

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY GORDON,	§
	§ No. 265, 2012
Defendant Below,	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§
Plaintiff Below,	§ Cr. ID 1001004117
Appellee.	§
	§

Submitted: September 18, 2012
Decided: October 24, 2012

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

ORDER

This 24th day of October 2012, upon consideration of the opening brief, the State’s motion to affirm, and the record on appeal, it appears to the Court that:

(1) The defendant-appellant, Gary Gordon, appeals from the Superior Court’s sentencing order for a violation of probation (“VOP”). The State of Delaware has moved to affirm the judgment below on the ground that it is manifest on the face of Gordon’s opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that Gordon pled guilty in May 2010 to two counts of Burglary in the Third Degree and Possession of Burglary Tools.¹ The Superior Court immediately sentenced Gordon as a habitual offender to a total of six-and-a-half years at Level V incarceration, with credit for 130 days served, to be suspended after serving six months in prison for one year at the Level III Gateway program, followed by two years at Level I probation (restitution only).²

(3) On August 16, 2011, the Superior Court found that Gordon had violated the terms of his probation. The court sentenced him to a total of five years and three months at Level V incarceration, with credit for four days served, suspended immediately for one year at Level IV residential drug treatment, followed by one year of Level III Aftercare and two years of Level I probation (restitution only).

(4) On May 1, 2012, the Superior Court found Gordon in violation of his probation for the second time. Gordon was charged with violating probation for returning a urine sample that tested positive for cocaine, and for failing to attend a scheduled Aftercare appointment and to report for a weekend intervention. Gordon acknowledged missing those two

¹ DEL. CODE ANN. tit. 11, §§ 824, 828 (2007).

² This sentence was modified on August 26, 2010 to remove the Gateway program requirement.

appointments. After considering the evidence and Gordon's extensive criminal record, the Superior Court found that Gordon had violated the terms of his probation and sentenced him to a total period of five years at Level V incarceration, to be suspended upon successful completion of the Greentree program, with the balance of the sentence to be served at Level III probation. This appeal followed.

(5) Gordon raises four issues in his opening brief on appeal. First, he contends that he should not have been arrested on the VOP charges until he had the chance to speak to his probation officer. Next, he claims that he was denied his constitutional right to the effective assistance of counsel before and during the VOP hearing. Third, he argues that the Superior Court erred in accepting medical opinion testimony about urine testing from an unqualified witness. Finally, he asserts that the trial court abused its discretion by sentencing him with a closed mind.

(6) We find no merit to Gordon's contentions. His first claim fails because he had no legal right to meet with his probation officer before being arrested on the VOP charges. Accordingly, the Superior Court committed no error in this respect. Gordon's second claim, arguing ineffective assistance of counsel, is not a claim that this Court will review on direct appeal where the issue was not first raised to, and addressed by, the Superior

Court in the proceedings below.³ Accordingly, we do not consider this claim further.

(7) Gordon next contends that the Superior Court erred in accepting the TASC officer's statement that a positive urine test for cocaine could only be caused by cocaine use. The record of the hearing reflects that Gordon first attempted to argue that his urine sample must have been mixed up with that of his father, Gary Gordon, Sr. The TASC officer explained why that was not possible, after which Gordon then suggested that his positive test must have been caused by his use of a lidocaine patch that he wore for pain.

(8) In a VOP hearing, unlike a criminal trial, the State is only required to prove that the defendant violated the terms of his probation by a preponderance of the evidence.⁴ A preponderance of evidence means "some competent evidence" to "reasonably satisfy the judge that the conduct of the probationer has not been as required by the conditions of probation."⁵ The record reflects that Gordon admitted to missing an Aftercare appointment and failing to report for a weekend intervention. Furthermore, his drug test results came back positive for cocaine use. The Superior Court properly

³ *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

⁴ *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006).

⁵ *Id.* (quoting *Collins v. State*, 897 A.2d 159, 160 (Del. 2006)).

relied on this evidence and did not err in finding that Gordon had violated his probation.⁶

(9) Having determined that Gordon had violated his probation, the Superior Court was authorized to impose any period of incarceration up to and including the balance of the Level V time remaining to be served on the original sentence.⁷ The original sentence imposed six years of suspended time. The first VOP sentence imposed five years and three months of suspended time. In sentencing Gordon on his second VOP, the Superior Court imposed a five year sentence to be suspended upon his successful completion of the Greentree program, with the balance to be served at Level III probation. That sentence was well within statutory limits, was not excessive, and in no way reflects a closed mind by the sentencing judge.⁸

⁶ The Superior Court informed Gordon that if he could provide scientific evidence that lidocaine use can produce a positive drug test for cocaine use, it would consider a sentence modification.

⁷ DEL. CODE ANN. tit. 11, § 4334(c) (2007).

⁸ See *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice