs. None of that." After deciding that he would not pursue Campbell's previous conviction in cross examination, the prosecutor asked Campbell, "So on the night in question, you did not walk away from the police after they caught you selling drugs; is that your testimony?" to which Campbell replied, "Uh-uh. I didn't walk away from the police." As his final question, the prosecutor asked, "Okay. And they had not caught you about to sell drugs?" to which Campbell replied, "Uh-uh. No."

(14) Campbell's first claim is that his trial counsel provided ineffective assistance. This Court will not consider on direct appeal any claim of ineffective

assistance of counsel that was not raised below.[4] Accordingly, we will not consider Campbell's claim of ineffective assistance for the first time in this direct appeal.

(15) Campbell's next claim is that the judge's questions to him were improper and prejudicial.[5] We have reviewed carefully the transcript of Campbell's trial, including the judge's questions, and conclude that this claim is meritless. The judge asked the questions only to clarify possible confusion.[6] Even if the questions did not succeed in clarifying the situation, there was no prejudice to Campbell and no plain error.

(16) Campbell's claim that the judge improperly permitted improperly suggestive, perjured testimony is also meritless. Our review of the trial transcript

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[4]*Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

[5]We review this claim, as well as the rest of Campbell's claims, for plain error, since he raises them for the first time in this appeal. SUPR. CT. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Plain error is error that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.*

[6]*Saunders v. State*, 401 A.2d 629, 632-33 (Del. 1979).

reveals no impropriety in the witnesses' testimony and no basis whatsoever for a claim of perjury. Campbell complains that Witte's testimony that Herron told him Campbell "dumped something" was inadmissible hearsay and should have been excluded. Even if the testimony was hearsay, its admission was harmless and caused no prejudice, since, as Herron had testified previously, he personally saw Campbell throw something into the street.

(17) There is no merit to Campbell's claim that his arrest was illegal because the date of the crime contained on the indictment was incorrect.[7] The Superior Court is permitted to amend an indictment at any time prior to verdict as long as "no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."[8] In this case, the Superior Court was clearly within its discretion to permit the amendment of the indictment and, as such, there is no support for Campbell's claim.

(18) There is absolutely no basis for Campbell's next claim that the physical evidence had been tampered with. Our review of the trial transcript

[7]Before trial, the State was permitted, without objection from the defense, to amend the indictment to indicate that the crime was committed on December 16, 1999 rather than December 15, 1999.

[8]SUPER. CT. CRIM. R. 7(e).

reveals no impropriety in the way the evidence was handled and no basis upon which to challenge the chain of custody.[9]

[9]*Tricoche v. State*, 525 A.2d 151, 153 (Del. 1987).

(19) Campbell claims that there was insufficient evidence upon which to base his convictions. When a defendant claims that the evidence against him was insufficient to support a jury verdict, the proper standard of appellate review requires this Court to determine "whether any rational trier of fact, viewing the evidence in the light most favorable to the [prosecution], could have found the essential elements of the charged offense beyond a reasonable doubt."[10] In this case, Campbell was charged with Possession with Intent to Distribute Cocaine[11] and Possession of Cocaine Within 300 Feet of a Park.[12] Our review of the trial transcript in this case reveals that a reasonable juror clearly could have found the essential elements of these charged offenses beyond a reasonable doubt by relying on the testimony of the State's witnesses. To the extent Campbell complains there was insufficient proof that he "possessed" the drugs, the jury accepted Herron's testimony that he witnessed Campbell throw something into the street, which he subsequently retrieved and gave to Baylor, and which ultimately was

[10]*Morrisey v. State*, 620 A.2d 207, 213 (Del. 1993).

[11]DEL. CODE ANN. tit. 16, §§ 4716(b) (4) and 4751 (1995).

[12]DEL. CODE ANN. tit. 16, § 4768 (1995).

revealed to be crack cocaine. The element of "possession" of cocaine was, thus, clearly established[13] and there was no plain error.

[13]DEL. CODE ANN. tit. 16, § 4701(30) (1995).

(20) Campbell's final claim is that the jury instructions were improper. Specifically, he argues that the word "constructive" should have been removed from the jury instruction on delivery based on a pre-trial agreement between counsel. A trial court's jury instruction can be a basis for reversal if the deficiency had the effect of undermining the ability of the jury to perform its duty to return a verdict.[14] We have reviewed the jury instruction on delivery and conclude that the Superior Court did not err in giving that instruction.[15] Even assuming that the use of the word "constructive" was contrary to counsel's prior agreement, the ability of the jury to perform its function was not undermined and there was no plain error.

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

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[14] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983).

[15] DEL. CODE ANN. tit. 16, § 4701(8) (1995).

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/Joseph T. Walsh
Justice