IN THE SUPREME COURT OF THE STATE OF DELAWARE

ARTHUR PETTIGREW,	§	
	§	
Defendant Below-Appellant,	§	No. 112, 2007
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. ID 0602021280
Plaintiff Below-Appellee.	§	
	§	

Submitted: August 8, 2007
Decided: October 23, 2007

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

O R D E R

This 23rd day of October 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, Arthur Pettigrew, of second degree assault, possession of a firearm during the commission of a felony, and carrying a concealed deadly weapon. The Superior Court sentenced Pettigrew to a total period of thirteen years at Level V incarceration, to be suspended after serving five years for decreasing levels of supervision. This is Pettigrew's direct appeal.

(2) Pettigrew's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Pettigrew's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Pettigrew's attorney informed him of the provisions of Rule 26(c) and provided Pettigrew with a copy of the motion to withdraw and the accompanying brief. Pettigrew also was informed of his right to supplement his attorney's presentation. Pettigrew has raised several issues for this Court's consideration. The State has responded to Pettigrew's points, as well as the position taken by Pettigrew'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]

(4) The record at trial fairly supports the following version of events: On February 23, 2006, Sascha Bolden ("Bolden") went to the Cedar

[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).

Tavern to celebrate his birthday. He was there alone initially, but left and later came back with his brother, Dana ("Dana"), and two friends (referred to as the "the Philly guys"). Bolden and Pettigrew, who had a prior history of disagreements between them, exchanged words, and their argument escalated into a physical fight between Dana and Pettigrew. Pettigrew left, but returned with a handgun. Dana testified at trial that Pettigrew appeared scared and was pointing the gun in several directions. Ultimately, the gun discharged and a bullet ricocheted off the ground, striking Bolden in the foot. Although indicted for attempted first degree murder, the jury found Pettigrew guilty of the lesser included offense of second degree assault, as well as two indicted weapon offenses.

(5) Pettigrew has raised the following five points for the Court's consideration on appeal: (i) there was no DNA testing of certain evidence collected by the State; (ii) the prosecutor struck potential jurors solely on the basis of their race; (iii) the evidence was insufficient to support his convictions; (iv) the State failed to call two eyewitnesses to testify at trial; and (v) the police conducted an illegal search of Pettigrew's home. We address these claims *seriatim*.

(6) Pettigrew's first claim is that the State should have presented a DNA expert to testify about a red substance[2] found on the floor of the Cedar Tavern and about a sock recovered from Christiana Hospital. Although Pettigrew suggests that DNA testing of this evidence would have revealed that neither the "red substance" nor the sock belonged to the victim, he fails to argue how this expert testimony would have aided his defense and changed the outcome of the trial. Pettigrew's counsel presented a self-defense argument at trial. There was no dispute that Pettigrew fired a gun and that the bullet from the gun struck Bolden in the foot. Pettigrew does not argue, and we find no basis to conclude, that DNA testing of the challenged evidence would have materially aided Pettigrew's justification defense. Accordingly, we reject Pettigrew's first claim of error.

(7) Pettigrew next argues that the State systematically excluded African-Americans from serving on his jury solely on the basis of their race in violation of *Batson v. Kentucky*.[3] Pettigrew did not raise this claim to the Superior Court in the first instance. Accordingly, we review it on appeal for

[2] The investigating officer, while reviewing several of the State's photographic exhibits on the witness stand, described the photographic exhibits as depicting blood on the floor of the Cedar Tavern. After the Superior Court sustained defense counsel's objection to this characterization, the witness referred to it as a "red substance."

[3] 476 U.S. 79 (1986).

plain error.[4] To establish a *Batson* violation, the defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race.[5] Pettigrew has made no effort to sustain his burden in this case. He points to nothing in the record in support of his claim that the prosecutor excluded African-Americans solely because of their race. Accordingly, we find no plain error with respect this claim.

(8) Pettigrew's third argument is that the evidence was insufficient to support his convictions. Because Pettigrew did not present this claim to the trial court either in a motion for a directed verdict or in a motion for a judgment of acquittal, he has waived this claim in the absence of plain error.[6] To be plain, the error complained of must be apparent on the face of the record, fundamental in nature, and so clearly prejudicial as to jeopardize the fairness and integrity of the trial process.[7] We find no plain error in this case because the evidence at trial was undisputed that Pettigrew fired the weapon which resulted in Bolden being shot in the foot. Under the circumstances, we find sufficient evidence in the record from which any

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[4] Del. Supr. Ct. R. 8.

[5] *Robertson v. State*, 630 A.2d 1084, 1089 (Del. 1993). If the defendant can make a prima facie showing, then the burden shifts to the State to articulate a race-neutral explanation for striking the jurors in question. Thereafter, the court must determine whether the defendant has carried the burden of proving purposeful discrimination.

[6] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).

[7] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

rational juror could have found Pettigrew guilty of second degree assault and the two weapon offenses beyond a reasonable doubt.[8]

(9) Pettigrew's fourth claim challenges the State's failure to present certain evidence at trial. Specifically, Pettigrew contends that the State should have presented the testimony of the Philly guys. The prosecution, however, has no duty to call any particular witness if it deems the testimony to be unreliable, irrelevant, or cumulative of other testimony.[9] Pettigrew knew about these potential witnesses and made a strategic decision not to call them to testify in his defense at trial. Accordingly, we find no merit to this claim on appeal.

(10) Pettigrew's final argument is that the gun found in his home was the result of an illegal search and seizure. Pettigrew contends that the search of his home occurred at 6:00 a.m., but the search warrant was not authorized until 11:25 a.m. Pettigrew did not file a suppression motion in the Superior Court. Accordingly, this claim is waived in the absence of plain error.[10] Because Pettigrew provides no support for his factual contentions regarding the timing of the search and the issuance of the search

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[8] *Monroe v. State*, 652 A.2d at 563.

[9] *United States ex. rel. Drew v. Myers*, 327 F.2d 174, 179 n.16 (3d Cir. 1964).

[10] Del. Supr. Ct. R. 8.

warrant, we find no plain error regarding the admission of the gun seized from his home as a result of the search.

(11) This Court has reviewed the record carefully and has concluded that Pettigrew's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Pettigrew's counsel has made a conscientious effort to examine the record and the law and has properly determined that Pettigrew 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/ Carolyn Berger
Justice