

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES B. WALSH, )  
 ) No. 337, 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. 1006004227  
 )  
 Plaintiff Below, )  
 Appellee. )

Submitted: November 14, 2012

Decided: December 3, 2012

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

***ORDER***

This 3<sup>rd</sup> day of November 2012, it appears to the Court that:

1. Defendant–Appellant James Walsh appeals the Superior Court judge’s order sentencing him for a violation of probation (VOP).

2. Walsh pleaded guilty on October 20, 2010 to a sixth offense of driving under the influence and resisting arrest, and in exchange the State entered a *nolle prosequi* on the eight remaining charges. On the DUI charge, Walsh received a sentence of eight years at Level V incarceration, with credit for two days served, to be suspended after one year and the successful completion of the TEMPO program, followed by successful completion of one year at a Level IV residential substance abuse treatment program, followed by two years of Level III aftercare.

On the resisting arrest charge, Walsh received a sentence of two years at Level V, suspended for two years at Level III.

3. On March 9, 2012, the Department of Corrections filed an administrative warrant alleging that Walsh violated his probation when he registered a 0.040 BAC on an Alco-Sensor test upon returning from approved employment. A Violation of Probation Report filed on March 19, 2012 included three additional alleged violations that Walsh's counsel did not contest because Walsh had previously admitted to them and thought they had been resolved through administrative discipline.

4. On April 26, 2012, the Superior Court judge found Walsh guilty of a VOP and ordered TASC to evaluate Walsh for substance abuse and mental health needs, with a report due to the court at sentencing. On May 25, 2012, the Superior Court judge gave Walsh credit for time served and resentenced him to six years at Level V incarceration, to be suspended after successful completion of the Key program, followed by one year at a Level IV residential substance abuse treatment program, followed by one year of Level III aftercare on the DUI charge and two years at Level V, suspended for one year at Level III, on the resisting arrest charge.

5. In his Opening Brief, Walsh contends that (1) he was denied due process under the Fourteenth Amendment to the U.S. Constitution because the trial court sentenced him without considering the court-ordered substance abuse and mental

health evaluation and (2) the Superior Court judge abused his discretion by allegedly improperly relying on evidence of previous probation violations resolved administratively and exhibited a closed mind by sentencing Walsh without the benefit of the substance abuse and mental health evaluation.

6. With respect to Walsh's first argument, we find no merit to his claim. While the report does not appear in the record,<sup>1</sup> the transcript from the sentencing hearing clearly indicates that Walsh admitted the evaluation was done and that Walsh's counsel read the report.<sup>2</sup> Walsh's counsel informed the trial judge that the report recommended Level V incarceration through the Key program combined with a Level IV substance abuse program (Crest).<sup>3</sup> The trial judge did not express confusion over the report to which Walsh's counsel referred, from which we infer that he was satisfied with the oral report by counsel. Accordingly, we find the Superior Court judge considered the mental health and substance abuse evaluation when resentencing Walsh and Walsh's due process claim is meritless.

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<sup>1</sup> We take judicial notice that the report is not ordinarily docketed because it is confidential and reviewed by the judge prior to sentencing.

<sup>2</sup> *State v. Walsh*, Crim. ID No. 1006004227, at 1–2, 6 (Del. Super. May 25, 2012) (TRANSCRIPT). We take judicial notice that the report, submitted by the State as an exhibit to its Answering Brief, indicates that it was copied to the Superior Court Case Manager and is consistent with Walsh's counsel's admissions at the hearing. App. to Answering Br. B–8 to B–10. Accordingly, if there was any error, it was harmless.

<sup>3</sup> *Walsh*, Crim. ID No. 1006004227, at 1.

7. With respect to the first prong of Walsh’s second claim, we find the Superior Court judge did not abuse his discretion by relying on improper evidence when he resentenced Walsh. Our review of sentences generally ends if the sentence is within the statutory limits imposed by the General Assembly.<sup>4</sup> Where the State can establish a VOP, the trial court may “impose any period of incarceration up to and including the balance of the Level V time remaining to be served on the original sentence.”<sup>5</sup> Furthermore, the trial judge is “entitled to rely upon information regarding other, unproven crimes” when making a sentencing determination.<sup>6</sup> The record supports the trial judge’s conclusion that the State established Walsh’s VOP by a preponderance of the evidence based on the Alco-Sensor test. The trial judge was permitted to consider evidence of other violations, whether administratively resolved or not, when making his sentencing determination.<sup>7</sup> Because the judge considered at least one violation for which Walsh had never been disciplined, we need not reach the issue of whether a trial judge could resentence a defendant for VOPs that have already been resolved

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<sup>4</sup> *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

<sup>5</sup> *Collins v. State*, 29 A.3d 245, 2011 WL 4838255, at \*2 (Del. Oct. 12, 2011) (ORDER) (citing 11 *Del. C.* § 4334(c)).

<sup>6</sup> *Mayes*, 604 A.2d at 842–43 (collecting cases).

<sup>7</sup> See *Kurzmann v. State*, 903 A.2d 702, 717 (Del. 2006) (“Because probation is an ‘act of grace,’ the State need only present ‘some competent evidence’ to prove the violation asserted and to reasonably satisfy the VOP judge that the probationer’s conduct has not been as good as required under the conditions of probation.”).

administratively. The sentence the trial judge imposed did not exceed the time remaining to be served on Walsh's original sentence, and, accordingly, we find that the sentence was authorized by law and was neither arbitrary nor excessive.

8. With respect to the second prong of Walsh's second claim, we find the Superior Court judge did not abuse his discretion by exhibiting a closed mind when he resentenced Walsh. A judge exhibits a closed mind when he bases a sentence on a preconceived bias and fails to consider the nature of the offense or the defendant's character.<sup>8</sup> A judge is also required to maintain an open mind toward all possible mitigating information.<sup>9</sup> Walsh bases his claim on his argument that the trial judge failed to consider the results of the substance abuse and mental health evaluation. Because we find that the trial judge considered the evaluation,<sup>10</sup> Walsh's claim is meritless.

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

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice

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<sup>8</sup> *Id.* at 714 (quoting *Weston v. State*, 832 A.2d 742, 746 (Del. 2003)).

<sup>9</sup> *Id.* (quoting *Weston v. State*, 832 A.2d 742, 746 (Del. 2003)).

<sup>10</sup> *See supra* ¶ 6.