

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES E. ROSS, )  
 ) No. 541, 2001  
 Defendant Below, )  
 Appellant, ) Court Below: Superior Court  
 v. ) of the State of Delaware in  
 ) and for Kent County  
 )  
 STATE OF DELAWARE, ) Cr. ID. No. 9707019006  
 )  
 Plaintiff Below, )  
 Appellee. )

Submitted: August 7, 2002  
Decided: October 10, 2002

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

***ORDER***

This 10<sup>th</sup> day of October 2002, upon consideration of the briefs of the parties, it appears to the Court that:

(1) In June 1998, the defendant-appellant James Ross pleaded guilty to Assault in the Second Degree and Conspiracy in the Second Degree. A Superior Court judge imposed a sentence of three years at Supervision Level V suspended after twelve months for six months at Supervision Level IV for Assault in the Second Degree, and two years at Supervision Level V, suspended for two years at Supervision Level III, for Conspiracy in the Second Degree.

(2) In April 1999, a Superior Court judge found Ross guilty of Violation of Probation and modified Ross' sentence for Assault in the Second

Degree to three years at Supervision Level V, suspended after two years for one year at Supervision Level III. The judge further sentenced Ross to two years at Supervision Level V, suspended for one year at Supervision Level IV, followed by one year at Supervision Level III for the VOP on the Conspiracy in the Second Degree.

(3) In March 2001, the sentencing judge again found Ross guilty of VOP. The judge modified Ross' sentence for Conspiracy in the Second Degree to two years at Supervision Level V and required Ross to participate in the Sussex County Boot Camp Program. After nine months, the Supervision Level V would be suspended for one year at Supervision Level III followed by one year at Supervision Level II.

(4) In April 2001, the Institutional Release Classification Board of the Delaware Department of Correction denied Ross admittance to the Boot Camp Program because Ross lacked the necessary nine months remaining on his sentence to complete the Program. In June 2001, in order to enable Ross to complete the Boot Camp Program, the judge modified Ross' sentence to two years at Supervision Level V, suspended after eighteen months for six months at Supervision Level III. The judge ordered Ross to complete the Boot Camp Program while at Supervision Level V and upon completion of the Boot Camp

Program (a six-month program), the remaining portion of the eighteen months at Supervision Level V would be suspended for Supervision Level III.

(5) In September 2001, Ross was discharged from the Boot Camp Program for inappropriate behavior. The sentencing judge then modified Ross' sentence to two years at Supervision Level V followed by six months at Supervision Level II. Ross filed a timely notice of appeal in this Court after his VOP hearing and resentencing.

(6) Ross claims the June 2001 VOP Order modifying his sentence of two years at Supervision Level V, suspended after nine months to two years at Supervision Level V, suspended after 18 months, violated the Double Jeopardy provisions of the United States and Delaware Constitutions. Ross asserts that doubling his incarceration time to enable him to complete the Boot Camp Program amounted to a double punishment because he had committed no additional criminal acts warranting an increase in punishment between the March and June 2001 VOP hearings. Thus, Ross asks this Court to vacate all sentence orders imposed after March 2001.

(7) Probation cannot be revoked in the absence of a violation of an express condition of probation or of a condition so clearly implied that the

probationer, in fairness, can be said to have no notice of it.<sup>1</sup> However, pursuant to 11 *Del C.* § 4334(c), after determining that an accused violated probation, the Superior Court may “require the probation violator to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which originally had been imposed.”<sup>2</sup> The March 2001 VOP Order requirement that Ross “participate” in the Boot Camp Program clearly implied that he would violate the Order if discharged from the Program for inappropriate behavior. That clear implication has never been contested by Ross.

(8) Ross’ failure to meet the conditions of the March 2001 sentence moots any Double Jeopardy challenge to the June 2001 modification. The sentencing judge’s March 2001 VOP order required that Ross be held at Supervision Level V for nine months. During that time, a condition of his probation was that he participate in the Boot Camp Program. In the absence of an intervening violation, Ross would complete his time in Supervision Level V in December 2001 whether or not he actually *completed* the Program. The circumstances of his September 2001 discharge from the Boot Camp Program

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<sup>1</sup> *Liles v. State*, Del. Supr., No. 105, 1992, Holland, J. (December 7, 1992 (ORDER)) (citing *Douglas v. Buder*, 412 U.S. 430, 432 (1973); *Carradine v. United States*, D.C. App., 420 A.2d 1385, 1389).

<sup>2</sup> See also *Bennet v. State*, Del. Supr., No. 253, 1999, Steele, J. (October 17, 2000 (ORDER)).

constituted a violation of a condition of his probation – that he participate in the Boot Camp Program until his release – therefore, the sentencing judge properly resentenced Ross in September 2001. Ross’ discharge from the Boot Camp Program was within nine months of the March 2001 sentence. Therefore, Ross’ failure to meet the conditions of the March 2001 sentence moots any Double Jeopardy challenge to the June 2001 modification. Consequently, there is no merit to Ross’ argument.

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

BY THE COURT:

Myron T. Steele  
Justice