



This 12th day of July, 2019, upon consideration of Defendant's Motion to Vacate Sentence Pursuant to Rule 35(a) and the record in this matter, it appears to the Court that:

1. Defendant Leroy Shelley ("Shelley") was convicted by a jury in 2007 of two counts each of Robbery First Degree, Kidnapping Second Degree, and Possession of a Firearm During the Commission of a Felony, as well as a single count of Conspiracy Second Degree. He waived his right to counsel and represented himself at trial. He was sentenced on March 6, 2008, but did not file a direct appeal. Instead, Shelley embarked on what has turned out to be a steady course of futile litigation when he moved for postconviction relief in 2009. That motion was denied as procedurally defaulted because Shelley's claims could have been raised on direct appeal had he filed one.<sup>1</sup> Shelley's appeal to the Delaware Supreme Court of that order was dismissed as untimely.<sup>2</sup> After an unsuccessful attempt at federal *habeas corpus* relief in 2010,<sup>3</sup> Shelley filed his first attempt to vacate his sentence. That motion, in which he argued that his re-indictment was defective causing the court to lack jurisdiction, was treated as a second postconviction relief motion and was denied again for procedural default.<sup>4</sup> The Delaware Supreme Court affirmed that decision.<sup>5</sup> This Court summarily dismissed his third postconviction relief motion on October 27,

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<sup>1</sup> D.I. 28.

<sup>2</sup> *Shelley v. State*, 2010 WL 1627335 (Del. Apr. 21, 2010).

<sup>3</sup> *Shelley v. Delaware*, 2012 WL 379907 (D. Del. 2012).

<sup>4</sup> D.I. 61.

<sup>5</sup> *Shelley v. State*, 53 A.3d 303 (Del. 2012).

2014.<sup>6</sup> This Court denied Shelley’s Motion for Modification of Sentence on March 7, 2017.<sup>7</sup> The Supreme Court affirmed.<sup>8</sup> This Court denied his Petition for a Writ of Habeas Corpus on April 20, 2017.<sup>9</sup> The Supreme Court affirmed.<sup>10</sup> A Motion for Sentence Clarification was denied on October 6, 2017.<sup>11</sup> The Supreme Court affirmed.<sup>12</sup> Shelley’s Motion to Recuse was denied on July 13, 2018.<sup>13</sup> The Supreme Court dismissed his appeal.<sup>14</sup>

2. In this motion, Shelley seeks to vacate his sentence because he claims that the trial court did not advise him as a *pro se* litigant of his right to appeal as required by Superior Court Criminal Rule 32(a)(2).<sup>15</sup> The relief he requests is for the Court to resentence him so that he may file a direct appeal.<sup>16</sup>

3. Pursuant to Superior Court Criminal Rule 35(a), “The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.” The time period for requesting a reduction of sentence is 90-days after sentence is imposed.<sup>17</sup> The Court

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<sup>6</sup> *Shelley v. State*, 2014 WL 5713236 (Del. Super. Oct. 27, 2014).

<sup>7</sup> D.I. 53.

<sup>8</sup> *Shelley v. State*, 2017 WL 2686551 (Del. Jun. 21, 2017).

<sup>9</sup> D.I. 63.

<sup>10</sup> *Shelley v. State*, 2017 WL 3122316 (Del. Jul. 17, 2107).

<sup>11</sup> D.I. 66.

<sup>12</sup> *Shelley v. State*, 2018 WL 3173852 (Del. Jun. 26, 2018).

<sup>13</sup> D.I. 74.

<sup>14</sup> *Shelley v. State*, 2018 WL 6331623 (Del. Dec. 3, 2018).

<sup>15</sup> D.I. 80.

<sup>16</sup> *Id.*

<sup>17</sup> Super. Ct. Crim. R. 35(b).

treats this motion as one alleging Shelley's sentence was imposed in an illegal manner, since the sentence clearly did not exceed the statutorily-authorized limits or violate the Double Jeopardy Clause.<sup>18</sup> Nor was Shelley's sentence ambiguous as to the time and manner in which it is to be served, internally contradictory, lacking a statutorily required term, uncertain as to its substance, or unauthorized by the judgment of conviction.<sup>19</sup> Therefore, the 90-day time period within which to move to correct a sentence imposed in an illegal manner applies. Shelley appears to agree, but argues that the doctrine of equitable tolling permits the Court to grant him the relief he seeks.<sup>20</sup>

4. The Delaware Supreme Court has held that the doctrine of equitable tolling is inapplicable to a motion for postconviction relief.<sup>21</sup> In *Chapman v. State*, the Supreme Court looked to Superior Court Criminal Rule 45(b)(2), which expressly provides that the Superior Court "may not extend the time for taking any action" under Rule 61(i)(1).<sup>22</sup> But, Rule 45(b)(2) is not limited to time limits under Rule 61(i)(1). It also provides that this Court "may not extend the time for taking any action" under Rule 35. Accordingly, the 90-day time limit under Rule 35 within which to file a motion alleging that a sentence was imposed in an illegal manner may not be extended

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<sup>18</sup> *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998), quoting *United States v. Pavlico*, 961 F.2d 440, 443 (4<sup>th</sup> Cir. 1992).

<sup>19</sup> *Id.*

<sup>20</sup> D.I. 80.


<sup>21</sup> *Turnage v. State*, 2015 WL 6746644 (Del. Nov. 4, 201500)

<sup>22</sup> 2007 WL 1933229 at \*2 (Del. Jul. 3, 2007).

by the doctrine of equitable tolling. In Shelley's case, that 90-day time limit expired more than a decade ago.

**THEREFORE**, Shelley's Motion to Vacate Sentence Pursuant to Rule 35(a) is **DENIED**.

**IT IS SO ORDERED.**



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Ferris W. Wharton, J.

oc: Prothonotary  
cc: Investigative Services