

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RODGER L. RUST,	§	
	§	No. 101, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court of
	§	the State of Delaware, in and for
v.	§	Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0912005406
Appellee.	§	

Submitted: June 6, 2011  
Decided: August 31, 2011

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

**ORDER**

This 31<sup>st</sup> day of August 2011, upon consideration of the appellant’s opening brief and the appellee’s motion to affirm, it appears to the Court that:

(1) The appellant, Rodger L. Rust, filed this appeal from the Superior Court’s February 8, 2011 denial of his second motion for modification of sentence pursuant to Superior Court Criminal Rule 35(b) (“Rule 35(b)”). The appellee, State of Delaware, has moved to affirm the Superior Court’s judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit. We agree and affirm.

(2) On May 10, 2010, Rust pled guilty/no contest to three offenses: Trafficking in Cocaine, Maintaining a Dwelling for Keeping Controlled

Substances, and Possession of a Deadly Weapon (Ammunition) by a Person Prohibited. As part of the plea agreement, Rust agreed to forfeit a firearm, currency and two vehicles.

(3) Rust was sentenced on June 25, 2010 after a presentence investigation. For the trafficking offense, Rust was sentenced to twenty-five years at Level V incarceration suspended after eight years – four years mandatory – for one year at Level IV work release followed by probation. For the other offenses, Rust was sentenced to a total of eleven more years at Level V suspended immediately for probation.

(4) On August 31, 2010, within ninety days of sentencing, Rust filed his first motion for modification of sentence pursuant to Rule 35(b). Rust asked that the Superior Court suspend the unsuspended Level V portion of his sentence after he finished serving the four years of mandatory incarceration and completed one or more therapeutic programs designated by the court. By order dated September 3, 2010, the Superior Court denied Rust's motion on the basis that the sentence imposed on June 25, 2010 was reasonable and appropriate.

(5) On February 1, 2011, Rust filed his second motion for modification of sentence. Rust asked that the Superior Court modify his sentence to require successful completion of the Key Program and twelve months at the Crest Program. Rust also sought the "immediate return of forfeited vehicles."

(6) By order dated February 8, 2011, the Superior Court denied Rust's second motion for modification of sentence for the reasons given in the court's September 3, 2010 order, which had concluded that the sentence was reasonable and appropriate. The Superior Court also sent Rust a copy of the court's order regarding the forfeiture of property. This appeal followed.

(7) In his opening brief on appeal, Rust claims that the Superior Court's February 8, 2011 denial of his second motion for modification of sentence was an abuse of discretion. The claim is without merit. Under Rule 35(b), Rust's second motion for modification of sentence was both repetitive and untimely.<sup>1</sup> In the absence of "extraordinary circumstances," the Superior Court properly denied the motion.<sup>2</sup>

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>1</sup> See Del. Super. Ct. Crim. R. 35(b) (providing that a motion must be filed within ninety days of sentencing and that the court will not consider "repetitive requests").

<sup>2</sup> *Id.* (providing that the court will consider a motion filed more than ninety days after sentencing only in extraordinary circumstances).