IN THE SUPREME COURT OF THE STATE OF DELAWARE

RODNEY BRUMMELL,	§	
	§	
Defendant Below,	§	No. 197, 2015
Appellant,	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	Cr. ID No. 1405014156
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: December 7, 2015
Decided: January 22, 2016

Before **VALIHURA, VAUGHN,** and **SEITZ,** Justices.

ORDER

This 22nd day of January 2016, 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) On February 13, 2015, a Superior Court jury found the appellant, Rodney Brummell, guilty of Driving Under the Influence ("DUI") and not guilty of Possession of a Controlled Substance and Possession of Drug Paraphernalia. Brummell was sentenced to five years of Level V incarceration, with credit for fifty-eight days previously served, suspended after eighteen months for Level III probation. This is Brummell's direct appeal.

(2) On November 13, 2015, Brummell's counsel ("Counsel") filed a brief and a motion to withdraw under Supreme Court Rule 26(c) ("Rule 26(c)"). Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. Counsel informed Brummell of the provisions of Rule 26(c) and provided Brummell with a copy of the motion to withdraw and the accompanying brief.

(3) Counsel also informed Brummell of his right to identify any points he wished this Court to consider on appeal. Brummell has raised several issues for this Court's consideration. The State has responded to the issues raised by Brummell and moved to affirm the Superior Court's judgment.

(4) When reviewing a motion to withdraw and an accompanying brief, 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) 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]

(5) The following evidence was presented at trial. On the night of May 17, 2014, emergency services received a call that there was a car in the northbound lane, but facing southbound, of Wesley Church Road in Sussex County. Jill Wix, a

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

paramedic with the Sussex County Emergency Medical Services and the first person on the scene, found the car running and in reverse gear. Brummell was slumped unconscious over the steering wheel of the car. Wix turned off the engine.

(6) According to Wix, Brummell did not respond to her inquiries. Wix observed that Brummell was holding a plastic bag containing smaller bags in one of his hands. Wix also observed that there was white powder all over the gear shift and a rolled up dollar bill near the gear shift. Brummell eventually came to, began screaming, and then went back to sleep.

(7) When emergency medical technician James Cina arrived on the scene, he and police officer Jordan Rollins helped Wix remove Brummell from the car and place him on a stretcher for the ambulance. Cina testified that Brummell's speech was slurred and Brummell was unable to stand on his own. Brummell's pupils were also non-reactive to a light shown in his eyes.

(8) Police officer Andrew Shea testified that Brummell's eyes were watery and bloodshot. Shea and Rollins testified that there was white powder under Brummell's nose. In the center console where the gear shift and cup holders were located, Shea and Rollins saw a bag of white powder and a rolled up dollar bill with white powder at one end. Rollins testified that Brummell was holding a plastic bag with twenty-four smaller bags that contained white powder.

(9) In the ambulance, Wix attempted to administer an IV, but Brummell yelled that he was scared of needles and "I don't shoot that shit, I snort it."[2] Rollins followed the ambulance to the hospital. At the hospital, Rollins observed white powder in Brummell's nose.

(10) In a post-*Miranda* statement to police officer Michael Morgan, Brummell indicated that he had bought cocaine. No evidence of blood or drug test results was introduced at trial. At the conclusion of the State's case, Brummell moved for a judgment of acquittal on all of the charges. The Superior Court denied the motion. The jury found Brummell guilty of DUI and not guilty of Possession of a Controlled Substance and Possession of Drug Paraphernalia.

(11) On appeal, Brummell first argues that the Superior Court erred in cancelling a hearing on a motion to suppress filed on August 29, 2014. In the motion to suppress, Brummell's trial counsel sought to exclude test results of Brummell's blood on May 17, 2014. The Superior Court indicated it would schedule a hearing on the motion. In its response to the motion, the State contended, among other things, that the motion appeared to be a motion *in limine*, rather than a motion to suppress, because no constitutional violation was alleged.

(12) At a September 24, 2014 office conference, the Superior Court indicated that the judge who had approved scheduling of Brummell's motion for a

[2] Appendix to Opening Brief at A98.

hearing should resolve the motion. Brummell's trial counsel stated that he believed, after further reflection, the State was correct that the motion was a motion *in limine*, rather than a motion to suppress. The motion to suppress hearing was scheduled for September 30, 2014.

(13) At a September 29, 2014 office hearing, the Superior Court judge who had scheduled the motion to suppress hearing and Brummell's counsel agreed that the motion to suppress was based on an evidentiary issue—whether the State could establish chain of custody in light of a labeling issue—that would be resolved on the morning of trial. In light of that agreement, the suppression hearing scheduled for September 30, 2014 was cancelled and the Superior Court denied the motion to suppress. Brummell's counsel then filed a motion *in limine* arguing that the blood test results should be excluded from evidence because the blood sample was mislabeled and expired before testing.

(14) The parties subsequently agreed that the State would not introduce the blood test results at trial. No blood test results were introduced at trial. Under these circumstances, there is no merit to Brummell's claim that the Superior Court erred in cancelling the hearing on the motion to suppress or denying the motion to suppress. To the extent Brummell contends that his counsel was ineffective for agreeing to cancellation of the motion to suppress hearing and agreeing with the State that the blood test results would not be introduced at trial, we will not

consider that claim for the first time on direct appeal.[3] Similarly, we will not consider Brummell's claim that his trial counsel should have filed a pre-trial motion to dismiss and should have subpoenaed the State's chemist to appear at trial.

(15) Brummell next claims that the Superior Court erred in denying his motion for a mistrial during Morgan's testimony. Morgan was the police officer who interviewed Brummell. During direct examination about the interview, Morgan testified that he asked Brummell where he bought the cocaine and heroin and Brummell responded that he got the cocaine in town. Brummell's trial counsel objected to Morgan's reference to heroin and sought a mistrial.

(16) The State argued that a cautionary instruction would be sufficient because the heroin charge had been withdrawn. The Superior Court denied the application for a mistrial, noting that Brummell had only acknowledged purchasing cocaine. The Superior Court instructed the jury that no evidence regarding heroin would be introduced at trial and to disregard any reference to heroin in their deliberations.

(17) We review the denial of a motion for a mistrial for abuse of discretion.[4] A mistrial should be granted "only where there is 'manifest necessity'

[3] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).
[4] *McNair v. State*, 990 A.2d 398, 403 (Del. 2010).

or the 'ends of public justice would be otherwise defeated.'"[5] Brummell's claim lacks merit. There was only one reference to heroin during the trial, there were no pending heroin charges against Brummell, and the Superior Court promptly instructed the jury to disregard the reference to heroin. "It is well established in Delaware that a trial judge's prompt curative instruction is presumed adequate to direct the jury to disregard improper statements and cure any error."[6]

(18) Finally, Brummell contends that there was insufficient evidence to support his DUI conviction. In reviewing Brummell's sufficiency of the evidence claim, we must determine whether any rational trier of fact, considering the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.[7] Under 21 *Del. C.* § 4177(a)(2), a person is guilty of DUI when he drives a vehicle under the influence of any drug.

(19) "Drive" is defined as "driving, operating, or having actual physical control of a vehicle."[8] "While under the influence" means "that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear

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[5] *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998) (quoting *Fanning v. Superior Court*, 302 A.2d 343, 345 (Del. 1974)).
[6] *Gomez v. State*, 25 A.3d 786, 793 (Del. 2011)
[7] *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991).
[8] 21 *Del. C.* 4177(c)(5).

judgment, sufficient physical control, or due care in the driving of a vehicle." [9] "Drug" includes "any substance or preparation defined as such by Title 11 or Title 16 or which has been placed in the schedules of controlled substances pursuant to Chapter 47 of Title 16,"[10] which includes cocaine.[11] Contrary to Brummell's contentions, chemical testing is not required to prove impairment.[12]

(20) The record reflects that: (i) Brummell was found unconscious in the driver seat of his car, which was in reverse gear and facing southbound in a northbound lane; (ii) Brummell was slurring his speech and unable to stand; (iii) Brummell's pupils were non-reactive to light; (iv) there was white powder in Brummell's nose and in his car, along with a rolled up dollar bill that had white powder on one end; and (v) Brummell admitted to purchasing cocaine. In light of this evidence, a rational trier of fact could find Brummell guilty of DUI beyond a reasonable doubt.[13]

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[9] 21 *Del. C.* 4177(c)(11)

[10] 21 *Del. C.* 4177(c)(6) (defining drug as any substance or preparation defined as such by Title 11 or Title 16 or which has been placed in the schedules of controlled substances pursuant to Chapter 47 of Title 16).

[11] 16 *Del. C.* § 4716(a)(4) (listing cocaine as a Schedule II narcotic).

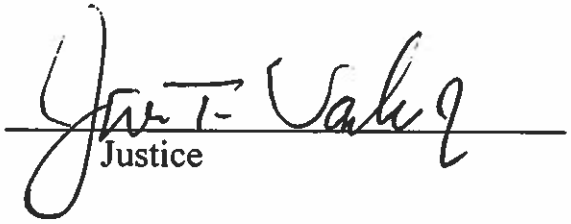
[12] 21 *Del. C.* 4177(g)(2) (providing that nothing precludes conviction based solely on admissible evidence other than results of chemical test of person's blood, breath, or urine).

[13] *See, e.g., Stevens v. State*, 2015 WL 7055375, at *3 (Del. Nov. 12, 2015) (finding evidence sufficient to support DUI conviction where defendant was in car accident, could not explain where he was coming from, smelled of alcohol, was stumbling and slurring his words, and had glassy eyes).

(21) This Court has reviewed the record carefully and has concluded that Brummell's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Brummell's counsel has made a conscientious effort to examine the record and the law and has properly determined that Brummell 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:



Justice