

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES E. FLOWERS,

Defendant Below-
Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below-
Appellee.

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§ No. 104, 2000

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§ Court Below—Superior Court

§ of the State of Delaware,

§ in and for New Castle County

§ Cr.A. No. VN93-07-0849-04

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Submitted: November 20, 2000

Decided: January 17, 2001

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

ORDER

This 17th day of January 2001, 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 August 1993, the defendant-appellant, James Flowers, was sentenced on one count of possession of cocaine to one year at Level V incarceration, to be suspended after six months for six months at Level IV drug treatment. In October 1993, Flowers pled guilty to one count of second degree robbery. The Superior Court sentenced him in January 1994 to five years at Level V incarceration, to be suspended after eighteen months for decreasing levels of

supervision. Flowers later was found in violation of his probation on four separate occasions. On February 24, 2000, the Superior Court sentenced Flowers on his fourth violation of probation (VOP) to one year at Level V incarceration. This appeal ensued. We find no substantive merit to Flowers' appeal. Accordingly, we affirm the Superior Court's decision.

(2) On appeal Flowers' counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). Flowers' counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Flowers' attorney informed him of the provisions of Rule 26(c) and provided Flowers with a copy of the motion to withdraw and the accompanying brief. Flowers also was informed of his right to supplement his attorney's presentation. Flowers has raised two related issues for this Court's consideration. The State has responded to the position taken by Flowers' counsel as well as the point raised by Flowers and has moved to affirm the Superior Court's decision.

(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 gist of Flowers' complaint is that the Superior Court improperly sentenced him in November 1995 following his first VOP hearing involving both of his sentences. Flowers apparently contends that, because of the Superior Court's improper sentence on the first VOP, which did not properly credit Flowers for time previously served at Level V incarceration on the two original sentences, all of Flowers' subsequent sentences for violating probation were unconstitutional.

(5) The State agrees that the sentences imposed following Flowers' first and second VOP hearings did not credit Flowers for all the time he previously had served at Level V on the original sentences. Nonetheless, the State argues that the Superior Court corrected that problem when it sentenced him on his third VOP. The State contends that Flowers has not suffered any prejudice because he has

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).

been credited with all of time he is entitled to, and he has not served more time at Level V incarceration than that to which he was originally sentenced.

(6) We find that the record supports the State's position. A defendant is entitled to credit for any period of actual incarceration which he has served on the sentence imposed.² In this case, Flowers has been credited with all of the time he has served at Level V incarceration. Flowers has not, and will not, serve more time in prison than that to which he was originally sentenced. Although the Superior Court's sentencing orders on Flowers' first and second VOPs did not properly credit Flowers with all of the time he previously had served at Level V, that oversight was corrected. Flowers has not been prejudiced, and his claim that his subsequent VOP sentences were unconstitutional is without merit.

(7) This Court has reviewed the record carefully and has concluded that Flowers' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Flowers' counsel has made a conscientious effort to examine the record and has properly determined that Flowers could not raise a meritorious claim in this appeal.

²See 11 Del. C. § 3901(c); *Gamble v. State*, Del. Supr., 728 A.2d 1171, 1172 (1999).

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