

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY PIERCE,	§
	§ No. 608, 2012
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. 0407019516
	§
Plaintiff Below-	§
Appellee.	§

Submitted: March 8, 2013

Decided: April 9, 2013

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

**ORDER**

This 9<sup>th</sup> day of April 2013, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Gary Pierce, filed an appeal from the Superior Court’s October 22, 2012 order denying his motion for correction of sentence pursuant to Superior Court Criminal Rule 35(a). We find no merit to the appeal. Accordingly, we affirm.

(2) The record before us reflects that, in 2005, Pierce was found guilty by a Superior Court jury of two counts of Rape in the First Degree, two counts of Attempted Rape in the First Degree and Theft. He was sentenced to 81 years of

Level V incarceration, to be suspended after 80 years for probation. Pierce's convictions were affirmed by this Court on direct appeal.<sup>1</sup>

(3) In 2007, Pierce filed a motion for postconviction relief pursuant to Rule 61 in the Superior Court. Pierce appealed the Superior Court's denial of the motion to this Court. After remanding the matter to the Superior Court for consideration of additional claims Pierce made in an amendment to his postconviction motion, this Court affirmed the Superior Court's denial of the motion.<sup>2</sup> In 2011, this also Court affirmed the Superior Court's denial of Pierce's second postconviction motion.<sup>3</sup> Pierce's third postconviction motion was accompanied by a motion for correction of illegal sentence pursuant to Rule 35(a). The Superior Court denied both motions. Pierce appealed from the denial of the postconviction motion and this Court affirmed.<sup>4</sup>

(4) In his appeal from the Superior Court's denial of his second motion for correction of illegal sentence, Pierce claims that a) his convictions and sentences constitute a violation of double jeopardy; and b) due to the sentencing judge's reliance on false information, his case should be remanded to the Superior Court for sentencing before a different judge.

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<sup>1</sup> *Pierce v. State*, 911 A.2d 793 (Del. 2006).

<sup>2</sup> *Pierce v. State*, 2009 WL 189150 (Del. Jan. 16, 2009).

<sup>3</sup> *Pierce v. State*, 2011 WL 2739498 (Del. July 11, 2011).

<sup>4</sup> *Pierce v. State*, 2012 WL 3711733 (Del. Aug. 28, 2012).

(5) Under Delaware law, a sentence is illegal if it exceeds the statutorily-authorized limits, violates double jeopardy, is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence or is a sentence that the judgment of conviction did not authorize.<sup>5</sup> The narrow function of Rule 35 is to permit correction of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence.<sup>6</sup>

(6) Pierce's first claim is that his sentences violate double jeopardy. Specifically, Pierce contends that his first degree rape and first degree attempted rape convictions should have been merged for purposes of sentencing because each of them was based upon a single finding by the jury---that his actions were facilitated by the commission or attempted commission of third degree assault.

(7) On direct appeal, this Court squarely addressed, and rejected, the claim that Pierce's convictions and sentences violated double jeopardy.<sup>7</sup> The Court, determining that the temporal and spatial separation between the rapes committed by Pierce supported the jury's finding that Pierce had formed a separate

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<sup>5</sup> *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

<sup>6</sup> *Id.*

<sup>7</sup> *Pierce v. State*, 911 A.2d 793, 795 (Del. 2006).

intent to commit each criminal act,”<sup>8</sup> concluded that double jeopardy was not implicated. That ruling constitutes the law of the case and, therefore, governs the claims made by Pierce in this proceeding.<sup>9</sup> As such, we conclude that Pierce’s first claim is without merit.

(8) Pierce’s second claim is that, due to the reliance of the sentencing judge on false information, his case should be remanded to the Superior Court for another sentencing hearing before a different judge. Fairly read, Pierce’s claim is that the Superior Court’s sentence was imposed in an illegal manner pursuant to Rule 35(b). Rule 35(b) provides that the Superior Court may reduce a sentence of imprisonment only on a motion made within 90 days after sentence is imposed. As such, Pierce’s request for relief is untimely. Nor do we find the existence of such “extraordinary circumstances” as would render the time bar inapplicable. Moreover, this was Pierce’s second motion for relief under Rule 35. Because Rule 35(b) does not permit repetitive requests for reduction of sentence, Pierce’s motion fails on that ground as well. For all of the above reasons, we conclude that Pierce’s second claim also is without merit.

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<sup>8</sup> *Spencer v. State*, 868 A.2d 821, 823 (Del. 2005).

<sup>9</sup> *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000).

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

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice