

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STEPHEN SELBY)	
Appellant,)	
)	
v.)	ID Nos.: 0806035277
)	0807035985
STATE OF DELAWARE,)	0808022618
Appellee,)	0908026980
)	1001008773
)	

Submitted: February 19, 2013
Decided: May 8, 2013

ORDER

1. On September 3, 2009, Appellant pleaded guilty in the Court of Common Pleas to two counts of assault third degree, two counts of noncompliance with bond, and a single count of criminal contempt. For each count, the court sentenced Appellant to one year at Level 5, suspended for one year at Level 3. The court required substance abuse and domestic violence evaluations, and no victim contact. The Level 3 probation required Appellant to report weekly.

2. On April 20, 2010, Appellant was arrested on new charges. At that time, Appellant was violated for failing to report to probation since January 11, 2010, in accordance with the September 2009 sentence order. Appellant appeared in the

Court of Common Pleas on May 14, 2010, for his VOP hearing. Finding Appellant in violation, the court sentenced him on each original charge to one year at Level 5, suspended after six months, followed by one year Level 4, home confinement.

3. In a separate, but related case, on June 25, 2010, Appellant was found guilty of assault third degree. After a presentence investigation, Appellant was sentenced on September 9, 2010 to one year at Level 5, suspended after nine months for one year at Level 3.

4. Appellant appealed both Court of Common Pleas sentencings on June 22, 2010. Filing *pro se*, Appellant caused or contributed to procedural problems and delays. Ultimately, on August 1, 2012, this court appointed the Public Defender's Office to serve as Appellant's counsel. Several requests for extensions later, on January 29, 2013, Appellant's counsel filed a motion to withdraw, accompanied by a Supreme Court Rule 26(c) brief, as contemplated by Superior Court Criminal Rule 39(c).

5. Appellant's counsel asserts that there are "no fully appealable issues." In accordance with Rule 26(c), Appellant submitted a response, arguing "Abuse of Discretion/Close Mind" as to the May 14, 2010 VOP and sentencing. Appellant did not address the September 9, 2010 sentencing. The State submitted an unhelpful response on February 20, 2013.

6. This court’s review of a motion to withdraw and its accompanying Rule 26(c) brief is two-fold. First, the court must be satisfied that counsel made a conscientious review of the record and law for any arguable claims.¹ Second, the court must independently review 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.”²

7. Appellant’s brief mostly recapitulates his allocution from the VOP hearing. In repetitive fashion, Appellant claims the Court of Common Pleas abused its discretion by revoking Appellant’s probation “without a proper finding that [Appellant] had indeed violated his conditions without reviewing the facts and factors as to why [Appellant] had not attending [*sic*] his weekly visits.” Additionally, Appellant argues that the court abused its discretion by considering Appellant’s latest interaction with police, and by allowing the victim to speak.

8. At the VOP hearing, Appellant submitted a doctor’s note, indicating that Appellant had foot surgery on December 8, 2009, January 29, 2010, and March 2, 2010, and several follow-up appointments. Appellant claimed his probation officer was aware of his medical problems and told Appellant not to report

¹ *Selby v. State*, 26 A.3d 215 (Del. 2011) (TABLE).

² *Id.*

until the medical issue resolved. Appellant also informed the court that his medical condition cleared two weeks before his April 20, 2010 arrest.

9. At the VOP hearing, Appellant admitted that he failed to report from January 11, 2010 through April 20, 2010:

Counsel: Your honor, he admits that allegation, however, he would like to address the Court in terms of mitigation.

Court: . . . I want to make a procedural record as to whether we have an admission.

Counsel: We do have an admission.

Court: We have an admission that Mr. Selby is in violation of his probation because he failed to report as required to his probation officer, correct?

Counsel: Correct, Your Honor.

Court: We don't even need to address the fact that he has new charges, because there's no question that he failed to report?

Counsel: That is correct.

Court: Correct, Officer?

Probation Officer: Yes, that's correct.

10. Following that colloquy, the court found Appellant in violation. Based on Appellant's statement that the medical condition cleared two weeks before his April arrest and that the condition did not prevent his April run-in with police, the

court rejected Appellant's medical excuse

11. Since Appellant failed to address the September 2010 sentencing in his 26(c) response brief, the court considers that appeal withdrawn.

12. As to the May 2010 VOP sentencing, after carefully reviewing the entire record, the court agrees with Appellant's counsel that the appeal wholly lacks merit and is devoid of any arguably appealable issue. The Court of Common Pleas found Appellant in violation due to his own admission. The sentence order under review was less than the maximum and, taking Appellant's repetitive criminal conduct and poor performance on probation into account, not unreasonable. Thus, it appears neither vindictive nor an abuse of the sentencing court's discretion.

For the above reasons, the judgment of the Court of Common Pleas is **AFFIRMED**. Appellant's counsel's motion to withdraw is **GRANTED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

cc: Prothonotary
J'Aime Walker, Deputy Attorney General
Cathy Johnson, Public Defender
Stephen Selby