

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN HOLTZMAN,)
) No. 567, 2001
 Defendant-Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for New Castle County
)
 STATE OF DELAWARE,) Cr. No. 9407008750
)
 Plaintiff-Below,)
 Appellee.)

Submitted: February 21, 2002
Decided: March 27, 2002

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

ORDER

This 27th day of March 2002, it appears to the Court that:

1. Defendant-below, Appellant, pled guilty on February 4, 1999 to two counts of unlawful sexual contact in the third degree with his fourteen-year old daughter as lesser included offenses.
2. The Superior Court sentenced him to four years at Level V, suspended after two and one-half years for probation.
3. As a part of his sentence, the Court ordered Appellant to “be evaluated for substance abuse and follow any directions for counseling, testing, or treatment made by the probation officer.”

4. In August 2001, Appellant agreed in writing to undergo biannual polygraph examinations at the request of his probation officer.

5. On October 18, 2001, the sentencing judge modified the sentence to include the condition that Appellant undergo biannual polygraph testing at the request of his probation officer.

6. Appellant claims that the sentencing judge could not modify his sentence because the Superior Court had lost jurisdiction to modify the original lawful sentence; that the order to undergo polygraph examinations violated appellant's right to due process because the defendant was not given notice and opportunity to be heard and that the order violated Appellant's right to counsel.

7. We conclude that to the extent the probation officer's request for polygraph examinations is a change to Appellant's initial sentencing Order, the Order of October 18, 2001 does no more than clarify the original sentence and allow polygraph testing to be used to monitor compliance with substance abuse treatment.

8. Appellant did not raise any of these issues presented on appeal in Superior Court. Because Appellant failed to raise an objection below, the issue may be reviewed only for plain error.¹ The issue is waived unless the error is so

¹ *Capano v. State*, 781 A.2d 556, 653 (Del. 2001).

clearly prejudicial to substantial rights that it jeopardizes the fairness and integrity of the process below.²

9. The original February 4, 1999 Sentencing Order requires Appellant to “be evaluated for substance abuse and follow any directions for counseling, testing, or treatment made by the probation officer.” The October 18, 2001 order for a biannual polygraph testing did not place any additional requirements on Appellant. The order does not constitute additional punishment.³ Modification of probation does not result in the same loss of liberty as probation revocation and therefore does not infringe on Appellant’s Due Process rights.⁴ The Order clarified Appellant’s original sentence thereby allowing the polygraph test to assist in determining his response to and compliance with substance abuse treatment.

10. Appellant argues that Superior Court Rule of Criminal Procedure 32.1(b) requires that a probationer be given an opportunity to be heard before terms of probation can be “modified.” This rule applies to modifying or revoking probation after an alleged violation. Here, we have no violation of probation. The Superior Court Judge’s October 18, 2001 Order simply clarifies his original sentence, conforms it to an agreement recorded between Appellant and his probation officer and is at best a modification under 11 Del. C. § 4332.

² *Id.*

³ See *Staley v. State*, 505 S.E.2d 491 at 493-94 (Ga. Ct. App. 1998).

⁴ See *Gould v. Patterson*, 2002 WL 54653 at *2 (Ga. Ct. App. 2002).

11. Appellant also argues that Superior Court does not have the power to modify the earlier sentence. This argument is wholly without merit. A sentencing court maintains jurisdiction over a probationer for the duration of his probationary period.

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

BY THE COURT:

/s/ Myron T. Steele
Justice