

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAWRENCE WHALEN,	§
	§
Defendant Below-	§ No. 408, 1999
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr.A. No. S99-05-0001-0005
Plaintiff Below-	§
Appellee.	§

Submitted: March 29, 2000

Decided: May 18, 2000

Before **WALSH, HOLLAND** and **HARTNETT**, Justices

ORDER

This 18th day of May 2000, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Lawrence Whalen, filed this appeal from an order of the Superior Court denying his motion for reduction of sentence pursuant to Superior Court Criminal Rule 35(b). We find no merit to the appeal. Accordingly, we AFFIRM. However, because that portion of the Superior Court's sentencing order relating to Whalen's probationary sentences requires clarification, we REMAND to the Superior Court for that limited purpose.

(2) In May 1999, Whalen entered a plea of nolo contendere to 5 counts of unlawful sexual contact in the third degree.¹ On the first count, Whalen was sentenced to 1 year of incarceration at Level V. On the remaining 4 counts, he was sentenced to 1 year of probation at Level III for each count. As conditions of his probation, he was required to have no contact with the victim of the unlawful sexual contact, participate in counseling, have no unsupervised contact with any minor under the age of 18 and be classified as a Tier III sex offender. Whalen did not file a direct appeal from his convictions or sentences.²

(3) In this appeal, Whalen claims the Superior Court abused its discretion and violated his constitutional rights in its sentencing order. Specifically, he contends: i) he should not be required to participate in counseling because it would require an “admission” to the charge of unlawful sexual contact in violation of his plea of nolo contendere; ii) the

¹Whalen’s plea agreement was entered into pursuant to Super. Ct. Crim. R. 11(e) (1) (C). Under such a plea agreement, the State and the defendant “[a]gree that a specific sentence is the appropriate disposition of the case.”

²Both Whalen and the State agree that the Superior Court’s May 7, 1999 sentencing order is unclear as to whether the probationary sentences in this case are to be served consecutively or concurrently with Whalen’s probationary sentence for a prior conviction (Cr. A. No. 95-07-0093) and, further, when the special conditions of his probation will take effect. We conclude that this matter must be remanded to the Superior Court to clarify this issue. Contrary to the State’s position, the Superior Court noted in its sentencing order that Whalen’s probationary terms in this case are to be served consecutively and, thus, there is no confusion on that point.

condition of his probation barring unsupervised contact with minors is unreasonable and violates his constitutional rights; iii) his sentence impermissibly exceeds the Truth in Sentencing guidelines; and iv) his classification as a Tier III sex offender amounts to an unconstitutional ex post facto violation. To the extent Whalen has not argued other grounds to support his appeal that were previously raised, those grounds are deemed waived and will not be addressed by this Court.³

(4) A defendant's statements to the Superior Court during the plea colloquy are presumed to be truthful and "pose a 'formidable barrier in any subsequent collateral proceedings.'"⁴ In the absence of clear and convincing evidence to the contrary, a defendant is bound by his answers on the Truth in Sentencing plea form and by his sworn testimony prior to the acceptance of the plea.⁵ Moreover, a defendant waives his right to challenge a voluntary and intelligent plea bargain that provides a benefit to him.⁶

³*Murphy v. State*, Del. Supr., 632 A.2d 1150, 1152 (1993). In his motion in the Superior Court, Whalen also argued that a portion of his Level V sentence should be suspended for Level IV work release.

⁴*Somerville v. State*, Del. Supr., 703 A.2d 629, 632 (1997) (quoting *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985)).

⁵*Somerville v. State*, 703 A.2d at 632.

⁶*Downer v. State*, Del. Supr., 543 A.2d 309, 312-13 (1988).

(5) Whalen's claim that the Superior Court abused its discretion and violated his constitutional rights in its sentencing order is without merit. Our review of the signed Truth in Sentencing plea form, the signed plea agreement and the transcript of the plea colloquy reflects that Whalen had discussed with his attorney, fully understood, and knowingly agreed to each and every element of his plea agreement, including the specific conditions of his probationary sentence that he now challenges.⁷ Moreover, the plea agreement conferred a substantial benefit upon Whalen by requiring a 1-year term of incarceration only on the first count of unlawful sexual contact.

(6) This Court will not interfere with the Superior Court's refusal to reduce Whalen's sentence absent evidence of an abuse of discretion by the sentencing judge.⁸ We have reviewed carefully the record in this case and conclude that there was no abuse of discretion by the Superior Court in denying Whalen's motion to reduce his sentence.

⁷There is no merit to Whalen's argument that he can not be required to "admit" guilt as part of his treatment program because he entered a plea of nolo contendere. Whalen's plea does not confer upon him a right to violate a condition of his bargained-for plea agreement. *Id.*

⁸*Mayes v. State*, Del. Supr., 604 A.2d 839, 842-43 (1992).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

IT IS FURTHER ORDERED that this matter is hereby REMANDED to the Superior Court for the limited purpose of clarifying the defendant's probationary sentences as reflected in this Order.

BY THE COURT:

Randy J. Holland
Justice