IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN SELBY,	§	
	§	
Defendant Below-Appellant,	§	No. 273, 2013
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. ID Nos. 0806035277,
	§	0807035985, 0808022618,
Plaintiff Below-Appellee.	§	0908026980 and 1001008773
	§	

Submitted: August 5, 2013
Decided: August 20, 2013

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 20th day of August 2013, upon consideration of the appellant's opening brief and the State's motion to affirm, it appears to the Court that:

(1) The defendant-appellant, Stephen Selby, filed this appeal from the Superior Court's decision affirming a judgment of the Court of Common Pleas sentencing Selby for a violation of probation (VOP). The State of Delaware has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Selby's opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that, in September 2009, Selby pled guilty in the Court of Common Pleas to two counts of Assault in the Third Degree, two counts

of Noncompliance with Bond, and one count of Criminal Contempt. The Court of Common Pleas sentenced Selby on each charge to one year at Level V incarceration to be suspended entirely for one year at Level III probation. In April 2010, Selby was arrested on new criminal charges. He was charged with violating probation because of the new criminal charges and also because he had failed to report to probation since January 2010. After a contested hearing at which he was represented by counsel, the Court of Common Pleas found Selby had committed a VOP because of his failure to report, which he admitted. The Court of Common Pleas sentenced Selby to a total period of five years at Level V incarceration to be suspended after serving two and a half years in prison for decreasing levels of supervision.

(3) Selby appealed his VOP sentence to the Superior Court. Selby's only argument on appeal to the Superior Court was that the Court of Common Pleas abused its discretion and sentenced him with a closed mind.[1] The Superior Court conducted an independent review of the record and concluded that Selby's appeal was wholly without merit. This appeal followed.

(4) Selby raises four issues in his opening brief on appeal. First, he contends that the Superior Court erred in failing to rule on his motion for removal

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[1] Selby's counsel on appeal to the Superior Court filed a motion to withdraw and a no-merit brief pursuant to Supreme Court Rule 26(c) and Superior Court Criminal Rule 39. Selby was given the opportunity to raise any additional issues for the Superior Court's consideration.

of his appointed counsel on appeal. Second, Selby argues that the Court of Common Pleas erred in allowing the victim of Selby's 2009 assault charges to testify at his VOP hearing. Third, Selby argues that the Court of Common Pleas committed an ex post facto violation by enhancing his VOP sentence. Finally, Selby contends that the attorney who represented him at the VOP hearing was ineffective.

(5) Selby first claims that the Superior Court erred in failing to rule on his motion to remove his appellate counsel. The Superior Court determined that Selby's motion to remove his counsel was moot after it granted counsel's motion to withdraw because the appeal lacked merit. We find no error in this ruling.

(6) Selby next claims that the Court of Common Pleas erred by allowing the victim of Selby's 2009 assaults testify at his VOP hearing. The witness was also the alleged victim of the charges for which Selby was arrested in April 2010, which formed one of the grounds for Selby's VOP charge. Although the judge ultimately found that her VOP adjudication was based solely on her finding that Selby had failed to report, it was not improper for the judge to consider testimony relating to the allegation that Selby had violated probation by committing new crimes.

(7) Selby next asserts that by imposing his VOP sentence pursuant to 11 Del. C. § 4204(k), which permits no reduction of sentence through good time, the

Court of Common Pleas illegally enhanced his sentence in violation of the *ex post facto* clause of the United States Constitution. There is no merit to this argument. The Court of Common Pleas originally sentenced Selby to a total period of five years at Level V incarceration to be suspended entirely for probation. Thus, Section 4204(k) was inapplicable to his suspended sentence. After finding Selby had violated his probation, the Court of Common Pleas could have resentenced Selby to serve the entire five year suspended sentence in prison,[2] giving credit for any time previously served.[3] Instead, the Court of Common Pleas again ordered the total five year sentence to be suspended after Selby served only two and a half years in prison. The imposition of this sentence pursuant to 11 Del. C. § 4204(k) was not an illegal enhancement of his original sentence.[4] Accordingly, we find no merit to this claim.

(8) Finally, Selby argues that his appointed counsel was ineffective at the VOP hearing. This Court, however, will not consider a claim of ineffective assistance of counsel for the first time on direct appeal if that issue was not raised

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[2] *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

[3] To the extent Selby now argues that he is entitled to credit for time he was held at Level V while awaiting adjudication of his VOP, he did not raise this claim below and has provided no evidence to support his claim. If he can establish his right to credit time, he may file an appropriate motion requesting such relief in the Court of Common Pleas.

[4] *Mains v. State*, 2011 WL 378800 (Del. Feb. 1, 2011).

to and addressed on the merits by the trial court in the first instance.[5] Selby did not raise this issue below. Accordingly, we do not consider his claim in this appeal.

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[5] *Johnson v. State*, 92 A.2d 233, 234 (Del. 2008).