

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES R. BUNGY,	§
	§ No. 246, 2013
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 1104022301
	§
Plaintiff Below-	§
Appellee.	§

Submitted: September 20, 2013

Decided: October 21, 2013

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

ORDER

This 21st day of October 2013, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, James R. Bungy, filed an appeal from the Superior Court’s April 24, 2013 violation of probation (“VOP”) sentencing order. We find no merit to the appeal. Accordingly, we affirm.

(2) The record before us reflects that, in January 2012, Bungy pleaded guilty to Possession of Cocaine Within 1000 Feet of a School and Possession of Cocaine Within 300 Feet of a Park. On the first conviction, he was sentenced to 10 years of Level V incarceration, to be suspended after 49 days, for 18 months of Level III probation. On the second conviction, he

was sentenced to 10 years at Level V, to be suspended for 18 months of concurrent Level III probation.

(3) On April 18, 2012, Bungy was found to have committed a VOP. He was re-sentenced to 10 years at Level V, with credit for 49 days previously served, to be suspended after 18 days for 18 months at Level IV Crest, in turn to be suspended upon successful completion of the Crest Program, with the balance of his sentence to be served at Level III probation. Bungy's subsequent motion for sentence modification was denied by the Superior Court on October 1, 2012.

(4) On April 24, 2013, Bungy again was found to be in violation of his probation at a contested VOP hearing at which he was represented by counsel. He was re-sentenced to 10 years at Level V, with credit for 67 days previously served, to be suspended after 1 year for 18 months at Level III probation. This appeal followed.

(5) In his appeal, Bungy claims that a) the prosecutor engaged in misconduct during his VOP hearing, tainting the proceedings; b) the Superior Court improperly relied on the testimony of a lay witness in finding that he had committed a VOP; and c) the Superior Court judge acted with a "closed mind" when he imposed the VOP sentence.

(6) The transcript of the April 24, 2013 contested VOP hearing reflects that, at the time of the VOP, Bungy was being housed at the VOP Center. A correctional officer, a watch commander and a senior probation officer testified about an incident that occurred there during the evening of March 26, 2013. The correctional officer testified that, on March 27, 2013, an inmate who resided in the same housing pod as Bungy reported that he had fallen and hit his head in the bathroom the night before. The correctional officer observed a laceration on the inmate's head and took him to get medical attention. Several minutes later, Bungy approached the correctional officer and reported that his hand was swollen from punching a wall in the bathroom the night before. He also was taken to get medical attention.

(7) The watch commander at the VOP Center testified that she interviewed both Bungy and the other inmate about their injuries. Bungy reiterated that he had punched a wall in the bathroom, but the other inmate changed his story. He reported that he had actually been assaulted by Bungy, and possibly others, in the bathroom and had been knocked unconscious. He reported that he and Bungy had been involved in other disagreements prior to the incident in the bathroom.

(8) The senior probation officer testified that she had reviewed a time-stamped videotape of Bungy's housing pod that was taken on the night of March 25, 2013. The video camera was mounted in such a way as to show the entryway into the bathroom. She testified that the inmates were required to wear "cros" when they entered the bathroom, but that both Bungy and the other inmate were seen in the video wearing boots when they entered the bathroom. The video also showed that, as soon as the other inmate entered the bathroom, the rest of the inmates in the pod followed him. Finally, the video showed the other inmate backing into view while fighting and Bungy exiting the bathroom while wrapping his hand in a towel. The senior probation officer ultimately issued a report citing Bungy for violating his probation by fighting in the VOP Center. The videotape as well as photographs of Bungy's and the other inmate's injuries were admitted into evidence at the VOP hearing.

(9) Bungy, who was represented by counsel, testified in his own behalf. He stated that he punched the wall in the bathroom because he had received news several days before that his grandfather and the mother of his fiancée had passed away. He explained that he wore his boots into the bathroom because he had been told there were "cros" in the bathroom he

could use. Bungy denied that he was fighting or that he had hit the other inmate.

(10) Bungy's first claim in this appeal is that the prosecutor engaged in misconduct during the VOP hearing by misstating the evidence, thereby tainting the proceedings. Because there was no objection raised at the hearing, this claim will be reviewed for plain error.¹ Under the plain error standard of review, the alleged error must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the proceedings.²

(11) Our review of the transcript of the VOP hearing reflects no impropriety on the part of the prosecutor, let alone an impropriety that was so prejudicial to Bungy's rights as to jeopardize the fairness and integrity of the VOP hearing. In the absence of any error, plain or otherwise, in connection with the prosecutor's conduct at the hearing, we conclude that Bungy's first claim is without merit.

(12) Bungy's second claim, which we also review for plain error, is that the Superior Court improperly relied on the testimony of a lay witness in finding that he had committed a VOP. Specifically, Bungy alleges that the Superior Court should not have relied on a medical opinion from a layperson

¹ *Kurzmann v. State*, 903 A.2d 702, 709, 719 (Del. 2006).

² *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

concerning his and the other inmate's injury to conclude that he had been fighting and struck the other inmate.

(13) Our review of the hearing transcript reveals that there was no medical opinion offered by any of the witnesses. Moreover, under the preponderance of the evidence standard applicable to VOP hearings,³ there was ample evidence to support the Superior Court's conclusion that Bungy had been fighting in violation of the rules of the VOP Center and in violation of his probation.⁴ Therefore, we conclude that Bungy's second claim also is without merit.

(14) Bungy's third, and final, claim is that the Superior Court judge acted with a "closed mind" when he imposed the VOP sentence. Under Delaware law, appellate review of a sentence is extremely limited,⁵ and generally ends upon a determination that the sentence falls within the limits prescribed by statute.⁶ Where the sentence falls within the statutory limits, this Court considers only whether the sentence is based upon false or unreliable factual predicates, judicial vindictiveness or bias, or a closed mind

³ *Kurzmann v. State*, 903 A.2d at 717.

⁴ *Id.* at 720 (concluding that, even assuming the Superior Court erroneously relied on non-expert medical testimony concerning the victim's injuries, there was no reversible error because the other evidence presented at the VOP hearing amply supported the conclusion that the defendant had violated his probation).

⁵ *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

⁶ *Id.* (citing *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989)).

on the part of the judge.⁷ A judge imposes sentence with a “closed mind” when the sentence is based on a preconceived bias without consideration of the nature of the offense or the character of the defendant.⁸

(15) Our review of the VOP hearing transcript does not reflect that the Superior Court judge sentenced Bungy with a closed mind. Rather, the judge listened to Bungy’s version of the events that transpired on March 25, 2013 and permitted Bungy to testify at length about his family history, his employment and participation in rehabilitation programs, all offered by Bungy as mitigating evidence. Bungy does not contend that the VOP sentence imposed exceeded the statutory limits. We, therefore, conclude that Bungy’s third claim is likewise without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

⁷ *Kurzmann v. State*, 903 A.2d at 714.

⁸ *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).