SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

August 10, 2011

Irvin F. Lovett, # 317
E.C.I.
30420 Revell's Neck Road
Westover, MD 21890

RE: *State of Delaware v. Irvin F. Lovett*, Def. ID# 9907008776 (R-2)

DATE SUBMITTED: June 7, 2011

Dear Mr. Lovett:

I am in receipt of your document where you seek to withdraw your guilty plea in this matter pursuant to Superior Court Criminal Rule 61 and/or attack your sentence as an illegal one pursuant to Superior Court Criminal Rule 35(a). You base your assertion of a right to relief on two grounds. The first ground is that the sentence entered in your case imposed an additional year of probation than that which the plea agreement specified. The second is that you were not physically present when the Court modified your sentence on December 27, 2000. Although you did not submit the motion on the correct form, I am considering it anyway for judicial economy's sake.

I begin by laying out the correct facts.

You entered into a guilty plea in this matter on November 20, 2000. In your Plea Agreement, the following recommended sentence was set forth. As to the burglary in the second degree charge (count 2), the recommended sentence was 8 years at Level 5 with credit for time served (approximately 6 months), balance suspended for 3 years Level 2 probation. As to the theft of a firearm charge (count 3), the recommended sentence was 2 years at Level 5, suspended for 1 year of probation at Level 2. Included as restitution was $726.14 in extradition costs. Furthermore, it was specified that the State of Delaware ("the State") had 30 days to determine the full amount of restitution due. Another condition to which you agreed was that you were to have no contact with Janice and Dale Lovett.

The sentence imposed on November 20, 2000, **identically** tracked this plea agreement. It was as follows. You were ordered to pay restitution to the State in the amount of $726.14. As to the burglary in the second degree charge, you were sentenced to 8 years at Level 5, with credit for 6 months previously served, suspended for 3 years at Level 2 probation. As to the theft of a firearm charge, you were sentenced to 2 years at Level 5, suspended for 1 year at Level 2 probation. This latter probation is to run consecutive to the probation on the burglary charge.

According to the plea agreement, the State had 30 days to determine the amount of restitution owed. On November 27, 2000, the State verified the only restitution owed was the extradition costs of $726.14, which this Court previously had ordered you to pay. Consequently, the Court entered a modified order dated December 27, 2000, which reflected that the only restitution owed was the $726.14, an amount which the Court previously ordered you to pay. All other terms and conditions remained the same. In effect, the "modified" sentence entered on December 27, 2000, made absolutely no change to your sentence.

Again, your sentence identically tracked your plea agreement. You previously have received copies of your plea agreement and sentencing order. Docket Entry Nos. 24 and 26. In 2001, you asserted, as you have here, that there was a difference between your plea agreement and the sentence imposed. Docket Entry No. 25. This Court informed you, by letter dated October 9, 2001, that your plea agreement and the sentence imposed were identical. Docket Entry No. 26. Thus, as you are well aware, this first argument is factually meritless and any ground for relief based upon it, including ineffective assistance of counsel, is denied.

Your second argument is as follows. "[T]he sentencing court took it upon itself to take the case back in session for a new sentencing hearing without the defendant being aware of that situation. The sentencing court did not make the defendant aware of any resentencing hearing, nor did the state's attorney's office or the defendants [sic] representation." You further claim that trial counsel was ineffective because trial counsel did not notify you of the resentencing.

This argument seeks the correction of a sentence imposed in an illegal manner. *McCleaf v. State*, 933 A.2d 1250, 2007 WL 2359554 at *1 (Del. Aug. 20, 2007). Such a motion "is subject to the 90-day limitations period of Superior Court Criminal Rule 35(b). [Footnote omitted.]" *Id.* Thus, the motion, which you filed over a decade late, is time-barred.

Even if the Court ignored the time-bar, it would deny the motion on its merits. The argument based on the supposed illegal modification of your sentence fails because the sentence was not changed in any way. It was "modified" solely to establish that no restitution other than what you originally were ordered to pay was due. You were present when the original sentence was imposed where you had the opportunity to be heard personally and through counsel. Because no change in your sentence was imposed by the "modified" sentence, you had no right to be

"present" for the entry of this modification.

For the forgoing reasons, your pending motion is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Melanie Withers, Esquire
Thomas D. H. Barnett, Esquire