

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER M. TOTH,	§
	§ No. 142, 2011
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. 1005017568
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 28, 2011

Decided: November 15, 2011

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

ORDER

This 15th day of November 2011, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Christopher M. Toth, filed an appeal from the Superior Court’s February 17, 2011 violation of probation (“VOP”) sentencing order. We find no merit to the appeal. Accordingly, we affirm.

(2) The record before us reflects that, in September 2009, Toth pleaded guilty to two counts of Burglary in the Third Degree, one count of Wearing a Disguise During the Commission of a Felony and one count of Possession of Burglary Tools. He was sentenced on the first burglary conviction to 3 years at Level V incarceration, to be suspended after 8

months for decreasing levels of supervision. On the second burglary conviction, he was sentenced to 3 years at Level V, to be suspended for 18 months at Level III probation. On the conviction of wearing a disguise, he was sentenced to 5 years at Level V, to be suspended for 1 year at Level II probation. On the conviction of possession of burglary tools, he was sentenced to 3 years at Level V, to be suspended for 1 year at Level II probation.

(3) On May 20, 2010, Toth was found to have committed a VOP. His probation was revoked and he was re-sentenced. On the burglary convictions and on the conviction of possession of burglary tools, Toth was discharged as unimproved. On the conviction of wearing a disguise, he was re-sentenced to 5 years at Level V, to be suspended for 5 years at Level IV, in turn to be suspended after 6 months for 18 months at Level III probation.

(4) Four days later, on May 24, 2010, Toth was arrested and charged with Burglary in the Third Degree, Misdemeanor Theft and Criminal Mischief. As a result, Toth was found to have committed a second VOP on February 17, 2011, the final day of his trial on the new charges. Toth was re-sentenced on the VOP to 5 years at Level V, to be suspended after 3 years and 6 months for 6 months at Level IV, to be followed by 1 year at Level III probation.

(5) The transcript of the final day of Toth's trial reflects that his VOP hearing was held when the jury had retired to deliberate. Toth agreed to have his standby counsel represent him on the VOP. Toth admitted that he violated his curfew. In finding that Toth had violated his probation, the judge stated that the VOP could have been based either on the curfew violation or on Toth's new charges.

(6) In this appeal from his VOP sentencing order, Toth makes a number of claims that may fairly be summarized as follows: a) he was not afforded the minimum requirements of due process at his VOP hearing; and b) his VOP sentence is improper.

(7) The record reflects that there was ample evidence presented at Toth's trial on his new charges supporting the Superior Court's finding of a VOP. Moreover, Toth admitted that he had violated his curfew. We find no merit to Toth's claim that he was not afforded the minimum requirements of due process at his VOP hearing. To the contrary, the VOP hearing was conducted in tandem with Toth's criminal trial, which provided Toth with far more due process protections than would have been required in a stand-alone VOP hearing.¹

¹ Super. Ct. Crim. R. 32.1.

(8) Toth's claim that his VOP sentence is improper is likewise without merit. The record reflects that Toth's conviction of Wearing a Disguise During the Commission of a Felony, a Class E felony, carried a sentence of 5 years of Level V incarceration.² The entire 5-year Level V term was suspended in Toth's initial sentence and his first VOP sentence. Thus, when Toth was found in violation of his probation a second time, the Superior Court had the authority to impose up to 5 years of Level V incarceration for the VOP. Therefore, the Superior Court's sentence of 5 years at Level V, suspended after 3 years and 6 months for 6 months at Level IV, and followed by 1 year at Level III, was proper.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

² Del. Code Ann. tit. 11, §§1239 and 4205(b) (5).