

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
v.)	I.D. No. 0305011869
)	
ALEJANDRO RODRIGUEZ,)	
)	
Defendant.)	
)	

Date Submitted: November 1, 2010
Date Decided: December 13, 2010

ORDER

On this 13th day of December, 2010, upon consideration of Defendant's Unopposed Motion for Modification of Sentence, it appears that:

- 1) On May 18, 2003, Alejandro Rodriguez, a non-U.S. citizen, was arrested and charged with Assault 2nd, Unlawful Sexual Contact 2nd, Unlawful Imprisonment 2nd, and Providing Alcohol to Minors.
- 2) On October 16, 2003, Defendant, then age 29 and now age 36, pled guilty to Unlawful Sexual Contact 3rd Degree. The victim was 16 years old.
- 3) On the same day, the Court sentenced Defendant to one year of incarceration at Level V, suspended for one year at Level II probation with special conditions. Defendant claims that he registered as a sex offender in

compliance with the sentencing order. Thereafter, he was successfully and timely discharged from probation.

4) Defendant now claims that prior to entering his plea he had informed his attorney that he was a non-U.S. citizen and that on July 25, 2002, he had applied for permanent residency. He alleges that his attorney advised him that he would not be denied residency as a result of the plea because the charge was a misdemeanor. However, on January 26, 2010, Defendant claims that his application for permanent residency was denied due to his conviction and sentence. He has appealed the denial but expects to be deported if his appeal is not successful. Defendant requests a sentence modification from one year at Level V to one day less than six months at Level V, suspended for Supervision Level II so that his conviction would not be in the class of offenses that would cause him to be deported. He further claims that his constitutional rights were violated because his plea was not knowing, intelligent, or voluntary.¹

¹ In *Padilla v. Kentucky*, the U.S. Supreme Court found that defendants require constitutionally competent counsel to advise them on immigration issues before a guilty plea is entered. 130 S. Ct. 1473, 1478 (U.S. 2010). Defendant refers to the *Padilla* case extensively in his argument. However, an argument under *Padilla* attacks the legality of a conviction and is, to all intent and purposes, an ineffective assistance of counsel claim, *see Padilla*, 130 S. Ct. at 1481, which is not a consideration when moving for modification of sentence under Rule 35(b). *State v. Lewis*, 797 A.2d 1198, 1200-1201 (Del. 2002). An attack on the legality of the conviction, however, is appropriate under a motion for postconviction relief under Rule 61. *Lewis*, 797 A.2d at 1200.

5) A motion for reduction of sentence is governed by Superior Court Criminal Rule 35(b) which permits the Court to reduce a prison sentence on a motion made within ninety days after imposition of sentence.² However, the “court will consider an application made more than 90 days after the imposition of sentence” where “extraordinary circumstances” are present.³

6) Furthermore, Rule 35(b) allows for a reduction of sentence “without regard to the legality of the conviction” and confers upon the trial judge considerable discretion.⁴ Rule 35(b) also provides that the Court may reduce the terms of probation “at any time” and may consider the consequences of a sentence as grounds for relief even after the sentence has been served.⁵

7) Moreover, in *State v. Lewis*, the Delaware Supreme Court particularly found that the possibility of deportation and resulting hardships can be deemed “extraordinary circumstances” and held that it was not an abuse of discretion for the trial court judge to modify a sentence that had already been

² Super. Ct. Crim. R. 35(b).

³ Super. Ct. Crim. R. 35(b); *Lewis*, 797 A.2d at 1200.

⁴ *Lewis*, 797 A.2d at 1200-1201.

⁵ Super. Ct. Crim. R. 35(b); *Lewis*, 797 A.2d at 1201.

served under such circumstances.⁶ The *Lewis* Court further noted the following four factors that the trial court considered in its decision:

- 1) the nature of the original sentence;
- 2) the time Defendant spent actually incarcerated;
- 3) possible deportation of Defendant; and
- 4) the hardship on innocent persons that would result from Defendant's deportation, viewed collectively.⁷

Nevertheless, the trial court must act “within a zone of reasonableness” or stay “within a range of choice” upon modification of a sentence under extraordinary circumstances.⁸

8) In this matter, since Defendant has not presented his motion within 90 days of the imposition of his sentence, he is required to demonstrate that “extraordinary circumstances” exist and that his requested modification is within a range of reasonableness. In considering the *Lewis* factors, the Court notes that Defendant was never incarcerated for his offense. Although Defendant mentions his possible deportation and the resulting hardship on his dependant wife and child, he provides no details as to the extent of the hardship or the plight of the innocent persons that depend on him.

⁶ 797 A.2d 1198, 1201.

⁷ *Lewis*, 797 A.2d at 1202.

⁸ *Lewis*, 797 A.2d at 1202.

9) Nevertheless, regardless of the insufficiency of information as to Defendant's circumstances, the Court finds the possibility of deportation to be sufficient grounds on which to modify the sentence and, therefore, determines that the Defendant's request for one day less than six months at Level V suspended immediately for Level II falls within a reasonable range of choices to which the Court may sentence him.

Accordingly, Defendant's Motion for Reduction of Sentence to one day less than six months at Level V suspended immediately for Level II is ***GRANTED.***

IT IS SO ORDERED.

Judge John A. Parkins, Jr.