

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

STATE OF DELAWARE)
)
 v.) I.D. # 0305011518
)
PATRICK W. SMITH)
)
 Defendant.)

Date Submitted: July 9, 2004
Date Decided: November 12, 2004

O P I N I O N

Upon Defendant's Motion to Modify Sentence - DENIED
Upon Defendant's Motion for Certificate of Reasonable Doubt - DENIED

Maria Knoll, Esquire, Department of Justice, Carvel State Office Building, 820 North French Street, Wilmington, Delaware 19801, for the State of Delaware.

Patrick W. Smith, Delaware Correctional Center, 1181 Paddock Road, Smyrna, Delaware 19977, Defendant.

Joseph A. Hurley, Esquire, 1215 King Street, Wilmington, Delaware 19801, trial counsel for the Defendant.

JURDEN, J.

INTRODUCTION

On May 11, 2004 Patrick W. Smith (hereinafter referred to as “Defendant”) was found guilty in this Court of two felony counts of Unlawfully Dealing in Material Depicting a Child Engaging in a Prohibited Act in violation of Title 11, Section 1109(4) of the Delaware Code of 1974, as amended. On July 2, 2004 the Defendant was sentenced to three years at Level V, suspended after six months, for six months at Level IV, followed by six months at Level III on the first count. As to the second count, the Defendant was sentenced to three years at Level V, suspended after six months, for one year at Level III. These probations were to be served concurrently. On July 7, 2004 the Defendant filed the present Motion to Modify Sentence and on July 9, 2004, with an appeal pending, the Defendant filed a Motion for a Certificate of Reasonable Doubt. On August 11, 2004, the Supreme Court of Delaware granted the Defendant’s Motion to Remand to permit this Court to consider these two motions. The Court held oral argument on September 24, 2004.

DISCUSSION

A. Motion to Modify Sentence

According to Superior Court Criminal Rule 35(a), “the court may correct an illegal sentence at any time ... [or] reduce a sentence of imprisonment.”¹ The Supreme Court of Delaware has stated that “the purpose of this rule is to permit correction of an illegal sentence, not to re-examine ... proceedings prior to the imposition of sentence.”² A sentence is illegal when it exceeds the statutorily authorized limits, violates double jeopardy, is ambiguous or uncertain, contradictory, omits a required term or is not authorized.³ As explained below, the Defendant has failed to establish that his sentence is illegal. The Defendant’s sentence is within the sentencing guidelines for the crimes for which the Defendant was convicted and is not ambiguous, uncertain, contradictory, or without a required term or unauthorized.

¹ See Criminal Rule 35 of Superior Court.

² See *Summers v. State*, 2004 WL 2154320 (Del. 2004).

³ *Id.*

The Defendant alleges, both through Counsel and in his own handwritten letter to the Court,⁴ that he was denied a fair sentence because the Court was improperly influenced by the Deputy Attorney General's sentencing recommendation. The Defendant asserts that the sentencing Judge increased the Defendant's sentence above that recommended by the Investigative Services Officer who prepared the presentence investigation.⁵ Contrary to the Defendant's allegation, the sentencing Judge, in fact, substantially *reduced* the Defendant's sentence from that recommended in the presentence report. The recommendation in the presentence report was four years at Level V, suspended after *two years*, for two years at Level III, on each count. After carefully reviewing the record, the Court finds no modification of the Defendant's sentence is appropriate under the

⁴ See D. I. 54.

⁵ Specifically, the Defendant asserts that, "[s]olely because of the request, a/k/a sentencing recommendation of the State, the sentencing Judge amended the sentence originally considered to be fair, just and appropriate under the circumstances and to the detriment of the defendant... it is a fair assumption that since the sentencing judge was observed effecting alterations to the sentencing Order that had been previously typed after the State recommended the harsh sentence of two years' incarceration, that the sentencing Court was not reducing the sentence thought to be appropriate, fair and just." See Defendant's Motion to Modify Sentence at 3.

circumstances. The Defendant's Motion to Modify Sentence is, therefore, **DENIED.**

B. Motion for Certificate of Reasonable Doubt

The Defendant seeks to have his bail restored to that imposed prior to his sentence, pending the outcome of his appeal. In reviewing the Defendant's Motion for a Certificate of Reasonable Doubt, the Court applies a *de novo* standard of review.⁶ The Defendant's Motion is premised on an alleged error by the trial court in denying the Defendant's October 20, 2003 Motion to Suppress Evidence. The governing statute, 11 Del. C. § 4502, provides in pertinent part:

No writ of error or writ of certiorari issuing from the Supreme Court in any criminal cause shall operate as a stay of execution of the sentence of the trial court unless ... the plaintiff in error obtains from the trial court (or, if the trial court refuses, then from 1 of the Justices of the Supreme Court) *a certificate that there is reasonable ground to believe that there is error in the record which might require a reversal of the judgment below*, or that the record presents an important question of substantive law which ought to be decided by the Supreme Court.⁷

⁶ The Delaware Supreme Court has stated that "4502 contemplates an independent consideration of the matter...the statute does not seem to provide for a 'review' of the discretionary judgment made by the Trial Court...[b]ut of course in ruling on the motion, a Justice of this Court should consider the ruling by the Trial Judge and any known reasons given for it." *See Bailey v. State*, 352 A.2d 411, 414 (Del. 1976).

⁷ 11 Del. C. § 4502 (emphasis added).

In order to secure bail under this statute, a Defendant must show either a reasonable ground to believe that there is error which might require a reversal, or that there is an important question of substantive law which should be decided by the Supreme Court.⁸ These requirements are alternative avenues of relief and, therefore, a defendant may prevail if he establishes a right under either of them.⁹ Here, the Defendant makes his argument solely under the “error in the record” avenue. Accordingly, in order to grant this motion, the Court must find there is reasonable ground to believe that there was an error in the trial court’s denial of the Defendant’s Motion to Suppress Evidence which might require a reversal. The statute does not require the reviewing Judge to conclude that the trial court’s ruling *will be* reversed.¹⁰ Rather, the Court need only identify an error which *might* require a reversal.

In the present motion, the Defendant reasserts the two arguments advanced in his Motion to Suppress Evidence as a basis for the Court to find that there is a

⁸ *See Bailey* at 413.

⁹ *Id.*

¹⁰ *Id.* at 414. (emphasis added).

reasonable ground to believe an error in the record exists. First, he again alleges that the investigating detective recklessly failed to include information in the Affidavit of Probable Cause regarding the timing of the events which was crucial to a finding of probable cause. Second, he again alleges that had that information been included, the issuing Magistrate would not have found that probable cause existed. Specifically, the Defendant alleges that the investigating detective recklessly omitted the fact that the alleged victim had not resided at the Defendant's residence for approximately four months and that pornographic images were last viewed on his computer approximately a year prior to the date of arrest. Therefore, the Defendant argues, the information in the Affidavit of Probable Cause was stale and unreliable.

Dealing first with the allegation of reckless omissions, the Defendant must initially make a substantial preliminary showing that such was done with reckless disregard for the truth.¹¹ Here, the Defendant points to no evidence that the investigating detective acted in reckless disregard for the truth when drafting the

¹¹ *See Blount v. State*, 511 A.2d 1030 (Del. Super. Ct. 1986)

affidavit. At best, the Defendant elicits an admission from the detective that the time periods in question were known by the detective when the affidavit was drafted.¹² However, an affidavit need not contain all known facts at the time of drafting, but rather, it need only give rise to an inference that the items sought will be found in the place to be searched.¹³ For this reason, and taking into consideration the Judge's reasoning and ruling at the Suppression Hearing,¹⁴ the Court concludes that there is no evidence that the detective acted with a reckless disregard for the truth.

¹² See Suppression Hearing Transcript at 25.

¹³ See *Hooks v. State*, 416 A.2d 189 (Del. 1980).

¹⁴ See Suppression Hearing Transcript at 35, 36:

The Court: If you read [the probable cause sheet] carefully, its written in such a way that it's clear that [the alleged victim] doesn't live there anymore...Clearly it is not as well stated or clearly stated as might have been, to suggest that Lisa doesn't live there anymore and that she saw this when she was living there. And it could have been drafted more carefully and, certainly, the language that you've referred to in this other affidavit with regard to the Internet and the persistence of imagery on the Internet is another bit of information that would have been useful. But...I do not find that there's evidence of the reckless disregard with regard to those omissions. I don't think that there is any intent to deceive the magistrate, nor do I think that the omission probably had that effect.

Turning to the Defendant's allegation of staleness, the Court concurs with the Suppression Hearing Judge's reasoning and ruling.¹⁵ In child pornography cases, courts have repeatedly recognized that collectors of child pornography tend to retain this material.¹⁶ The Court finds no reasonable ground to believe that an error exists in the record which might require a reversal. For the foregoing reasons, Defendant's Motion for Certificate of Reasonable Doubt is **DENIED**.

IT IS SO ORDERED.

Jan. R. Jurden, Judge

¹⁵ See Suppression Hearing Transcript at 36:

The Court: If those specific words had been included with regard to the fact that she hadn't been in the house for four months and she hadn't seen anything since the end of 2002, I still think it would have been an adequate affidavit because we are talking about computers. And I think it rises to the level of common knowledge, that imagery in computers is still in existence and is persistent. And in addition, this is not evidence that is like a gun, this is not evidence that's like drugs, this is not the kind of thing that typically gets recycled. This is a product that typically stays in a house, like a refrigerator or a bed. It's there for a long time. It isn't moved in and out overnight.

¹⁶ See *U.S. v. Cox*, 190 F.Supp.2d 330 (N.D.N.Y. 2002) (stating that "[t]he observation that images of child pornography are likely to be hoarded ... is supported by common sense and the cases, ... collectors are unlikely to quickly destroy them... This proposition is not novel in either state or federal courts... child pornography collectors maintain their materials for significant periods of time.")