

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN F. WHITEMAN,	§
	§
Defendant Below-	§ No. 618, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. IN89-03-1597
Plaintiff Below-	§
Appellee.	§

Submitted: March 21, 2003
Decided: April 22, 2003

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

ORDER

This 22nd day of April 2003, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Benjamin F. Whiteman, filed an appeal from the Superior Court's October 25, 2002 order denying his motion for modification of sentence pursuant to Superior Court Criminal Rule 35. We find no basis for the appeal. Accordingly, we AFFIRM.

(2) In 1982, Whiteman was convicted of Robbery in the Second Degree. In 1983, he was convicted of Possession of a Deadly Weapon by a Person Prohibited. Finally, in 1985, Whiteman was convicted of Escape in the

Second Degree. On April 14, 1987, Whiteman pleaded guilty to Burglary in the Second Degree and the Superior Court declared Whiteman to be an habitual offender, as reflected in his plea agreement. Instead of sentencing Whiteman to life in prison, as was authorized by statute,¹ the Superior Court sentenced him to 10 years incarceration at Level V, to be suspended after 3 years for 7 years of probation. In denying Whiteman's subsequent motion for sentence modification, the Superior Court noted that Whiteman would most likely receive a life sentence if he committed another felony.

(3) In 1989, Whiteman was convicted by a Superior Court jury of Unlawful Sexual Penetration in the Third Degree and was sentenced to life in prison as an habitual offender. Later, Whiteman unsuccessfully pursued a direct appeal of his conviction and sentence, as well as two postconviction motions.² The Superior Court's denial of Whiteman's previous motion for modification of sentence pursuant to Rule 35 was affirmed by this Court on appeal.³

¹DEL. CODE ANN. tit. 11, § 4214(a).

²*Whiteman v. State*, Del. Supr., No. 40, 2001, Steele, J. (Oct. 23, 2001).

³*Id.*

(4) In this appeal, Whiteman argues that: a) he should not have been sentenced as an habitual offender because he never admitted to committing the predicate felonies; and b) his habitual offender status is invalid because it is premised on at least one criminal offense committed in 1976 when he was a juvenile.

(5) Whiteman's motion is unavailing. If considered as a motion to correct sentence, it fails because there is no evidence that Whiteman's sentence is illegal.⁴ If considered as a motion for sentence reduction, it is time-barred.⁵ Moreover, Whiteman's first claim was presented and rejected in his previous motion for modification of sentence and it is, therefore, barred as repetitive.⁶ His second claim was not presented to the Superior Court in the first instance and, therefore, Whiteman cannot raise it for the first time on appeal.⁷ The claim is factually unsupported in any case, since the record reflects that Whiteman's habitual offender status was based upon criminal offenses beginning in 1982 when he was no longer a minor.

⁴SUPER. CT. CRIM. R. 35(a); *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

⁵SUPER. CT. CRIM. R. 35(b).

⁶SUPER. CT. CRIM. R. 35(b); *Brittingham v. State*, 705 A.2d at 579.

⁷SUPR. CT. R. 8.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice