

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY J. PETERSON,	§
	§
Defendant Below-	§ No. 64, 2004
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware,
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr.A. Nos. IN99-11-1308, -1312,
	§ -1313, and N01-06-0907
Plaintiff Below-	§ Cr. ID 9911001165
Appellee.	§

Submitted: May 21, 2004
Decided: August 17, 2004

Before **STEELE**, Chief Justice, **BERGER**, and **JACOBS**, Justices.

ORDER

This 17th day of August 2004, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, Corey Peterson, filed this appeal from the Superior Court's order denying his motion for correction of sentence. Peterson asserts that his sentence is illegal because he was denied due process when the Superior Court modified his sentence following a violation of probation (VOP) proceeding. The State concedes that the record in this case raises questions about the sufficiency of the process afforded Peterson below. The State requests that the matter be remanded to the Superior Court for further proceedings and consideration of the issues. We agree.

(2) The record reflects that Peterson pled guilty in June 2001 to maintaining a vehicle for keeping controlled substances, second degree forgery, and two counts of possession of heroin. The Superior Court sentenced Peterson immediately to a total period of six years at Level V incarceration to be suspended after two and a half years, with credit for five months already served, for decreasing levels of supervision. No appeal was taken.

(3) In May 2002, the Superior Court modified Peterson's sentence following a hearing to permit him to transfer to a Level IV drug treatment program. In June 2002, Peterson's sentence was further modified to provide that he be held at Level III probation pending space availability in the treatment program. In October 2002, Peterson's sentence was again modified to suspend all of his current sentences for Level III probation. In March 2003, following a TASC (Treatment Access Services Center) status conference, Peterson's sentence was modified to include a zero tolerance provision. The following month, Peterson failed to appear for another TASC status conference and a bench warrant was issued for his arrest.

(4) On August 25, following the return of the bench warrant, a Superior Court Commissioner held a hearing and recommended that Peterson's sentence again be modified. Based on the Commissioner's

recommendation, a judge of the Superior Court signed an order that revoked Peterson's probation with respect to his maintaining a vehicle conviction and reimposed the original two year sentence to be suspended upon Peterson's successful completion of a Level V drug treatment program. The sentences for Peterson's other convictions were reimposed.

(5) Peterson filed a motion requesting credit for time previously served. In December 2003, the Superior Court, without holding a hearing, modified Peterson's sentence to give him credit for 18 months and 21 days previously served. The Superior Court's modified sentencing order also reimposed Peterson's sentence on the forgery conviction and suspended the sentence for two years at Level IV to be suspended upon successful completion for Level III probation. Peterson was ordered to be held at Level V incarceration pending space availability at Level IV. The Superior Court discharged Peterson from his remaining sentences as unimproved. Peterson filed a motion for modification of sentence, which the Superior Court denied. This appeal followed.

(6) In his opening brief on appeal, Peterson argues: (a) he was improperly sentenced by the Superior Court Commissioner, rather than a Superior Court judge; (b) he did not receive notice of his alleged probation violation; (c) if he had known he was facing a probation violation charge, he

would have requested counsel; (d) the Superior Court improperly sentenced him in absentia when it modified his sentence in December 2003; and (e) he was sentenced twice for the same probation violation.

(7) In its answering brief, the State asserts that Peterson's VOP sentence does not implicate double jeopardy concerns and is otherwise a legal sentence.¹ Nonetheless, the State concedes that the record raises questions about whether Peterson's VOP sentence was imposed in a legal manner.² Specifically, the State indicates that there is nothing in the Superior Court record to reflect that Peterson was afforded a VOP hearing before a Superior Court judge as required by Superior Court Criminal Rule 32.1. Furthermore, the State concedes that the record does not reflect that Peterson ever received notice of the alleged VOP.³ Finally, the State concedes that Peterson should have been entitled to a hearing on his motion for modification of sentence to the extent that the Superior Court's modified sentencing order reflected a substantive legal change to Peterson's sentence.⁴

The State therefore requests that the matter be remanded to the Superior

¹ See Super. Ct. Crim. R. 35(a) ("The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.").

² See Super. Ct. Crim. R. 32.1(a) (providing that a person held on a VOP charge "shall be afforded a prompt hearing before a judge of Superior Court on the charge of violation."); *Perry v. State*, 741 A.2d 359 (Del. 1999).

³ *Id.*

⁴ *Jones v. State*, 672 A.2d 554, 556 (Del. 1996).

Court for reconsideration of Peterson's motion for modification of sentence after the State has been given the opportunity to respond to Peterson's motion.

(8) After careful consideration of the parties' briefs, we agree that the Superior Court's judgment on Peterson's motion for modification of sentence must be vacated, and this matter must be remanded for further proceedings. On remand, the Superior Court is directed to hold a hearing on Peterson's motion and give both parties notice and an opportunity to be heard on the motion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is VACATED, and this matter is REMANDED for further proceedings consistent with this order. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele
Justice