

SUPREME COURT OF THE STATE OF DELAWARE

Pennington v. State

Pennington v. State · No. No. 439, 2014 · Decided December 15, 2014

SUMMARY

The Delaware Supreme Court affirmed the Superior Court’s denial of David Pennington’s motion for postconviction relief following his guilty pleas and sentences for dealing in and possessing child pornography. Applying Supreme Court Rule 26(c), the Court found the appeal wholly without merit and devoid of any arguably appealable issue, and deemed appointed counsel’s motion to withdraw moot.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	Karen L. Valihura; Chief Justice Strine; Justice Ridgely; Justice Valihura
JURISDICTION	Delaware
DECIDED	December 15, 2014
DOCKET	No. 439, 2014
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the Superior Court's order granting appointed postconviction counsel's motion to withdraw and denying Pennington's motion for postconviction relief.
STANDARD OF REVIEW	On review of a Supreme Court Rule 26(c) motion to withdraw, the Delaware Supreme Court must determine whether counsel made a conscientious examination of the record and law for arguable claims and independently review the record to determine whether the appeal is wholly devoid of at least arguably appealable issues.
PRECEDENTIAL VALUE	published
PARTIES	David Pennington v. State of Delaware

TOPICS

- post-conviction relief
- appellate procedure
- criminal procedure
- sentencing
- ineffective assistance

PRACTICE AREAS

criminal procedure

post-conviction relief

appellate procedure

sentencing

QUESTIONS PRESENTED

1. Whether appointed postconviction counsel satisfied the requirements for withdrawal under Delaware Superior Court Criminal Rule 61(e)(2) and Supreme Court Rule 26(c).
2. Whether Pennington's postconviction appeal presented any arguably appealable or meritorious issue, including his claims of vindictive prosecution, improper sentence enhancement, lack of benefit from the plea agreement, and ineffective assistance of counsel.

HOLDINGS

1. Counsel may withdraw when counsel has conscientiously examined the record and law for arguable claims, provided the defendant with the motion and supporting brief and an opportunity to identify issues, and the Supreme Court independently determines that the appeal is wholly devoid of at least arguably appealable issues.
2. Pennington's appeal was wholly without merit and devoid of any arguably appealable issue; the Superior Court's denial of postconviction relief was affirmed.

KEY QUOTATIONS

“When reviewing a motion to withdraw and an accompanying brief under Rule 26(c), this Court must: (i) be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (ii) 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.” (at 3)

“This Court has reviewed the record carefully and has concluded that Pennington’s appeal is wholly without merit and devoid of any arguably appealable issue.” (at 4)

FACTUAL BACKGROUND

In April 2013, Pennington was indicted on two counts of Dealing in Child Pornography. He pleaded guilty to one count of Dealing in Child Pornography and one count of Possession of Child Pornography and was sentenced to twenty-five years of Level V incarceration on the first count and three years of Level V incarceration followed by six months of Level IV home confinement on the second count. The sentencing judge cited the risk Pennington posed to children in the community when imposing the maximum sentence.

PROCEDURAL HISTORY

Pennington pleaded guilty to one count each of Dealing in Child Pornography and Possession of Child Pornography and received aggregate Level V and related custodial sentences. He filed a pro se motion for postconviction relief asserting vindictive prosecution, improper sentence enhancement, lack of benefit from the plea agreement, and ineffective assistance of counsel. The Superior Court appointed postconviction counsel, granted counsel's motion to withdraw under Superior Court Criminal Rule 61(e)(2), and denied relief. On appeal,

counsel filed a Supreme Court Rule 26(c) motion to withdraw, and Pennington did not identify additional issues for review.

DISPOSITION

affirmed

CASES CITED

- Penson v. Ohio, 488 U.S. 75, 83 (1988)
- Leacock v. State, 690 A.2d 926, 927-28 (Del. 1996)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF THE STATE OF DELAWARE DAVID PENNINGTON, § § Defendant Below, § No. 439, 2014 Appellant, § § Court Below—Superior Court v. § of the State of Delaware, § in and for Sussex County STATE OF DELAWARE, § Cr. ID No. 1302020857 § Plaintiff Below, § Appellee. § Submitted: November 20, 2014 Decided: December 15, 2014 Before STRINE, Chief Justice, RIDGELY, and VALIHURA, Justices.

ORDER This 15th day of December 2014, upon consideration of the appellant's Supreme Court Rule 26(c) brief, the State's response, and the record below, it appears to the Court that: (1) In April 2013, the appellant, David Pennington, was indicted on two counts of Dealing in Child Pornography.

On June 20, 2013, Pennington pled guilty to one count of Dealing in Child Pornography and one count of Possession of Child Pornography. After a presentence investigation, Pennington was sentenced to twenty-five years of Level V incarceration, with credit for 225 days previously served, for Dealing in Child Pornography and three years of Level V incarceration, followed by six months of Level IV Home Confinement, for Possession of Child Pornography.

In imposing the maximum sentence, the Superior Court judge expressed his concern for the risk posed by Pennington to children in the community. (2) On November 13, 2013, Pennington filed a pro se motion for postconviction relief.

In this motion, Pennington argued that there was vindictive prosecution because his sentence exceeded the sentencing guidelines and the recommendation of the prosecutor, his sentence was improperly enhanced, he received no benefit from the plea agreement, and his counsel was ineffective.

The Superior Court appointed counsel (“Postconviction Counsel”) to represent Pennington and directed Postconviction Counsel to file any amendments to Pennington’s motion for

postconviction relief by May 30, 2014. (3) On May 29, 2014, Postconviction Counsel filed a motion to withdraw under Superior Court Criminal Rule 61(e)(2). Postconviction counsel represented that, after conducting a thorough and conscientious review of the record, law and allegations, he had concluded that Pennington's postconviction claims were wholly without merit and devoid of any potentially arguable issues.

Pennington was informed of his right to respond to the motion to withdraw by Postconviction Counsel and the Superior Court. Pennington did not respond to the motion to withdraw. 2 (4) On July 29, 2014, the Superior Court granted Postconviction Counsel's motion to withdraw and denied Pennington's motion for postconviction relief.

The Superior Court concluded that Pennington's claims were belied by the Truth-in-Sentencing guilty plea form and the guilty plea colloquy. This appeal followed. (5) On appeal, Postconviction Counsel filed a brief and a motion to withdraw under Supreme Court Rule 26(c) ("Rule 26(c)"). Postconviction Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues.

Postconviction Counsel informed Pennington of the provisions of Rule 26(c) and provided Pennington with a copy of the motion to withdraw and the accompanying brief. Postconviction Counsel also informed Pennington of his right to identify any points he wished this Court to consider on appeal. Pennington did not provide any points for this Court's consideration.

(6) When reviewing a motion to withdraw and an accompanying brief under Rule 26(c), this Court must: (i) be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (ii) 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 1 *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *Leacock v. State*, 690 A.2d 926, 927-28 (Del.

1996). 3 (7) This Court has reviewed the record carefully and has concluded that Pennington's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Postconviction Counsel has made a conscientious effort to examine the record and the law and has properly determined that Pennington could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot. BY THE COURT: /s/ Karen L. Valihura Justice 4