

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CLEOPHAS MULLEN, JR.,	§
	§
Defendant Below-	§ No. 403, 2000
Appellant,	§
	§
v.	§ Court Below–Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr.A. Nos. VS97-02-0164-02
Plaintiff Below-	§
Appellee.	§

Submitted: February 6, 2001

Decided: March 13, 2001

Before **HOLLAND, BERGER** and **STEELE**, Justices

ORDER

This 13th day of March 2001, 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, Cleophas Mullen, Jr., filed this appeal from the August 7, 2000 order of the Superior Court denying his motion for correction of sentence. We find no merit to the appeal. Accordingly, we **AFFIRM**.

(2) In this appeal, Mullen claims he has not been properly credited with time spent at Level V on his sentence for a violation of probation (VOP). He contends that the second time he was sentenced for a VOP in connection with the same forgery conviction he was not given proper credit for participation in the Crest Program and time spent at Level V pending space availability at Level IV.

(3) In 1997, Mullen pleaded guilty to 3 counts of second degree forgery, in addition to other charges. On the first forgery conviction,¹ he was sentenced to 2 years incarceration at Level V, with credit for time served. On the second forgery conviction,² he was sentenced to 2 years incarceration at Level V, to be suspended for decreasing levels of probation, with the defendant to be held at Level V pending space availability at Level IV. On the third forgery conviction,³ he was sentenced to 2 years incarceration at Level V, to be suspended for 2 years at Level II.

¹S97-02-0162.

²S97-02-0163.

³S97-02-0164.

(4) In 1998, after being notified that Mullen had completed the Key Program, the Superior Court modified its sentence on the first forgery conviction to provide that the balance of Mullen's Level V time would be suspended for Level IV Residential Substance Abuse Treatment Program for 6 months, with the defendant to be held at Level V pending space availability at Level IV. In 1999, the Superior Court again modified its sentence on the first forgery conviction to provide that Mullen would be held at Level III pending space availability at Level IV.

(5) On August 27, 1999, the Superior Court found that Mullen had committed a VOP. On the third forgery conviction, Mullen was sentenced to 2 years incarceration at Level V, with credit for time served, to be suspended for 9 months at Level IV Residential Substance Abuse Treatment Program (Crest), to be followed by decreasing levels of probation after successful completion of the program. On the first and second forgery convictions, Mullen was discharged from probation as unimproved.

(6) On May 26, 2000, the Superior Court again found that Mullen had committed a VOP. On the forgery conviction, he was sentenced to 1 year and 11 months incarceration at Level V, to be suspended after successful completion of

the Key Program for 6 months at Level III, followed by 1 year of probation at Level II.

(7) Mullen's claim that he has not been given proper credit for time spent in the Crest Program is without merit. Upon finding Mullen in violation of probation, the Superior Court was authorized to revoke his probation and reimpose the period of incarceration that had been suspended in his prior sentence.⁴ The Superior Court was required to credit Mullen only with "any period of actual incarceration."⁵ Participation in the Crest Program at Level IV, while considered "quasi-incarceration," does not constitute "actual incarceration" and, therefore, properly was not credited against Mullen's Level V sentence.⁶ Because Mullen's claim that he was not credited with time spent at Level V pending space availability at Level IV was not presented to the Superior Court in the first instance, we decline to address it.⁷

⁴11 Del. C. § 4334(c). The record reflects that a 2-year period of incarceration at Level V, with credit for time served, remained on Mullen's previous sentence.

⁵11 Del. C. § 3901(c).

⁶*Walt v. State*, Del. Supr., 727 A.2d 836, 839-40, fn.4 (1999).

⁷Supr. Ct. R. 8. While the record is unclear on this point, it appears that Mullen's sentence of 1 year and 11 months at Level V may have been intended to take account of such Level V time.

(8) It is manifest on the face of Mullen's 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, clearly there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice