IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTOINE FOREMAN,	§	
	§	No. 675, 2009
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for Sussex County
v.	§	
	§	
STATE OF DELAWARE,	§	ID No. 0904019745
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: April 5, 2010
Decided: May 11, 2010

Before **STEELE**, Chief Justice, **BERGER**, and **RIDGELY**, Justices.

O R D E R

This 11th day of May 2010, it appears to the Court that:

(1) Defendant-Appellant Antoine Foreman ("Foreman") appeals from the Superior Court's decision sentencing him to, collectively, sixteen years imprisonment followed by one year of Level IV home confinement and eighteen months at Level III probation. Foreman contends that the Superior Court, in determining his sentence, impermissibly considered the criminal disposition of his family. We find no merit to his argument and affirm.

(2) Foreman was arrested on April 23, 2009, and charged with possession of drug paraphernalia, possession with intent to deliver cocaine and maintaining a dwelling. His arrest triggered a violation of probation on his previous convictions

of trafficking in cocaine, maintaining a dwelling and conspiracy in the second degree. If convicted, Foreman faced a sentence of life imprisonment as an habitual offender.[1]

(3) Foreman entered into a plea agreement under which he agreed to plead guilty to one count of possession with intent to deliver cocaine in return for the State entering a *nolle prosequi* on the remaining two charges, and recommending that his probation violations be discharged. Further, the State agreed to move to have Foreman declared an habitual offender pursuant to 11 *Del. C.* § 4214(a) rather than § 4214(b).[2] On August 13, 2009, the Superior Court accepted his plea. The Superior Court declared Foreman to be an habitual offender and ordered that he be sentenced pursuant to 11 *Del. C.* § 4214(a). The Superior Court then ordered a presentence investigation.

(4) On October 20, 2009, Foreman appeared before the Superior Court for sentencing. The Superior Court reviewed the presentence investigation, Foreman's record of prior convictions and considered Foreman's sentencing statement. The Superior Court noted the aggravating factors: (1) that Foreman needed correctional treatment; (2) his custody status at the time of the offense; (3) his statutory habitual offender status; and (4) his repetitive criminal conduct. Before referring to

[1] 11 *Del. C.* § 4214(b).
[2] Pursuant to § 4214(a) the maximum sentence is life in prison, whereas under § 4214(b), there is a mandatory life sentence.

Foreman's criminal history[3] during the sentencing hearing, the Superior Court asked the prosecutor about Foreman, "[i]s this one of the illustrious Foreman family?" The prosecutor responded, "[y]es." Before imposing Foreman's sentence, the Superior Court stated, "[t]hey have a cottage industry. They have a drive-thru where you can drive in a circle behind the house and get to a window." There was no objection made to the Superior Court's inquiry or remark about Foreman's family.

(5) On Foreman's conviction of possession with intent to deliver, the Superior Court imposed a sentence of fifteen years at Level V, with credit for time served. On Foreman's violation of probation on the trafficking charge, the Superior Court imposed a sentence of ten years at Level V, suspended after one year for one year of Level IV Home Confinement, followed by eighteen months at Level III. The remaining violations of probation were discharged. This appeal followed.

(6) "This Court, in the exercise of its appellate authority, will generally decline to review contentions not raised below and not fairly presented to the trial court for decision."[4] "This Court may excuse a waiver, however, if it finds that the

[3] "There was a possession with intent in '96. Possession '99, which was kicked up to 3 years. He got Key/Crest on that. You got three years under 4204(k) on that. And then we get out, violation of probation, violation of probation. Then we do the trafficking three years ago. While that was pending, you got a maintaining, it looks like. And now we have got this."

[4] SUP. CT. R. 8.; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); *Jenkins v. State*, 305 A.2d 610 (Del. 1973).

trial court committed plain error requiring review in the interests of justice."[5] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[6] "Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[7]

(7) Appellate review of a criminal sentence is generally limited in Delaware:

> Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature. Thus, in reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicia of reliability. In reviewing a sentence within the statutory guidelines, this Court will not find error unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind.[8]

(8) Furthermore, "[i]n Delaware, a sentencing court has broad discretion to consider information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which the defendant was

[5] SUP. CT. R. 8.; *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).
[6] *Wainwright*, 504 A.2d at 1100; *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982).
[7] *Wainwright*, 504 A.2d at 1100; *Bromwell v. State*, 427 A.2d 884, 893 n.12 (Del. 1981).
[8] *Fink v. State*, 817 A.2d 781, 790 (Del. 2003) (internal footnotes omitted).

convicted.[9] Foreman argues that, despite this broad discretion to consider information, "a familial disposition shown by the criminal history of other members of a defendant's family is not a permissible factor for a court to take into account in sentencing a defendant."

(9) Foreman relies largely on *Fuller v. State*.[10] In *Fuller*, we held that it was impermissible for a trial court to enhance a sentence based merely on a "family tie."[11] However, *Fuller* is distinguishable from this case. In *Fuller*, the trial judge "expressly indicated that it was [the brother's] perjury that justified the sentence he imposed, and that Fuller's sentence would not have been as severe if the trial judge were not allowed to consider Ean's perjured testimony."[12] Although the trial judge in this case made a passing remark about the Foreman family, he gave no express or even implied indication that the actual sentence was based upon Foreman's family tie. Rather, the sentence was based specifically upon the presence of aggravating factors recognized by SENTAC.[13]

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[9] *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).
[10] 860 A.2d 324 (Del. 2004).
[11] *Id.* at 334.
[12] *Id.* at 327.
[13] The trial judge said: "As to the new charge, 09-04-1285, taking into consideration the aggravators, taking into consideration your continued desire to stay in the business. . .."

(10) In *Ward v. State*, this Court affirmed a sentence despite a remark made by the trial judge about the jury's verdict in an unrelated hearing.[14] We held:

> Despite the judge's comments about the jury's verdict, we see no indication that he was biased against Ward. The record of the sentencing hearing indicates that the judge's decision to impose the maximum sentences was the result of a logical and conscientious process, and was based specifically upon the presence of aggravating factors recognized by SENTAC.[15]

Similarly, the record here indicates that the trial judge's decision was the result of a "logical and conscientious process" based specifically on the presence of aggravating factors recognized by SENTAC. Four aggravating factors were expressly enumerated prior to rendering the sentence that provide ample justification for the sentence imposed.

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[14] *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989). The trial judge remarked that the defendant's acquittal on charges of murder and robbery was "the most bizarre verdict in the history of jurisprudence." *Id.*
[15] *Id.* at 1298.