IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEREMY L. BENSON,	§	
	§	
Defendant Below-Appellant,	§	No. 652, 2006
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. ID 0603015815
Plaintiff Below-Appellee.	§	
	§	

Submitted: June 27, 2007
Decided: September 6, 2007

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

O R D E R

This 6th day of September 2007, 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, Jeremy Benson, pled guilty to two counts of fourth degree rape. The Superior Court sentenced Benson to a total period of thirty years at Level V incarceration to be suspended after serving seven years for decreasing levels of supervision. This is Benson's direct appeal.

(2) Benson's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Benson's counsel asserts that, based upon

a complete and careful examination of the record, there are no arguably appealable issues. By letter, Benson's attorney informed him of the provisions of Rule 26(c) and provided Benson with a copy of the motion to withdraw and the accompanying brief. Benson also was informed of his right to supplement his attorney's presentation. Benson filed a letter arguing that the Superior Court erred in refusing to allow him to withdraw his guilty plea. Benson argues that he should have been allowed to withdraw his plea because his trial counsel told him that he would receive a sentence of no more than one year in prison. The State has responded to Benson's argument, as well as to the position taken by Benson'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.[1]

[1] *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).

(4) The record reflects that Benson was indicted in April 2006 on three counts of second degree rape and one count of terroristic threatening. The victim was the minor daughter of his ex-wife. Benson pled guilty in August 2006 to two counts of fourth degree rape. In exchange, the State dismissed the remaining charges. Benson's plea agreement reflects that the maximum sentence the Superior Court could impose for both charges was thirty years imprisonment. At the start of his sentencing hearing on November 27, 2006, Benson requested that he be permitted to withdraw his guilty plea. He asserted that he had entered his guilty plea because his attorney had misinformed him that, at most, he would get a year in prison. Upon questioning, however, Benson admitted that he was aware that each charge carried a potential sentence of up to fifteen years in prison. He further acknowledged that "[my lawyer] did not promise me that it was going to be a year." Based on this information, the Superior Court denied Benson's request to withdraw his plea.

(5) On appeal, Benson argues that the Superior Court's denial of his motion to withdraw his plea constituted an abuse of discretion. We disagree. Upon moving to withdraw a guilty plea, the defendant bears the burden of establishing that a fair and just reason exists to permit the

withdrawal.[2] The judge should permit withdrawal of the plea only if the judge determines that "the plea was not voluntarily entered or was entered because of misapprehension or mistake of defendant as to his legal rights."[3]

(6) In this case, the transcript of the guilty plea colloquy clearly reflects Benson's understanding that, by pleading guilty to two counts of fourth degree rape, the Superior Court could sentence him to a total maximum period of thirty years incarceration. Benson also acknowledged that no one had promised what sentence he would receive. Absent clear and convincing evidence to the contrary, Benson is bound by his sworn answers in open court.[4] Accordingly, we find no abuse of the Superior Court's discretion in denying Benson's motion to withdraw his guilty plea.

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

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[2] Del. Super. Ct. Crim. R. 32(d) (2007).

[3] *Scarborough v. State*, __ A.2d __, 2007 WL 1223911 (Del. Apr. 26, 2007) (quoting *State v. Insley*, 141 A.2d 619, 622 (Del. 1958)).

[4] *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

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