

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHNNY R. HONAKER,	§	
	§	No. 105, 2006
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr. I.D. No. 0212006828
Plaintiff Below,	§	
Appellee.	§	

Submitted: August 1, 2006  
Decided: September 25, 2006

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

ORDER

This 25<sup>th</sup> day of September, 2006, on consideration of the briefs of the parties, it appears to the Court that:

1) Johnny R. Honaker appeals from the sentence imposed after his most recent violation of probation. He argues that the trial court's modified sentence is illegal because it exceeds the maximum time imposed in the original sentence by four months. We agree and remand this matter to the Superior Court for resentencing.

2) On May 7, 2003, Honaker pled guilty to rape in the fourth degree, and was sentenced to five years at Level V, with credit for time served, suspended for one year at Level IV and four years of decreasing levels of supervision. On November 7, 2003,

the trial court found Honaker in violation of probation. He was resentenced to four years and six months at Level V, suspended for nine months at Level IV and two years at Level III. On March 4, 2004, the court again found Honaker in violation of probation. This time, he was resentenced to four years and six months at Level V, with credit for time served, suspended after successful completion of the Key Program for one year at Level IV, suspended after successful completion of the Residential Substance Abuse Treatment Program for 18 months at Level III.

3) On October 28, 2005, the trial court found Honaker in violation of probation for the third time. The court resentenced him to four years and six months at Level V, with credit for 29 days previously served, suspended after two years for two years at Level III. On January 23, 2006, Honaker moved for correction of sentence, arguing that he had not been credited for the Level V time he had served in the Key Program. Two days later, the trial court entered the modified sentence order now being appealed. That order sentenced Honaker to three years and eight months at Level V (giving him credit for the ten months he served in the Key Program and awaiting placement in the Level IV program) suspended after two years for two years at Level III.

4) Honaker argues that the trial court could not legally impose a sentence greater than three years and eight months, because that is all that remained of his

original five year sentence.<sup>1</sup> He apparently acknowledges that the court was authorized to impose the two years at Level V, but says that the sentence must be modified to reduce his Level III time to one year and eight months.

5) The State responds that the additional Level III time is authorized as “transition” time. Pursuant to 11 *Del.C.* §4204 (l), trial courts must impose a sentence of at least six months of custodial supervision as a “transition period” when a person is sentenced to one year or more at Level V.<sup>2</sup> If a person is sentenced to the maximum Level V time permitted by statute, the transition period may not exceed the six months mandated by §4204(l).<sup>3</sup> If the Level V sentence is not the maximum permitted by statute, however, the transition period may be greater than six months. The State argues that, since Honaker’s original five year Level V sentence was not the maximum for fourth degree rape, and since the two year Level V sentence now on appeal is not the maximum Level V time remaining on his original sentence, the trial court was authorized under §4204(l) to impose a two-year transition period.

6) The problem with the State’s argument is that it largely ignores §4334(c). Under §4334(c), after finding a violation of probation, the trial court is authorized to

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<sup>1</sup>*See*: 11 *Del.C.* §4334(c) (“If the violation [of probation] is established, the court may... require the violator to serve the sentence imposed, or any lesser sentence....”).

<sup>2</sup>This requirement does not apply to those sentenced to life in prison or death.

<sup>3</sup>*Larson v. State*, 1995 WL 236650 (Del. Supr.).

impose the original sentence, “or any lesser sentence....” Thus, as a general rule, the statute prohibits the imposition of a greater sentence. Section 4204(1) creates an exception to that rule in cases where a trial court reimposes the entire original sentence at Level V (in this case, that would be three years and eight months). In such a case, since §4204(1) requires at least a six-month transition period, the trial court would have to impose six months of probation in addition to the Level V time even though that would result in the total reimposed sentence being greater than the original.<sup>4</sup>

7) Here, however, the trial court did not reimpose the entire original sentence at Level V. Thus, the general rule of §4334(c) controls and the total sentence could not exceed the remainder of Honaker’s original sentence. Since the trial court imposed a sentence totaling four years, when only three years and eight months remained on Honaker’s original sentence, the trial court erred.

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED for resentencing in accordance with this decision. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>4</sup>*Id. at* \*2.