

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. Henley Graves  
*Resident Judge*

SUSSEX COUNTY COURTHOUSE  
THE CIRCLE  
P.O. BOX 746  
GEORGETOWN, DE 19947  
(302) 856-5257

September 21, 2004

Carole E.L. Davis, Esquire  
Department of Justice  
114 E. Market Street  
Georgetown, DE 19947

William E. Moore, Esquire  
Office of the Public Defender  
14 The Circle  
Georgetown, DE 19947

RE: State of Delaware v. Cheryl E. Hall, Def. ID# 0401008083

Dear Counsel:

Pending before the Court is an appeal which the State of Delaware (“the State”) has brought pursuant to 10 Del. C. § 9903. Although errors were committed below, this Court will not correct them because it dismisses the appeal on procedural grounds.

On March 16, 2004, defendant Cheryl E. Hall (“defendant”) pled guilty in Court of Common Pleas (“CCP”) to a second offense driving under the influence charge. The sentencing judge mistakenly believed that he was able to suspend the Level V mandatory jail time to Level 4, Home Confinement, and he sentenced accordingly. That was an illegally imposed sentence as

the statute clearly does not provide a judge with such authority. 21 Del. C. § 4205(c)(1) and (2).<sup>1</sup>

At the time CCP sentenced defendant to Level IV, Home Confinement, the State expressed concern with the sentence and indicated to CCP that it might be appealing the sentencing order. On March 18, 2004, the State filed a motion to reargue on the ground that the sentence was illegal.

While its own motion to reargue was pending, the State filed, on April 7, 2004, a notice of appeal pursuant to 10 Del. C. § 9903.<sup>2</sup> The appeal document does not contain any language

---

<sup>1</sup>In 21 Del. C. §4205(c), it is provided in pertinent part as follows:

(1) For offenses under this title, except those ... which involve a driving under the influence-related conviction or offense as defined in § 4177B(e)(1) a.-d. of this title, the terms of imprisonment defined in this title may be served at Supervision Accountability Level IV as defined in § 4204(c)(4) of Title 11.

(2) For offenses under this title which involve ... a driving under the influence-related conviction or offense as defined in § 4177B(e)(1)a.-d.. of this title, any term of imprisonment defined in this title shall be served at Supervision Accountability Level V as defined in § 4204(c)(5) of Title 11 or at Supervision Accountability Level IV as defined in § 4204(c)(4) of Title 11 provided that such Level IV placement must be served in a Department of Correction facility which requires full-time residence at the facility and that the person may not be outside the confines of that facility without armed supervision.

The only Level IV facility referenced in §4205(c)(2) which qualifies for such a placement is the Violation of Probation Center. Neither Home Confinement nor the Work Release Center qualify.

<sup>2</sup>Therein, it is provided:

The State may apply to the appellate court to permit an appeal to determine a substantial question of law or procedure, and the appellate court may permit the appeal in its absolute discretion. The appellate court shall have the power to adopt rules governing the allowance of the appeal; but, in no event of such appeals shall the decision or result of the appeal affect the rights of the defendant and he or she shall not be obligated to defend the appeal, but the court may require the Public Defender of this State to defend the appeal and to argue the cause.

which moves the Court for leave to appeal or otherwise comply with Superior Court Criminal Rule 39(f).<sup>3</sup>

Two months after the State called to CCP's attention the illegality of its sentence, CCP finally acted by correcting its error in an order dated May 18, 2004. That order modified the original sentence to provide as follows:

Defendant is committed to the custody of the Department of Corrections at Level V for sixty (60) days, commencing May 28, 2004 at 9:00 a.m. At that date and time Defendant shall report to Women's Correctional Institution. All other terms and conditions of the prior sentence not inconsistent herewith shall remain in effect.

Then, on May 26, 2004, CCP entered the following modified order:

AND NOW, TO WIT THIS 26<sup>th</sup> DAY OF MAY, 2004 IT IS THE ORDER OF THE COURT that the order dated May 18, 2004 be modified **only** to reflect that the defendant shall report to the Sussex County Work Release Center on Friday, May 28, 2004 at 9:00 a.m.

All other terms and conditions shall remain the same.

The docket sheet states that defendant was notified of this modified order; however, it does not indicate whether the State was notified of it. The State contends in its briefing that the modified order of May 26, 2004, caused the Department of Correction to place defendant at Level IV, Work Release rather than Level V, and consequently, the order was illegal.

The State did not appeal from the May 26, 2004, sentencing order entered by CCP.

The appeal is not properly before this Court. Because its motion to reargue was pending at the time the State filed its appeal, the matter was not final. Linda D.P. v. Robert J. P., 493 A.2d

---

<sup>3</sup>In Superior Court Criminal Rule 39(f), it is provided in pertinent part:

The state shall file ... an application for appeal under 10 Del. C. § 9903 within 30 days of the entry of the order appealed from. An application for appeal shall contain a statement of the nature of the proceeding below and of the substantial question of law or procedure to be decided. An appeal by the state shall be on the record.

968 (Del. 1985). There must be a final order entered before an appeal may be brought pursuant to chapter 99 of 10 Del. C. State v. Cooley, 430 A.2d 789 (Del. 1981). Once CCP entered a final order, if the State considered the sentence unauthorized by or contrary to a statute, then the State could have appealed as of right pursuant to 10 Del. C. § 9902(f).<sup>4</sup>

For the foregoing reasons, the appeal is dismissed.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotary's Office  
Court of Common Pleas  
The Honorable Kenneth S. Clark, Jr.

---

<sup>4</sup>In 10 Del. C. § 9902(f), it is provided as follows:

The State shall have an absolute right to appeal any sentence on the grounds that it is unauthorized by, or contrary to, any statute or court rule, in which case the decision or result of the State's appeal shall affect the rights of the accused.