

IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                    |   |                              |
|--------------------|---|------------------------------|
| KENNETH DUNNE,     | § |                              |
|                    | § |                              |
| Defendant Below-   | § | No. 254, 2004                |
| Appellant,         | § |                              |
|                    | § |                              |
| v.                 | § | Court Below---Superior Court |
|                    | § | of the State of Delaware, in |
|                    | § | and for New Castle County    |
| STATE OF DELAWARE, | § | Cr. ID Nos. 0401022001       |
|                    | § | 0401015500                   |
| Plaintiff Below-   | § | 0402005020                   |
| Appellee.          | § |                              |

Submitted: November 3, 2004

Decided: January 12, 2005

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

**ORDER**

This 12<sup>th</sup> day of January 2005, 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, Kenneth Dunne, pleaded guilty to Misdemeanor Home Improvement Fraud, Felony Home Improvement Fraud and Felony Theft. He was sentenced to a total of 5 years incarceration at Level V, to be suspended after 2 years for 3 years at decreasing levels of probation. This is Dunne's direct appeal.

(2) Dunne'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.<sup>1</sup>

(3) Dunne's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Dunne's counsel informed Dunne 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. Dunne was also informed of his right to supplement his attorney's presentation. Dunne responded with a brief that raised one issue for this Court's consideration. The State has responded to the position taken by Dunne's counsel as well as the issues raised by Dunne and has moved to affirm the Superior Court's judgment.

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<sup>1</sup> *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) Dunne raises one issue for this Court's consideration. He claims that he did not enter his guilty plea voluntarily because his attorney led him to believe he would receive a sentence of only 6 months at Level V.<sup>2</sup>

(5) Dunne's claim of a coerced guilty plea is refuted by the transcript of his March 29, 2004 plea colloquy. At the beginning of the hearing, the prosecutor noted for the record that, in exchange for Dunne's guilty plea, the State would dismiss the remaining charges in the indictment and recommend a presentence investigation. He also stated that Dunne would be required to pay restitution to all of the victims of his crimes. The Superior Court judge then confirmed with Dunne that he was freely and voluntarily agreeing to plead guilty, that no one had coerced him into entering the plea, that he understood the charges against him and that he could be sentenced to a total of 5 years incarceration at Level V. Absent clear and convincing evidence to the contrary, Dunne is bound by the representations he made at the time he entered his guilty plea.<sup>3</sup> Moreover, nothing in the record, including the transcript of the plea colloquy, Dunne's signed guilty plea form and

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<sup>2</sup> To the extent Dunne seeks to present a claim of ineffective assistance of counsel in this direct appeal, we decline to address any such claim. *Wing v. State*, 690 A.2d 921, 923 (Del. 1996).

<sup>3</sup> *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

the transcript of the sentencing hearing, reflects that anyone told Dunne he would receive only 6 months incarceration at Level V.<sup>4</sup>

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

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<sup>4</sup> Dunne's contention that the prosecutor recommended a sentence of 2 years to the sentencing judge also is not reflected in the record.