

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERALD MASARONE,	§	
	§	No. 483, 2013
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 1301016588
Appellee.	§	

Submitted: February 12, 2014

Decided: April 16, 2014

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

O R D E R

This 16th day of April 2014, upon careful consideration of the appellant's brief pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"), his attorney's motion to withdraw, and the State's response, it appears to the Court that:

(1) After a two-day trial in July 2013, a Superior Court jury convicted the appellant, Gerald Masarone, of Driving Under the Influence ("DUI"). It was Masarone's seventh DUI offense. After a presentence investigation, the Superior Court sentenced Masarone on September 12, 2013, to fifteen years at Level V suspended after seven years and successful completion of the Greentree Program for six months at Level IV work release followed by two years of Level III probation. This is Masarone's direct appeal.

(2) Masarone's appellate counsel, (hereinafter "Counsel"), has filed a Rule 26(c) brief and motion to withdraw asserting that there are no arguably appealable issues.¹ Masarone has responded to his Counsel's presentation with a written submission that raises one issue for the Court's consideration. The State has responded to the position taken by Counsel as well as the issue raised by Masarone and has moved to affirm the Superior Court's judgment.

(3) The record reflects that on January 22, 2013, police officers in the vicinity of the Indian River Inlet Bridge received a general broadcast of a silver pick up truck swerving in and out of the southbound lane of Route 1. Corporal John Jenney of the Dewey Beach Police and Trooper Lindsay Coleman of the Delaware State Police located the truck, a Ford FX, just south of the Indian River Inlet Bridge where the truck had stopped. Trooper Joshua Rowley of the Delaware State Police and Lieutenant Richard Haden of the Bethany Beach Police also responded to the scene.

(4) Corporal Jenney found the operator of the truck, Masarone, slumped over the steering wheel, passed out, with the truck still in drive and his foot resting on the brake. Corporal Jenney, with the assistance of Trooper Coleman, roused Masarone with some difficulty and coaxed him out of the truck. When Trooper

¹ See Del. Supr. Ct. R. 26(c) (governing criminal appeals without merit).

Rowley arrived on the scene, Masarone was seated in the back seat of Lieutenant Haden's patrol car, which was equipped with a dash camera.

(5) At trial, Corporal Jenney and Troopers Coleman and Rowley all testified that Masarone could not stand up without assistance, smelled strongly of alcohol, and was incoherent, and each officer opined that Masarone was under the influence of alcohol. Trooper Rowley testified that, after administering the alphabet and counting field sobriety tests, which Masarone failed, he opted not to attempt any physical field tests because Masarone could not stand up. Trooper Rowley also testified that, after he took Masarone into custody and was transporting him to the Sussex Correctional Institution, Masarone made an unsolicited incriminating statement that he was "sorry," had "made a mistake," and was "an alcoholic."

(6) At trial, the State attempted to admit into evidence the Mobile Device Record ("MVR") recorded from the dash camera in Lieutenant Haden's patrol car. Masarone objected to the admission of the MVR on the ground that Lieutenant Haden, who was on administrative leave at the time of trial, was not available to testify and therefore could neither authenticate the MVR nor establish its chain of custody.

(7) In response to Masarone's objection, and in an effort to authenticate the MVR and establish its chain of custody, the State called Chief Michael D.

Redmon and Sergeant Jason Riddle of the Bethany Beach Police. On the stand, Chief Redmon described generally the operation of the MVR cameras in the department's patrol cars. He also testified that each officer has access only to the MVRs from that officer's patrol car, and that only one other officer, Sergeant Riddle, has access to the MVRs.

(8) Sergeant Riddle described the department's standard practice of uploading, storing, and retrieving the MVRs. Sergeant Riddle also testified that he was not the officer who retrieved the MVR in Masarone's case, but he confirmed that only he and the officer from whose vehicle the MVR had been recorded could access the MVR on the department's server, and that a MVR recording cannot be altered.

(9) At the conclusion of the testimony of Chief Redmon and Sergeant Riddle, the Superior Court sustained Masarone's objection to the admission of the MVR. After further argument, however, the court reconsidered its decision, overruled the objection, and allowed the jury to view the MVR.

(10) In his written submission on appeal, Masarone argues that the Superior Court abused its discretion when admitting the MVR over his defense counsel's objection. Generally, it is within the trial judge's discretion whether to

admit evidence in particular circumstances.² We review the Superior Court’s ruling on the admission of evidence for abuse of discretion.³

(11) A party may authenticate physical evidence either by establishing a chain of custody, which establishes the continuous whereabouts of the evidence, or by having a witness with knowledge testify that the evidence is what it is claimed to be.⁴ When considering a chain of custody objection to the admission of evidence, the court considers “whether there is a reasonable probability that the evidence offered has been properly identified and that no tampering or adulteration has occurred.”⁵ “[T]he party attempting to admit the evidence must eliminate possibilities of misidentification and adulteration, `not absolutely, but as a matter of reasonable probability.’”⁶

(12) In this case, the dash camera in Lieutenant Haden’s patrol car was equipped to record events occurring in front of the vehicle and in the vehicle’s back seat. With respect to the recorded events occurring in front of the patrol car, the State properly authenticated the MVR by having Trooper Rowley and Corporal

² See *Hendricks v. State*, 871 A.2d 1118, 1122 (Del. 2005) (citing *Tricoche v. State*, 525 A.2d 151, 152 (Del. 1987)).

³ *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

⁴ See *Hendricks v. State*, 871 A.2d 1118, 1121-22 (Del. 2005) (citing *Tricoche v. State*, 525 A.2d 151, 152 (Del. 1987)).

⁵ See *Murphy v. State*, 632 A.2d 1150, 1153 (Del. 1993) (citing *Tricoche v. State*, 525 A.2d 151, 153 (Del. 1987)).

⁶ See *McNally v. State*, 980 A.2d 364, 371 (Del. 2009) (citing *Tricoche v. State*, 525 A.2d 151, 153 (Del. 1987)).

Jenney testify that the MVR, which they viewed before trial, accurately depicted what they had witnessed at the scene.

(13) The back seat recording of Lieutenant Haden's patrol car consisted chiefly of a sixteen-second audio clip of Masarone speaking and slurring his words, events that were witnessed only by Lieutenant Haden who was unavailable to testify at trial. Trooper Rowley testified, however, that Masarone was the person he took out of the back seat of the patrol car, and that Masarone's speech was confused and slurred as Trooper Rowley was removing him from the car.

(14) Having carefully considered Masarone's chain of custody claim and the record of the trial, we conclude that the claim is without merit, and that the Superior Court did not abuse its discretion when admitting the MVR. The combined testimony of Chief Redmon, Sergeant Riddle, Corporal Jenney and Trooper Rowley, was sufficient to establish that the MVR was authentic and that tampering had not occurred.

(15) The standard and scope of review applicable to the consideration of Rule 26(c) brief and motion to withdraw is twofold.⁷ First, the Court must be satisfied that defense counsel has made a conscientious examination of the record

⁷ *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).

and the law for claims that could arguably support the appeal.⁸ Second, the Court must 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.⁹

(16) In this case, upon careful review of the record, the Court has concluded that Masarone'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 Masarone 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/ Henry duPont Ridgely
Justice

⁸ *Id.*

⁹ *Id.*