

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JABARI H. CAMPBELL,	§
	§
Defendant Below-	§ No. 78, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0802011891
Plaintiff Below-	§
Appellee.	§

Submitted: May 13, 2011

Decided: July 11, 2011

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

**ORDER**

This 11<sup>th</sup> day of July 2011, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) On February 16, 2011, the appellant, Jabari Campbell, filed this appeal from the Superior Court's order, dated January 19, 2011, denying his motion for correction of sentence. While the appeal was pending, the Superior Court attempted to vacate its January 19, 2011 order and issue a corrected sentencing order on February 22, 2011. Given the Superior Court's lack of jurisdiction to vacate an order from which an appeal had properly been perfected to this Court, we conclude that this matter must be remanded to the Superior Court for further action consistent with this Order.

(2) The record reflects that Campbell pled guilty on May 12, 2008 to one count each of receiving stolen property and resisting arrest. The Superior Court immediately sentenced Campbell on the receiving stolen property conviction to one year at Level V incarceration, with credit for 94 days previously served, to be suspended immediately for one year at Level I probation (restitution only). The Superior Court did not impose any Level V sentence on Campbell with respect to his resisting arrest conviction.

(3) At the time of his May 2008 sentencing, Campbell already was serving a probationary sentence for a 2007 conviction for receiving stolen property. His 2008 conviction on the new charges led to a violation of probation sentence with respect to the 2007 conviction. Thereafter, Campbell picked up new criminal charges in 2009. He pled guilty in April 2009 to one count of attempted second degree robbery and was sentenced on that conviction to three years at Level V incarceration, to be suspended after serving six months in prison for thirty months at Level IV home confinement, to be suspended after serving six months at Level IV for two years at Level III probation.

(4) As a result of his 2009 conviction, Campbell was found guilty of violating his 2008 probation. The Superior Court sentenced Campbell on

the VOP to eighteen months at Level V incarceration, to be suspended after serving sixteen months in prison for two months at Level IV work release, followed by an additional twelve months at Level I probation (restitution only). Campbell filed a motion for correction of sentence, arguing that the VOP sentence exceeded the amount of Level V time remaining on his original one-year sentence for which he was also given 94 days credit for time served.

(5) The Superior Court denied Campbell's motion for correction of sentence and, instead, issued an amended VOP sentencing order reimposing eighteen months at Level V incarceration, to be suspended after serving sixteen months in prison for two months at Level IV work release, followed by an additional twelve months at Level I probation (restitution only). The "amendment" to the sentencing order added a provision declaring Campbell to be a habitual offender and purported to vacate a prior sentencing order dated August 26, 2010.<sup>1</sup> It is from this order that Campbell appeals.<sup>2</sup>

(6) Upon review, it is manifest to this Court that the Superior Court erred in denying Campbell's motion for correction of sentence. A violation

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<sup>1</sup> The Superior Court docket does not reflect that a sentencing order was issued on August 26, 2010 in this case.

<sup>2</sup> The State's answering brief, for reasons that are not apparent to this Court, is based upon the incorrect premise that Campbell filed this appeal from the denial of a habeas corpus petition. Consequently, the State's nonresponsive answering brief provides no assistance to the Court in clarifying the errors that appear to have occurred this matter.

of probation sentence cannot exceed the amount of Level V time remaining to be served on the original sentence.<sup>3</sup> In this case, Campbell originally was sentenced to one year at Level V, with credit for 94 days previously served, which was suspended entirely for probation. Accordingly, at the most, Campbell had 271 days remaining to be served on the original sentence, assuming he had not served any other time at Level V or the Level IV VOP Center awaiting disposition of his VOP charge.<sup>4</sup> The Superior Court's January 19, 2011 order, which sentenced Campbell to eighteen months at Level V incarceration, to be suspended after serving sixteen months in prison for two months at Level IV work release, followed by an additional twelve months of probation, clearly was illegal.

(7) Although the Superior Court attempted to rectify its error by vacating the January 19, 2011 order and issuing a new sentencing order on February 22, 2011, it lacked jurisdiction to do so because Campbell had timely filed this appeal on February 16, 2011. Thus, the Superior Court's February 22, 2011 order has no legal effect. Moreover, in remanding this case to the Superior Court for further action, we note that the sentencing

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<sup>3</sup> *Pavulak v. State*, 880 A.2d 1044, 1045-46 (Del. 2005).

<sup>4</sup> The Court simply is unable to determine from the record before us if Campbell may be entitled to additional credit for time served on this sentence. On remand, the Superior Court must make this determination in resentencing Campbell.

order it attempted to issue on February 22, 2011 also appears to be illegal. While the February 22, 2011 order purports to sentence Campbell to 318 days at Level V incarceration, the maximum sentence Campbell could have received for violating probation in this case was 271 days. Thus, on remand, the Superior Court is directed to vacate its January 19, 2011 sentencing order and to resentence Campbell, giving him proper credit for all time previously served, to no more than 271 days at Level incarceration or any lesser period of time deemed appropriate.

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

BY THE COURT:

/s/ Carolyn Berger  
Justice