

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE M. MOORE,	§
	§
Defendant Below-	§ No. 289, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID Nos. 0504021045 and
Plaintiff Below-	§ 0505016449
Appellee.	§

Submitted: June 18, 2010
Decided: August 4, 2010

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

ORDER

This 4th day of August 2010, upon consideration of the appellant’s opening brief, the State’s motion to affirm, and the record below, it appears to the Court that:

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

(2) The record reflects that Moore pled guilty in 2006 to two counts of first degree robbery, two counts of second degree robbery, possession of a

firearm during the commission of a felony, and second degree conspiracy. The charges stemmed from two different indictments. In exchange for his guilty plea, the State dismissed the balance of the charges against Moore. On April 7, 2006, the Superior Court sentenced Moore to a total period of twenty years at Level V incarceration to be suspended after serving eleven years for decreasing levels of supervision.¹ Moore did not appeal. Instead, he filed a motion for modification of sentence, which was denied on May 17, 2006. He did not appeal that ruling. In 2008, Moore filed a second unsuccessful motion for reduction or modification of sentence.

(3) In April 2010, Moore filed his third motion for modification of sentence. In the motion he filed in Superior Court, Moore argued that his sentence is illegal because it violates “the suspended sentence doctrine.” Specifically, he asserted that it was illegal for the Superior Court to order that he be held at Level V pending space availability at Level IV. Moore contended that he should be released from custody after he has served the eleven-year, Level V portion of his sentence. The Superior Court denied

¹ Specifically, the Superior Court sentenced Moore on each first degree robbery count to 5 years at Level V, to be suspended after serving 3 years mandatory at Level V for 1 year at Level IV to be held at Level V until space is available at Level IV. On the firearm count, Moore was sentenced to serve a 3 year mandatory term at Level V. On each second degree robbery count, Moore was sentenced to serve 3 years at Level V, to be suspended after serving 1 year at Level V for 2 years at Level IV, to be suspended after serving 1 year at Level IV for 1 year at Level III. On the second degree conspiracy, Moore was sentenced to serve 1 year at Level V to be suspended entirely for 1 year at Level III.

Moore's motion on the grounds that it was untimely and repetitive and because his sentence is not illegal.

(4) In his opening brief on appeal, Moore argues that the Superior Court's order failed to consider the merits of his motion for correction of sentence under Superior Court Criminal Rule 36,² or alternatively under Rule 35(a),³ and, instead, improperly, treated his motion as if it was a motion for sentence reduction or modification under Rule 35(b).⁴ Moore argues that the matter should be remanded to the Superior Court for consideration of the merits of his motion under Rule 36.

(5) In the first instance, we note that the motion Moore filed in the Superior Court was a motion for correction of sentence under Rule 35(a). To the extent Moore now argues that the Superior Court erred in failing to consider his motion as a motion for correction of a clerical mistake under

² Superior Court Criminal Rule 36 provides, "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."

³ Superior Court Criminal Rule 35(a) provides, "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence."

⁴ Superior Court Criminal Rule 35(b) provides that the court may reduce a prison sentence upon a motion made within 90 days of sentencing. Rule 35(b) also permits the court to reduce the term or conditions of partial confinement or probation at any time.

Rule 36, we find no plain error.⁵ Moore’s motion did not assert that his sentence contained a clerical mistake. Accordingly, the Superior Court did not err in failing to consider his motion under Rule 36.

(6) While it appears that the Superior Court denied Moore’s motion for correction of illegal sentence, in part, on the inapplicable grounds that it was untimely filed and repetitive under Rule 35(b), we nonetheless affirm the trial court’s judgment denying the motion on the independent and alternative ground that the motion lacked merit.⁶

(7) A motion for correction of an illegal sentence under Rule 35(a) is very narrow in scope.⁷ Rule 35(a) permits relief when the sentence exceeds statutorily-authorized limits or violates the Double Jeopardy Clause.⁸ A sentence also is illegal if it “is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not

⁵ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (holding that the Supreme Court generally will decline to review claims on appeal that were not presented to the trial court in the first instance unless the error is plain).

⁶ *Unitrin, Inc. v. American Gen’l Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (noting that the Delaware Supreme Court may affirm a judgment on the basis of a different rationale than that articulated by the trial court).

⁷ *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

⁸ *Id.* (citing *United States v. Pavlico*, 961 F.2d 440, 443 (4th Cir. 1992)).

authorize.”⁹ The substance of Moore’s argument is that his sentence is internally contradictory because the Superior Court ordered that Moore continue to be held at Level V incarceration, even after he reached the suspended portion of his sentence, pending space availability at Level IV.

(8) We find no merit to Moore’s contention. This Court previously has held that the “[i]mposition of the condition that a prisoner continue to be held at Level V pending space availability at Level IV is within the Superior Court’s discretion.”¹⁰ If, after completing the Level V portion of his sentence, Moore continues to be held at Level V awaiting available space at Level IV, he may file a motion requesting the sentencing judge to review his status to ensure that his “degree of confinement is in conformity with the intent of the original sentencing plan.”¹¹

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

BY THE COURT:

/s/ Randy J. Holland
Justice

⁹ *Id.* (quoting *United States v. Dougherty*, 106 F.3d 1514, 1515 (10th Cir. 1997)).

¹⁰ *Defoe v. State*, 750 A.2d 1200, 1202 (Del. 2000).

¹¹ *Id.*