

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSE COLON,	§
	§ No. 199, 2006
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0501004460
	§
Plaintiff Below-	§
Appellee.	§

Submitted: August 30, 2006
Decided: September 22, 2006

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

ORDER

This 22nd day of September 2006, 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, Jose Colon, was found guilty in a Superior Court bench trial of Robbery in the First Degree.¹ He was

¹ The indictment also included the charge of Possession of a Deadly Weapon During the Commission of a Felony, which the State subsequently dismissed.

sentenced as a habitual offender to 25 years of Level V incarceration.² This is Colon's direct appeal.

(2) Colon'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 arguably could 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.³

(3) Colon's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Colon's counsel informed Colon 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. Colon also was informed of his right to supplement his attorney's presentation. Colon responded with a brief that raises six issues for this Court's consideration. The State has responded to

² Del. Code Ann. tit. 11, § 4214(a).

³ *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).

the position taken by Colon's counsel as well as the issues raised by Colon and has moved to affirm the Superior Court's judgment.

(4) The evidence presented at trial supports the following version of events. At around 6:00 a.m. on January 5, 2005, Colon and his girlfriend, Barbara Lank, were driving in the City of Wilmington. It was still dark out. Colon was a passenger in Lank's tan Nissan Sentra. Colon told Lank to stop in the vicinity of Third and Fourth Streets near an Amoroso's bread truck, which was parked on the side of the street. Colon got out of the car. Lank testified that she did not know why Colon asked her to stop and did not see what happened next.

(5) The driver of the Amoroso's bread truck, Charles Siefert, had stopped to make a delivery when he saw a man get out of the passenger side of a tan Nissan Sentra. There was a white female in the driver's seat. The man, who was carrying what looked like a handgun, approached Siefert and demanded money. Siefert gave the man \$26.00 from his pants pocket. The man then got back in the Sentra, which drove away. Siefert called 911 on his cell phone and gave the license number of the Sentra to the Wilmington Police Department. After the police arrived on the scene, they ran the license number on their computer and pulled up a photo of an individual

named Daniel Rivera. They showed Siefert the photo. Siefert told the police he thought Rivera was the robber.

(6) Detective James Diana of the Wilmington Police Department interviewed Rivera. It turned out that Rivera had once dated Lank, but their relationship ended a few months prior to the robbery. After interviewing Rivera, the police turned to Colon as a potential suspect. After a few days, the police showed Siefert a photo lineup that included photos of two Hispanic men, one of whom was Colon. Seifert identified Colon as the robber. The photos of Colon and Rivera showed a pattern of similar facial features.

(7) In connection with their investigation, the police secured a search warrant on Lank's Sentra. Detective Diana executed the search warrant and found a handgun-shaped lighter on the floor behind the driver's seat as well as discharge papers from Christiana Hospital that contained Colon's name. Lank testified that the lighter had belonged to her grandfather and that she had put it in the trunk of the Sentra. She also stated that she had never seen Colon near the trunk or with the lighter. The lighter was never fingerprinted. Colon ultimately was arrested and gave a videotaped statement to Detective Diana. While Colon initially insisted that

he was not with Lank on the day of the robbery, he ultimately confessed to being the perpetrator.

(8) Colon raises six issues for this Court's consideration. He claims that: a) there was insufficient evidence presented at trial to support his robbery conviction; b) his videotaped confession was involuntary and should have been excluded as evidence; c) his robbery conviction is invalid because the State dismissed the weapon charge; d) his rejection of the State's plea offer was involuntary because he was under the influence of medication; e) the trial judge should not have considered a redacted version of his videotaped confession; and f) his designation as a habitual offender was not supported by the proper documentation.⁴

(9) Colon's first claim is that there was insufficient evidence presented at trial to support his robbery conviction, citing inconsistent testimony by Lank and Siefert's initial identification of Rivera as the perpetrator. When reviewing the sufficiency of the evidence, this Court must determine, after reviewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the

⁴ Because Colon's first five claims were not raised at trial, we review them in this appeal for plain error. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (Under the plain error standard of review, the alleged error must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.)

essential elements of the crime beyond a reasonable doubt.⁵ When the determination of facts turns on a question of witness credibility, the findings of the trial judge sitting as the trier of fact will be approved upon review.⁶ At Colon's trial, it was for the trial judge to assess the credibility of Lank's and Siefert's testimony. Moreover, as the trial judge noted, there was a substantial amount of evidence beyond Siefert's identification, including Colon's own admission of guilt, supporting Colon's conviction of Robbery in the First Degree.⁷ We, therefore, find no error, plain or otherwise, with respect to Colon's first claim.

(10) Colon's second claim is that his confession was involuntary because he was under the influence of a medication that impaired his judgment. While the record reflects that Colon was mistakenly given the wrong medication while in prison, there is no factual support for his claim that the medication caused his judgment to be impaired at the time he gave his confession. We, therefore, find no error, plain or otherwise, with respect to Colon's second claim.

(11) Colon's third claim is that, once the State had dismissed the weapon charge, he no longer could be convicted of first degree robbery. The

⁵ *Williams v. State*, 539 A.2d 164, 168 (Del. 1988).

⁶ *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).

⁷ Del. Code Ann. tit. 11, § 832(a)(2) (2003).

evidence at trial was that Colon was in possession of a handgun-shaped lighter during the commission of the robbery. While Colon could not have been convicted of the weapon charge given that fact,⁸ there were, nevertheless, sufficient facts to support his conviction of first degree robbery.⁹ We, therefore, find no error, plain or otherwise, with respect to Colon's third claim.

(12) Colon's fourth claim is that his refusal of the State's plea offer was involuntary because he was under the influence of medication that impaired his judgment. There is no record evidence to support Colon's claim that the medication caused his judgment to be impaired at the time he refused the State's plea offer. Moreover, a defendant has no constitutional right to a plea bargain.¹⁰ Colon, thus, has no right to complain that the plea offer was more generous than the verdict he obtained at trial. We, therefore, find no error, plain or otherwise, with respect to Colon's fourth claim.

(13) Colon's fifth claim is that the trial judge should not have considered a redacted version of his videotaped confession. The record reflects that the trial judge asked that Colon's videotaped confession be advanced directly to the relevant portion. The trial judge and defense

⁸ Under Del. Code Ann. tit. 11, § 222, a "firearm" is "any weapon from which a shot, projectile, or other object may be discharged."

⁹ Under Del. Code Ann. tit. 11, § 832(a) (2), the State had to prove, among other things, that Colon "display[ed] what appear[ed] to be a deadly weapon."

¹⁰ *Washington v. State*, 844 A.2d 293, 295-97 (Del. 2004).

counsel discussed where to start the tape. Detective Diana then described what was contained on that portion of the tape that would not be played. There is no evidence in the record suggesting that Detective Diana's characterization of what was contained on the rest of the tape was improper or false. Nor is there any evidence in the record suggesting that Colon was prejudiced by the trial judge's request that the tape be redacted for presentation at trial. We, therefore, find no error, plain or otherwise, with respect to Colon's fifth claim.¹¹

(14) Colon's sixth claim is that his designation as a habitual offender was not supported by the proper documentation. Specifically, he contends that the State improperly failed to proffer the charging documents and the transcripts of the guilty pleas from his prior felony convictions. Colon's argument is incorrect as a matter of law. Delaware law provides that it is the State's burden to establish that each predicate offense meets the requirements of the habitual offender statute beyond a reasonable doubt.¹² To sustain its burden, the State must present "unambiguous documentary evidence of a predicate conviction."¹³ The trial judge's determination of habitual offender status must, in turn, be supported by substantial evidence

¹¹ To the extent that Colon seeks to present a claim of ineffective assistance of trial counsel to assert the proper objections at trial, we decline to review that claim for the first time in Colon's direct appeal. *Wing v. State*, 690 A.2d 921, 923 (Del. 1996).

¹² *Hall v. State*, 788 A.2d 118, 127 (Del. 2001).

¹³ *Id.* at 128.

and must be free of any legal error or abuse of discretion.¹⁴ In this case, the record reflects that, in its motion to declare Colon a habitual offender, the State presented unambiguous documentary evidence of three previous predicate convictions and that there was no error or abuse of discretion on the part of the trial judge. We, therefore, find Colon's sixth claim to be without merit.

(15) This Court has reviewed the record carefully and has concluded that Colon's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Colon's counsel has made a conscientious effort to examine the record and has properly determined that Colon 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/ Myron T. Steele
Chief Justice

¹⁴ *Walker v. State*, 790 A.2d 1214, 1221 (Del. 2002).