

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAVINCE M. PATRICK,) No. 43, 2000
)
Defendant Below,) Court Below: Superior Court
Appellant,) of the State of Delaware in
) and for New Castle County
v.)
) Cr. A. Nos. 91-04-0809, 0810 &
STATE OF DELAWARE,) 90-12-0324; VN91-04-0809-0810,
) and VN90-12-0324
Plaintiff Below,) CA No. 99M-11-048
Appellee.) ID #s: 91004224DI, 30103605DI and 30009676DI

Submitted: March 20, 2001

Decided: June 25, 2001

Before **HOLLAND, BERGER, and STEELE**, Justices.

ORDER

This 25th day of June, 2001, it appears to the Court that:

1. LaVince M. Patrick appeals the Superior Court's order dated January 4, 2000 that modified his sentence under Superior Court Criminal Rule 35(b); the Superior Court's order dated January 7, 2000 that denied his motion for postconviction relief under Superior Court Criminal Rule 61; and the Superior Court's order dated January 7, 2000 that denied his petition for writ of habeas corpus.

2. This case first came before us on April 5, 2000. At that time, because Patrick's extensive history in the criminal justice system prevented our factual reconstruction of his numerous sentences beginning in 1991 and ending in 2000, we remanded this case on June 5, 2000¹ to the Superior Court to clarify the following three matters: (a) the legal basis for the May 8, 1992 order sentencing Patrick to four years at Level V, suspended after one year for four years of quasi-incarceration and probation on his second degree assault conviction; (b) whether it is within the Superior Court's authority to impose any combination of incarceration and probationary sentences, as long as their total length does not exceed the maximum Level V sentence authorized by statute; and (c) the then current status of Patrick's sentences, including the amount of time he had already served at Level V and the amount of time remaining on both his incarceration and probationary portions of his sentences. In its response to our remand, the Superior Court clearly tracked Patrick's criminal history relevant to this case, outlined its authority under the sentencing guidelines and satisfactorily explained the basis for Patrick's sentence. For the reasons stated below, we **AFFIRM** the Superior Court.

3. Patrick contends that the Superior Court erred when it sentenced him on May 8, 1992 for Assault Second Degree because the Court unintentionally

¹ For a detailed account of Patrick's criminal history see *Patrick v. State*, Del. Supr., No. 43, 2000, Hartnett, J. (June 5, 2000).

suspended a four-year Level V sentence for five years.² He further contends that since 1992, his sentences resulting from four violations of probation convictions³ have been based upon the original erroneous sentence. Thus, Patrick argues that he should not have been found in violation of probation on August 26, 1999, based on an arrest that occurred on February 9, 1999, because according to Patrick, if the 1992 sentence had not contained the one-year discrepancy, his probationary term would have expired on January 17, 1999, approximately one month before his arrest on February 9, 1999.⁴ Finally, Patrick argues that the modified sentence imposed by the Superior Court in its January 4, 2000 order was erroneous because it contained an additional six months at Level V.⁵ While the State concedes that the January 4, 2000 modified sentence adds an additional six months to Patrick's sentence, it argues that the increased sentence as well as all of Patrick's previous sentences were appropriate.

² That sentence reads in pertinent part: "Effective May 8, 1992, the Def. is placed in the custody of the Dept. of Correction at supervision Level 5 for a period of 4 years. If the Def. is presently serv. another sent., that sent. shall be susp. until completion of this sent. After serv. 1 year this sent. is susp. for 6 mos. at Level 4 halfway house to be followed by 6 mos. at Level 4 home confinement. This sent. is to be followed by 1 year at Level 3 then 2 years at Level 2." Thus, while the sentence states four years at Level V, the sentence totals five years including one year to be served at Level V, followed by four years probation.

³ These violations occurred on September 9, 1994, April 11, 1995, August 27, 1996 and August 26, 1999.

⁴ Patrick's violation was the illegal use of cocaine and marijuana.

⁵ On November 2, 1999 Patrick filed a document captioned "Motion for Sentence Reduction/Modification in which he complained that the two and a half year sentence imposed on August 26, 1999 for violating probation was severe. The modified order added six months to the two and a half year sentence to include time at a drug treatment center. *See* para. 7 *infra*.

4. In its response to our order of remand, the Superior Court explained in detail the complicated chronology of Patrick's criminal history. The Superior Court explained that Patrick had been sentenced on three occasions, between June 28, 1991 and May 8, 1992, to a total of ten years at Level V. The underlying offenses on these occasions were Robbery Second Degree, Possession of Cocaine and Assault Second Degree.

5. The Superior Court noted that by inadvertent error, the May 8, 1992 sentencing order suspended the four-year Level V sentence imposed for the Assault Second Degree conviction for five years of various levels of lesser supervision. The Superior Court calculated the total amount of time Patrick actually served at Level V for all three charges, including probation violations, at seventy-nine months. Subsumed within those seventy-nine months of time served were twenty-eight months, a combination of original Level V time and Level V imposed as a result of probation violations, as a direct result of the Assault Second Degree conviction. The Superior Court determined that Patrick theoretically could serve an additional forty-one months at Level V for violating his probation based on these convictions. The Superior Court determined that given the amount of time Patrick could have served compared to the actual amount of time he actually has served, the error of adding an additional year of supervised probation to his 1992 sentence for Assault Second Degree had no effect. We agree.

6. When the Superior Court sentenced Patrick on May 8, 1992, it had discretion to sentence Patrick up to eight years at Level V because Assault Second Degree is a Class D Felony punishable by imprisonment up to eight years.⁶ Thus, the inadvertent error of suspending his Level V sentence for five years rather than four had no effect on whether Patrick was on probation on February 9, 1999. Patrick was on probation on February 9, 1999 because he had received additional sentences for violating probation on three earlier occasions. Moreover, what Patrick overlooks is that for any one of these violations, the Superior Court could have sentenced Patrick to eight years at Level V, the maximum amount for a Class D Felony, with credit for time served.⁷ Thus, the additional year of supervised probation inadvertently added to his sentence had no effect because each probation violation placed Patrick in jeopardy of being sentenced up to eight years at Level V with credit for time served. Because the Superior Court had discretion to sentence Patrick up to eight years at Level V, and because Patrick received additional sentences for his numerous probation violations, Patrick's arguments are without merit.

⁶ See 11 *Del.C.* § 4205.

⁷ The authority for this lies in 11 *Del.C.* §§ 4204, 4205 and 4206. The statutory provisions explain the manner in which a sentence may be imposed, its length and whether it may be suspended in whole or in part. In addition, to the extent that all of a sentence is not suspended, a court may combine that which is suspended for probation with the balance of the total as long as it does not exceed the statutory maximum.

7. Finally, Patrick argues that the Superior Court abused its discretion when it modified Patrick's sentence on January 4, 2000 relating to his August 26, 1999 conviction for violation of probation because the Superior Court added an additional six months to Patrick's sentence. Patrick contends that on January 4, 2000 the Superior Court erroneously sentenced him to three years imprisonment when it modified the August 26, 1999 order that had only sentenced him to two and a half years at Level V. In its modified order, the Superior Court sentenced Patrick to three years at Level V suspended for three years at Level IV to allow Patrick to take advantage of the treatment at the Recovery Center of Delaware. Although the Superior Court added six months to Patrick's sentence, we find no abuse of discretion because the total term of incarceration imposed does not exceed the Level V time originally imposed in November 1991 and May 1992.⁸ For these reasons, we **AFFIRM** the Superior Court's order modifying Patrick's sentence, the Superior Court's order denying Patrick's motion for post-conviction relief, and the Superior Court's order denying Patrick's petition for writ of habeas corpus.

⁸ See *Ingram v. State*, Del. Supr., 567 A.2d 868, 869 (1989).

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

BY THE COURT:

/s/ Myron T. Steele
Justice