

Degree, Attempted Robbery First Degree (3 counts), Kidnapping Second Degree (3 counts), Assault Third Degree, and Offensive Touching (2 counts). Rather than risk indictment on more serious charges, Defendant accepted the State's plea offer which was negotiated on Defendant's behalf by defense counsel and pled guilty to one single charge of Robbery Second Degree (a reduced and lesser-included offense of the lead charge of Robbery First Degree). Not only did Defendant receive the benefit of the State agreeing not to pursue the more serious charges, Defendant also did not face minimum mandatory time for Robbery Second Degree.

2. The Court accepted Defendant's guilty plea as a knowing, intelligent, and voluntary waiver of his constitutional trial and appellate rights. Pursuant to Superior Court Criminal Procedural Rule 11(c)(1), the Court addressed Defendant personally in open court and determined that Defendant understood the nature of the charge to which the plea was offered, and the maximum possible penalty provided by law. Defendant also acknowledged the risks and benefits of accepting the plea rather than proceeding to trial, including the mandatory minimum penalty provided by law upon indictment. Accordingly, Defendant acknowledged in open court that the range of possible penalties included the sentence that was imposed by the Court, including the expectation of a lengthy probationary period.

3. By Sentencing Order dated February 8, 2013, Defendant was committed to the custody of the Department of Correction for 3 years at supervision level 5, suspended immediately for 2 years at supervision level 3, suspended after 1 year at supervision level 3, for 1 year at supervision level 2. In addition, the Court imposed numerous terms and conditions for community-based supervision, including substance abuse and mental health evaluation and treatment, and required abstinence from alcohol and drugs except as prescribed. (The Sentencing Order was modified by Order dated December 5, 2013 to include a no-contact provision.) Accordingly, Defendant was given the opportunity to avoid jail time and to engage in community-based treatment.

4. In December 2014, Defendant was convicted for shoplifting in the Court of Common Pleas. A new conviction is a violation of probation as a matter of law.¹

¹ See *Hawkins v. State*, 3 A.3d 1097 (Del. 2010) (“The Superior Court has the authority to revoke probation and to impose sentence on the basis that the probationer has been charged with new criminal conduct.”); *Downing v. State*, 803 A.2d 427 (Del. 2002) (holding that the “Superior Court was within its discretion to find a [violation of probation] where the probationer merely had been charged with new criminal offenses.”); *Munson v. State*, 242 A.2d 313, 314 (Del. 1968) (“Probation is granted on condition of good conduct during the period thereof.”); *In re Reed*, 1997 WL 524066, at *3 (Del. Super. June 27, 1997) *aff’d sub nom. Reed v. State*, 703 A.2d 644 (Del. 1997) (providing that “a new conviction, while on probation, is a violation of the original probation”); *State v. Flowers*, 1995 WL 716812, at *3 (Del. Super. Nov. 6, 1995) (finding that convictions for Shoplifting and Conspiracy in the Third Degree provided a sufficient basis as a violation of defendant’s probation).

5. On December 4, 2014, Defendant's Probation Officer arrested Defendant on an administrative warrant for violation(s) of probation and Defendant was committed in default of bail until his father posted cash bail on Defendant's behalf to secure Defendant's appearance at a VOP hearing.

6. The U.S. Supreme Court has explained that probation is a privilege, not a right, "designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation."² The Court explained that broad discretion and great "flexibility in administration" is essential to accomplish to purpose of the probation statute.³ Furthermore, the Court pointed out that the court has broad discretion when modifying or revoking probation.⁴

7. In a VOP hearing, the State is only required to prove by a preponderance of the evidence that the defendant violated the terms of his probation.⁵ A preponderance of evidence means "some competent evidence" to "reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation."⁶

8. The Court considered the allegations of violation of probation at a hearing on January 8, 2015. The Court deferred finding a violation of probation

² *Burns v. United States*, 287 U.S. 216, 220 (1932).

³ *Id.*

⁴ *Id.* at 221.

⁵ *Kurzman v. State*, 903 A.2d 702, 716 (Del. 2006).

⁶ *Id.* (quoting *Collins v. State*, 897 A.2d 159, 160 (Del.2006)).

and instead issued a modified Sentencing Order dated January 5, 2015, which added additional terms and conditions of community-based supervision, including TASC monitoring and more frequent urine screening for use of drugs and alcohol. The violation of probation hearing was continued until January 29, 2015 to give Defendant a renewed opportunity to engage in treatment. Defendant was given an opportunity to remain in the community and his treatment was increased in an effort to reduce the risk for continued criminal behavior in the community and another new conviction.

9. On January 29, 2015, the matter was heard again by the Court. In consideration of remaining on probation and the additional conditions meant to protect the community by enduring ongoing substance abuse treatment and monitoring, the probation for the shoplifting conviction in the Court of Common Pleas was consolidated with the Superior Court probation. This new term of probation *started* in December 2014 upon the conviction. Consolidating the cases gave Defendant yet another chance to avoid incarceration since he would only be supervised in one court and not in two separate courts.

10. Although the Court's Sentencing Order dated January 29, 2015, mistakenly identifies the effective date as February 8, 2013, a review of the transcript of that hearing makes it abundantly clear that Defendant would remain on

probation rather than be incarcerated at that time. The sentence imposed on January 29, 2015 is consistent with the mandate to supervise offenders at the lowest possible level of supervision to endure community safety and reduce recidivism. Because of Defendant's continued drug use and new conviction in violation of the terms and conditions of his probation, the Court had the authority to incarcerate Defendant at that time or to continue the term of probation. Indeed, on January 29, 2015, Defendant stated he had been abstinent for 30 days, acknowledging his continued drug use prior to the start of that period of abstinence. It was clearly understood based on the Court's findings and conclusions that Defendant would be required to continue supervision at Level 3.

11. The incorrect identification of the effective date on the Court's January 8, 2015 and January 29, 2015 Orders, which incorrectly identified the effective date of sentence as the February 8, 2013, were clerical errors. Delaware Rule of Criminal Procedure 36 permits the Court to correct clerical mistakes. The record clearly supports a new term of probation beginning on January 29, 2015, and Defendant reported to probation consistent with that Order.

12. On September 15, 2015, a violation of probation report was filed with the Court, and a violation of probation hearing was scheduled, with notice to Defendant. Probation Officer Baker noted in the report that Defendant had been

compliant with probation from January 2015 until late August 2015, when Defendant stopped reporting but also was arrested for shoplifting. During this entire period, Defendant never claimed that his term of probation had expired. To the contrary, Defendant acted entirely consistently as someone who knew he was required to report to probation and comply with the terms and conditions.

13. The Court issued a bench warrant for violation of probation, and Defendant returned the warrant to JP Court 2 which allowed Defendant to be released on unsecured bail until a Superior Court bail hearing on September 17, 2015. The Superior Court set secured bail in consideration of Defendant having recently absconded from probation supervision. Defendant posted bail to secure his release and a hearing was scheduled to consider the pending violation of probation.

14. Defendant failed to appear at the scheduled hearing on October 15, 2015, and the Court set cash bail, which is necessary to secure Defendant's appearance since he failed to appear after having posted secured bail. On October 26, 2015, the Court received a letter from the Rockford Center providing that Defendant was admitted into the Rockford Park Center for an inpatient Psychiatric Program from October 14, 2015 – the day immediately preceding the scheduled hearing date – to October 23, 2015. Without leave from the Court, Defendant was

nevertheless required to appear at his scheduled hearing on October 15, 2015.

15. The Court finds that Defendant poses a risk to the community when he is using drugs. Each of his criminal convictions reflects criminal behavior in the community that occurred when he was actively using illegal substances.

NOW, THEREFORE, this 19th day of November, 2015:

(1) Defendant's Motion to Dismiss the Violation of Probation, Rescind Capias, and Discharge Probation is hereby DENIED;

(2) a Rule to Show Cause is hereby issued why secured bail posted on September 17, 2015 should not be forfeited;

(3) bail on the VOP warrant is hereby set at \$10,000 cash only to secure Defendant's appearance at a hearing; and

(4) the Court shall issue a corrected sentencing order indentifying the effective date of the January 29, 2015 Order as January 29, 2015.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli

cc: Francis Farren, Esq.
William Baker, Probation and Parole
Prothonotary