

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MACHEL A. WHITAKER,	§
	§
Defendant Below-	§ No. 63, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID Nos. 0708007312
Plaintiff Below-	§
Appellee.	§

Submitted: March 31, 2011

Decided: April 12, 2011

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

**ORDER**

This 12<sup>th</sup> day of April 2011, upon consideration of the State's motion to remand, it appears to the Court that:

(1) The appellant, Machel Whitaker, filed this appeal from a Superior Court order, which denied Whitaker's motion to modify his criminal sentence on the ground that it was not timely filed. After Whitaker filed his opening brief on appeal, the State filed a motion seeking to remand this matter to the Superior Court for consideration of the merits of Whitaker's motion. We agree that a remand is appropriate. Accordingly, this matter shall be returned to the Superior Court for consideration of the merits of Whitaker's motion. Jurisdiction will not be retained.

(2) The record reflects that Whitaker pled guilty to attempted first degree robbery and possession of a firearm during the commission of a felony in April 2008. The Superior Court sentenced him to a total period of eleven years at Level V incarceration to be suspended after serving six years for six months at Level IV home confinement followed by one year at Level III probation. In January 2011, Whitaker filed a motion for modification of the partial confinement portion of his sentence. He requested the Superior Court to convert the Level IV home confinement portion of his sentence to Level IV Crest Program. The Superior Court denied Whitaker's motion on the ground that it was untimely and because his sentence was appropriate.

(3) In his opening brief on appeal, Whitaker argues that the Superior Court erred in denying his motion as untimely because a motion for modification of the terms of partial confinement or probation may be filed "at any time."<sup>1</sup> Laudably, the State concedes that Whitaker's argument is correct. Moreover, the State points out that there is no transcript of Whitaker's original sentencing hearing in the record and, thus, there is no basis upon which this Court may review the Superior Court's conclusion that Whitaker's sentence was appropriate.<sup>2</sup> The State requests that the matter be remanded to the Superior Court for further consideration of the merits of Whitaker's motion.

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<sup>1</sup> Del. Super. Ct. Crim. R. 35(b) (2011).

<sup>2</sup> *Johnson v. State*, 2008 WL 187958 (Del. Jan. 9, 2008).

(4) Under the circumstances, we agree that a remand is appropriate. Accordingly, this matter shall be remanded to the Superior Court for further consideration of the merits of Whitaker's motion. The Superior Court shall issue its order within 45 days of this order. Jurisdiction shall not be retained.

NOW, THEREFORE, IT IS ORDERED that this matter is hereby REMANDED to the Superior Court for further proceedings consistent with this order. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice