

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRUCE L. PORTER,	§
	§
Defendant Below-	§ No. 32, 2005
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID. 90001246DI
Plaintiff Below-	§
Appellee.	§

Submitted: June 17, 2005
Decided: August 15, 2005

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

ORDER

This 15th day of August 2005, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, Bruce Porter, filed this appeal from the Superior Court's denial of his motion for correction of sentence. The State concedes that Porter's 2001 sentence violates the ex post facto clause of the United States Constitution and must be corrected. We agree. Accordingly, this matter is reversed and remanded for further action by the Superior Court consistent with this order.

(2) The record reflects that Porter pled guilty in 1990 to Murder in the Second Degree. On February 15, 1991, the Superior Court sentenced

Porter to twenty years imprisonment to be suspended after ten years of “mandatory incarceration pursuant to 11 Del. C. § 4204(k).” The sentencing order also provided, among other things, that “if defendant refuses to be tested or has a bad urine test result this will result in a violation of probation and an additional 10 years of incarceration” pursuant to 11 Del. C. § 4204(k). Porter did not appeal his sentence.

(3) On August 14, 2001, Porter was arrested on criminal charges and tested positive for alcohol at the time of his arrest. As a result, a violation of probation report was filed. After a hearing, the Superior Court found Porter in violation of the probationary portion of his 1991 sentence. The Superior Court sentenced Porter on the VOP charge to “ten years at Level V, pursuant to 11 Del. C. § 4202(k) [sic] without benefit of parole or good time or any other credits.” Porter did not appeal his VOP conviction or sentence. He did file a motion for sentence modification and a motion for postconviction relief, which were both denied. In December 2004, Porter filed a motion for correction of sentence pursuant to Superior Court Criminal Rule 35(a), which also was denied. This appeal followed.

(4) The gist of Porter’s claim on appeal is that the Superior Court imposed a more onerous sentence on his VOP charge than was authorized by law. Porter asserts that 11 Del. C. § 4204(k), as it existed when he originally

was sentenced in 1991, did not prohibit a defendant from earning good time credits or being paroled.¹ Porter argues that when the Superior Court sentenced him on the VOP charge in 2001 and ordered that the sentence be served pursuant to 11 Del. C. § 4204(k), as amended in 1997,² without benefit of parole or good time or any other credits, it violated the ex post facto clause of the United States Constitution. The State concedes that Porter's 2001 sentence, which was ordered to be served without benefit of parole or good time or any other credits, is illegal.

(5) After careful consideration of the parties' arguments, we agree that Porter's VOP sentence must be vacated and this matter remanded for reimposition of sentence consistent with this order. Although revocation of probation is within the sound discretion of the trial court,³ it is well settled that in sentencing a defendant on a VOP charge, the trial court may neither enlarge the period of probation nor impose a sentence greater than that

¹ At the time of his sentencing in 1991, Section 4204(k) provided, in its entirety, "The court may direct as a condition to any sentence of imprisonment that the Department of Correction shall not permit an offender to be furloughed or be allowed to participate in work release or supervised custody outside the prison institution or facilities." 11 Del. C. § 4204(k) (1987).

² After its amendment in 1997, Section 4204(k) provided, among other things, that the sentencing court could order "all or a specified portion of said sentence shall be served without benefit of any form of early release, good time, furlough, work release, supervised custody or any other form of reduction or diminution of sentence."

³ *Brown v. State*, 249 A.2d 269, 271 (Del. 1968).

originally imposed.⁴ In this case, by imposing Porter's VOP sentence pursuant to 11 Del. C. § 4204(k), as amended in 1997, the Superior Court precluded Porter from earning good time, which was not a limitation on the original sentence. By eliminating Porter's ability to earn good time, the Superior Court's 2001 sentence necessarily increased "the quantum of punishment"⁵ attached to Porter's original crime. The retroactive application of 11 Del. C. § 4204(k) (1997) thus violates the ex post facto clause.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED. This matter is hereby REMANDED to the Superior Court to resentence Porter in accordance with this order. Jurisdiction is not retained.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁴ *Ingram v. State*, 567 A.2d 868, 869 (Del. 1989). *Pavulak v. State*, ___ A.2d ___, No. 20, 2005, Ridgely, J. (Aug. 8, 2005).

⁵ *Weaver v. Graham*, 450 U.S. 24, 33 (1981). *See also Gasby v. State*, 429 A.2d 165 (Del. 1981).