

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)	
)	
)	
v.)	Case ID No.: 1702011402
)	
)	
KEVIN T. GALE,)	
)	
Defendant.)	

ORDER

AND NOW TO WIT, this 21st day of April, 2020, upon consideration of Kevin T. Gale’s (“Defendant”) Motion for Modification of Sentence under Superior Court Criminal Rule 35, the sentence imposed upon the Defendant, and the record in this case, it appears to the Court that:

1. On July 10, 2017, Defendant pled guilty to Possession of a Firearm by a Person Prohibited (Class C Felony) (“PFPP”) and Possession of Ammunition by a Person Prohibited (Class D Felony) (“PAPP”).¹ On July 17, 2017, the State filed a Motion to Declare Defendant an Habitual Offender.² On August 25, 2017, J. Cooch sentenced Defendant as a habitual offender, to a total of fifteen years and six months

¹ Final Case Review: Pled Guilty. PSI Ordered, *State of Delaware v. Kevin T. Gale*, Crim. ID No. 1702011402, D.I. 12 (Del. Super. Ct. July 10, 2017) [hereinafter “Def.’s Plea”].

² State’s Motion to Declare Defendant an Habitual Offender, *State of Delaware v. Kevin T. Gale*, Crim. ID No. 1702011402, D.I. 16 (Del. Super. Ct. July 17, 2017). The Court granted this Motion on a record at Defendant’s Sentencing. *Id.*

at Level V, suspended after seven years and six months minimum mandatory at Level V, followed by eighteen months at Level III.³

2. On November 18, 2019, Defendant filed this motion⁴ and a supplemental letter⁵ under Delaware Superior Court Criminal Rule 35(b).⁶ In doing so, Defendant asks that this Court suspend his seven years and six months upon completion of the Level V Key/Crest Program.⁷

3. In support of his motion, Defendant states the following grounds for relief: (1) “No prior treatment and/or access to rehabilitative services” – Defendant asserts that he “was declared a habitual offender without the benefit of prior treatment or for consideration for the impact that prior treatment may had had upon [his] life[;]” (2) “Non-violent criminal history[;] (3) “Current treatment” – Defendant asks the Court to consider the various groups joined and certificates

³ Sentencing Calendar: Defendant Sentenced, *State of Delaware v. Kevin T. Gale*, Crim. ID No. 1702011402, D.I. 16 (Del. Super. Ct. Aug. 25, 2017); Sentence: ASOP Order Signed and Filed on 9/1/17, *State of Delaware v. Kevin T. Gale*, Crim. ID No. 1702011402, D.I. 18 (Del. Super. Ct. Sept. 1, 2017).

⁴ Defendant’s Motion for Modification of Sentence (Letter to Judge Cooch), *State of Delaware v. Kevin T. Gale*, Crim. ID No. 1702011402, D.I. 21 (Del. Super. Ct. Nov. 18, 2019) [hereinafter “Def.’s Letter”].

⁵ Defendant’s Motion for Reduction/Modification of Sentence, *State of Delaware v. Kevin T. Gale*, Crim. ID No. 1702011402, D.I. 22 (Del. Super. Ct. Nov. 18, 2019) [hereinafter “Def.’s Mot.”]. Defendant’s Motion was referred to ISO for J. Cooch on December 12, 2019. Defendant’s Motion was reassigned to this Court on January 16, 2020.

⁶ DEL. SUPER. CT. CRIM. R. 35(b).

⁷ See Def.’s Mot at page 2.

acquired while incarcerated; (4) “Home Environment/ Peer Influences” – Defendant emphasizes his lack of a father and negative peer influences growing up.⁸

4. Defendant’s sentence was imposed pursuant to a Plea Agreement. After an appropriate colloquy, the Court addressed Defendant in open court and determined he understood the nature of the charge to which the plea was offered, the mandatory minimum penalty provided by law and the maximum statutory penalty – life in prison. Defendant fully acknowledged in open court that the range of possible penalties included the minimum sentence imposed by the Court in this case.⁹

5. Under Superior Court Criminal Rule 35(b), the Court may reduce a sentence of imprisonment on a motion made within ninety days after the sentence is imposed.¹⁰ Defendant is time-barred. In order to overcome the ninety-day time bar in Rule 35(b), Defendant must show that “extraordinary circumstances”¹¹ forgive the tardiness of his Motion.¹² This exception is not a plea for leniency nor does it permit “exceptional rehabilitation” to suffice for “extraordinary circumstances.”¹³

⁸ Def.’s Mot at pages 1-2.

⁹ In Defendant’s Plea Agreement, the State indicated that it would “seek to declare defendant a habitual offender pursuant to 11 Del. Code 4214(b) and agree[d] to recommend the minimum mandatory 7.5 years Level V.” Def.’s Plea.

¹⁰ DEL. SUPER. CT. CRIM. R. 35(b).

¹¹ The Delaware Supreme Court has defined “extraordinary circumstances” as circumstances which: “‘specifically justify the delay;’ are ‘entirely beyond a petitioner’s control;’ and ‘have prevented the applicant from seeking the remedy on a timely basis.’” *State v. Diaz*, 113 A.3d 1081, 2015 WL 1741768, at *2 (Del. 2015) (TABLE) (quoting *State v. Lewis*, 797 A.2d 1198, 1203, 1205 (Del. 2002) (Steele, C.J., dissenting)).

¹² See *Colon v. State*, 900 A.2d 635, 638 (Del. 2006).

¹³ See *Morrison v. State*, 846 A.2d 238, 2004 WL 716773, at *1–2 (Del. 2004) (TABLE).

This Court does not find that Defendant has raised any “extraordinary circumstances” to overcome this bar.

6. Even if Defendant’s Motion was merely a request to modify his probation¹⁴ or under Rule 35(b), “[to] reduce the . . . term or conditions of partial confinement or probation,”¹⁵ Defendant’s Motion would have to be denied as repetitive.

7. Superior Court Criminal Rule 35(b) also provides that “[t]he court *will not* consider repetitive requests for reduction of sentence.”¹⁶ A motion is considered repetitive when it “is preceded by an earlier Rule 35(b) motion, even if the subsequent motion raises new arguments.”¹⁷ The bar to repetitive motions has no exception. The repetitive motion bar is applicable even when the request is for reduction or modification of a term of partial confinement or probation.¹⁸ Therefore, were Defendant has previously submitted a Motion for Modification,¹⁹ regardless of

¹⁴ See Def.’s Mot at page 2.

¹⁵ See *Morrison v. State*, 846 A.2d 238, 2004 WL 716773, at *1–2 (Del. 2004) (TABLE).

¹⁶ *Id.* (emphasis added).

¹⁷ *State v. Culp*, 152 A.3d 141, 144 (Del. 2016).

¹⁸ See *Teat v. State*, 2011 WL 4839042, at *1 (Del. Oct. 12, 2011); *State v. Bennett*, 2015 WL 1746239, at *2 (Del. Super. Ct. Apr. 13, 2015); *State v. Weidlow*, 2015 WL 1142583, at *1–2 (Del. Super. Ct. Mar. 11, 2015).

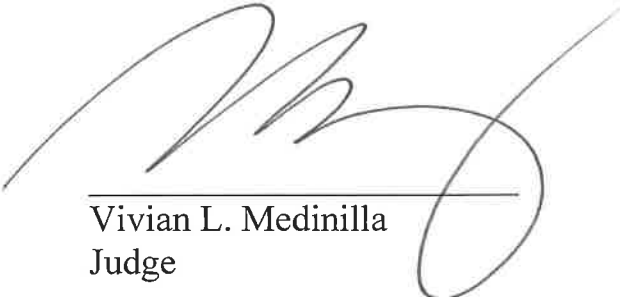
¹⁹ Defendant’s Motion for Modification of Sentence, *State of Delaware v. Kevin T. Gale*, Crim. ID No. 1702011402, D.I. 19 (Del. Super. Ct. Nov. 16, 2017). J. Cooch denied Defendant’s Motion for Modification, finding that “no additional information ha[d] been provided to . . . warrant a reduction or modification of this sentence.” Order Denying Defendant’s Motion for Modification of Sentence, *State of Delaware v. Kevin T. Gale*, Crim. ID No. 1702011402, D.I. 20 (Del. Super. Ct. Dec. 04, 2017).

whether the Court considered Defendant's Motion as a request to modify Level V time or his probation, this second Rule 35(b) motion is barred as repetitive.

8. Furthermore, Superior Court Rule of Criminal Procedure 35(b) provides no authority for a reduction or suspension of the mandatory portion of a *substantive* statutory minimum sentence.²⁰ Therefore, where Defendant is subject to a minimum mandatory sentence, Defendant's motion is denied.

9. Defendant's sentence remains appropriate for all the reasons stated at the time of sentencing.

IT IS SO ORDERED that Defendant's Motion for Modification is **DENIED**.



Vivian L. Medinilla
Judge

oc: Prothonotary
cc: Department of Justice
Investigative Services
Defendant

²⁰ *State v. Sturgis*, 947 A.2d 1087, 1092 (Del. 2008).