

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY HENRY,	§	
	§	No. 93, 2014
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	Cr. ID Nos. 1204003166
	§	1201002933
Plaintiff Below,	§	
Appellee.	§	

Submitted: April 15, 2014

Decided: June 5, 2014

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 5th day of June 2014, upon careful consideration of the appellant’s brief pursuant to Supreme Court Rule 26(c), his attorney’s motion to withdraw, and the State’s response, it appears to the Court that:

(1) On September 18, 2012, the appellant, Jerry Henry (“Henry”) pleaded guilty to Tier 5 Drug Dealing/Aggravated Possession, Attempted Robbery in the First Degree, Possession of a Firearm During the Commission of a Felony (“PFDCF”), Conspiracy in the Second Degree, and multiple counts of Violation of Probation (“VOP”). When imposing Henry’s sentence, the Superior Court found Henry to be a habitual offender and sentenced him to fifteen years at Level V for Drug Dealing/Aggravated Possession. For Attempted Robbery, PFDCF,

Conspiracy, and one count of VOP, the Superior Court sentenced Henry to a total of thirty-two years at Level V, suspended after ten years for one year of Level IV work release, followed by four years at Level III probation. Henry was discharged as unimproved on the remaining VOP counts.

(2) On June 20, 2013, Henry filed a *pro se* motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). Henry alleged ineffective assistance of counsel, malicious prosecution, and violations of his constitutional rights. The Superior Court appointed counsel (“Counsel”) to represent Henry and directed that Counsel file an amended postconviction motion by October 15, 2013. The deadline was later extended to November 15, 2013, when Counsel requested, and was granted, an extension of time on the basis that he needed additional time to review the record and transcripts.

(3) On November 14, 2013, Counsel filed a motion to withdraw under Rule 61(e)(2) in lieu of an amended postconviction motion.¹ In that motion to withdraw, Counsel represented that, after conducting “a thorough and conscientious review of the record, law and allegations,” he had concluded that Henry’s postconviction claims were “wholly without merit,” and that the record was “devoid [of] any potentially arguable issues.”

¹ See DEL. SUPER. CT. CRIM. R. 61(e)(2) (“If counsel considers the movant’s claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw.”).

(4) Under Rule 61(e)(2), Henry had a right to respond to Counsel's motion to withdraw and was advised of that right by Counsel and the Superior Court. Henry did not respond to the motion to withdraw.

(5) By order dated February 3, 2014, the Superior Court granted Counsel's motion to withdraw and denied Henry's *pro se* motion for postconviction relief. The court reasoned as follows:

[T]he Court is satisfied that [Henry] has not sustained his burden of proof to establish any of the allegations in the Rule 61 Motion. [Henry's] statements at the time the plea was entered belie his subsequent claims. He admitted he was guilty which was the same thing he confessed to. He shall not get another bite out of the apple.²

This appeal followed.

(6) On appeal, Counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c).³ Counsel claims that, based upon a complete and careful examination of the record, there are no arguably appealable issues. Counsel reports that Henry did not submit any points for the Court's consideration. The State has moved to affirm the Superior Court judgment.

(7) When reviewing a motion to withdraw and an accompanying brief under Rule 26(c), the Court must be satisfied that the appellant's counsel has made

² *State v. Henry*, Cr. ID Nos. 1204003166 & 1201002933 (Del. Super. Feb. 3, 2014) (Order).

³ See DEL. SUPR. CT. R. 26(c) (governing appeals without merit).

a conscientious examination of the record and the law for arguable claims.⁴ The Court must also conduct its own review of the record to determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.⁵

(8) The Court has reviewed the record carefully and has concluded that Henry's appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Counsel made a conscientious effort to examine the record and the law and properly determined that Henry could not raise a meritorious claim on 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/ Jack B. Jacobs
Justice

⁴ *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).

⁵ *Penson*, 488 U.S. at 83; *McCoy*, 486 U.S. at 442; *Anders*, 386 U.S. at 744.