

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID STRAWLEY,	§
	§
Defendant Below-	§ No. 296, 2001
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware,
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr.A. Nos. IS99-08-0828
	§ Cr. ID 9908014940
Plaintiff Below-	§
Appellee.	§

Submitted: November 27, 2001

Decided: January 15, 2002

Before **VEASEY**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

ORDER

This 15th 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, David Strawley, filed this appeal from the Superior Court's denial of his motion for sentence reduction. Strawley's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Strawley's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Strawley's attorney informed him of the provisions of Rule 26(c) and provided Strawley with a copy of the motion to withdraw and the

accompanying brief. Strawley also was informed of his right to supplement his attorney's presentation. Strawley has written several letters challenging his placement in the Key Program. The State has responded to the position taken by Strawley's counsel as well as the points raised by Strawley and has moved to affirm the Superior Court's decision.

(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 in this case reflects that Strawley pleaded guilty to one count of second degree assault in January 2000. The Superior Court sentenced Strawley to five years at Level V imprisonment suspended immediately for one year at Level IV home confinement followed by three and a half years of probation. Conditions of his sentence required that he receive a substance abuse evaluation, a mental health evaluation, and

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).

“counseling/treatment/testing.” Upon his sentencing, Strawley was informed of the conditions of his placement at Level IV Home Confinement, which included a strict curfew.

(4) Within a month of his sentencing, Strawley was picked up on a curfew violation. He was held at the VOP (violation of probation) Center at Sussex Correctional Institution for one week. Upon entering the VOP Center, Strawley’s urine tested positive for cocaine use. Within a week of his release from the VOP Center, Strawley was arrested for another probation violation. He was charged with testing positive for cocaine and for violating curfew. The Superior Court found Strawley guilty of violating probation and sentenced him to five years at Level V imprisonment to be suspended after successful completion of the Key Program, followed by one year at the Level IV Crest Program, suspended upon successful completion of Crest for three years probation. Strawley did not appeal from the Superior Court’s sentencing order.

(5) Instead, Strawley filed several pro se motions seeking modification of his sentence. In January 2001, Strawley, who was represented by counsel, filed a motion to set aside the Superior Court’s original VOP adjudication. That motion was denied. Strawley’s counsel then filed a motion for sentence modification on the ground that the Key

Program was inappropriate for Strawley. At the time he filed his motion, Strawley already had been terminated from the Key Program for his refusal to participate. At counsel's request, the Superior Court ordered an independent evaluation by the Treatment Access Center (TASC) in order to determine whether Key was an appropriate program for Strawley. After receiving TASC's evaluation, which recommended Strawley complete the Key Program, the Superior Court held a hearing on Strawley's motion to modify. Thereafter, the Superior Court denied Strawley's motion, and this appeal ensued.

(6) Strawley's counsel on appeal has represented that there are no arguable issues to support Strawley's appeal. In response, Strawley wrote several letters to his counsel contending: (a) he was never afforded a mental health evaluation in accordance with the terms of his original plea agreement; (b) he should not have been arrested for a probation violation on February 29, 2000; and (c) he should be allowed to participate in another treatment program other than Key. We find no merit to any of these contentions.

(7) Strawley never raised the issue about the mental health examination with the Superior Court. Accordingly, absent plain error, there

is no basis for this Court to review Strawley's claim on appeal.² We find no plain error. On the record before us, we find no substantiation for Strawley's claim that he was never evaluated prior to his placement in the Key Program. The Superior Court's original sentence ordered such an evaluation, and Strawley admits that, while he was participating in Key, he was being treated with antidepressant medication. Strawley's treatment for mental health issues supports a reasonable inference that Strawley, in fact, received a mental health evaluation in accordance with the Superior Court's original sentencing order.

(8) Furthermore, Strawley's attempt to challenge his underlying probation violation, which was imposed in March 2000 is untimely.³ Strawley had an opportunity to appeal from the Superior Court's VOP adjudication and sentence but failed to do so. A motion seeking a correction of sentence is not an appropriate means to challenge alleged errors that occurred at proceedings prior to the imposition of sentence.⁴ This Court will not consider Strawley's untimely claim.

(9) Finally, we find no abuse of the Superior Court's discretion in ordering Strawley to complete the Key Program. The record reflects that the

² Supr. Ct. R. 8.

³ See *Carr v. State*, 554 A.2d 778 (Del. 1989).

⁴ See *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998)

Superior Court ordered an independent evaluation by TASC regarding Strawley's placement in the Key Program. This was entirely within the Superior Court's discretion.⁵ The TASC report was appropriately considered by the Superior Court in formulating its sentencing decision, and Strawley offered nothing to contradict TASC's recommendation. We find no abuse of discretion in the Superior Court's sentencing decision.

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

⁵ See *Williams v. State*, 560 A.2d 1012, 1015 (Del.1989) (holding that trial court has "wide latitude in probationary matters").