

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE McDOUGAL,	§
	§ No. 152, 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. 0607023450
	§
Plaintiff Below-	§
Appellee.	§

Submitted: September 23, 2011

Decided: October 17, 2011

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices

**ORDER**

This 17th day of October 2011, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Andre McDougal, filed an appeal from the Superior Court’s March 2, 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 January 2008, a jury found McDougal not guilty of Murder in the First Degree and was hung on the lesser-included charges of Murder in the Second Degree and Manslaughter as well as two weapon charges. In September 2008, on the day of his retrial, McDougal pleaded guilty to a single count of Manslaughter. He was

sentenced to twenty years at Level V incarceration, to be suspended after three years for one year of Level III probation. In January 2010, McDougal was found to have committed a VOP. He was re-sentenced to seventeen years at Level V, to be suspended for seventeen years at Level IV, in turn to be suspended after six months for one year at Level III probation. On March 2, 2011, following a contested VOP hearing, McDougal again was found to have committed a VOP and was re-sentenced to seventeen years at Level V, to be suspended after fifteen years for two years at Level III probation.

(3) In this appeal from his latest VOP sentence, McDougal claims that a) the Superior Court abused its discretion when it sentenced him to fifteen years at Level V; b) the public defender who represented him at the VOP hearing provided ineffective assistance due to a conflict of interest; and c) his due process rights were violated because the finding of a VOP was based upon hearsay evidence.

(4) McDougal's first claim is that the Superior Court abused its discretion when it revoked his probation and sentenced him to fifteen years at Level V. Revocation of probation is within the broad discretion of the Superior Court.<sup>1</sup> Once a VOP is established, the Superior Court may order the violator to serve any sentence that originally was suspended, less time

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<sup>1</sup> *Brown v. State*, 249 A.2d 269, 271-72 (Del. 1968).

served.<sup>2</sup> A VOP sentence will not be reversed unless it exceeds the maximum permitted by law or was the result of vindictive or arbitrary action on the part of the sentencing judge.<sup>3</sup>

(5) The transcript of the March 2, 2011 VOP hearing reflects that McDougal's criminal record included convictions of first degree assault, weapon violations and escape after conviction, in addition to his manslaughter conviction. Moreover, this was McDougal's second VOP in connection with his manslaughter conviction. Finally, McDougal's VOP was based not only on a curfew violation, but also because he had been arrested on new drug and weapon charges. As such, there was more than ample support for the Superior Court's sentence. In the absence of any evidence that McDougal's VOP sentence exceeded the statutory maximum or resulted from an abuse of discretion on the part of the sentencing judge, we conclude that his first claim is without merit.

(6) McDougal's second claim is that the public defender who represented him at the March 2, 2011 VOP hearing provided ineffective assistance due to a conflict of interest. McDougal bases this claim on the fact that, following his indictment on his new drug and weapon charges, the Office of the Public Defender was assigned to represent his co-defendant,

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<sup>2</sup> Del. Code Ann. tit. 11, §4334(c).

<sup>3</sup> *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992).

who pleaded guilty to Possession of Heroin. The record before us reflects that, at the time of McDougal's VOP hearing, McDougal's co-defendant had absconded from probation and did not appear as a witness. Also, following the VOP hearing, the Office of the Public Defender filed a conflict letter in the Superior Court declining further representation of McDougal.<sup>4</sup> The letter explained that, if McDougal should proceed to trial on his new drug and weapon charges, his co-defendant could be called as a witness, thereby creating a conflict for defense counsel.

(7) This Court has held that a claim of ineffective assistance due to a conflict of interest must be supported by a demonstration of actual prejudice.<sup>5</sup> McDougal has presented no evidence of "an actual conflict of interest adversely affect[ing] his lawyer's performance,"<sup>6</sup> nor do we find any such evidence in the transcript of the VOP hearing. As such, we conclude that McDougal's second claim also is unavailing.

(8) McDougal's third, and final, claim is that his due process rights were violated because the finding of a VOP was based upon hearsay evidence. The United States Supreme Court has ruled that a VOP hearing is not a formal criminal trial and that, therefore, only minimal requirements of

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<sup>4</sup> Del. Rules of Prof. Cond., Rule 1.7(a).

<sup>5</sup> *Lewis v. State*, 757 A.2d 709, 717 (Del. 2000).

<sup>6</sup> *Id.* at 718.

due process must be observed.<sup>7</sup> Following that precedent, this Court has determined that the formal rules of evidence are inapplicable to a VOP hearing<sup>8</sup> and that hearsay is permissible.<sup>9</sup>

(9) The transcript of McDougal's March 2, 2011 VOP hearing reflects that the hearing was conducted in accordance with the procedures outlined in Superior Court Criminal Rule 32.1 and that he was afforded the due process to which he was entitled in a VOP proceeding. We, therefore, conclude that McDougal's third claim likewise is without merit.

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

BY THE COURT:

/s/ Randy J. Holland  
Justice

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<sup>7</sup> *Perry v. State*, 741 A.2d 359, 362-63 (Del. 1999) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)).

<sup>8</sup> *Brown v. State*, 249 A.2d 269, 272 (Del. 1968).

<sup>9</sup> *Id.*; Super. Ct. Crim. R. 32.1.