

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LANCE KENNARD,	§	
	§	No. 122, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 9908005342
Appellee.	§	

Submitted: July 23, 2010
Decided: September 28, 2010

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

ORDER

This 28th day of September 2010, upon consideration of the briefs on appeal and the Superior Court record, it appears to the Court that:

(1) In December 1999, the appellant, Lance Kennard, pled guilty to two charges including Driving after Judgment Prohibited (“DAJP”).¹ DAJP is codified at title 21, section 2810 of the Delaware Code.² In January 2000, Kennard was sentenced for DAJP to five years at Level V imprisonment suspended after six months for Level III probation (“original sentence”).³

¹ Kennard also pled guilty to his fourth offense of Driving under the Influence (“DUI”).

² Del. Code Ann. tit. 21, § 2180 (2005).

³ For DUI, Kennard was sentenced to five years at Level V, suspended after one year and successful completion of the Key Program for decreasing levels of supervision.

(2) In October 2003, Kennard was adjudged guilty of violation of probation (“VOP”) and was sentenced for DAJP to five years at Level V, suspended after twenty-five days at the Level IV VOP Center.⁴ In May 2004, Kennard again was adjudged guilty of VOP and was sentenced for DAJP to five years at Level V, suspended after successful completion of the Key Program for one year of Aftercare.

(3) On September 20, 2005, Kennard was adjudged guilty of VOP for a third time and was sentenced for DAJP to three years at Level V, pursuant to title 11, section 4204(k) of the Delaware Code (“4204(k) condition”), with credit for all time previously served (“VOP sentence”).⁵ Kennard did not appeal the VOP sentence.

(4) By letter dated September 25, 2005, Kennard asked the Superior Court sentencing judge (“Superior Court” or “sentencing judge”) to reduce the VOP sentence by removing the 4204(k) condition. Kennard argued that the 4204(k) condition constituted an illegal enhancement of the original sentence and thus could not be imposed in the VOP sentence

⁴ For DUI, Kennard was sentenced to time served at Level V and discharged as unimproved.

⁵ Del. Code Ann. tit. 11, § 4204(k)(1) (2007) (providing that the court may direct that a sentence of imprisonment at Level V be served without any form of reduction or diminution of sentence).

("4204(k) claim"). By order dated October 11, 2005, the sentencing judge denied Kennard's request. Kennard did not appeal.

(5) By letter dated January 14, 2010, addressed to the sentencing judge, Kennard again raised the 4204(k) claim. Kennard also complained that the Department of Correction "is trying to say that [the original sentence] is a TIS sentence, which is not possible" ("TIS claim"). In response to Kennard's letter, the sentencing judge issued a February 15, 2010 letter stating:

Your argument that [DAJP] is not a TIS sentence is incorrect. The 2010 Benchbook states:

Traffic offenses with the exception of 21-2810 ([DAJP]) do not come under the purview of SENTAC's sentencing recommendations.

Therefore, [DAJP] is a TIS sentence.

IT IS SO ORDERED.

This appeal followed.

(6) Kennard has raised both the 4204(k) claim and the TIS claim on appeal. With respect to the TIS claim, Kennard argues:

When TIS was enacted, the Legislature included both Title 11 and Title 16 crimes under its jurisdiction, not Title 21 offenses. No legislative bill in the time since the enactment of TIS has changed this fact. Therefore, Title 21 offenses,

including [DAJP], are not under the purview of TIS.

In support of the TIS claim, Kennard has provided the Court with a copy of the original sentence order.⁶ The sentence order appears to bear a “non-TIS” designation.⁷

(7) The Superior Court correctly ruled that DAJP is subject to SENTAC guidelines.⁸ Nonetheless, Kennard’s TIS claim may have merit. We decline to consider the TIS claim under the circumstances of this case, however, wherein Kennard’s underlying claim, *i.e.*, that the Department of Correction “is trying to say that [the original sentence] is a TIS sentence,” was not properly brought in the first instance.⁹

(8) In any event, the 4204(k) claim is without merit. Under the circumstances of this case, the imposition of the 4204(k) condition to the VOP sentence “is not synonymous to the imposition of an additional term of

⁶ The original sentence order is attached to Kennard’s notice of appeal.

⁷ See SENTAC (Delaware Sentencing Accountability Commission) Benchbook at 113 (2010) (emphasizing importance of correctly designating sentence as TIS or non-TIS). See generally *Baylis v. State*, 1994 WL 148108 (Del. Supr.) (discussing calculating good time credits with respect to pre-TIS sentence); *State v. Clyne*, 2002 WL 1652149 (Del. Supr.) (discussing calculating good time credits with respect to non-TIS sentence).

⁸ See SENTAC (Delaware Sentencing Accountability Commission) Benchbook Statement of Policy No. 13 at 23, 80 (2010) (regarding applicability to traffic offenses).

⁹ Cf. *Anderson v. State*, 2008 WL 187959 (Del. Supr.) (affirming trial court judgment when defendant failed to use proper procedural vehicle for remedy sought). See generally Del. Code Ann. tit. 10, § 564 (1999) (governing mandamus proceedings in the Superior Court).

imprisonment,” as Kennard would have this Court conclude.¹⁰ Both the original sentence and the VOP sentence fit the criteria for the 4204(k) condition.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.¹¹

BY THE COURT:

/s/ Carolyn Berger
Justice

¹⁰ *Ingram v. State*, 567 A.2d 868, 870 (Del. 1989); *Jurbala v. State*, 2007 WL 666783 (Del. Supr.).

¹¹ *See Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (affirming a judgment on grounds different than those relied upon by the trial court).