

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS L. MOORE,	§
	§
Defendant Below-	§ No. 285, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. VN99-02-1545-02
Plaintiff Below-	§ Cr. ID 9902006667
Appellee.	§

Submitted: December 10, 2001

Decided: January 9, 2002

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

ORDER

This 9th day of January 2002, 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, Thomas L. Moore, filed this appeal from the Superior Court's sentence for Moore's second violation of probation (VOP). Moore's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Moore's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Moore's attorney informed him of the provisions of Rule 26(c) and provided Moore with a copy of the motion to

withdraw and the accompanying brief. Moore also was informed of his right to supplement his attorney's presentation. Moore raised several issues for this Court's consideration. The State responded to the position taken by Moore's counsel as well as the points raised by Moore and moved to affirm the Superior Court's decision. After considering the parties' submissions, the Court requested supplemental responses from Moore's counsel and the State regarding one of Moore's points.

(2) 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

(3) The record reflects that in 1999 Moore pleaded guilty, among other things, to his fifth offense for driving under the influence. The Superior Court sentenced Moore, effective January 7, 2000, to three years at Level V imprisonment, suspended after serving six months for two and a

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).

half years at Level IV residential drug treatment, suspended after successful completion of drug treatment for probation. In September 2000, the Superior Court found Moore in violation of probation and sentenced him to two and a half years at Level V imprisonment suspended entirely for two and a half years at Level IV Recovery Center of Delaware (RCD), suspended upon successful completion of the RCD program for probation. On January 6, 2001, the day he was released, Moore was arrested for violating probation by committing new charges, including second degree assault.

(4) At a contested VOP hearing held on June 7, 2001, Officer Jennifer Bunora of the New Castle County Police Department testified that she was dispatched to the scene of a single car accident on the afternoon of January 6, 2001. As she approached the scene, an ambulance worker flagged her down. The ambulance worker informed Officer Bunora that the passenger of the car had been taken to the hospital. The ambulance worker pointed out the driver of the car, who turned out to be Moore. Moore was walking away from the scene of the accident coming toward them. Officer Bunora activated her emergency equipment. She asked Moore to stop. Moore asked if he was under arrest. Officer Bunora testified that she told

Moore he was not under arrest but that he was being detained while she investigated the accident. Officer Bunora testified that she detected the odor of alcohol on Moore. Despite being told to stop, Moore continued to walk away. Officer Bunora instructed Moore to come to her vehicle. Moore refused and sat down in the road on a cooler that he had been carrying. Eventually Moore attempted to walk away from Officer Bunora despite being told to get in her car. A struggle ensued when Officer Bunora advised Moore to put his hands behind his back because he was under arrest. Two ambulance workers assisted Officer Bunora in taking Moore to the ground so that she could place handcuffs on him. Officer Bunora testified that she sprained her knee during the struggle with Moore and went to the hospital for treatment.

(5) Officer Bunora was the only witness to testify at the VOP hearing. Following the hearing, the Superior Court found Moore in violation of probation for committing a new offense, i.e. assault. The court sentenced him to two years at Level V imprisonment, effective January 6, 2001, to be suspended upon successful completion of the Key West Treatment Program for one year at Level III probation.

(6) As part of the opening brief on appeal, Moore raises seven separately numbered arguments for the Court's consideration, although many of the arguments overlap. Moore contends: (1) the Superior Court violated his due process rights under Superior Court Criminal Rule 32.1; (2) the Superior Court illegally sentenced him; (3) the VOP proceedings lacked due process; (4) it was error for the Superior Court to "fast track" his VOP hearing; (5) his arrest was not supported by probable cause, and his VOP adjudication was the result of untrustworthy testimony; (6) his current VOP was illegal because it was the direct result of a previous illegal sentence; and (7) he was denied effective assistance of counsel.

(7) Most of Moore's complaints assert violations of his right to due process. Moore contends that his rights were violated because: (a) no bail was fixed for his VOP; (b) there was prejudicial delay in holding a VOP hearing; (c) the State withheld evidence by not formally charging him in writing with a VOP; (d) he did not receive proper notice of the VOP hearing; (e) by placing his VOP on a "fast track," the State and the Superior Court improperly rushed to violate him; (f) he never met with his probation officer before being violated; (g) he was not permitted an opportunity to be heard at the VOP hearing; and (h) the Superior Court erred by failing to provide him

with written findings of fact supporting the court's conclusion that Moore had violated probation.

(8) Moore did not raise any of these objections to the Superior Court below. Absent plain error, Moore cannot raise these issues for the first time on appeal.² The record in this case reflects that Moore was arrested on new criminal charges for which he was held in lieu of bail, that Moore was present at the VOP hearing with appointed counsel and did not express any surprise about the hearing or request a continuance, that Moore did not express any desire to testify at the VOP hearing, and that the Superior Court clearly explained its factual findings following the hearing. Given these circumstances, we find no plain error with respect to any of Moore's due process claims. Accordingly, review of these claims is not warranted in the interest of justice.³

(9) Moore next claims that his sentence was illegal because (a) the Superior Court violated his due process rights under Rule 32.1(a) and, therefore, was prohibited by Rule 32.1(b) from sentencing him for a probation violation; (b) the Superior Court failed to credit him with 10 months he already had served at Level V on his original sentence; and (c)

² Supr. Ct. R. 8.

the Superior Court's sentence for Moore's second VOP was the direct result of the Superior Court's allegedly illegal sentence imposed for Moore's first VOP. We already have rejected Moore's due process contentions. Accordingly, we find no merit to Moore's contention that his sentence was prohibited by Rule 32.1(b).

(10) Furthermore, the record does not support Moore's contention that the Superior Court failed to credit him with all of the time to which he was entitled. After finding Moore in violation of his probation, the Superior Court was authorized to reimpose any portion of the previously suspended two and a half year prison term that had been imposed on September 29, 2000.⁴ The Superior Court's two year sentence for Moore's second VOP inherently gave credit to Moore for the time he spent at Level V awaiting placement at Level IV on his first VOP sentence.⁵ Accordingly, we find no merit to Moore's contention that he did not receive credit for all the time he previously served at Level V.

(11) Finally, Moore's complaint about the Superior Court's sentence for his first VOP, which was imposed on September 29, 2000, is untimely.

³ See *Gaines v. State*, 571 A.2d 765, 767 (Del. 1990).

⁴ *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

⁵ *Id.*

Moore could have appealed from that sentence but did not. He is no longer in custody as a result of that sentence. Accordingly, there is no basis for this Court to review his untimely complaint.

(12) Moore next asserts that there was no probable cause to arrest him and that the Superior Court's finding of a probation violation was the result of untrustworthy testimony. Moore contends that Officer Bunora's testimony was inconsistent. Even assuming without deciding that Officer Bunora's testimony contained inconsistencies, those inconsistencies were for the Superior Court, as the fact finder, to resolve in its discretion.⁶ We find no abuse of the Superior Court's discretion. The Superior Court's finding of a probation violation is amply supported by the record.

(13) Finally, Moore asserts that, because he was represented by several different attorneys during the VOP process, he did not receive effective assistance of counsel. Representation by different attorneys at different stages of the adjudicative process does not deprive a defendant of the right to the effective assistance of counsel so long as each attorney is adequately informed.⁷ In order to prevail on his claim of ineffective

⁶ See *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982).

⁷ *Siers v. Ryan*, 773 F.2d 37, 44 (3rd Cir. 1985), *cert. denied*, 490 U.S. 1025 (1989).

assistance of counsel, Moore must show that his lawyers' representation fell below an objective standard of reasonableness and that, but for his lawyers' unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.⁸ Moore has failed to substantiate any specific claim of error by any of his lawyers that resulted in prejudice to him.⁹ Accordingly, we find no merit to Moore's allegation of ineffective assistance of counsel.

(14) The Court has reviewed the record carefully and has concluded that Moore's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Moore's counsel has made a conscientious effort to examine the record and the law and has properly determined that Moore 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/Joseph T. Walsh
Justice

⁸ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁹ *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).