

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES BOYER,	§
	§
Defendant Below-	§ No. 727, 2009
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0206001272
Plaintiff Below-	§
Appellee.	§

Submitted: March 23, 2010

Decided: May 18, 2010

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

ORDER

This 18th day of May 2010, upon consideration of appellant's opening brief and the State's motion to affirm, it appears to the Court that:

(1) The appellant, James Boyer, filed this appeal from a Superior Court judgment denying his motion for modification of sentence. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Boyer's opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that, in December 2002, Boyer pled no contest to multiple criminal charges, including trafficking, possession of a firearm during the commission of a felony, maintaining a vehicle, possession

with intent to deliver cocaine, and second degree conspiracy. The Superior Court sentenced Boyer in accordance with his plea agreement to a total period of twenty-three years at Level V incarceration, to be suspended after serving thirteen years and upon successful completion of the Key Program for decreasing levels of supervision. The first eight years of his sentence are mandatory. Boyer did not appeal.

(3) Instead, Boyer filed several unsuccessful motions seeking postconviction relief or modification of sentence. In November 2009, Boyer filed his fifth motion for sentence modification. Boyer argued that his sentence for possession with intent to deliver exceeded the SENTAC guidelines. He also requested relief from the Key Program based on other drug counseling programs he had attended. The Superior Court denied his motion on November 19, 2009 on the grounds that the motion was untimely and Boyer had failed to establish extraordinary circumstances to excuse his untimely filing.¹ On November 30, 2009, Boyer wrote to the Superior Court asking for advice on how to establish “extraordinary circumstances” to warrant a modification of sentence. The Superior Court treated his letter as

¹ Del. Super. Ct. Crim. R. 35(b) (2010) (providing that the Superior Court will consider a sentence modification motion “made more than 90 days after the imposition of sentence only in extraordinary circumstances...”)

another request for sentence modification and denied it on December 7, 2009. It is from this judgment that Boyer now appeals.

(4) We find no merit to Boyer’s appeal. His motion for sentence modification clearly was repetitive and untimely. We find no error or abuse in the Superior Court’s conclusion that Boyer’s prison rehabilitation efforts were expected and did not constitute “extraordinary circumstances” sufficient to excuse his untimely motion.²

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

² See *Allen v. State*, 2007 WL 1519030 (Del. May 25, 2007).