

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BEN ROTEN,	§
	§ No. 311, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0401005180
	§
Plaintiff Below-	§
Appellee.	§

Submitted: August 24, 2012
Decided: September 24, 2012

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 24th day of September 2012, upon consideration of the appellant’s opening brief and the appellee’s motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Ben Roten, filed an appeal from the Superior Court’s May 9, 2012 order denying his motion for correction of illegal sentences pursuant to Superior Court Criminal Rule 35(a).¹ The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

¹ The order was docketed on May 29, 2012.

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.² We agree and affirm.

(2) The record before us reflects that, in August 2004, Roten entered a plea of guilty to Assault in the First Degree, as a lesser-included offense of Attempted Murder, and Aggravated Menacing. Prior to sentencing, Roten filed a motion to withdraw his guilty plea on the ground that it was coerced. Following a hearing, the Superior Court denied the motion and sentenced Roten to 25 years of Level V incarceration on the assault conviction and, on the aggravated menacing conviction, to 5 years at Level V, to be suspended after successful completion of the Key Program to 6 months at Level IV Crest Program followed by 12 months of Level III Aftercare. This Court affirmed the Superior Court's denial of Roten's motion to withdraw his guilty plea.³ This Court also affirmed the Superior Court's denial of Roten's subsequent motions for postconviction relief.⁴

(3) In this appeal from the Superior Court's denial of his Rule 35(a) motion, Roten claims that the Superior Court abused its discretion when it found that his motion was time-barred under Rule 35(b). He contends that the sentencing judge imposed his sentences with a closed mind, thereby

² Supr. Ct. R. 25(a).

³ *Roten v. State*, Del. Supr., No. 464, 2004, Berger, J. (Sept. 15, 2005).

⁴ *Roten v. State*, Del. Supr., No. 290, 2006, Jacobs, J. (Mar. 15, 2007); *Roten v. State*, Del. Supr., No. 394, 2009, Steele, C.J. (July 23, 2009); *Roten v. State*, Del. Supr., No. 438, 2011, Berger, J. (Dec. 28, 2011).

violating his due process rights and rendering his sentences illegal under Rule 35(a).

(4) While Roten's claim in the Superior Court was that his sentences were illegal because the judge imposed them with a closed mind, the Superior Court treated it as a claim that his sentences were imposed in an illegal manner.⁵ As such, the claim was subject to the time limitation of Rule 35(b), which bars any motion filed more than 90 days after sentence is imposed except upon a showing of "extraordinary circumstances." The Superior Court found that Roten had made no such showing.

(5) The Superior Court was correct when it treated Roten's claim that the judge imposed his sentences with a closed mind as a claim that his sentences were imposed in an illegal manner.⁶ Even if the Superior Court had construed Roten's claim as a claim that his sentences were illegal, Roten would not have prevailed. A sentence is illegal when it exceeds the statutorily-imposed limits, violates double jeopardy, is ambiguous or contradictory, omits a term required to be imposed by statute or is a sentence that the judgment of conviction did not authorize.⁷ Roten did not, and does

⁵ Super. Ct. Crim. R. 35(a).

⁶ See *Wilson v. State*, Del. Supr., No. 549, 2005, Steele, C.J. (May 9, 2006) (determining that a claim that the sentencing judge imposed sentence with a closed mind constituted a claim that the sentence was "imposed in an illegal manner" and not a claim that the sentence was "illegal").

⁷ *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

not, make any such claims regarding his sentences. We also conclude that there was no error or abuse of discretion on the part of the Superior Court when it denied Roten's Rule 35(a) motion on the ground that it was time-barred under Rule 35(b), since Roten clearly did not file his motion within the 90-day time limit.

(6) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice