

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERALD PRICE,	§
	§ No. 103, 2007
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. 0505010414
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 9, 2007
Decided: October 24, 2007

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

ORDER

This 24th day of October 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, Gerald Price, was found guilty by a Superior Court jury of Robbery in the First Degree and Burglary in the Third Degree. Price was acquitted of the charge of Possession of a Firearm During the Commission of a Felony.¹ On the robbery conviction, he was sentenced to 7 years of Level V incarceration, to be suspended after 5 years for 18

¹ Two counts of Aggravated Menacing were dismissed by the Superior Court following presentation of the State’s case in chief.

months at Level III. On the burglary conviction, he was sentenced to 2 years of Level V incarceration, to be suspended for 18 months at Level III, concurrent with the probationary period in the robbery sentence. This is Price's direct appeal from his convictions and sentences.

(2) 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.²

(3) Price's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Price's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Price's attorney informed him of the provisions of Rule 26(c) and provided Price with a copy of the motion to withdraw and the accompanying brief. Price also was informed of his right to supplement his attorney's presentation. Price raises three issues for this Court's

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).

consideration. The State has responded to the position taken by Price's counsel and has moved to affirm the Superior Court's judgment.

(4) The following evidence was presented at trial. Lauren Scales testified that, on April 20, 2005, she was an employee of the Newark Café, which was located in the Newark Public Library, Newark, Delaware. As was her custom, Scales arrived at the café at about 8:30 a.m. and went down the back alley to the "soda closet" next door to the café, where the safe was located. She noticed that the door to the room was unlocked. When Scales entered the room, a man emerged. His face was covered and he was carrying a gun, which was black and silver, with orange on the tip. The man pointed the gun in her face and demanded the money in the safe. Scales pleaded with the man not to hurt her. She took the cash box out of the safe and handed it to the man.

(5) As the man walked into the alley, he took the covering off his face. Scales recognized him as "Ty", a man who was dating another employee of the Newark Café named Latoya Davis. When Scales saw his face, she was shocked and started to cry. He took off down the alley. One of the librarians eventually called the police.

(6) When the police arrived, Scales was still shaken. She told Detective Scott Reiger that the man she knew as "Ty" had robbed the safe.

While Detective Reiger was interviewing her, Scales received a call on her cell phone from Latoya Davis' cell phone. It was the man she knew as "Ty." He asked Scales not to tell anyone what had happened. Scales screamed at him and hung up the phone. Detective Reiger took a photograph of the cell phone, showing the date and time of the call and the name "Latoya" on the screen.

(7) On May 9, 2005, Detective Reiger presented a photo lineup to Scales. The lineup contained a photo of Gerald Price.³ Scales immediately identified Price as the man she knew as "Ty" and the one who had robbed the safe. Scales denied any romantic involvement with Price.

(8) Latoya Davis testified that she dated Price for about a year and was pregnant with his child at the time of the robbery. She worked at the Newark Café and had keys to the "soda closet" and the safe. Davis had Scales' number on her cell phone so that they could communicate if problems came up at work. Davis testified that Price was not having a relationship with Scales at the time of the robbery. Davis was angry with Price and planned to break up with him, but not because he was having a relationship with Scales.

³ At sidebar, the prosecutor informed the judge that Detective Reiger had received information from Probation and Parole that Gerald Price was living at the same address as Latoya Davis. The judge did not permit the prosecutor to elicit this information from Detective Reiger in the presence of the jury.

(9) Price testified in his own defense. He stated that he and Scales had an intimate relationship during the time he and Davis were living together and Scales became angry when she learned that Davis was carrying Price's child. Price testified that he did not know the Newark Café had been robbed because Davis never told him. He denied any involvement in the robbery and suggested that Scales implicated him as the robber "out of spite."

(10) Price raises three claims for consideration by this Court. He claims that: a) his trial attorney provided ineffective assistance; b) his conviction was improperly based on hearsay evidence; and c) his convictions of robbery and burglary were inconsistent with his acquittal of the charge of possession of a firearm during the commission of a felony.

(11) Price's first claim is that his trial counsel provided ineffective assistance. This claim was not addressed by the Superior Court in the first instance. It is well settled that this Court may not address a claim of ineffective assistance of counsel that is raised for the first time on appeal.⁴ As such, Price's first claim is unavailing.

(12) Price's second claim is that his conviction was improperly based upon hearsay evidence. Price does not identify specifically the

⁴ *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

“hearsay” upon which he believes his conviction was improperly based. To the extent that the claim is based on the fact that Detective Reiger learned from Probation and Parole that Price was living with Latoya Davis, the trial transcript clearly reflects that this information was never presented to the jury. As such, Price’s second claim is without merit.

(13) Price’s third claim is that his robbery and burglary convictions were inconsistent with his acquittal of the charge of possession of a firearm during the commission of a felony. Price was charged with, and was convicted of, first degree robbery for “display[ing] what appear[ed] to be a deadly weapon.”⁵ Conviction of this charge does not require the jury to find that the defendant actually possessed a firearm, only that the defendant displayed what appeared to be a firearm. There is, thus, no inconsistency in those verdicts. Likewise, there is no inconsistency in the jury convicting Price of third degree burglary for “knowingly enter[ing] or remain[ing] unlawfully in a building with intent to commit a crime therein”⁶ and declining to convict Price of possessing a firearm. We conclude, therefore, that Price’s third claim is without merit.

(14) This Court has reviewed the record carefully and has concluded that Price’s appeal is wholly without merit and devoid of any arguably

⁵ Del. Code Ann. tit. 11, § 832(a) (2).

⁶ Del. Code Ann. tit. 11, § 824.

appealable issue. We also are satisfied that Price's counsel has made a conscientious effort to examine the record and the law and has properly determined that Price 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/ Jack B. Jacobs
Justice