

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HARRY W. ANDERSON,	§
	§
Defendant Below-	§ No. 663, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0511001605
Plaintiff Below-	§
Appellee.	

Submitted: April 15, 2011  
Decided: June 20, 2011

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

**ORDER**

This 20th day of June 2011, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, Harry Anderson, filed this appeal from the Superior Court's imposition of sentence following his third violation of probation (VOP). Anderson contends that the sentence imposed by the Superior Court is illegal because it exceeded the amount of time remaining to be served on his sentence. After a careful review of the record, we find no merit to Anderson's argument. Nonetheless, we agree with the State that the Superior Court's sentence failed to credit Anderson with 62 days he previously served on the underlying sentence. Accordingly, we

conclude that this matter must be remanded to the Superior Court for further proceedings.

(2) The record reflects that Anderson pled guilty on March 6, 2006 to one count of second degree assault. On May 26, 2006, the Superior Court sentenced Anderson to eight years at Level V incarceration, with credit for 167 days previously served, to be suspended after serving one year at Level V for two years of decreasing levels of probation. On March 9, 2007, the Superior Court sentenced Anderson on his first VOP, effective February 8, 2007, to six years and six months at Level V incarceration, to be suspended upon the completion of a TASC<sup>1</sup> evaluation for two years at Level IV (home confinement or substance abuse treatment), to be suspended after serving six months at Level IV for the balance to be served at Level III probation. After completion of the TASC evaluation, the Superior Court modified Anderson's VOP sentence by suspending the Level IV portion of his sentence upon successful completion of the Crest Program (rather than simply suspending the Level IV portion of his sentence after six months), with the balance of the sentence to be served at Level III Crest Aftercare.

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<sup>1</sup> TASC refers to the Treatment Access Center, which performs evaluations and makes recommendations for treatment options for offenders.

(3) On November 21, 2007, the Superior Court sentenced Anderson on his second VOP, effective November 7, 2007, to six years at Level V incarceration, to be suspended for six years at Level IV work release, to be suspended after serving six months at Level IV work release for two years at Level III probation. On September 22, 2010,<sup>2</sup> the Superior Court sentenced Anderson on his third VOP, effective June 5, 2010, to six years at Level V incarceration, to be suspended after serving one year and one month at Level V for six months at Level IV work release followed by one year at Level III probation. It is from this sentence that Anderson appeals.

(4) In his opening brief on appeal, Anderson contends that the Superior Court's sentence for his third VOP is illegal because it ignored a modified sentence entered by the Superior Court on January 4, 2008, which, according to Anderson, reduced the overall length of his sentence to one year, seven months, and seven days. Anderson is incorrect, however. The Superior Court's modified sentencing order, dated January 4, 2008, reimposed the exact same six-year suspended sentence set forth in the November 7, 2007 sentencing order. The modified order simply eliminated

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<sup>2</sup> The violation report on Anderson's third violation was filed in December 2008. Anderson was serving a sentence in Pennsylvania, however, so the *capias* was not returned in the Delaware Superior Court until June 24, 2010.

some superfluous language and also added a provision that Anderson should not be held at Level V for more than 45 days pending his placement at Level IV work release. Accordingly, we reject Anderson's argument on appeal.

(5) It is well settled that, upon finding a defendant has violated probation, the Superior Court is authorized to reimpose any previously suspended prison term.<sup>3</sup> In this case, the Superior Court's September 22, 2010 sentencing order reimposed the six year suspended sentence that was imposed by the Superior Court's January 4, 2008 modified sentencing order. All but one year and one month of that Level V time was suspended. Accordingly, the Superior Court's September 22, 2010 sentencing order did not impose more Level V time than remained to be served on Anderson's original sentence.

(6) Nonetheless, we agree with State's contention that the Superior Court's September 22, 2010 sentencing order failed to credit Anderson with 62 days that Anderson previously spent at Level V and at the Level IV VOP Center while he was awaiting space at Level IV work release. A defendant is entitled to receive credit toward a VOP sentence for any time spent at Level V on the underlying charge, including time spent at Level V awaiting

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<sup>3</sup> *Ingram v. State*, 567 A2d 868, 869 (Del. 1989) (citing DEL. CODE ANN. tit. 11, § 4334(c)).

space in a Level IV program.<sup>4</sup> A defendant also is entitled to credit for time spent at the Level IV VOP Center,<sup>5</sup> although the defendant is not entitled to credit for time spent at Level IV work release or home confinement.<sup>6</sup> Accordingly, we conclude that this matter must be remanded to the Superior Court in order to credit Anderson with 62 days he previously served on his sentence while awaiting space at Level IV work release. In all other respects, we affirm the Superior Court's judgment.

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED for further proceedings consistent with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Randy J. Holland  
Justice

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<sup>4</sup> *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

<sup>5</sup> *Anderson v. State*, 2006 WL 3931460 (Del. Dec. 5, 2006).

<sup>6</sup> *Gamble v. State*, 728 A.2d at 1172.