

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOSE MERCADO,)

**Defendant Below,
Appellant,**

)

)

)

Court Below - Court of Common Pleas

)

for the State of Delaware, in and for

v.

)

New Castle County

)

Cr.A.No. MN-00-05-0408

STATE OF DELAWARE,

)

)

**Plaintiff Below,
Appellee.**

)

)

Def. ID No. 0001019943

Submitted: November 6, 2000

Decided: January 30, 2001

ORDER

This 30th day of January, 2001, upon consideration of the defendant below, appellant, Jose Mercado's brief filed pursuant to Supreme Court Rule 26(c), incorporated by Superior Court Criminal Rule 39(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

1. On June 8, 2000, Mercado was found guilty in the Court of Common Pleas of assault in the third degree. He was sentenced to sixty days at level 5 suspended for one year at level 3, running concurrently with any existing probation, no contact with Jennifer Rodriguez, except pursuant to a Family Court Order, and an assessment of fifty dollars to pay for the costs of the public defender.

2. Mercado's counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c), incorporated by Superior Court Criminal Rule 39(c). His counsel asserts that, based upon a diligent and complete examination of the record, there are no meritorious issues to appeal. Mercado's counsel states that she informed Mercado of the provisions of Supreme Court Rule 26(c), as incorporated by Superior Court Criminal Rule 39(c), by mailing him on September 11, 2000 a copy of the motion to withdraw, a copy of Rule 26, a letter explaining Rule 26 and a request that Mercado respond in writing to counsel within thirty days concerning any points he wishes the Court to consider on appeal.

3. Mercado did not respond, and has not responded, regarding the motion to withdraw from his counsel or raised any issue that he wanted this Court to consider on this appeal. The State has responded that, absent any issues presented for the Court's consideration, the judgment of the Court of Common Pleas should be affirmed without further proceedings.

4. The standard and scope of review applicable to 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 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

5. Mercado has not presented any issues for this Court to consider on appeal.

6. Mercado was charged and convicted of assault in the third degree under 11 *Del.C.* §611, which states:

A person is guilty of assault in the third degree when:
(1) The person intentionally or recklessly causes physical injury to another person; or
(2) With criminal negligence the person causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

¹*Purnell v. State of Delaware*, Del.Supr., 760 A.2d 163 (2000); *Jackson v. State*, Del.Supr., No. 103, Veasey, C.J. (August 8, 2000) (ORDER); *Dickens v. State*, Del.Supr., No. 576, Veasey, C.J. (July 10, 2000) (ORDER); *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988); *McCoy v. Court of Appeals*, 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988); *Anders v. California*, 386 U.S. 638, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967).

7. The trial court, sitting without a jury, concluded from the testimony of Jennifer Rodriguez and Officer David Holder that Mercado slapped then punched the victim on the side of the face. This caused swelling, a bloody nose and pain. Pictures of the injuries were also presented and admitted into evidence. Mercado testified at trial and denied any involvement. The trial court weighed the testimony of all the witnesses and concluded that Mercado caused the physical injury and did so intentionally. It found the testimony of the State's witnesses to be more credible than Mercado's testimony. As the trier-of-fact, the trial judge is the sole judge of the credibility of witnesses and is responsible for resolving conflicts in factual disputes relating to the admissibility of evidence.²

8. This Court has reviewed the record carefully and has concluded that Mercado's appeal is wholly without merit and devoid of any arguably appealable issue. This Court is also satisfied that Mercado's counsel has made a conscientious effort to examine the record and has properly determined that Mercado 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 Court of Common Pleas is **AFFIRMED** and the motion to withdraw is **MOOT**.

²*Folks v. State*, Del.Supr., No. 301, Walsh, J. (June 28, 1994) (ORDER); *Coleman v. State*, Del.Supr., 562 A.2d 1171, 1177, (1989) (citing *Tyre v. State*, Del.Supr., 412 A.2d 326, 330 (1980)).

J.