

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARSHALL RIVERS,	§
	§ No. 83, 2021
Defendant Below,	§
Appellant,	§ Court Below—Superior Court
	§ of the State of Delaware
v.	§
	§ Cr. ID No. 1708017971A&B (K)
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: May 24, 2021

Decided: June 29, 2021

Before **SEITZ**, Chief Justice; **TRAYNOR** and **MONTGOMERY-REEVES**, Justices.

**ORDER**

Upon consideration of the appellant’s opening brief, the appellee’s motion to affirm, and the record below, it appears to the Court that:

(1) The appellant, Marshall Rivers, filed this appeal from the Superior Court’s denial of his “Motion for Modification, Deferral, Suspension, or Reduction of Sentence for Serious Physical Illness, Injury or Infirmary.” The State has moved to affirm the judgment below 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) In 2018, Rivers pled guilty to second-degree robbery and carrying a concealed deadly weapon. The Superior Court sentenced Rivers as follows: for

second-degree robbery, to five years of imprisonment, suspended after two years for one year of Level III probation; for carrying a concealed deadly weapon, to eight years of imprisonment and completion of the Key program, suspended after four years for six months of Level IV work release, followed by one year of Level III Crest.

(3) In January 2019, Rivers filed, with the assistance of counsel, a motion for sentence modification. The Superior Court denied the motion. Rivers did not appeal.

(4) In February 2021, Rivers filed a *pro se* “Motion for Modification, Deferral, Suspension, or Reduction of Sentence for Serious Physical Illness, Injury or Infirmary.” He invoked 11 *Del. C.* § 4221 and the Eighth Amendment and sought relief based on the effects of the COVID-19 pandemic within the prison, including the suspension of rehabilitative and treatment programs and his contraction of COVID-19 while incarcerated. The Superior Court denied the motion on the grounds that the motion was untimely and repetitive under Superior Court Criminal Rule 35(b), the Department of Correction had implemented a protocol to protect incarcerated people and others from COVID-19, and Rivers had not established sufficient grounds for relief under 11 *Del. C.* § 4221. This appeal followed.

(5) We review the denial of a motion for sentence modification for abuse of discretion.<sup>1</sup> On appeal, Rivers argues that the Superior Court erred by considering the motion under Superior Court Criminal Rule 35(b), rather than under 11 *Del. C.* § 4221; by not requiring the State to respond to the motion before denying it; and by failing to further investigate the pandemic conditions inside the prison.

(6) We conclude that the Superior Court’s order should be affirmed. Contrary to Rivers’s claim, 11 *Del. C.* § 4221 does not provide a basis for modification or reduction of his sentence, because that statute applies only to sentences of one year or less.<sup>2</sup> On appeal, Rivers has made only conclusory references to the Eighth Amendment, and his Eighth Amendment argument is therefore waived.<sup>3</sup> In any event, it appears that the Eighth Amendment cases that Rivers cited in his Superior Court submission involved civil litigation and not modification of a defendant’s criminal sentence and therefore do not support the relief Rivers seeks. The court did not err by considering the motion under Superior

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<sup>1</sup> *Gladden v. State*, 2020 WL 773290 (Del. Feb. 17, 2020).

<sup>2</sup> *See* 11 *Del. C.* § 4221 (“Notwithstanding any provision of law to the contrary, a court may modify, defer, suspend or reduce a minimum or mandatory sentence of 1 year or less, or a portion thereof, where the court finds by clear and convincing evidence, or by stipulation of the State, that the person to be sentenced suffers from a serious physical illness, injury or infirmity with continuing treatment needs which make incarceration inappropriate and that such person does not constitute a substantial risk to the community.”).

<sup>3</sup> *See Flamer v. State*, 953 A.2d 130, 134 (Del. 2008) (“[T]his Court has held that the failure of a party appellant to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal.”).

Court Criminal Rule 35(b) rather than under 11 *Del. C.* § 4221 or the Eighth Amendment.

(7) Superior Court Criminal Rule 35(b) provides that the court will consider a motion made more than ninety days after the imposition of sentence only in “extraordinary circumstances or pursuant to 11 *Del. C.* § 4217.”<sup>4</sup> Section 4217 permits the Superior Court to modify a defendant’s sentence if the Department of Correction (“DOC”) files an application for good cause shown—including a defendant’s serious medical illness or infirmity—and certifies that the defendant does not constitute a substantial risk to the community or himself.<sup>5</sup>

(8) Rivers’s contention that DOC has not acted appropriately to contain the spread of COVID-19 within the prison system does not provide a basis for relief under Superior Court Rule 35(b).<sup>6</sup> And if Rivers has a “specific individual medical condition [that] warrant[s] sentence modification, an application by DOC under § 4217 is the proper vehicle to deliver such relief.”<sup>7</sup>

(9) Finally, the Superior Court did not abuse its discretion by denying the motion without requiring briefing by the State. Rule 35, on its face, does not contain

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<sup>4</sup> Del. Super. Ct. Crim. R. 35(b).

<sup>5</sup> 11 *Del. C.* § 4217.

<sup>6</sup> *Woods v. State*, 2021 WL 304007 (Del. Jan. 28, 2021). *See also Williams v. State*, 2020 WL 7311325 (Del. Dec. 10, 2020) (affirming denial of motion for sentence modification based on a “general concern that the Department of Correction . . . was unable to contain the spread of COVID-19 in the prison population”).

<sup>7</sup> *Williams*, 2020 WL 7311325, at \*1.

specific briefing requirements, and Rivers has not demonstrated how a State response would have altered the Superior Court’s decision on the motion.<sup>8</sup>

NOW, THEREFORE, IT IS ORDERED that the Motion to Affirm is GRANTED and the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Tamika R. Montgomery-Reeves  
Justice

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<sup>8</sup> See *Woods*, 2021 WL 304007, at \*2 (holding that the Superior Court did not abuse its discretion by denying a motion for sentence modification without requiring briefing by the State). Cf. *Miller v. State*, 2008 WL 187957, at \*1 (Del. Jan. 9, 2008) (rejecting claim that the Superior Court erred by denying motion for sentence correction without giving the defendant an opportunity to file a reply to the State’s response because “Rule 35 on its face does not provide for the filing of a reply to a response to the motion” and the appellant did not demonstrate “that any reply that he would have made to the response would have altered the Superior Court’s decision on the motion”).