

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE SELBY,	§	
	§	No. 404, 2012
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 1008018914
Appellee.	§	

Submitted: October 19, 2012
Decided: January 17, 2013

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

O R D E R

This 17th day of January 2013, upon consideration of the briefs of the parties and the Superior Court record, it appears to the Court that:

(1) The appellant, Dwayne Selby, filed this appeal from the Superior Court’s June 20, 2012 denial of his motion for modification of sentence under Superior Court Criminal Rule 35(b) (“Rule 35(b)”). Because there is no merit to the appeal, we affirm the Superior Court judgment.

(2) The record reflects that Selby pled guilty on May 19, 2011 to Possession with Intent to Deliver Cocaine and was sentenced to five years at Level V suspended after three years for probation (hereinafter “May 2011

sentence”).¹ Thereafter, Selby pled guilty on November 8, 2011 to Possession of a Firearm by a Person Prohibited and was sentenced to eight years at Level V suspended after five years for probation (hereinafter “the November 2011 sentence”).²

(3) On July 19, 2011, Selby filed a motion under Rule 35(b) to modify the May 2011 sentence. In support of his motion, Selby cited to his success in completing the prison’s life skills program, his commitment to “positive change,” and his plans following his release from prison. By order dated August 15, 2011, the Superior Court denied the motion. Selby did not appeal the court’s decision.

(4) On January 4, 2012, Selby again moved to modify the May 2011 sentence. Selby’s second motion sought a modification that would allow him to serve the November 2011 sentence before serving the May 2011 sentence. By order dated January 11, 2012, the Superior Court denied the motion. Again, Selby did not appeal the court’s decision.

(5) On June 14, 2012, Selby filed his third motion to modify the May 2011 sentence. Selby sought a modification on the grounds that he had successfully completed several prison programs, that he has plans to finish

¹ Selby also pled guilty to Assault in the Third Degree and Endangering the Welfare of a Child and received suspended sentences.

² The Court takes judicial notice of the proceedings in *State v. Selby*, Del. Super., Cr. ID No. 1105004508. See docket at 7 (Nov. 8, 2011) (sentencing).

his associate degree and obtain employment, and that he suffers from “multiple illnesses, including diabetes, asthma, high blood pressure and sarcoidosis.” By order dated June 20, 2012, the Superior Court denied Selby’s motion as repetitive. This appeal followed.

(6) On appeal, Selby does not advance any argument challenging the Superior Court’s June 20, 2012 denial of his third motion for modification of sentence. Instead, Selby advances arguments challenging the court’s January 11, 2012 denial of his second motion for modification of sentence.

(7) Selby’s attempt to litigate his second modification motion is unavailing. Selby may not use this appeal from the denial of his third motion for modification of sentence to resurrect claims of error that could have been, but were not, raised in an appeal from the denial of his second motion for modification of sentence.³

(8) In the absence of raising any argument related to the denial of his third motion for modification of sentence, Selby has waived his right to challenge the June 20, 2012 judgment.⁴ Be that as it may, having reviewed the parties’ briefs and the record, we can discern no error or abuse of

³ *Aiken v. State*, 2011 WL 4375252 (Del. Supr.).

⁴ *See Allison v. State*, 2003 WL 21206010 (Del. Supr.) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)).

discretion in the Superior Court's denial of Selby's third sentence modification motion as repetitive.⁵ Under Rule 35(b), the Superior Court is precluded from considering a repetitive motion.⁶

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

⁵ This Court reviews the denial of a modification of sentence for an abuse of discretion. *Hickman v. State*, 2003 WL 22669335 (Del. Supr.) (citing *Shy v. State*, 246 A.2d 926, 927 (Del. 1968)).

⁶ "The court will not consider repetitive requests for reduction of sentence." Del. Super. Ct. Crim. R. 35(b).