IN THE SUPREME COURT OF THE STATE OF DELAWARE

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§
§ No. 249, 2012
§
§ Court Below—Superior Court
§ of the State of Delaware,
§ in and for New Castle County
§
§ Cr. ID 1012000026
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Submitted: September 21, 2012 Decided: November 13, 2012

Before BERGER, JACOBS, and RIDGELY, Justices.

ORDER

This 13th day of November 2012, upon consideration of the appellant's Supreme Court Rule 26(c) brief, the State's response thereto, and the record below, it appears to the Court that:

(1) The defendant-appellant, Nigel Sykes ("Sykes"), pled guilty on July 12, 2011 to one count each of Robbery in the First Degree, Attempted Robbery in the First Degree, and Possession of a Firearm by a Person Prohibited, and to two counts of Possession of a Firearm During the Commission of a Felony.¹ Sykes filed a *pro se* motion to withdraw his plea

¹ DEL. CODE ANN. tit. 11, §§ 531, 832, 1447A, 1448(a)(4) (2007).

on August 26, 2011. After obtaining the State's response, the Superior Court denied Sykes' motion in a detailed, ten-page order and opinion. Thereafter, the Superior Court sentenced Sykes to a total period of sixty-four years at Level V incarceration, to be suspended after fifteen years for decreasing levels of supervision. This is Sykes' direct appeal.

- (2) Sykes' counsel on appeal has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c). Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Sykes' attorney informed him of the provisions of Rule 26(c) and provided Sykes with a copy of the motion to withdraw and the accompanying brief. Sykes also was informed of his right to supplement his attorney's presentation. Sykes raised several issues for this Court's consideration. The State has responded to Sykes' issues, as well as to the position taken by Sykes' counsel, and has moved to affirm the Superior Court's judgment.
- (3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is two-fold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for any arguable claims,

and (b) this Court must conduct its own review of the record and determine whether the appeal is devoid of any arguably appealable issues.²

- (4) The record reflects that Sykes was indicted in January 2011 on fifty-nine criminal charges, including eleven counts of Robbery in the First Degree, two counts of Attempted Robbery in the First Degree, twenty counts of Possession of a Firearm During the Commission of a Felony, nine counts of Possession of a Firearm by a Person Prohibited, nine counts of Wearing a Disguise During the Commission of a Felony, six counts of Aggravated Menacing, one count of Reckless Endangering, and one count of Assault in the Third Degree. The charges stemmed from eight different robberies that occurred during the autumn of 2010. The minimum mandatory sentence for the fifty-nine charged offenses was ninety-nine years in prison.
- (5) On July 12, 2011, Sykes pled guilty to five of the fifty-nine charged offenses. In exchange for his guilty plea, the State dismissed the remaining charges. The transcript of the guilty plea hearing reflects that the charges were carefully explained to Sykes, and that Sykes admitted to committing armed robbery. On August 26, 2011, Sykes filed a *pro se* motion to withdraw his plea. He asserted that he had not taken his

² See 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).

prescribed medication on the day he entered the plea and thus was easily pressured into wrongly entering a guilty plea. After obtaining the State's response, the Superior Court ruled that Sykes had failed to present clear and convincing evidence of a fair and just reason to permit withdrawal of his plea. Accordingly, the Superior Court denied his motion. Sykes ultimately was sentenced to serve a total of fifteen years in prison, followed by decreasing levels of supervision.

- (6) On appeal, Sykes raises five discernible issues in response to his attorney's Rule 26(c) brief. First, he alleges multiple claims of ineffective assistance of counsel. Next, he contends that the prosecutor engaged in misconduct at sentencing by referring to charges to which Sykes had not pled guilty. Third, he contends that the guilty plea agreement was not valid because he agreed only to a twelve-year prison term. Fourth, he contends that his guilty plea was not voluntary because he had failed to take his prescribed Prozac medication that day. Finally, he argues that the Superior Court erred in denying his motion to withdraw his plea.
- (7) With respect to Sykes' allegations of ineffective assistance of counsel, it is well-settled that this Court will not consider such claims for the first time on direct appeal.³ Accordingly, we do not consider those claims.

³ Johnson v. State, 962 A.2d 233, 234 (Del. 2008).

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- (8) Sykes next contends that the prosecutor engaged in misconduct at the sentencing hearing by referring to crimes that were not part of the guilty plea agreement. We find no merit to this contention. When sentencing, a judge has broad discretion to consider almost any fact, even facts that would not have been admissible at trial, including prior criminal charges and hearsay evidence.⁴ We conclude that the prosecutor committed no error in pointing out to the Superior Court at sentencing that surveillance videos linked Sykes to eight different robberies, and that this information could be considered in determining an appropriate sentence.
- (9) Sykes next argues that the Superior Court erred in sentencing him to fifteen years in prison when his guilty plea agreement provided only for a twelve-year sentence. Sykes is incorrect. As the guilty plea form reflects, the minimum sentence that the Superior Court could impose was twelve years; the maximum sentence the Superior Court could impose was 108 years. As both the guilty plea form and the transcript of the guilty plea colloquy reflect, Sykes was not promised a particular sentence. There is no merit to Sykes' contention that the Superior Court erred in imposing more

⁴ Mayes v. State, 604 A.2d 839, 842-43 (Del. 1992) (holding that sentencing courts are entitled to rely upon information regarding other, unproven crimes).

than the minimum mandatory sentence.⁵ The Superior Court's fifteen-year sentence was entirely appropriate and in no way reflects evidence of a closed mind.⁶

(10) Sykes' next claim—that his guilty plea was involuntary—is contradicted by the record. The transcript of the guilty plea hearing reflects that the Superior Court carefully reviewed all aspects of Sykes' decision to plead guilty. Among other things, Sykes stated under oath that he was satisfied with his counsel's representation, that no one had promised him what his sentence would be, and that he was pleading guilty because he was, in fact, guilty. In the absence of clear and convincing evidence to the contrary, Sykes is bound by his sworn representations. We conclude that the plea agreement, the guilty plea form, and the transcript of the plea hearing all support a finding that Sykes entered his guilty plea knowingly, intelligently, and voluntarily.

(11) Finally, Sykes argues that the Superior Court erred in refusing to grant his motion to withdraw his plea. We review the Superior Court's

⁵ See id. at 845 (holding that a sentence will only be reviewed to ensure that it is within the statutorily authorized range of sentences and that exceeding sentencing guidelines does not provide a basis for review).

⁶ See Siple v. State, 701 A.2d 79, 83 (Del. 1997).

⁷ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

denial of Sykes' motion to withdraw his guilty plea for abuse of discretion. Upon moving to withdraw his guilty plea, Sykes had the burden to establish a fair and just reason to permit the withdrawal. A judge should permit withdrawal of a plea only if the judge determines that "the plea was not voluntarily entered or was entered because of misapprehension or mistake of defendant as to his legal rights." Here, as we have already held, the record unequivocally establishes that Sykes entered his plea voluntarily and was not operating under any misapprehension or mistake as to his legal rights. Under the circumstances, we find no abuse of the Superior Court's discretion in denying Sykes' motion to withdraw his guilty plea. Sykes failed to sustain his burden of establishing duress, coercion, or any other error by his trial counsel.

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

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⁸ Chavous v. State, 953 A.2d 282, 285 (Del. 2008).

⁹ Del. Super. Ct. Crim. R. 32(d).

¹⁰ Scarborough v. State, 938 A.2d 644, 650 (Del. 2007) (quoting State v. Insley, 141 A.2d 619, 622 (Del. 1958)).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs
Justice