IN THE SUPREME COURT OF THE STATE OF DELAWARE

NOEL SANTIAGO,	§	
	§	
Defendant Below-Appellant,	§	No. 484, 2002
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr.A. Nos. VN00-03-1068-02
Plaintiff Below-Appellee.	§	VN00-02-0499-02
	§	

Submitted: December 20, 2002
Decided: February 13, 2003

Before **VEASEY**, Chief Justice, **WALSH** and **STEELE**, Justices

O R D E R

This 13th day of February 2003, 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) In May 2000, the defendant-appellant, Noel Santiago, pleaded guilty to Possession of Heroin and Possession of Heroin Within 1000 Feet of a School. On the first conviction, Santiago was sentenced to 4 years incarceration at Level V, to be suspended for 4 years at Level III, in turn to be suspended after 6 months for 3 years at Level II. On the second conviction, Santiago was sentenced to 4 years incarceration at Level V, to be suspended

after 2 years for 2 years at Level IV, in turn to be suspended after 6 months for 1 year, 6 months at Level III.

(2) On July 23, 2002, Santiago was found to be in violation of probation ("VOP"). On his first possession conviction, the Superior Court reimposed his sentence of 4 years incarceration at Level V, to be suspended for 2 years, 6 months at Level IV Crest upon successful completion of either the Key or Greentree drug program, in turn to be suspended for 21 months at Level III probation. On his second possession conviction, Santiago was discharged from his sentence as unimproved. This is Santiago's direct appeal.

(3) Santiago's trial 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 could arguably 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.[1]

(4) Santiago's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Santiago's counsel informed Santiago of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Santiago was also informed of his right to supplement his attorney's presentation. Santiago responded with a brief that raises several issues for this Court's consideration. The State has responded to the position taken by Santiago's counsel as well as the issues raised by Santiago and has moved to affirm the Superior Court's judgment.

(5) Santiago raises several claims for this Court's consideration, which may fairly be summarized as follows: a) his lack of fluency in English prejudiced him; b) the probation officer improperly testified to hearsay at the VOP hearing and displayed racial prejudice against him; c) the Superior Court failed to review the lab report containing the drug test results before rendering a decision; d) the Superior Court's sentence did not apply the proper credit for

---

[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).

time previously served at Level V, rendering his sentence illegal; and e) his due process rights were violated because he did not receive notice of the hearing.[2]

(6) The transcript of the VOP hearing reflects that Officer Brian Kananen, Santiago's probation officer, was not able to attend the hearing and that another probation officer testified in his place.[3] He was Santiago's former probation officer and testified from Officer Kananen's probation report. He stated that Santiago had served only 2 months of home confinement when he took a random drug test and tested positive for opiates. He recommended that Santiago's probation be revoked, a term of incarceration be imposed and Santiago be placed in the Level V Key Program. Santiago also testified at the hearing. He stated that he had tested positive for opiates because he was on a Methadone program. He also stated that the probation officer who testified was prejudiced against him and that he had not been given credit for 70 days spent at Level V between January 2000 and May 2002.

---

[2]Santiago also claims that his public defender provided ineffective assistance. However, we will not consider claims of ineffective assistance of counsel for the first time on direct appeal. *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

[3]The transcript of the VOP hearing does not reflect the name of this individual.

(7) Santiago's claims are without merit. The transcript of the VOP hearing does not reflect that Santiago had any problem communicating with the Superior Court judge or that the probation officer who testified was prejudiced against him. The Superior Court properly based its decision on testimony from the probation officer, who relied on the contents of Officer Kananen's VOP report.[4] The record does not reflect any violation of Santiago's due process rights.[5] Even assuming that Santiago did not receive proper notice of the hearing, the transcript does not reflect that Santiago was prejudiced as a result. Finally, while Santiago claims that he did not receive proper credit for time served at Level V, there is no evidence in the record to support that claim.[6] Moreover, there is no evidence to support Santiago's claim that the sentence reimposed by the Superior Court was illegal, since it did not exceed the statutory authorization or the sentence originally imposed.[7]

---

[4]*Brown v. State*, 249 A.2d 269, 272 (Del. 1968) (hearsay testimony is admissible at a VOP hearing).

[5]SUPER. CT. CRIM. R. 32.1; *Gibbs v. State*, 760 A.2d 541, 543-44 (Del. 2000).

[6]The record reflects that the Superior Court, in its March 18, 2002 order denying Santiago's motion for reduction/modification of sentence, directed the Department of Correction to give Santiago credit for any time served while held in default of bail. There is no evidence in this record that the Department of Correction did not comply with the Superior Court's order.

[7]*Ingram v. State*, 567 A.2d 868, 869 (Del. 1989).

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

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice