IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICK R. MULLIN,	§	
	§	
Defendant Below-Appellant,	§	No. 572, 2007
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. ID 0307011873
Plaintiff Below-Appellee.	§	
	§	

Submitted: April 7, 2008
Decided: June 20, 2008

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

O R D E R

This 20th day of June 2008, 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, Patrick Mullin (Mullin), filed this appeal from his adjudication for a second violation of probation (VOP). The Superior Court sentenced Mullin on the VOP to thirty-three months at Level V incarceration, to be suspended upon successful completion of the Key Program for six months at Level IV Crest, followed by six months at Level III Crest Aftercare.

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

careful examination of the record, there are no arguably appealable issues. By letter, Mullin's attorney informed him of the provisions of Rule 26(c) and provided Mullin with a copy of the motion to withdraw and the accompanying brief. Mullin also was informed of his right to supplement his attorney's presentation. Mullin has raised several issues for this Court's consideration. The State has responded to the position taken by Mullin's counsel, as well as the arguments presented by Mullin, 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 reflects that Mullin originally was convicted in 2006 of driving under the influence (fourth offense). This Court affirmed his conviction and sentence on direct appeal.[2] In December 2006, he was sentenced for violating

[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).

[2] *Mullin v. State*, 2006 WL 2506358 (Del. Aug. 29, 2006).

the terms of his probation. In August 2007, Probation and Parole filed a progress report in the Superior Court requesting that a special condition be added to Mullin's probation requiring him to complete 120 days of Secure Continuous Remote Alcohol Monitoring (SCRAM) by wearing a bracelet, which could remotely detect if Mullin consumed any alcohol. The progress report also requested that a provision be added to Mullin's probation reflecting a zero tolerance for alcohol consumption. The Superior Court approved the report and the additional conditions of probation.

(5) On September 14, 2007, an administrative warrant was issued charging Mullin with violating his probation. The probation officer filed a violation report alleging that Mullin had violated probation by failing to report for an office visit and failing to comply with the special conditions of his probation by: (i) obstructing his SCRAM bracelet; (ii) refusing to submit to alcohol testing; (iii) testing positive for alcohol consumption; and (iv) failing to report to Brandywine Counseling on September 11, 2007. After a contested violation hearing in October 2007, the Superior Court found Mullin in violation of his probation. This appeal followed.

(6) Mullin's first complaint on appeal is that the administrative warrant served on him on September 13, 2007 alleged the violation of only one condition of his probation, i.e., violating special conditions, but that an additional violation—

failure to report—was argued at the hearing. The record reflects that the violation report submitted on September 17, 2007 set forth both of the conditions Mullin was charged with violating. Mullin does not dispute that he received a copy of this report when it was issued. Moreover, his counsel never indicated that he had not received a copy of the violation report in advance of the October hearing. Under the circumstances, we conclude that Mullin had ample notice of the charges against him and was given an adequate opportunity to prepare a defense.[3]

(7) Mullin next argues that he never received a court order requiring him to wear the SCRAM bracelet; therefore, he should not have been charged with a violation for interfering with the bracelet. Mullin, however, elected to wear the bracelet in August 2007 to avoid facing a VOP charge for testing positive for alcohol consumption. He signed an agreement acknowledging the terms and conditions of the SCRAM bracelet. The Superior Court docket reflects the trial judge's approval of the SCRAM bracelet as an additional condition of Mullin's probation. Accordingly, we find no basis for Mullin's complaint that the bracelet condition was invalid because it was not contained in a court order.

(8) Mullin next raises a series of disjointed issues that appear to challenge facts allegedly asserted either in the violation report or at the VOP hearing. Specifically, Mullin appears to argue that: (i) there is no DUI charge in his criminal

[3] *See* Super. Ct. Crim. R. 32.1.

record; (ii) the State misrepresented the number of Mullin's positive urine tests; and (iii) the SCRAM bracelet was on Mountain Standard Time. We find no relevance to any of these perceived issues. The basis for the VOP charge against Mullin arose from his interference with the proper functioning of the SCRAM bracelet by putting a sock between the bracelet and his skin. There simply was no allegation that Mullin had a DUI charge. Furthermore, even assuming the prosecutor misstated the number of times Mullin tested positive for alcohol use, Mullin admits that he tested positive for alcohol use during the period of his probation. Finally, even assuming that the SCRAM bracelet was on Mountain Standard Time rather than Eastern Standard Time, Mullin can establish no prejudice from that fact.

(9) Mullin next argues that the State never proved the SCRAM bracelet was working properly on the date of the alleged violation. At the VOP hearing, however, the probation officer testified that Mullin admitted to placing a sock between his leg and the bracelet on the date of the alleged violation, despite having been instructed not to do so. Given this testimony, there was no evidence to suggest that the reported interference with the SCRAM bracelet was the result of a malfunction, as Mullin now wants to argue.

(10) Mullin's next contention challenges that portion of the violation report asserting that Mullin had failed to attend Brandywine Counseling, which was

required by TASC. This issue, however, was never presented to the Superior Court at the violation hearing. Accordingly, we will not consider it on appeal.[4]

(11) Mullin next argues that the VOP sentencing order is incorrect because it does not conform to the sentence pronounced in open court. Having reviewed the record carefully, we find no factual basis for this argument.

(12) Mullin's final argument is that his legal counsel was ineffective. This Court, however, will not consider allegations of ineffective assistance of counsel for the first time on direct appeal.[5]

(13) Having reviewed the record carefully, we find Mullin's appeal to be wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Mullin's counsel has made a conscientious effort to examine the record and the law and has properly determined that Mullin 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/Henry duPont Ridgely
Justice

[4] *See* Del. Supr. Ct. R. 8 (2008).

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