

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

STATE OF DELAWARE	)	
	)	CR. A. Nos.: IN96-12-1117;
v.	)	IN96-09-0301; IN96-12-1112;
	)	IN96-09-0307
LARRY M. JOHNSON,	)	
	)	DEF. I.D.: 9608002551
Defendant.	)	

Date Submitted: July 19, 2006  
Date Decided: December 7, 2006

*Upon Consideration of Defendant's  
Renewed Motion for Modification of Sentence*  
**DENIED.**

**ORDER**

This 7th day of December, 2006, upon consideration of the Renewed Motion for Modification of Sentence brought by Defendant, Larry M. Johnson, it appears to the Court that:

1. Defendant, Larry M. Johnson (“Johnson”), pled guilty to four counts of Burglary in the Second Degree on April 17, 1997.<sup>1</sup> Prior to his sentencing on October 3, 2003, Johnson pled guilty in Maryland and was sentenced for separate charges

---

<sup>1</sup>Docket Item, “D.I.,” 28, Ex. A.

occurring around the same time as his offenses in Delaware.<sup>2</sup> At his sentencing in Delaware, Johnson was sentenced to 2 years at supervision Level V for each of the first three counts, for a total of 6 year incarceration.<sup>3</sup> On the fourth count, Johnson was sentenced to 4 years at supervision Level V, suspended after serving 2 years at Level V, for 2 years at supervision Level IV, suspended after serving 6 months at Level IV followed by 18 months at supervision Level III.<sup>4</sup> The sentencing order also provided that “[t]his sentence is to run concurrent to any sentence now serving.”<sup>5</sup>

2. On November 26, 2003, Johnson filed a *pro se* Motion for Sentence Modification of Sentence. He asked the Court “to hold this motion *sub curia* until the petitioner feels that he has made significant progress, and until he notifies this court in writing, requesting a hearing on this matter.”<sup>6</sup>

3. Johnson’s motion was denied as moot.<sup>7</sup> Specifically, the Court directed that “[t]his case should not go on the criminal pending list. No relief is being sought

---

<sup>2</sup>D.I. 28; D.I. 31.

<sup>3</sup>D.I. 28.

<sup>4</sup> *Id.*, Ex. B

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*, Ex. D.

<sup>7</sup>D.I. 24.

by the petitioner.”<sup>8</sup> This information was entered on the docket pursuant to a direction from chambers.

4. On July 19, 2006, Johnson filed a Renewed Motion for Modification of Sentence.<sup>9</sup> He posits that his first Motion for Sentence Modification is still pending because the ruling that his motion was moot was based on an informal direction from chambers and not a formal Order of the Court.<sup>10</sup> Alternatively, Johnson argues that the Court should treat the Renewed Motion as if no motion was filed because the first motion was not considered on the merits and, specifically, the Court did not specifically address the defendant’s request that the motion be held *sub curia*.<sup>11</sup>

5. Johnson seeks reduction of his sentence on the following substantive grounds: (1) the Court may “effectuate the intent” of its original sentencing order by removing 17 months of Level V time from the order because the Department of Correction (“DOC”) began his time served on February 25, 2005 without giving him credit for the first 2 year sentence he was serving concurrently in Maryland beginning

---

<sup>8</sup>D.I. 28.

<sup>9</sup>*Id.*

<sup>10</sup>*See id.*, Ex. D (attaching notation on the docket from chambers).

<sup>11</sup>Def. Supp. Ltr. Nov. 7, 2006.

October 3, 2003;<sup>12</sup> (2) his mental health has improved;<sup>13</sup> (3) he has been a model inmate, has completed all of the required pre-release programs, has avoided any disciplinary write ups in Maryland and Delaware, and has assisted the prison community;<sup>14</sup> (4) his 81 year old father suffers from two forms of cancer and his 80 year old mother cannot care for her husband alone;<sup>15</sup> (5) he will not re-integrate into society with ease when he is released at age 62 in 2012 because gainful employment will be difficult to find and his parents may not be able to help him;<sup>16</sup> and (6) he suffers from serious health problems - an enlarged prostate, kidney stones, and back problems - and must seek surgical treatment for his prostate outside the DOC.<sup>17</sup>

6. On August 3, 2006, the Court sent a letter to counsel to convene a hearing concerning the possible illegality of the sentence based on an issue not raised in Johnson's motion.<sup>18</sup> Specifically, as to criminal action number 96-12-1117, the

---

<sup>12</sup>D.I. 28.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

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

<sup>17</sup>*See* D.I. 28 (“In January, 2006, Dr. Durst, at the Delaware Correctional Center, advised Johnson that his prostate cannot be managed medically and referred him to an outside urologist. [According to Mr.] Johnson [he] has not yet seen the urologist despite follow-up requests and rescheduling of appointments.”).

<sup>18</sup>D.I. 30.

sentencing order “appear[ed] to run afoul of 11 *Del. C.* § 3901(d) (“Section 3901(d)”) which states: ‘no sentence of confinement of any criminal defendant by any court of this State shall be made to run concurrently with any other sentence of confinement imposed on such criminal defendant.’”<sup>19</sup>

7. On August 17, 2006, the Court held a teleconference during which the parties agreed to modify the sentence imposed for criminal action number 96-12-1117 to effectuate the Court’s original intent and to comply with Section 3901(d).<sup>20</sup>

8. On October 16, 2006, the parties submitted a Stipulated Revised Sentencing Order. The sentencing order as to Cr. A. No. 96-12-1117 now reads: “Effective October 3, 2003, the defendant is placed in the custody of the Department of Correction for 2 years at supervision Level 5, suspended immediately for two years at supervision Level 2, such probation to be concurrent with the remaining counts.”<sup>21</sup>

9. The Court held Johnson’s request for further modification in abeyance pending the Supreme Court of Delaware’s decision in *State v. Walls*, No. 214, 2006, which the parties thought might address the question of whether the Court can “book mark” a timely filed motion to modify a sentence in a manner that allows the Court

---

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

<sup>20</sup>D.I. 31.

<sup>21</sup>D.I. 32.

to consider circumstances that arise beyond the 90 day deadline set forth in Rule 35.<sup>22</sup> Ultimately, the Supreme Court decided the case on other grounds and did not address the “book mark” issue.<sup>23</sup>

10. The State opposes Johnson’s Renewed Motion for several reasons. First, the State argues that the Superior Court cannot bookmark a motion *sub curia* “for the purpose of delaying decision on a Rule 35(b) motion, even if timely made, for an indefinite period of time, in contemplation of future events which may or may not occur.”<sup>24</sup> This practice, the State contends, is contrary to the public policy considerations inherent in the 90 day time limit of Rule 35(b) and the Truth in Sentencing Act because the Court would, in effect, be administering judicially created parole.<sup>25</sup> Second, the State argues that Johnson’s motion should be denied because it fails to meet the requirements set forth in Rule 35(b).<sup>26</sup> In particular, Johnson’s motion was not timely because it was filed 2 ½ years after he was sentenced. The State argues that the lack of a formal Order of the Court finding that Johnson’s first motion was moot does not signify that the motion is still pending in 2006 because the

---

<sup>22</sup>*Id.*

<sup>23</sup>*State v. Walls*, 2006 WL 2950491, at \*1-2 (Del. Oct. 17, 2006).

<sup>24</sup>D.I. 31.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

Court's order is clearly reflected in the docket and its intent clearly stated in the docket entry - Johnson was not entitled to relief because he did not request relief.<sup>27</sup> Thus, according to the State, Johnson must make a showing of extraordinary circumstances to justify a modification of his sentence.<sup>28</sup> Because he has not demonstrated a change in circumstances considered extraordinary by the Delaware courts, his motion must be denied on the merits.<sup>29</sup>

11. The Court may modify a sentence pursuant to two sources of authority: its statutory authority and its inherent authority.<sup>30</sup> Under its statutory authority, the Court may modify a sentence under 11 *Del C.* § 4217 or Superior Court Criminal Rule of Procedure 35(b).<sup>31</sup> Section 4217 will be invoked only when the DOC files an application to modify the sentence after certifying “that the release of the defendant shall not constitute a substantial risk to the community or the defendant’s own self.”<sup>32</sup> Section 4217 is not applicable here because the DOC has not moved to modify Johnson’s sentence.

---

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*State v. Sloman*, 886 A.2d 1257 (Del. 2006); *Jones v. State*, 825 A.2d 238 (Del. 2003).

<sup>31</sup>11 *Del C.* § 4217 (2005); *Jones*, 825 A.2d at 238.

<sup>32</sup>§ 4217(b).

\_\_\_\_\_12. Rule 35(b) is triggered when the defendant moves the Court to reduce or modify his sentence. The Court may consider a Rule 35(b) motion to reduce or modify a sentence if the motion is made within 90 days after the sentence is imposed or in extraordinary circumstances.<sup>33</sup> The purpose of placing such a heavy burden on the defendant to show extraordinary circumstances after 90 days have passed from the date of his sentence is to uphold the finality of sentences.<sup>34</sup> Even where extraordinary circumstances exist, “[t]he court will not consider repetitive requests for reduction of sentence.”<sup>35</sup>

13. In addition to statutory grounds, a sentencing judge has the “inherent authority [independent of statutory mechanisms] to modify the initial sentence based

---

<sup>33</sup>Super. Ct. Crim. R. 35(b). *See e.g. State v. DeRoche*, 2003 WL 22293654, at \*3 (Del. Super. Ct. Aug. 29, 2003)(granting the defendant’s motion for reduction of sentence because the DOC’s failure to give adequate medical care in accordance with 11 *Del C.* § 6536 was an extraordinary circumstance); *State v. Liket*, 2002 WL 31133101, at \*2 (Del. Super. Ct. Sept. 25, 2002) (rejecting defendant’s rehabilitation, absence of a substantial criminal record prior to the offense for which he was sentenced because they are insufficient grounds” to reduce a sentence under Rule 35(b)); *id.* (finding that familial hardship and financial difficulties are not extraordinary circumstances because the defendant should consider these things before engaging in criminal conduct); *State v. Lewis*, 2000 WL 33113932, at \*3 (Del. Super. Ct. 2000) (finding extraordinary circumstances justifying the defendant’s motion for reduction of sentence in part because the nature of the original sentence was to provide for a long probationary period).

<sup>34</sup>*See* 1989 Truth in Sentencing Act, 67 *Del. Laws*, c.130 § 2 (1989) (explaining the General’s Assembly’s legislative intent, “to achieve truth in sentencing by assuring that the public, the State and the court will know that the sentence imposed by the court will be served by the defendant and that the defendant will know what the actual effect of the sentence will be.”).

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



on the terms of the original sentence itself.”<sup>36</sup> The Court may exercise its inherent authority to modify a sentence if the sentence contained ambiguous provisions that were not carried out in accordance with the court’s intent.<sup>37</sup> The Court may also modify a sentence pursuant to its inherent authority when it expressly and affirmatively retains its authority over the original and timely filed Rule 35(b) motion to ensure that the primary goal of the sentence is preserved.<sup>38</sup>

---

<sup>36</sup>*Sloman*, 886 A.2d at 1265. See also *State v. Guthman*, 619 A.2d 1175, 1178 (Del. 1993) (internal citations omitted) (“[C]ourts are generally afforded inherent powers to undertake whatever action is reasonably necessary to ensure the proper administration of justice. This Court has consistently held that Delaware courts have the inherent power to vacate, modify or set aside their judgments or orders.”); *Tyndall v. Tyndall*, 214 A.2d 124, 125 (Del. 1965) (ordering trial court to vacate its order dismissing a divorce action because “a possible misunderstanding in the minds of the parties” is not sufficient to invoke the court’s inherent power); *Lyons v. Delaware Liquor Comm’n*, 58 A.2d 889, 895 (Del. 1948) (affirming liquor commissioner’s decision to vacate prior decision regarding retail package liquor license because “the Commission’s power to make a decision implies the power to vacate it, where cause is shown, within a limited period.”).

<sup>37</sup>*Sloman*, 886 A.2d at 1265. In *Sloman*, the sentencing order did not specify the court’s intent that a TASC evaluation and recommendation for substance abuse treatment occur after the defendant served 5 ½ year at Level V. *Id.* at 1258. The State moved to vacate a subsequent order modifying the defendant’s sentence (issued by another judge) because the modification allowed the defendant to flow down to Level IV supervision prior to serving 5 ½ years at Level V. *Id.* The Supreme Court affirmed the denial of the State’s motion, stating “where a judge, in his sentencing Order, reserves that authority to modify a sentence upon the occurrence of certain conditions, Rule 35(b) is not implicated at all.” *Id.* at 1265.

<sup>38</sup>*State v. Walls*, 2006 WL 2950491, at \*1-2 (Del. Oct. 17, 2006). In *Walls*, the court granted the defendant’s fourth Rule 35(b) motion to modify her sentence after noting that it would “retain jurisdiction” in the three prior orders denying her motions (the first was filed within the 90 day deadline). *State v. Walls*, 2006 WL 1067272, at \*1-2 (Del. Super. Ct. Mar. 31, 2006). The Supreme Court reasoned that the sentencing judge “treated this sentence as subject to further consideration . . . [and the] denials were without prejudice.” *Id.* at \*2-3. Accordingly, the court affirmed the modification because “[t]he Superior court . . . retained jurisdiction to modify Wall’s sentence based upon its inherent authority to modify a sentence, and did not rely upon Rule 35(b).” *Walls*, 2006 WL 2950491, at \*2.

14. The issue the parties have presented to the Court is whether the defendant must demonstrate extraordinary circumstances as a predicate to relief because his request for modification comes beyond Rule 35(b)'s 90 day deadline, or whether the Court will consider the motion timely filed because the defendant's November 26, 2003 motion to modify is still pending.<sup>39</sup> This, of course, assumes that the Court would be inclined to modify its original sentence if it was not constrained by the "extraordinary circumstances" standard set forth in Rule 35(b). The assumption is flawed. In this regard, the Court considers whether it would have sentenced the defendant any differently (at the outset or within 90 days of the sentencing) had it been aware of the factual bases that defendant has proffered in support of his motion to modify. The Court has considered its original sentencing order and the facts giving rise to that order, including, but not limited to, the defendant's lengthy criminal history, the circumstances surrounding the offenses and

---

<sup>39</sup>The Court notes that this court has, in the past, delayed its rulings on timely filed motions to modify sentence, or has denied such motions without prejudice, so that circumstances that may arise beyond the 90 day deadline might be presented to the court in support of a modification request. *See e.g. State v. Neal*, Del. Super., ID No. 0408023122, Toliver, J. (Jan. 17, 2006) (ORDER) (denial of the defendant's motion for reduction of sentence was "without prejudice. [Defendant] may refile after one year of the original date sentence was imposed."); *State v. Reed*, Del. Super., ID No. 0311002871, 0403024802, Carpenter, J. (Dec. 17, 2004) (Letter to counsel) (indicating the court's preference to deny the defendant's motion for reduction of sentence without prejudice and allow the defendant to refile it on or before July 20, 2005); *State v. Castro*, Del. Super., ID No. 0203021354, Carpenter, J. (July 2, 2003) (ORDER) (denying the defendant's motion for reduction of sentence "without prejudice to the defendant to refile within one year of the date of sentencing."). As discussed below, the Court need not pass on the propriety of such decisions because the issue is not dispositive here.

the ineffectiveness of prior efforts to rehabilitate the defendant with lesser sanctions. In light of these factors, the Court cannot conclude that it would have sentenced the defendant any differently had it known that his mental health would improve, he would be a model inmate, his father would suffer from cancer, and/or he would suffer from his own health problems. Moreover, the defendant's anticipated difficulty re-integrating into society after his release from prison in 2012 is a factor he should have considered before committing the crimes.<sup>40</sup> Thus, regardless of whether the Court considers the current application under an extraordinary circumstances standard under Rule 35, without that restriction (as a timely filed motion to modify under Rule 35), or under its inherent authority to modify sentences to accomplish its original intent, the defendant has not satisfied the Court that a sentence modification is appropriate.<sup>41</sup>

15. Based on the foregoing, the Renewed Motion for Modification of Sentence is **DENIED**.

**IT IS SO ORDERED.**

---

Judge Joseph R. Slights, III

Original to Prothonotary

---

<sup>40</sup>*See State v. Liket*, 2002 WL 31133101, at \*2. The Court also notes that the defendant may seek the assistance of his probation officer or seek to participate in the Court's re-entry program if he is concerned about "reintegration" issues.

<sup>41</sup>The Court has already modified the sentence in Cr. A. No. 96-12-1117 to comport with its original intent that the defendant's jail sentence in Maryland for similar offenses serve as a mitigating circumstance for his sentencing here in Delaware.