IN THE SUPREME COURT OF THE STATE OF DELAWARE

WAYNE A. JONES,	§	
	§	
Defendant Below-Appellant,	§	No. 223, 2001
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware,
	§	in and for Sussex County
STATE OF DELAWARE,	§	Cr.A. Nos. VS93-09-0571-03,
	§	VS95-03-0344-03,
Plaintiff Below-Appellee.	§	VS99-09-0414-02
	§	

Submitted: September 20, 2001
Decided: October 31, 2001

Before **VEASEY**, Chief Justice, **WALSH**, and **STEELE**, Justices.

O R D E R

This 31st day of October 2001, upon consideration of the appellant's opening brief and the appellee's motion to affirm, it appears to the Court that:

(1) The defendant-appellant, Wayne A. Jones, filed this appeal from his adjudication and sentence for violation of probation (VOP). Following a hearing on April 16, 2001, the Superior Court concluded, based on Jones' own admissions, that Jones had violated three conditions of his probation. At defense counsel's suggestion, the Superior Court ordered an evaluation by the Treatment Access Center (TASC) and deferred sentencing until TASC issued its report. On May 8, 2001, the Superior Court followed

the TASC recommendation and sentenced Jones to a total of 4 years at Level V incarceration, to be suspended upon successful completion of the Key program, to be followed by work release and probation.

(2) Jones raises eight separately numbered issues in his opening brief on appeal, although many of the issues are interrelated. The heart of Jones' complaint is that the Superior Court improperly sentenced him to complete the Level V Key drug treatment program rather than allowing him to participate in the out-patient treatment program recommended by Jones' private psychiatrist, Dr. Mittal. The State has moved to affirm the judgment of the Superior Court.

(3) The record of the VOP hearing reflects that Jones admitted to violating three conditions of his probation by failing to keep appointments with his probation officer, by failing to timely report a change in his employment to his probation officer, and by testing positive for cocaine use. As a result of Jones' admissions, there was no error in the Superior Court's conclusion that Jones had violated his probation. The real issue is whether there is any error in the sentence imposed by the Superior Court.

(4) Jones complains that, at the VOP hearing, the Superior Court failed to treat Dr. Mittal as an expert, failed to accord Dr. Mittal's opinion the proper weight, and improperly deferred to the respective opinions of

Jones' probation officer and the TASC counselor. Jones further argues that it was improper for the Superior Court to consider the TASC report, which refuted Dr. Mittal's recommendation, after the conclusion of the VOP hearing on April 16, 2001. As a corollary to that argument, Jones argues that because the TASC report was improperly admitted below after the close of the April 16, 2001 hearing, it should not be considered part of the record on appeal.

(5) None of these arguments has merit. Because Jones admitted violating several conditions of his probation, the record of the April 16, 2001 VOP hearing reflects that the focus of the hearing concerned the appropriate punishment for Jones' violations. Dr. Mittal did not testify at the April 16, 2001 hearing. Accordingly, there was no opportunity or need for the Court to qualify Dr. Mittal as an expert. Nonetheless, it is clear that Dr. Mittal's written recommendation was offered into evidence and was considered by the Superior Court. Given the conflicting recommendations concerning whether private drug treatment was more appropriate than the Key Program, the Superior Court, at defense counsel's suggestion, ordered the TASC evaluation and deferred sentencing. This was entirely within the Superior Court's discretion, and we find no abuse of discretion.[1] The TASC report

[1] *See Williams v. State*, Del. Supr., 560 A.2d 1012, 1015 (1989) (holding that trial court

was appropriately considered by the Superior Court in formulating its sentencing decision and is appropriately part of the record on appeal. In determining the appropriate sanction for Jones' admitted violations, it was well within the Superior Court's discretion to reject the recommendation of Dr. Mittal for private drug treatment in favor of the TASC recommendation for the Key Program.[2]

(6) Jones also complains that the Superior Court improperly found him in violation of all of his probationary sentences (including probation he had not yet begun serving) when, in fact, he was serving only the Level III portion of his probation at the time of the violations. There is no merit to this claim. We previously have held that, after a VOP finding, the Superior Court may revoke any portion of a defendant's probationary sentence including the unexecuted portion of the sentence.[3] Accordingly, we reject this claim.

(7) Finally, Jones complains that his probation officer improperly mentioned a pending assault charge at the VOP hearing, although Jones ultimately was found not guilty of the charge after a trial. The record, however, reflects that it was defense counsel who first mentioned the

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has "wide latitude in probationary matters").

[2] *Accord Tyre v. State*, Del. Supr., 412 A.2d 326, 330 (1980) (holding that factfinder is responsible for weighing evidence and resolving conflicting testimony).

pending assault charge in response to a question from the Superior Court about a bandage on Jones' head. Furthermore, in light of Jones' admissions to other violations, it is clear that the pending assault charge did not form the basis of the Superior Court's finding that Jones had violated probation. Even if the pending assault charge had been considered by the Superior Court, we do not find any error. We previously have recognized that the Superior Court has authority to revoke probation notwithstanding the defendant's acquittal on criminal charges involving the same conduct giving rise to the VOP hearing.[4]

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/Joseph T. Walsh
Justice

[3] *Williams v. State*, 560 A.2d at 1013.

[4] *See Gibbs v. State*, Del. Supr., 760 A.2d 541 (2000).