

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN W. BARNHARD,	§
	§ No. 122, 2011
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware, in and
STATE OF DELAWARE,	§ for Sussex County
	§ Cr. ID 1002004189
Plaintiff Below-	§
Appellee.	§

Submitted: June 12, 2011
Decided: August 17, 2011

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

ORDER

This 17th day of August 2011, after careful consideration of the appellant's opening brief, the State's motion to affirm, and the record on appeal, it appears to the Court that:

(1) The appellant, John Barnhard, filed this appeal following his sentencing modification in the Superior Court. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Barnhard's opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that Barnhard pled guilty in May 2010 to one count each of first degree reckless endangering, third degree assault, and criminal mischief. He was sentenced immediately to a total period of six years and thirty

days at Level V incarceration, with credit for seventy-five days previously served, to be suspended immediately for one year at Level III probation. The Superior Court also ordered Barnhard to complete anger management counseling, to be evaluated for substance abuse issues and follow any recommendations for treatment, and to pay \$534 restitution. In October 2010, Barnhard was found in violation of probation and sentenced to a total of six years and thirty days at Level V incarceration, with credit for one hundred eleven days served, to be suspended upon his acceptance into the Level III Gateway Program for two years in that program. He was ordered to be held at Level V until his acceptance into the Level III program.

(3) On January 24, 2011, Barnhard filed a motion for modification of sentence requesting that he be held at Level III pending his acceptance into Gateway and requesting discharge from any further probation upon his successful completion of the program so that he could relocate to South Carolina. On February 21, 2011, Barnhard was scheduled for a resentencing hearing because he was not accepted into the Gateway Program. On February 25, 2011, the Superior Court resentenced Barnhard to five years and five months at Level V incarceration, to be suspended upon successful completion of the Level V Greentree Program for two years at Level III probation. On March 17, 2011, Barnhard filed this appeal from the Superior Court's February 25, 2011 resentencing order.

(4) In his opening brief on appeal, Barnhard contends that there was insufficient evidence to support the October 2010 VOP adjudication and that his defense counsel was ineffective for failing to present a viable defense to the VOP allegations. Finally, Barnhard contends that the Superior Court abused its discretion in resentencing him in February 2011 to the Level V Greentree Program instead of ordering him to receive treatment at a Level III program.

(5) With respect to Barnhard's first two issues, this Court has no jurisdiction to consider the Superior Court's VOP finding because Barnhard failed to file a timely appeal from the October 2010 VOP adjudication.¹ Moreover, this Court's review of a sentencing order is extremely limited.² When the sentence imposed is within the statutory limits, as in this case, this Court will not find an abuse of discretion unless it is clear that the judge relied on impermissible factors or sentenced the defendant with a closed mind.³ To the extent Barnhard contends that the sentencing judge had a closed mind and abused his discretion in imposing the modified sentence, Barnhard's failure to provide this Court with a transcript of the resentencing hearing precludes appellate review of this claim.⁴

¹ *Carr v. State*, 554 A.2d 778, 779 (Del. 1989).

² *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).

³ *Id.*

⁴ *Tricoche v. State*, 525 A.2d 151, 154 (Del. 1987).

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice