

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANCIS J. BROWN,	§
	§ No. 215, 2009
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 9912004296
	§
Plaintiff Below-	§
Appellee.	§

Submitted: April 27, 2009

Decided: June 5, 2009

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 5th day of June 2009, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Francis J. Brown, filed an appeal from the Superior Court's March 30, 2009 order denying his motion for sentence modification pursuant to Superior Court Criminal Rule 35. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court's

judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

(2) The record reflects the following. In July 1996, Brown pleaded guilty to Burglary in the Second Degree. He was sentenced to 5 years incarceration at Level V, to be suspended after 1 year for 4 years of probation. In October 1999, Brown's sentence was modified to 5 years at Level V, to be suspended after 9 months for 4 years and 3 months of probation.

(3) In February 2000, Brown was charged with Burglary in the Second Degree and Felony Theft. He pleaded guilty to Burglary in the Second Degree and was sentenced to 8 years at Level V. In 2003, Brown received a modified sentence of 8 years at Level V, to be suspended after 3 years for 5 years of decreasing levels of supervision. Brown's 1999 sentence and his 2003 sentence were ordered to run consecutively.

(4) In August 2003, an administrative warrant was issued charging Brown with a violation of probation ("VOP"). Brown, who had been released on bail, failed to appear at the hearing. A *capias* was issued for his arrest. Brown finally surrendered to Delaware authorities in December 2008. At a VOP hearing in February 2009, the Superior Court revoked

¹ Supr. Ct. R. 25(a).

Brown's 2003 probationary sentence and re-sentenced him to 1 year at Level V. The Superior Court discharged Brown from his 1999 probationary sentence as unimproved.

(5) The record further reflects the following. In October 2006, Brown was arrested in Virginia and charged with criminal offenses under the Virginia criminal code and with being a fugitive. The charges were resolved in December 2006. In February 2008, Brown again was arrested in Virginia and again charged with criminal offenses under the Virginia criminal code and with being a fugitive. Those charges were resolved in March 2008.

(6) In this appeal from the Superior Court's denial of his motion for sentence modification, Brown claims that he was erroneously denied Level V credit for time spent in prison in Virginia while he was awaiting extradition to Delaware, first in 2006 and again in 2008.

(7) Under Delaware law, an inmate must be credited with "any period of actual incarceration" when calculating the amount of Level V time he has served on a Level V sentence.² However, that calculation does not include any period of incarceration on an unrelated sentence, or, in particular, a sentence served in another jurisdiction.³ As such, Brown's

² Del. Code Ann. tit. 11, § 3901(c); *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

³ Del. Code Ann. tit. 11, § 3901(b); *Fradley v. State*, Del. Supr., No. 269, 2008, Berger, J. (Sept. 16, 2008); *Brisco-Bey v. State*, Del. Supr., No. 40, 1993, Walsh, J. (Mar. 15, 1993).

claim that he is entitled to credit against his Delaware Level V sentences for time spent incarcerated in Virginia on Virginia charges is without merit.

(8) To the extent that Brown argues he is entitled to additional Level V credit for the time he spent incarcerated in Virginia on charges of being a fugitive from justice in Delaware, we conclude that he has failed to demonstrate any such entitlement. To begin with, while Brown alleges that he was “awaiting extradition” while incarcerated in Virginia, the record, rather, reflects that he was serving sentences in Virginia based upon Virginia criminal charges. Moreover, when the Superior Court sentenced Brown for the VOP in February 2009, it sentenced him to 1 year at Level V, substantially less than the suspended period of 5 years remaining on his 2003 sentence. As such, Brown has, in essence, already received any “credit” to which he arguably is entitled and his claim of entitlement to additional credit must fail.

(9) It is manifest on the face of the opening brief that the appeal is without merit because the issues presented are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice