

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREW D. HARRIS,	§
	§
Defendant Below-	§ No. 519, 2000
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr.A. No. VK97-10-0757-04
Plaintiff Below-	§
Appellee.	§

Submitted: February 6, 2001

Decided: March 8, 2001

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

ORDER

This 8th day of March 2001, upon consideration of the appellant's opening brief and the State of Delaware's motion to affirm, it appears to the Court that:

(1) The appellant, Andrew D. Harris, filed this appeal from an order of the Superior Court modifying his criminal sentence. The State of Delaware has moved to affirm the judgment of the Superior Court on the ground that it is manifest on the face of Harris' opening brief that the appeal is without merit.¹

We agree and affirm.

¹Supr. Ct. R. 25(a).

(2) The record reflects that Harris pled guilty in March 1998 to one count of felony driving under the influence. The Superior Court sentenced Harris to two years at Level V imprisonment, suspended after six months for decreasing levels of supervision. Thereafter, Harris was found in violation of probation (VOP) on four separate occasions, in September 1998, April 1999, November 1999, and August 2000.

(3) Following his fourth VOP hearing in August 2000, the Superior Court revoked Harris' probation and reimposed sentence as follows: eighteen months at Level V imprisonment, suspended after six months with the balance to be served at Level III probation. In September 2000, Harris filed a motion to correct the Superior Court's sentence. In his motion, Harris asserted that the Superior Court's August 25 sentencing order was improper because it failed to account for all the time he previously served at Level V imprisonment. Without addressing his specific claims, the Superior Court responded to Harris' motion by modifying its August 25, 2000 sentencing order to reimpose an eighteen month sentence at Level V incarceration, with credit for time previously served, to be suspended for six months at Level IV Work Release. The Superior Court thus suspended all of Harris' Level V jail time.

(4) The gist of Harris' complaint about the Superior Court's modified sentence is that it fails to give him credit for all the time he previously served at Level V incarceration on this charge. The State responds that Harris' complaint is moot given that the Superior Court, in its modified sentence, suspended all of Harris' Level V time for six months at Level IV.

(5) It is well settled that, upon finding a violation of probation, the Superior Court is authorized to reimpose any previously suspended prison term.² In this case, the Superior Court originally sentenced Harris to a total of two years at Level V incarceration, suspended after six months for decreasing levels of supervision. Accordingly, upon a subsequent finding that Harris had violated his probation, the Superior Court was authorized to reimpose the eighteen month suspended portion of Harris' original sentence. Reimposing the suspended portion of the original sentence upon a subsequent finding of a VOP inherently credits a defendant with any time the defendant already has served on the unsuspended portion of the original sentence.

²*Ingram v. State*, Del. Supr., 567 A.2d 868, 869 (1989) (citing 11 Del. C. § 4334(c)).

(6) In Harris' case, he spent six months in jail on his original two year sentence. Credit for the six months Harris originally spent in jail on this charge was reflected in the Superior Court's reimposition of an eighteen month sentence following Harris' first VOP. To the extent that the Superior Court ordered that Harris be credited with time served on his eighteen month VOP sentence, that credit time should not include the six months Harris spent in jail on the original sentence because credit for those six months already was reflected in the Superior Court's reduction of the original two year sentence to eighteen months. Credit time toward the eighteen month VOP sentence should include only time Harris has spent in jail for a violation of probation.³

(7) Accordingly, at the time of his fourth VOP hearing, the record reflects that Harris had not spent more than eighteen months at Level V incarceration for his earlier probation violations. Thus, Harris' claim that the Superior Court's modified sentence (which in fact suspended all of his Level V time following his fourth VOP) exceeded the maximum punishment authorized by law is without merit.

³Harris is entitled to receive Level V credit toward his eighteen month VOP sentence for any time that he has spent at Level V, including time spent awaiting space availability in a Level IV program. *Gamble v. State*, Del. Supr., 728 A.2d 1171, 1172 (1999).

(8) It is manifest on the face of Harris's opening brief that his appeal is without merit because the issues presented on appeal clearly 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 hereby AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice