

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEREMIAH L. SEWELL,	§	
	§	No. 324, 2003
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County in IS98-02-
	§	0509; S98-09-0166I.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Def. ID No. 9801013800
Appellee.	§	9808007468

Submitted: August 15, 2003
Decided: November 26, 2003

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

ORDER

This 26th day of November 2003, 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) In May 1998, the appellant, Jeremiah L. Sewell, pled guilty to a charge of Riot and was sentenced to three years at Level V imprisonment suspended for probation. On February 18, 1999, Sewell entered a guilty plea to Burglary in the Second Degree and was sentenced to three years at Level V, suspended upon successful completion of the Boot Camp Program, for probation. In December 2001, the Superior Court found Sewell guilty of his

fifth violation of probation (VOP). On appeal, this Court affirmed the Superior Court's judgment.¹

(2) This appeal is from the denial of Sewell's sixth unsuccessful motion to modify his December 2001 VOP sentence.² In his motion, Sewell argued, pursuant to Superior Court Criminal Rule 35(b), that the December 2001 sentence violates title 11, § 4333 of the Delaware Code, which was recently amended to impose certain limits to probationary sentences. By order dated June 11, 2003, the Superior Court denied Sewell's motion.

(3) In his opening brief on appeal, Sewell argues, pursuant to Superior Court Criminal Rule 35(a), that his December 2001 VOP sentence is illegal because it exceeds the limits of section 4333, as recently amended. Sewell also argues that the Superior Court sentencing judge (i) wrongly revoked his probation before he had begun serving it; (ii) violated double jeopardy when sentencing him; and (iii) had a closed mind when sentencing

¹*See Sewell v. State*, 2002 WL 651271 (Del. Supr.)

²Sewell has also filed several unsuccessful motions to correct an illegal sentence pursuant to Superior Court Criminal Rule 35(a).

him. Furthermore, Sewell argues that he was deprived of counsel at the December 2001 VOP hearing.

(4) Sewell's first claim is without merit. It is true that the Delaware legislature recently amended title 11, § 4333 of the Delaware Code to establish limits to certain probationary sentences.³ The legislature later clarified, however, that the provisions of the new law do not apply to defendants who were sentenced prior to June 1, 2003.⁴ Thus, the recent amendment to section 4333 does not apply to Sewell, who was sentenced in December 2001.

(5) Sewell's remaining claims were not fairly presented to the Superior Court and thus will be reviewed only for plain error.⁵ Sewell cannot demonstrate any plain error in the revocation of the unexecuted portion of his probationary sentence.⁶ Moreover, Sewell has not demonstrated that the judge had a closed mind in sentencing him,⁷ or that the prohibition against double

³74 Del. Laws c. 27, § 4 (Approved May 1, 2003), S.B. 50 as amended by S.A. 3.

⁴74 Del. Laws c. 88, § 1 (Approved June 30, 2003), S.B. 150.

⁵Supr. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁶The Superior Court has broad authority to terminate probationary sentences "at any time." Del. Code Ann. tit. 11, § 4333 (2001). "This Court has interpreted 11 Del. C. § 4333 to mean that the Superior Court may revoke a grant of probation prior to its actual commencement." *Cornish v. State*, 1998 WL 382641 (Del. Supr.) citing *Williams v. State*, 560 A.2d 1012, 1013 (Del. 1989).

⁷See *Ellerbe v. State*, 2000 WL 949625 (Del. Supr.) (defining sentencing with a

jeopardy was violated in this case.⁸ Sewell's claim that he was entitled to counsel at his December 2001 VOP hearing is not justiciable in this appeal from the denial of a 2003 Rule 35(b) sentence modification motion.

(6) We find no abuse of discretion in the Superior Court's denial of Sewell's sixth motion for modification of sentence. The motion was repetitive and was filed well beyond the ninety-day limit of Superior Court Criminal Rule 35(b).⁹ Sewell did not establish extraordinary circumstances sufficient to overcome the time bar.

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/ Myron T. Steele
Justice

"closed mind" as "sentencing based on preconceived bias without consideration of the nature of the offense or the character of the defendant").

⁸After determining that an accused violated probation, the Superior Court may "require the probation violator to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which originally had been imposed." Del. Code Ann. tit. 11, § 4334(c) (2001).

⁹*See* Super. Ct. R. 35(b) (providing in part that the court will not consider repetitive requests for reduction of sentence and will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances).