

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE

:

v.

ID #9811009212

:

Supreme Court No. 64, 2001

KEITH B. NELSON

:

:

MEMORANDUM OPINION

Date Submitted: September 6, 2001

Date Decided: December 6, 2001

Upon remand by the Delaware Supreme Court to determine certain issues of fact.

**FINDINGS AND CONCLUSIONS**

Bernard J. O'Donnell, Esquire, Wilmington, Delaware, attorney for defendant.

Stephanie A. Tsantes, Esquire, Department of Justice, Georgetown, Delaware, attorney for the State.

**STOKES, J.**

Keith Nelson (Nelson) was convicted of assault third degree, theft, receipt of stolen property, and conspiracy on February 5, 1997. On June 18, 1999, Nelson violated his probation by testing positive for cocaine on two occasions. He also refused to submit to a drug test. Nelson was sentenced to four (4) years Level 5, suspended upon successful completion of the Key Program for lower levels of supervision. Nelson's request to modify his sentence was denied by letter dated January 23, 2001, and an appeal was filed with the Supreme Court.

The point in controversy concerns Nelson's capacity to participate in the Key Program. Under a remand dated September 5, 2001, the Superior Court was asked to determine:

- (a) Nelson's mental health status at the time he was admitted to the Key Program;
- (b) The specific reasons for Nelson's discharge from the Key Program; and
- (c) Nelson's current mental health status and whether he is capable of participating in the Key Program.

The Superior Court was also to determine whether Nelson's sentence should be modified.

Two evidentiary hearings were held, one on October 10 and another on November 1, 2001.

Ten persons testified, including two psychiatrists, two medical doctors, the Key South

Program Director, a Mental Health Director, a Records Custodian, two correctional counselors, and Nelson. The State submitted correctional and medical records. A joint exhibit, consisting of numerous documents, was also received. A complete set of records was submitted by agreement after November 1 for review.

Following consideration, it is recommended that TASC evaluate Nelson with a subsequent sentence review.

### **FINDINGS OF FACT**

1. Nelson is a polysubstance abuser, with a history of excessive use of alcohol, marijuana, cocaine and heroin.

2. Nelson is 34 years old and suffers from asthma. While incarcerated, this condition was regularly monitored by medical personnel and did not interfere with his ability to function.

3. When imprisoned in June of 1999, Nelson was not a suitable candidate for the Key Program. He had previously been admitted to the psychiatric wing of Nanticoke Hospital, Seaford, Delaware.

4. Before beginning the Key Program, Nelson had behavioral problems, including fighting with another inmate on November 26, 1999. In November and December of 1999, he was internally disciplined by the Department of Corrections.

5. By January of 2000, Nelson's condition improved with medication that permitted his participation in the Key Program.

6. The Key Program is a mode of treatment that is a benefit to individuals with substance abuse problems.

7. The Key Program is designed to change behavior. It is confrontational, stressful and lengthy, requiring up to 12 months or more of intense supervision in a therapeutic prison based community.

8. The confrontational aspect of the Key Program is a recognized technique in the field of drug rehabilitation.

9. Individuals, like Nelson, who are depressed have participated in the Key Program with medical support.

10. Individuals with even more severe disorders, including schizophrenia, have also participated in the Key Program.

11. Nelson was twice admitted into and discharged from the Key Program.

12. Nelson's first experience in the Key Program was February 8, 2000 and ended on April 23, 2000.

13. On February 8, 2000, Nelson was suffering from depression. He was not delusional, suicidal or homicidal. He was oriented to time, person and place.

14. Before and after the first admission, Nelson was prescribed psychotropic and anti-depressant medications. Nelson was also prescribed sleep medication.

15. Nelson was discharged for inappropriate behavior and for threatening another inmate. Nelson also refused to participate in the program, claiming its confrontational nature was too stressful.

16. At his request, Nelson was readmitted into the Key Program on May 21, 2001, following improvement of his behavior.

17. At that time, Nelson continued to suffer from depression and was taking anti-depressant medication.

18. Nelson was discharged from the Key Program on July 21, 2001 for failing to participate in the program.

19. At all times, although suffering from depression, Nelson was psychologically capable of participating in the Key Program with the help of prescribed medicine that was appropriate for his condition.

20. Although capable of participating, Nelson is not likely to complete the Key Program. Nelson's personality is incompatible with the lifestyle changes sought by the Key Program.

21. Nelson was also treated for two gunshot wounds to his lower extremities in New York on New Year's Eve in 1997.

22. These wounds were not life threatening, surgery was not then indicated, and Nelson was released after one day, being given Tylenol for pain.

23. At all times, Nelson was physically able to participate in the Key Program. Medical orders were written to permit him to move about, to have back support, to limit standing, and to have a blanket for a chair cushion. These accommodations sufficiently addressed any physical complaints concerning the medical effects of these wounds. The orders were written on February 28, 2000 and July 5, 2001.

24. Nelson continues to suffer from depression and has a violent disposition, engaging in fighting or threatening behavior on June 22, 2000, July 10, 2000, and November 9, 2000.

25. While incarcerated, Nelson claimed to see dwarfs and to hear voices. These complaints were reviewed by psychiatrists.

26. These complaints are not credible and were made to avoid the Key Program.

27. Nelson also presented claims of having blood in his urine that exaggerated his actual physical condition and were not supported by objective tests.

### **CONCLUSIONS**

Nelson does not want to accept the Key Program. This decision is not driven by mental illness. Rather, he seeks to avoid a stressful environment. Nelson has a history of serious polysubstance abuse. By his actions, a major part of the four year Level 5 sentence has been served by default. Unless Nelson's substance abuse problem is addressed, he is likely to reoffend when released to the community.

In this regard, Nelson submitted a report from a Psycho-Forensic Evaluator employed by the Public Defender's Office (Defense Exhibit 1). It recommended treatment at the Recovery Center of Delaware with conditions of supervision, including random drug testing. The sentencing plan recognized supervised drug rehabilitation treatment with Nelson's cooperation. Notwithstanding, Nelson has been incarcerated over two years, a longer period of time than expected for completion of the Key Program.

In cases of this nature, a deterrent aspect is required to prevent individuals like Nelson from too easily refusing treatment. The Court does not have sufficient information to make an informed modification decision. For this reason, a TASC evaluation should be completed to see what reasonably can be done with the remaining sentence, considering Nelson's background.<sup>1</sup>

**IT IS SO ORDERED.**

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Richard F. Stokes, Judge

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<sup>1</sup>The Court recognizes the violation of probation was basically for cocaine use and calls for appropriate treatment of his polysubstance abuse. Being in prison, the Level 5 Key Program also addressed Nelson's violent nature, reported in this Court's denial of the modification request and in records introduced at the evidentiary hearing. Nelson also pled guilty to Terroristic Threatening on October 7, 1999 in this Court for an incident involving his brother on May 15, 1999. One of the rehabilitation goals was anger management. The less stressful Level 5 Greentree Program has a lengthy waiting list. Nelson was discharged from the less confrontational Level 5 Tempo Program in November, 2000. A TASC evaluation would be helpful to the Court.