

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEE ROSS,	§	
	§	No. 491, 2001
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in
v.	§	and for Sussex County in
	§	VS88-07-0107
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 88S01761DI

Submitted: May 1, 2002

Decided: June 13, 2002

Before **HOLLAND, BERGER** and **STEELE**, Justices.

ORDER

This 13th day of June 2002, upon consideration of the appellant’s opening brief and the State’s motion to affirm, it appears to the Court that:

(1) On January 20, 1989, Lee Ross pleaded guilty to Unlawful Sexual Intercourse in the Third Degree. Ross was sentenced to twenty years at Level V, suspended after ten years for ten years at Level II probation.

(2) Ross was thrice adjudged guilty of violation of probation (“VOP”) and was sentenced for those judgments on February 5, 1999, July 23, 1999 and April 7, 2000. On February 5, 1999, the Superior Court continued Ross’ probation at Level III. On July 23, 1999, the Superior Court

sentenced Ross to ten years at Level V, suspended for one year at a residential substance abuse treatment program (RSATP). On April 7, 2000, the Superior Court sentenced Ross to ten years at Level V, suspended for six months at Level IV home confinement, followed by six months at Level III, followed by nine years at Level II probation.

(3) On August 7, 2001, Ross was adjudged guilty of VOP for a fourth time. He was sentenced to ten years at Level V, referred after two years to the Key Program, suspended upon successful completion of the Key Program for one year at a Level IV RSATP, suspended upon successful completion of the RSATP, for one year at Level III aftercare.

(4) On September 6, 2001, Ross moved to modify/restructure the sentence imposed for his fourth VOP. Ross amended his motion on the same day. In his motion as amended, Ross complained that the sentence imposed for his fourth VOP, namely the two years ordered to be served at Level V prior to the Key Program, was too severe and was contrary to his probation officer's recommendation. Ross requested that the Superior Court allow him to enter substance abuse treatment right away. By order dated September 7, 2001, the Superior Court denied Ross' request to modify /restructure his sentence.

(5) On appeal, Ross contends that he has already served twelve and one-half years of his original twenty-year sentence and that, as a result, the ten years imposed for his fourth VOP exceeds the seven and one-half year balance that remains on his sentence. In his calculation, Ross includes as creditable time: seven years he served at Level V, four years on parole, one year at Level IV home confinement, and six months at Level IV work release. Ross did not raise this issue in the Superior Court; accordingly, we review Ross' claim only for plain error.¹

(6) We find no plain error. It is well settled that, upon finding a VOP, the Superior Court is authorized to reimpose any previously suspended prison term.² Reimposing the suspended portion of the original sentence upon a subsequent finding of VOP inherently credits a defendant with any time the defendant already has served on the unsuspended portion of the original sentence.³ Moreover, title 11, section 3901(c) of the Delaware Code requires that a person be credited with “any period of actual incarceration.”

¹Supr. Ct. R. 8.

²*Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999); *Ingram v. State*, 567 A.2d 868, 869 (Del. 1989); Del. Code Ann. tit. 11, § 4334(c).

³*See Harris v. State*, 2001 WL 257797 (Del. Supr.).

(7) In this case, the Superior Court originally sentenced Ross to twenty years at Level V incarceration, suspended after ten years for Level II probation. Upon a subsequent finding that Ross was guilty of VOP, the Superior Court was authorized to reimpose the ten-year suspended portion of Ross' original sentence. At both the second and third VOP hearings, the Superior Court reimposed, but then suspended, the ten years remaining on Ross' original twenty-year sentence.⁴ Thus, the reimposition of ten years at Ross' fourth VOP hearing did not exceed the maximum punishment allowed. Ross' claim to the contrary is without merit.

(8) It is manifest on the face of Ross' opening brief that this appeal is without merit. The issues raised are clearly controlled by settled Delaware law. To the extent the issues on appeal implicate the exercise of judicial discretion, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁴At Ross' first VOP hearing, the Superior Court continued probation at Level III.