

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN F. BERGEN,	§	
	§	No. 184, 2006
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
	§	for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID # 0410016885
	§	
Plaintiff Below,	§	
Appellee.	§	
	§	

Submitted: February 28, 2007
Decided: April 26, 2007

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

ORDER

This 26th day of April 2007, upon consideration of the briefs of the parties and the record on appeal, it appears to the Court that:

(1) Appellant John F. Bergen appeals his sentence after pleading guilty to Possession of a Deadly Weapon by a Person Prohibited, Aggravated Harassment, and Carrying a Concealed Deadly Weapon. Bergen argues that he was prejudiced and denied due process of law because the trial judge considered information at sentencing that did not meet minimum reliability standards, imposed an excessive sentence, and exhibited a closed mind. We find no merit to these arguments and affirm.

(2) Bergen and his ex-wife, Leslie Bergen, were involved in what he characterizes as an “acrimonious divorce and child custody proceeding.” Following those proceedings, on October 20, 2004, Leslie Bergen reported to police that she was receiving harassing phone calls from her ex-husband. While investigating at Leslie’s home, one of the officers saw Bergen “park his vehicle in the development and began to walk toward [Ms. Bergen’s] residence.” When Bergen saw the police, he fled. Bergen was later stopped in his vehicle with “a 4 inch double blade dagger type knife in his jacket on his person,” as well as “rubber gloves, a tarp type object, a shovel, and a pair of binoculars.” Two indictments were returned by the Grand Jury as a result of this incident.¹

(3) On May 25, 2005, Leslie Bergen again contacted the police, this time complaining that Bergen was sending her emails. A search warrant for Bergen’s residence was issued and police found the following items: a diagram of Ms. Bergen’s South Carolina residence, medical history about Ms. Bergen, a map of

¹ In the first indictment, No. 0410016885, Bergen was charged with Attempted Murder First Degree, Stalking, two counts of Possession of a Deadly Weapon During the Commission of a Felony, Carrying a Concealed Deadly Weapon, Possession of a Deadly Weapon by a Person Prohibited, Aggravated Harassment, Terroristic Threatening, Criminal Impersonation, Harassment and twenty-three counts of Criminal Contempt. In the second indictment, No.041100307/041100543, Bergen was charged with Tampering with Physical Evidence, Conspiracy Second Degree, and Criminal Trespass Second Degree.

Charleston, South Carolina, and a copy of Ms. Bergen's birth certificate. As a result, a third indictment was returned and filed against Mr. Bergen.²

(4) Bergen eventually pled guilty to three charges from the first indictment: Aggravated Harassment, Carrying a Concealed Deadly Weapon, and Possession of a Deadly Weapon by a Person Prohibited. Sentencing was held on March 10, 2006. In addition to fines and restitution, the trial judge sentenced Bergen to three years at level 5 with credit for 204 days previously served for the possession charge, two years at level 5 for the aggravated harassment charge, and two years at level 5, suspended for a total of 2 years at decreasing levels of supervision, for the concealed weapon offense.

(5) Bergen first argues that the trial court committed reversible error by taking into consideration information that was either false or not trustworthy. We review sentencing in a criminal case under an abuse of discretion standard.³ Furthermore, appellate review of sentences is "extremely limited" and "generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature."⁴ A sentencing judge "has broad discretion to consider 'information pertaining to a defendant's personal history and behavior which is not

² The third indictment, No. 0506005971, charged Bergen with eighteen counts of Criminal Contempt of a Domestic Violence Protective Order, Aggravated Harassment, and fifteen counts of Noncompliance with Bond Conditions.

³ *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).

⁴ *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

confined exclusively to conduct for which that defendant was convicted.”⁵ A trial court commits an abuse of discretion when it relies upon inaccurate or unreliable information.⁶ This includes information that lacks minimal indicia of reliability.⁷

(6) Bergen specifically takes issue with three pieces of information which the trial judge allegedly took into account when determining the sentences. First, Bergen contends that the trial judge rejected his expert’s report and instead, relied upon Bergen’s probation officer’s opinion that Bergen is “crazy, intelligent, and obsessed” and that she “would not be surprised if he [Mr. Bergen] killed her [Leslie Bergen.]” Second, Bergen argues that the trial judge should not have considered allegations that he called Leslie Bergen from an “untraceable” prepaid cell phone while she was in South Carolina. Finally, Bergen argues that the trial court considered emails that were allegedly sent from Bergen to Leslie Bergen. These emails were the basis for the third indictment.⁸

(7) The record does not support Bergen’s claim of reversible error. There is nothing in the record to suggest that the trial judge did not consider Bergen’s expert report or that he relied entirely upon the Probation Officer’s report.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ As the third indictment progressed to trial, the State improperly withheld forensic computer evidence supporting the charge that Bergen sent the emails. This was recognized by trial judge and a continuance was granted. The plea was subsequently entered, rendering the discovery issue moot.

Additionally, it is within the trial judge's discretion to "find expert reports unpersuasive" when sentencing a defendant.⁹

(8) It was also within the judge's discretion to consider the allegations that Bergen was calling Leslie Bergen while she was in South Carolina from an untraceable number. Leslie Bergen's unlisted phone number in South Carolina was found in Bergen's home. Bergen had a history of making harassing phone calls to Leslie Bergen. Bergen himself admitted to making harassing phone calls to Leslie Bergen's Delaware residence. Thus, the accusations do not lack minimal indicia of reliability.

(9) Finally, the trial judge did not consider the challenged emails and said so.¹⁰ As the judge explained at sentencing, "I don't even need to get into the email situation. There's enough bizarre behavior in this to be quite frightening." The judge continued, "I'm not going to get into a he-said/she-said contest as to who sent what email. What I have to do, and what does concern me is the behavior that, which [sic] one exception, he doesn't deny."

⁹ See *Cheeks v. State*, 768 A.2d 467 (Del. 2000) (TABLE) ("At sentencing, a judge is supposed to make evaluations about the evidence, and therefore is free to find expert reports unpersuasive and unworthy of constituting mitigating factors.").

¹⁰ The trial judge, however, could have properly relied on the emails. See *Mayes*, 604 A.2d at 844 ("the indictment itself provides sufficient reliability to meet the constitutional standard.").

(10) Bergen next argues that his sentence is excessive. Possession of a Deadly Weapon is a class F felony.¹¹ Both Aggravated Harassment¹² and Carrying a Concealed Deadly Weapon¹³ are class G felonies. A class F felony is punishable by up to three years at level 5.¹⁴ A class G felony is punishable by up to two years at level 5.¹⁵ The sentences imposed were within the statutory range authorized by the General Assembly and therefore lawful.

(11) Bergen finally argues that the judge had a closed mind when he sentenced Bergen. There is nothing to suggest that conclusion. After the colloquy, the trial judge articulated the basis for his sentence as follows:

To the extent the sentence imposed exceeds the SENTAC guidelines, I cite the defendant's repetitive criminal history, undue appreciation for the events on that one day, prior abuse of victim, lack of amenability to lesser sanctions.

Mr. Bergen, quite honestly, I've been a member of the Bar of the Superior Court, State of Delaware, for 31 years. I've been here for 16. You frighten me. And I don't scare easily. If there's potential violence here, I'm sorry, you ex-wife, because I can't do any more to protect her and the son.

And what [defense counsel] said, actually I was going to give you a straight seven years, followed by six months Level IV. Counsel made a valiant effort to portray you in the best possible light. But what

¹¹ 11 *Del. C.* § 1448.

¹² 11 *Del. C.* § 1312.

¹³ 11 *Del. C.* § 1442.

¹⁴ 11 *Del. C.* § 4205(b)(6).

¹⁵ 11 *Del. C.* § 4205(b)(7).

[counsel] ... can't do is explain some of the really bizarre things and scary things. I don't know what happened. And I don't know what made a productive citizen and made him into what you've turned out to be. But I have to protect the public safety. And, quite honestly, I'm not sure we are able to do it the way we would like to do it. If I had more time, I would impose it and extend the probation because, clearly, everybody who has touched this case has remarked that they are awfully afraid that you're going to do some harm to that woman. I haven't seen anything like that, and you're a smart man. You're not like a lot of some people we see come through here, find their way to places. You gave them a map. But you're really smart. And that's the scarier point. I hope that you learn something. But I've done all that I can do under the circumstances. I regret having to do it, but that's just the way it is.

(12) The sentencing judge clearly articulated a rationale basis for imposing a sentence within the permitted statutory range. Bergen's argument that the sentence was the product of a closed mind is contradicted by the record and without merit.

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

BY THE COURT:

/s/Henry duPont Ridgely
Justice