

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMBER RIVERA,	§
	§ No. 604, 2013
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 1007007244
Plaintiff Below-	§
Appellee.	§

Submitted: May 2, 2014
Decided: May 15, 2014

Before **STRINE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

ORDER

This 15th day of May 2014, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Amber Rivera, filed this appeal from the Superior Court’s sentence for her second violation of probation (“VOP”). We find no merit to the appeal. Accordingly, we affirm.

(2) The record reflects that Rivera was indicted for robbery in the first degree, possession of a deadly weapon during the commission of a felony, conspiracy in the second degree and wearing a disguise during a commission of a felony on August 16, 2010. On January 13, 2011, Rivera pled guilty to robbery in

the first degree and conspiracy in the second degree in exchange for dismissal of the remaining charges in the indictment. Sentencing occurred on March 18, 2011. On the first degree robbery count, the Superior Court sentenced Rivera, effective October 4, 2010, to eight years at Level V Harbor House, suspended after three years for two years at Level IV Crest, suspended after successful completion for two years at Level III Crest Aftercare. On the second degree conspiracy count, the Superior Court sentenced Rivera to two years at Level V, suspended for one year at Level III. Rivera did not appeal.

(3) On July 17, 2013, the Superior Court found Rivera had violated her probation. Rivera had been discharged from Level IV Crest for fighting. On the first degree robbery count, Rivera was resentenced to four years and ten months at Level V, suspended for four years and ten months at the Level IV VOP Center, suspended after three months for six months Level IV Work Release, suspended after six months for one year Level III. On the second degree conspiracy count, Rivera was resentenced to one year at Level V, suspended for one year at Level III.

(4) On October 4, 2013, an administrative warrant charging Rivera with her second VOP was filed. According to a VOP report filed on October 9, 2013, the Sussex VOP Multi-Disciplinary Team Board (“MDT Board”) had found that Rivera violated the rules of the Sussex Community Corrections Center by engaging in sexual conduct with another inmate. Rivera was required to comply with the

rules and regulations of the Sussex Community Corrections Center as a condition of her probation. The report also reflected that Rivera had appeared before the MDT Board multiple times for various infractions during her time at the Sussex VOP Center. Rivera included the violation reports in the appendix accompanying her opening brief on this appeal. The VOP report recommended that if Rivera was found guilty of a VOP, she should be resentenced as follows: (i) on the first degree robbery count, to four years and six months Level V, suspended upon successful completion of a Level V program designed to instill structure in young offenders for one year Level IV Work Release, followed by one year Level III; and (ii) on the second degree conspiracy count, to one year Level V, suspended for two years Level I restitution only.

(5) Rivera, with counsel, appeared before the Superior Court on October 10, 2013. After Rivera initially indicated that she did not admit to engaging in sexual conduct with another inmate, the Superior Court began rescheduling the matter for a contested VOP hearing on November 7, 2013. Rivera then stated that she did have sexual contact with another inmate, she understood she was not supposed to do that and that she took responsibility for her actions. Rivera's counsel indicated that he had understood Rivera was not disputing the charge.

(6) The Court found Rivera had violated her probation. The parties discussed the recommendation that Rivera complete a Level V program designed

to instill discipline in young offenders and agreed that Rivera was likely ineligible and not suited for the Boot Camp program. Noting her probation violations and the serious nature of Rivera's conviction for first degree robbery, the Superior Court resentenced Rivera as follows: (i) on the first degree robbery count, to four years and three months at Level V, suspended after twelve months for three years and three months at Level IV Work Release, suspended after six months for twelve months at Level III; and (ii) on the second degree conspiracy count, to one year at Level V, suspended for twelve months at Level III. Rivera appealed the October 10, 2013 VOP order.

(7) In her appeal, Rivera claims that: (i) her due process rights were violated in the Sussex VOP Center; (ii) there was insufficient evidence of a VOP; (iii) she was sentenced based on her past juvenile and criminal history without a Pre-Sentence Investigation ("PSI"); (iv) the sentence was too harsh and did not reflect credit for prior time served; (v) she was denied effective assistance of counsel; (vi) the October 10, 2013 hearing was not conducted by the same judge who imposed her original sentence; and (vii) the Superior Court abused its discretion in denying her motion for a transcript at the State's expense. We find no merit to these arguments.

(8) Rivera did not raise any due process issues concerning the Sussex VOP Center proceedings at the October 10, 2013 Superior Court hearing and has

therefore waived appellate review of those issues absent plain error.¹ There is no evidence of plain error here. Rivera does not claim to have been deprived of any of the protections afforded by Superior Court Criminal Rule 32.1 in the Superior Court proceedings. Superior Court Criminal Rule 32.1 provides that a defendant accused of a VOP is entitled to: (1) a bail hearing; (ii) written notice of an alleged violation; (iii) disclosure of the evidence against the defendant; (iv) an opportunity to hear and present evidence; (v) an opportunity to question adverse witnesses; and (vi) notice of the right to retain counsel. The record reflects that a bail hearing was held on October 4, 2013, Rivera was represented by counsel at the October 10, 2013 hearing and Rivera was aware of the sexual conduct charge at the October 10, 2013 hearing. When it appeared that Rivera contested that charge, the Superior Court offered to schedule a contested VOP hearing on November 7, 2013. Rivera could have presented her own evidence and cross-examined adverse witnesses at that hearing. Instead, Rivera admitted to sexual conduct with another inmate and that she understood such conduct was prohibited. Under these circumstances, there is no merit to Rivera's due process claims.

(9) Rivera's claim that there was insufficient evidence of a VOP because her admission of sexual conduct with another inmate in the Sussex VOP Center proceedings was a result of perjury by a probation officer and/or coercion also

¹ Supr. Ct. R. 8.

lacks merit. In a VOP hearing, unlike a criminal trial, the State is only required to prove by a preponderance of the evidence that the defendant violated the terms of probation.² A preponderance of the evidence means “some competent evidence” to “reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.”³ Rivera admitted at the October 10, 2013 hearing to sexual conduct with another inmate and that she understood such conduct was prohibited. This admission constituted sufficient competent evidence to revoke probation.⁴

(10) Turning to Rivera’s attacks on her sentence, this Court’s appellate review of a sentence is extremely limited and generally ends upon a determination that the sentence is within the statutory limits prescribed by the legislature.⁵ If the sentence is within statutory limits, the sentence will not be disturbed on appeal unless the defendant can establish that the sentencing judge relied on impermissible factors or exhibited a closed mind.⁶ Rivera cites no authority in support of her claim that the Superior Court was required to order a PSI before

² *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006).

³ *Brown v. State*, 249 A.2d 269, 272 (Del. 1968).

⁴ *Collins v. State*, 897 A.2d 159, 161 (Del. 2006).

⁵ *Kurzmann*, 903 A.2d at 714.

⁶ *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).

sentencing her for her second VOP. The decision to order a PSI is left to the discretion of the sentencing judge.⁷ Nothing in the record suggests the Superior Court abused its discretion by not ordering a PSI or relied on impermissible factors in sentencing Rivera. In imposing the October 10, 2013 sentence, the Superior Court noted Rivera's probation violations and the serious nature of her first degree robbery conviction.

(11) There is also no merit to Rivera's complaints regarding the length of her sentence. The Superior Court could impose any period of incarceration up to and including the balance of the Level V time remaining on the July 17, 2013 sentence (more than five and a half years).⁸ The Superior Court did not exceed that amount of time in imposing a total Level V sentence of five years and three months on October 10, 2013, which was suspended after one year for decreasing levels of supervision.

(12) The record does not support Rivera's contention that she is entitled to additional credit for time served. A defendant is entitled to Level V credit for time previously served on an underlying charge at Level V or a Level IV VOP Center,

⁷ 11 *Del. C.* § 4331(a).

⁸ 11 *Del. C.* § 4334(c); *Pavulak v. State*, 880 A.2d 1044, 1046 (Del. 2005).

but not for other Level IV time.⁹ Rivera was originally sentenced, effective October 4, 2010, to a total of ten years at Level V, suspended after three years for decreasing levels of supervision, and served two years, six months and twenty days of that sentence by April 24, 2013. After Rivera's first VOP, the Superior Court could have imposed a total Level V sentence of more than seven years. Instead, the Superior Court imposed a total Level V sentence of five years and ten months, which more than accounted for the time Rivera served between October 4, 2010 and April 24, 2013 and between June 21, 2013 and July 17, 2013 after her discharge from Level IV Crest. By the second VOP hearing on October 10, 2013, Rivera had served an additional two months and twenty-three days at Level V and Level IV VOP. The transcript of the October 10, 2013 hearing reflects that the Superior Court took that time into account by sentencing Rivera to a total Level V sentence of five years and three months instead of re-imposing the July 17, 2013 total Level V sentence of five years and ten months. Thus, Rivera has not shown she is entitled to any additional credit for time served.

(13) Turning to Rivera's remaining arguments, this Court will not consider Rivera's ineffective assistance of counsel claim on this direct appeal.¹⁰ Rivera was

⁹ 11 *Del. C.* § 3901(c); *Anderson v. State*, 2006 WL 3931460, at *1 (Del. Dec.5, 2006); *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

¹⁰ *Barnes v. State*, 2014 WL 60963, at *2 (Del. Jan. 7, 2014); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

entitled to a “prompt hearing before a judge of the Superior Court,” but was not entitled to the original sentencing judge at her VOP hearing.¹¹ Finally, the State paid for a transcript of the October 10, 2013 hearing and included it in the appendix accompanying its answering brief. It is therefore unnecessary to address Rivera’s claim that the Superior Court abused its discretion by denying her motion for a transcript *in forma pauperis*.

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

¹¹ Del. Super. Ct. Crim. R. 32.1(a); *Piper v. State*, 2010 WL 2574173, at *1 (Del. June 28, 2010); *Mayfield v. State*, 2003 WL 1711946, at *2 (Del. Mar. 28, 2003).