

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HARRY W. ANDERSON,	§
	§ No. 45, 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. 0511001605
	§
Plaintiff Below-	§
Appellee.	§

Submitted: August 16, 2013
Decided: September 25, 2013

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

ORDER

This 25th day of September 2013, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Harry W. Anderson, filed an appeal from the Superior Court’s January 30, 2013 violation of probation (“VOP”) sentencing order. For the reasons that follow, this matter will be remanded to the Superior Court for the sole purpose of correcting a calculation error in Anderson’s VOP sentencing order. In all other respects, the Superior Court’s judgment is affirmed.

(2) The record before us reflects that, in December 2005, Anderson was indicted on charges of Possession of a Deadly Weapon During the Commission of a Felony, Assault in the Second Degree, two counts of Reckless Endangering in the

First Degree, Receiving Stolen Property and Resisting Arrest. On March 6, 2006, Anderson pleaded guilty to Assault in the Second Degree. The remaining charges were dismissed. Anderson was sentenced to 8 years of Level V incarceration, with credit for 167 days of Level V time served, to be suspended after 1 year for 2 years of Level III probation.

(3) On March 9, 2007, Anderson was found to have committed a VOP. He was re-sentenced to 6 and ½ years at Level V, to be suspended upon completion of TASC evaluation for 2 years of Level IV Home Confinement, in turn to be suspended after 6 months for Level III probation.¹ On November 21, 2007, Anderson was found to have committed a second VOP. He was re-sentenced to 6 years at Level V, to be suspended for 6 years at Level IV Work Release, in turn to be suspended after 6 months for 2 years of Level III probation.²

(4) On September 22, 2010, Anderson was found to have committed a third VOP. He was re-sentenced to 6 years at Level V, to be suspended after 1 year and 1 month for 6 months at Level IV, to be followed by 12 months of Level III probation.³ On January 30, 2013, Anderson was found to have committed his fourth VOP. He was re-sentenced to 6 years at Level V, with credit for 1 year and

¹ The sentencing order was modified on April 3, 2007 to add the Crest Program and Crest Aftercare.

² The sentencing order was modified on January 4, 2008 to remove the phrase “suspended immediately.”

³ The sentencing order was modified on September 13, 2011 to credit Anderson with 62 days previously served and was further modified on September 20, 2011 to credit Anderson with 1 year, 6 months and 7 days previously served.

62 days previously served, to be suspended after 4 years for 6 months at Level II probation. This appeal followed.

(5) In his appeal, Anderson claims that a) the Superior Court relied on unproven criminal conduct to find him in violation of his probation; b) he was not provided with the minimum requirements of due process at the VOP hearing; c) the Superior Court imposed a sentence in excess of that recommended by the SENTAC guidelines; d) his sentence to 4 years at Level V was improper; and e) the Superior Court miscalculated the amount of Level V time remaining on his original Level V sentence.

(6) Anderson's first claim is that the Superior Court relied on unproven criminal conduct to find him in violation of his probation. A guilty plea to criminal charges that are the basis for a VOP renders moot any challenge to the sufficiency of the evidence at the VOP hearing.⁴ The record in this case reflects that Anderson entered a plea of guilty to 2 counts of Burglary in the Third Degree on January 24, 2013. The transcript of the VOP hearing on January 30, 2013 reflects that Anderson's probation officer informed the judge that Anderson had pleaded guilty to those charges. As such, there was sufficient evidence supporting the Superior Court's finding of a VOP. We, therefore, conclude that Anderson's first claim is without merit.

⁴ *Dejesus v. State*, 977 A.2d 797, 799-800 (Del. 2009).

(7) Anderson's second claim is that he was not provided with the minimum requirements of due process at the VOP hearing. A VOP hearing is not a criminal trial and does not require the full panoply of constitutional protections.⁵ At the hearing, the State need only prove by a preponderance of the evidence that the probationer's conduct has not been as good as required by the conditions of his probation.⁶ There is no evidence of a due process violation in this case. The administrative warrant apprised Anderson of the alleged violations. Moreover, the transcript of the VOP hearing reflects that Anderson was aware of the alleged violations and was permitted to speak at length in his own behalf. In addition to the probation officer's testimony concerning Anderson's previous guilty plea to criminal charges, the sentencing judge also had Anderson's admission to a curfew violation before him when he issued his VOP sentencing order. We, therefore, conclude that Anderson's second claim is without merit.

(8) Anderson's third claim is that his VOP sentence exceeded the sentence recommended by the SENTAC guidelines. It is well-settled that there is no constitutional or statutory right in Delaware to appeal a criminal punishment solely on the sole basis that it deviates from the SENTAC sentencing guidelines.⁷ There is no evidence that the sentencing judge abused his discretion by deviating

⁵ *Jones v. State*, 560 A.2d 1056, 1058 (Del. 1989) (citing *Black v. Romano*, 471 U.S. 606, 610 (1985)).

⁶ *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006).

⁷ *Wynn v. State*, 23 A.3d 145, 148-150 (Del. 2011).

from the SENTAC guidelines in sentencing Anderson. We, therefore, conclude that Anderson's third claim also is without merit.

(9) Anderson's fourth claim is that the judge's imposition of a 4-year sentence at Level V was improper. Delaware law provides that, once a defendant commits a VOP, the Superior Court is authorized to impose the full amount of Level V time remaining on his original Level V sentence.⁸ Anderson does not claim that his 4-year Level V sentence exceeds the amount of time remaining on his original Level V sentence. Rather, Anderson claims that the sentencing judge, in his discretion, should have sentenced him only to "time served." In the absence of any evidence that the 4-year Level V sentence was illegal, or that the sentencing judge abused his discretion in imposing a 4-year Level V sentence,⁹ we conclude that Anderson's fourth claim also is without merit.

(10) Finally, Anderson claims that the Superior Court miscalculated the amount of time remaining on his original Level V sentence. As laudably conceded by the State, it appears that there was an error in the calculation of the suspended Level V time in Anderson's VOP sentencing order. Specifically, because Anderson was continuously incarcerated from June 24, 2010 to June 7, 2011, that period should have been subtracted from the Level V time remaining on

⁸ *Pavulak v. State*, 880 A.2d 1044, 1045-46 (Del. 2005) (citing Del. Code Ann. tit. 11, §4334(c)).

⁹ *Weber v. State*, 655 A.2d 1219, 1221 (Del. 1995) (this Court's appellate review of a sentence is limited to whether the sentence is illegal or is the product of an abuse of the judge's broad discretion).

Anderson's original sentencing order when he was sentenced for his third VOP. We, therefore, conclude that this matter must be remanded to the Superior Court for the sole purpose of correcting this apparent error.

NOW, THEREFORE, IT IS ORDERED that this matter is remanded to the Superior Court for further proceedings in accordance with this Order. In all other respects, the judgment of the Superior Court is AFFIRMED. Jurisdiction is not retained.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice