

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREGORY S. PHILLIPS,	§	
	§	No. 217, 2003
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court of
	§	the State of Delaware, in and
v.	§	for Sussex County in Cr. ID
	§	No. 9612002787.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: May 27, 2003  
Decided: August 25, 2003

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

**ORDER**

This 25<sup>th</sup> day of August 2003, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) On March 2, 2001, Gregory S. Phillips was found guilty of violating his probation and was sentenced to a total of five years and nine months at Level V incarceration, suspended after successful completion of the Key Program, for one year of a residential substance abuse treatment program,

followed by one year of aftercare and eighteen months of Level III probation.<sup>1</sup>

On appeal, this Court affirmed the Superior Court's judgment.<sup>2</sup>

(2) On April 10, 2003, Phillips moved for modification of his sentence pursuant to Superior Court Criminal Rule 35(b). By order dated April 11, 2003, the Superior Court denied Phillips' motion. This appeal followed.

(3) On appeal, Phillips argues that he is entitled to be released from Level V imprisonment to Level III probation because, in April 2003, he obtained a default judgment against Randy Parker, Director of the Key South Program.<sup>3</sup> Phillips' claim is unavailing.

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<sup>1</sup>Originally in 1997, Phillips pleaded guilty to Harassment, Reckless Endangering in the First Degree and Possession of a Deadly Weapon by a Person Prohibited and was sentenced to a total of eight years and six months of incarceration at Level V, suspended after one year, for four years of decreasing levels of probation. In November 1998, Phillips pleaded guilty to Escape After Conviction and was sentenced to two years at Level V, suspended after six months for probation. *State v. Phillips*, Del. Super. Ct., Cr. ID No. 9808002280, Graves, J. (Nov. 19, 1998). Phillips was adjudged guilty of violation of probation on July 17, 1998, August 28, 1998, and February 23, 2001.

<sup>2</sup>*Phillips v. State*, 2002 WL 229503 (Del. Supr.).

<sup>3</sup>In a § 1983 action filed in the U.S. District Court, Phillips alleged that Parker had violated Phillips' constitutional right to be free from cruel and unusual punishment by allowing certain inmates to be in positions of authority in the Key Program. By memorandum and order dated April 3, 2003, the District Court entered a default judgment against Parker, pursuant to Fed. R. Civ. P. 55(a). *Phillips v. Parker*, D. Del, C.A. No. 01-516-JJF, Farnan, J. (Apr. 3, 2003).

(4) A motion filed under Superior Court Criminal Rule 35(b) is addressed to the sound discretion of the Superior Court.<sup>4</sup> Rule 35(b) provides that the court will not consider repetitive requests for relief and will not consider an application made more than ninety days after the imposition of sentence except in “extraordinary circumstances.”

(5) The Superior Court’s denial of Phillips’ motion for modification of sentence was not an abuse of discretion. Phillips’ motion was repetitive<sup>5</sup> and was filed beyond the ninety-day time limit of Rule 35(b). Phillips has not established the existence of “extraordinary circumstances” that would justify consideration of the motion beyond the ninety-day time limit. Phillips’ judgment against the director of the Key Program “affects a *condition* of his confinement, not the *length or validity*.”<sup>6</sup> Notwithstanding Phillips’ default judgment against

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<sup>4</sup>*Shy v. State*, 246 A.2d 926 (Del. 1968).

<sup>5</sup>*See State v. Phillips*, Del. Super. Ct., Cr. ID Nos. 9612002787, 9808002280, Graves, J. (Mar. 13, 2001) (denying Phillips’ motion for modification of sentence); *Phillips v. State*, 2002 WL 31260320 (Del. Supr.) (affirming denial of Phillips’ motion for reduction of sentence); *State v. Phillips*, Del. Super. Ct., Cr. ID Nos. 9612002787, 9808002280, Graves, J. (Oct. 21, 2002) (denying Phillips’ motion to review sentence); *State v. Phillips*, Del. Super. Ct., Cr. ID No. 9612002787, Graves, J. (Jan. 21, 2003) (denying Phillips’ request to modify treatment program); *State v. Phillips*, Del. Super. Ct., Cr. ID No. 9612002787, Graves, J. (Mar. 4, 2003) (concluding that any early release from the five years sentence was contingent upon successful completion of the Key Program).

<sup>6</sup>*Phillips v. Kearney*, 2003 WL 2004392 at \*8 (D. Del.) (emphasis in original).

the director of the Key South Program, Phillips must serve the Level V portion of the sentence that was imposed against him.

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/ E. Norman Veasey  
Chief Justice