

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK SMITH,	§
	§
Defendant Below-	§ No. 114, 2013
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 1101020846
Plaintiff Below-	§
Appellee.	§

Submitted: February 19, 2014

Decided: March 13, 2014

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

ORDER

This 13th day of March 2014, 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, Derrick Smith, filed this appeal from the Superior Court's judgment denying his motion for postconviction relief. At the State's request, we remanded this matter for preparation of the transcript of Smith's guilty plea colloquy and the Superior Court's reconsideration of his motion for postconviction relief in light of the full record. On remand, the Superior Court granted Smith's motion for postconviction relief in part and

determined that Smith should be resentenced. The matter has now been returned from remand.

(2) Smith's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Smith's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Smith's attorney informed him of the provisions of Rule 26(c) and provided Smith with a copy of the motion to withdraw and the accompanying brief. Smith also was informed of his right to supplement his attorney's presentation. Smith responded with points for the Court's consideration. The State has responded to Smith's points, as well as to the position taken by Smith'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) The record reflects that, on January 29, 2011, Wilmington Police officers observed an apparent drug transaction. An officer confronted Smith and commanded him to stop. A footchase ensued. During the chase, Smith turned and fired a gun at the officer several times. Ultimately, the officer arrested and searched Smith. Officers found Smith to be in possession of marijuana, and recovered the gun from a nearby residence.

(5) A grand jury indicted Smith on one count each of Attempted Murder in the First Degree, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm by a Person Prohibited,² Resisting Arrest, and Possession of Marijuana. Smith pled guilty to PFDCF and Attempted Assault in the First Degree.³ The Superior Court sentenced Smith to twenty-five years at Level V incarceration on the PFDCF charge and to twenty-five years at Level V incarceration on the Attempted Assault in the First Degree charge, suspended after serving five years at decreasing levels of supervision. This Court affirmed Smith's convictions and sentence on direct appeal.⁴

(6) Smith then filed a motion for postconviction relief, which the Superior Court denied. Smith appealed that ruling to this Court. Although Smith did not

² Smith has a prior violent felony conviction. *See* DEL. CODE ANN. tit. 11, § 1448(a)(1) (2007).

³ This is a lesser-included offense of Attempted Murder in the First Degree. *See Ward v. State*, 575 A.2d 1156, 1158 (Del. 1990).

⁴ *Smith v. State*, 2012 WL 1530849 (Del. Apr. 30, 2012).

raise it as an issue in his opening brief, the State requested a remand of the appeal for preparation of the transcript of Smith's guilty plea colloquy because the guilty plea form erroneously indicated that the maximum statutory penalty for Attempted Assault in the First Degree was twenty years instead of twenty-five years. We granted the motion and stayed Smith's appeal while the Superior Court reconsidered Smith's postconviction motion in light of the full record, including the transcript of the guilty plea colloquy.

(7) On remand, the Superior Court granted Smith's motion for postconviction relief in part, finding that Smith was ineffectively represented with respect to his sentencing on the charge of Attempted Assault in the First Degree. The Superior Court resentenced Smith, with the assistance of newly appointed counsel, but otherwise denied his postconviction claims.

(8) In response to his counsel's Rule 26(c) brief, Smith has raised points for the Court's consideration, alleging several instances of ineffective assistance of counsel. His first three claims allege that his counsel misinformed him of how the sentencing phase would proceed. His fourth claim alleges that his counsel failed to withdraw his guilty plea despite Smith's request to do so. For the reasons that follow, we reject all of Smith's arguments.

(9) To prevail on an ineffective assistance of counsel claim, a defendant must satisfy the familiar *Strickland* test. "A defendant must first show that that his

counsel's representation fell below an objective standard of reasonableness. Second, the defendant must show that the deficient performance prejudiced the defense.”⁵ In the context of a guilty plea, to establish prejudice the defendant must demonstrate a reasonable probability that, but for his counsel’s unprofessional errors, the defendant would not have pled guilty but would have insisted on going to trial.⁶ A defendant must set forth and substantiate concrete allegations of actual prejudice⁷ in order to overcome the “strong presumption” that his attorney’s representation was professionally reasonable.⁸

(10) Smith first claims that he received ineffective assistance when his lawyer failed to inform him of the penalty-enhancing effect of his prior violent felony conviction. We find this argument to be without merit. Once Smith’s lawyer recognized her error, she asked Smith whether he wished to withdraw his guilty plea. Smith declined the opportunity to file a motion to withdraw the entire plea in favor of filing an appeal from his sentence. Under these circumstances, Smith cannot establish that, but for counsel’s error, he would not have pled guilty but would have insisted on going to trial. Accordingly, we find no error in the Superior Court’s rejection of this claim.

⁵ *Neal v. State*, 80 A.3d 935, 941-42 (Del. 2013) (internal quotations omitted).

⁶ *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

⁷ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁸ *Strickland v. Washington*, 466 U.S. at 689.

(11) Smith's second ineffective assistance claim is that his lawyer coerced him into accepting the plea agreement by informing Smith that he would receive only a five year sentence. The transcript of Smith's plea colloquy belies this claim. Smith indicated under oath that no one had threatened or forced him to enter a plea, that no one had promised him what sentence he would receive, and that he was satisfied with his counsel's representation. In the absence of clear and convincing evidence to the contrary, Smith is bound by these sworn statements.⁹ Accordingly, we find no error in the Superior Court's rejection of this claim.

(12) Smith's third claim is that his trial counsel misstated the statutory maximum sentence for Attempted Assault First Degree. Smith's plea form stated that the maximum sentence for Attempted Assault First Degree was twenty years. In reality, the maximum sentence was twenty-five years. The original sentencing judge sentenced Smith to the statutory maximum of twenty-five years. On remand, however, the sentencing judge reduced this sentence to twenty years to comport with the misstatement on Smith's plea form. The second sentencing hearing thus corrected any alleged error. Accordingly, Smith can establish no prejudice.

(13) Smith's fourth claim is that his trial counsel did not withdraw Smith's guilty plea despite his request that she do so. In an affidavit, Smith's lawyer stated that when she counseled Smith on whether to accept the plea offer, she failed to

⁹ *Somerville v. State*, 703 A.2d at 632.

inform Smith of the enhanced penalty he faced because of his prior violent felony conviction. In light of her error, Smith's lawyer asked him whether he wanted to withdraw his guilty plea. Smith's lawyer stated that he declined to withdraw his plea, but instead wanted to appeal his sentence. Although Smith disputes his lawyer's account, it was within the Superior Court's discretion to resolve this credibility issue by accepting counsel's sworn statement. Accordingly, we reject Smith's fourth claim.

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