

**SUPERIOR COURT
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: June 13, 2005
Decided: September 29, 2005

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Re: *State v. Derrick Fuller, ID# 0305001419 & ID# 9609017656*
Upon Defendant's Motion for Sentence Modification - - DENIED

Dear Counsel:

This decides Defendant's untimely motion to modify the sentences imposed after Defendant's conviction at trial on three drug-related misdemeanors and for the violation of an earlier probation sentence. The latter sentence was imposed on July 3, 2003, and the former was imposed on December 9, 2004.

Under Superior Court Criminal Rule 35(b), absent extraordinary circumstances, "the court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed." Therefore, at the latest, the time for filing a motion for sentence reduction was March 10, 2004. The instant motion was filed on May 12, 2005, over two months after Rule 35(b)'s limitation had run.

Moreover, the court does not find any extraordinary circumstances exist that justify Defendant's failure to comply with Rule 35(b). Defendant's motion is essentially a mere request for reargument.

Defendant received prison sentences totaling two years, nine months for the misdemeanor, drug convictions. For the violation of probation, Defendant received a four year prison sentence. In total, Defendant was sentenced to six years, nine months in prison, followed by probation at decreasing levels, beginning with Level IV. The sentences Defendant received are unusually long, especially the misdemeanor sentences. They substantially exceed the SENTAC guidelines.

Here, Defendant minimizes the drug-related prosecution as "a run of the mill vehicle stop in which drugs were found in the trunk of the car." Defendant argues that there are no circumstances "that make this crime more egregious than any other drug possession case." Actually, Defendant's sentence is justified, in part, by the drug possession case's facts. More importantly, it is justified by Defendant's serious, violent, drug-related, criminal history, which shockingly demonstrates his unsuitability for probation and lesser sanctions.

The facts surrounding Defendant's convictions have been laid-out in prior decisions.¹ In summary, Defendant was indicted on June 2, 2003 for trafficking in cocaine, possession with intent to deliver cocaine, use of a vehicle for keeping controlled substances, and possession of drug paraphernalia. Those crimes allegedly occurred a month earlier.

On July 3, 2003, before trial, the court conducted a contested violation of probation hearing based on the pending indictment. A judge, other than the trial judge, found Defendant in violation of probation, as alleged. As mentioned, the court sentenced Defendant to four years in prison for the violation.

On October 9, 2003, a jury acquitted Defendant of the trafficking and possession with intent to deliver charges. Instead, it found Defendant guilty of simple possession, use of a vehicle for keeping controlled substances and possession of drug paraphernalia. The story, however, does not end there.

The court heard all the evidence presented to the jury. And although the

¹ See, e.g., *Fuller v. State*, 860 A.2d 324, 327 (Del. 2004).

jury was unable to conclude beyond a reasonable doubt that Defendant was guilty as charged, the court was easily convinced by a preponderance of the evidence that the indictment's allegations and the contested violation hearing's outcomes were correct. The full evidentiary record supported the finding that Defendant probably possessed approximately 20 grams of cocaine with intent to deliver it.

If the question had been close, which it was not, the court also learned later that important testimony offered on Defendant's behalf was untrue. The court knows that because Defendant's witness, his brother, eventually pleaded guilty and was sentenced for committing perjury at Defendant's trial. With that testimony discredited, there is no room to doubt whether Defendant violated his probation. This is so, despite the jury's more favorable verdict, which it rendered under a more exacting standard of proof. Thus, the court considers this case as far more serious than Defendant contends.

In addition, the sentence orders reflect Defendant's violent, drug-related, criminal history and his non-amenable to community-based supervision. The probation that Defendant violated in this case had begun only a few months earlier. That probation started after Defendant finished six years in prison for shooting two young men, one of whom Defendant shot repeatedly, in a drug-related crime spree. In fact, the shootings happened while Defendant was free on bail after his arrest for trafficking and other drug-related crimes in 1996, when Defendant was 17 years old.

Worse, those crimes were not Defendant's first and only brushes with the law. In 1995, Defendant was found delinquent for possession with intent to deliver marijuana, and simple possession. Moreover, when the Family Court declared Defendant non-amenable on February 7, 1997 it found, in part:

The fact that [defendant] was arrested for four sets of charges while he was on aftercare status warrants a finding of non-amenable.

The "four sets of charges," included the September 16, 1996 drug transaction, the November 14, 1996 shootings and arrests for several drug-related charges on August 1, 1996 and August 21, 1996.

In response to Defendant's violent, uncontrolled behavior in 1996-1997, Defendant was sentenced to Ferris and he received a ten year prison sentence, the first six years of which were mandatory. Defendant did well enough in prison that in

2002, TASC recommended elimination of the four year, non-mandatory prison sentence and the court granted the reduction, which was unopposed.

Only months after the court reduced Defendant's sentence he violated probation by committing acts amounting to drug trafficking. Thus, considering the entire record, it becomes apparent that after it had reduced Defendant's prison sentence by four years and after he had promptly violated probation as described above, the court simply re-imposed the four years that Defendant had originally merited and which he would have served, but for TASC's recommendation. Putting it bluntly, the court gave Defendant a huge break in 2002 and he blew it.

As to the misdemeanor sentences, they exceed the guidelines but they are not the maximum allowed. Again, they are justified by Defendant's record and his unsuitability for probation. Defendant already has shot two people and he's committed a string of serious drug offenses, while on juvenile aftercare, bail or adult probation.

Having considered Defendant's criminal history and the evidence, two judges have concluded separately that Defendant has not been rehabilitated, he is a threat to the public when he is at liberty and he is non-amenable to community-based supervision. Defendant's claim, through counsel, that: "he has learned a harsh lesson and is committed to making a positive change in the direction of his life in order to avoid further incarceration" is belied by his actual behavior. Defendant has shown that if he is released any time soon, we will read about him in the newspaper, and it will be very bad.

For the foregoing reasons, Defendant's Motion for Sentence Modification is ***DENIED***.

IT IS SO ORDERED.

Very truly yours,

FSS/lah
oc: Prothonotary