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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE SUPREME COURT
FILED

DUANE HARDY,

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Defendant Below-
Appellant,

No. 502, 2006
DEPUTY CLERK
WILMINGTON

v.

Court Below—Superior Court
of the State of Delaware,
in and for New Castle County
Cr. ID 0508019761

STATE OF DELAWARE,

Plaintiff Below-
Appellee.

Submitted: March 14, 2007

Decided: May 18, 2007

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

ORDER

This 18th day of May 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) A Superior Court jury convicted the defendant-appellant, Duane Hardy (Hardy), of possession of cocaine and tampering with physical evidence and acquitted him of possession with intent to deliver cocaine. The Superior Court declared Hardy to be an habitual offender and sentenced him to a total period of three years at Level V incarceration. This is Hardy's direct appeal.

(2) Hardy's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Hardy's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Hardy's attorney informed him of the provisions of Rule 26(c) and provided Hardy with a copy of the motion to withdraw and the accompanying brief. Hardy also was informed of his right to supplement his attorney's presentation. Hardy has raised two issues for this Court's consideration. The State has responded to Hardy's points, as well as to the position taken by Hardy'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) Hardy first argues that his trial counsel provided ineffective assistance on Hardy's behalf. Claims of ineffectiveness, however, will not be considered for the first time on direct appeal.² The Court, therefore, will not address this claim in the first instance.

(5) Hardy's second discernible contention challenges the sufficiency of the evidence to support his conviction of tampering with physical evidence. The gist of Hardy's argument is that the testimony of the witnesses was inconsistent, and the evidence otherwise was insufficient to prove beyond a reasonable doubt that Hardy was intending to tamper with physical evidence at the time the arresting officer retrieved a bag of drugs from Hardy's mouth.

(6) When a defendant raises a sufficiency claim on appeal, the relevant question for this Court is whether "after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."³ In this case, we find the State's evidence sufficient to support Hardy's conviction of tampering with physical evidence beyond a reasonable doubt. Although Hardy argues that there were inconsistencies in the testimony and

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

³ *William v. State*, 539 A.2d 164, 168 (Del. 1988) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

that there was no physical evidence that Hardy had damaged or was attempting to destroy the drugs he had in his mouth, the jury is solely responsible for judging the credibility of the witnesses and resolving conflicts in the evidence.⁴ It was entirely within the jury's purview to credit the arresting officer's testimony at trial. Moreover, Hardy's suggestion that the State was required to prove his intent to destroy the evidence is simply wrong. Section 1269(2) of Title 11 provides in relevant part that a person is guilty of tampering with physical evidence when, believing evidence will be used in an official proceeding and intending to prevent its use, "the person suppresses it by any act of concealment, alteration, or destruction...."⁵ Given that the arresting officer retrieved the bag of drugs from Hardy's mouth, any rational juror could have found the essential elements of tampering were established beyond a reasonable doubt.⁶

(7) This Court has reviewed the record carefully and has concluded that Hardy's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Hardy's counsel has made a

⁴ *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

⁵ 11 Del. C. § 1269(2) (2001).

⁶ See *Fletcher v. State*, 2005 WL 646841 (Del. Mar. 16, 2005) (concealing evidence in a glove compartment found to constitute tampering).

conscientious effort to examine the record and the law and has properly determined that Hardy 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:



Justice