

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|--------------------|--------------------------------|
| PATRICK R. MULLIN, | § |
| | § No. 681, 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. 0307011873 |
| | § |
| Plaintiff Below- | § |
| Appellee. | § |

Submitted: May 16, 2007
Decided: June 28, 2007

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

ORDER

This 28th day of June 2007, 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, Patrick R. Mullin, was found guilty by a Superior Court jury of Driving Under the Influence of Alcohol and Failing to Use a Turn Signal. He was sentenced to 4 years of Level V incarceration, to be suspended after 7 months for 3 years of Level IV Home Confinement, to be

suspended in turn after 6 months for 1 year of Level III probation. Mullins's convictions and sentences were affirmed by this Court on direct appeal.¹

(2) In September 2006, probation officers filed a violation report alleging that Mullin had committed a violation of probation ("VOP"). In November 2006, Mullin was arrested in Dewey Beach, Delaware, on a motor vehicle charge. Following a VOP hearing, the Superior Court found that Mullin had committed a VOP and sentenced him to 40 months of Level V incarceration. This is Mullins' direct appeal from his VOP sentence.

(3) Mullin's 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.²

(4) Mullin's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter,

¹ *Mullin v. State*, Del. Supr., No. 92, 2006, Berger, J. (Aug. 29, 2006).

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).

Mullin's counsel informed Mullin 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. Mullin also was informed of his right to supplement his attorney's presentation. While Mullin did not submit a written brief, he informed his counsel that he wished to raise four issues for this Court's consideration. The State has responded to the position taken by Mullin's counsel as well as the issues raised by Mullin and has moved to affirm the Superior Court's judgment.

(5) Mullin raises four issues for this Court's consideration. He claims that: a) he received ineffective assistance of counsel at his VOP hearing; b) the VOP sentence imposed by the Superior Court is improper because it exceeds the sentencing guidelines; c) the Superior Court should not have held him without bail pending his VOP hearing because he was employed; and d) the court reporter did not accurately transcribe what occurred at the VOP hearing.

(6) The transcript of the VOP hearing reveals the following. Mullin's probation officer testified that Mullin violated his probation by moving from his reported residence without first informing Probation and Parole, by failing to report to the Level IV Plummer Center, by failing to take a scheduled breathalyzer test, and by being arrested in Dewey Beach while in the control and custody of a

motor vehicle. Mullin argued that he had not violated the terms of his probation, but the Superior Court judge did not find his testimony to be credible.

(7) Mullin's first claim of ineffective assistance of counsel may not be considered in his direct appeal because it was not fairly presented to the Superior Court below.³ Mullin's second claim that his sentence is improper on the sole ground that it exceeds the sentencing guidelines is incorrect as a matter of law.⁴ Mullin's third claim that he should not have been held without bail pending his VOP hearing is without merit. Given that Probation and Parole claimed that Mullin had absconded from his Level IV probation, it was clearly within the discretion of the Superior Court to order Mullin held without bail pending the VOP hearing.⁵ Finally, there is no evidence to support Mullin's fourth claim that the court reporter did not accurately transcribe what occurred at the VOP hearing.

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

³ *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

⁴ *Siple v. State*, 701 A.2d 79, 82-83 (Del. 1997).

⁵ Del. Code Ann. tit. 11, § 4334(b).

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/Henry duPont Ridgely
Justice