

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH IACONE,	§
	§ No. 399, 2011
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 1009018700
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 28, 2011
Decided: November 7, 2011

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 7th day of November 2011, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Kenneth Iacone, filed an appeal from the Superior Court’s July 5, 2011 order denying his second motion for sentence modification. We find no merit to the appeal. Accordingly, we affirm. However, we also remand this matter to the Superior Court for further consideration of Iacone’s April 15, 2011 sentencing order.

(2) The record reflects that, in January 2011, Iacone pleaded guilty to Possession With Intent to Deliver Oxycodone. On April 15, 2011, he was sentenced as a habitual offender to 1 year of Level V incarceration, with

credit for 84 days previously served. In May 2011, the Public Defender filed a motion for sentence modification on behalf of Iacone requesting that he be given 3 additional days of Level V credit. The Superior Court denied the motion by order dated May 31, 2011, on the ground that there was no documentation supporting the claim. In June 2011, the Public Defender filed a second motion on behalf of Iacone, this time requesting that he be moved to another correctional facility so his mother could more easily visit him. The Superior Court denied the motion by order dated July 5, 2011, on the ground that the placement of inmates is within the discretion of the Department of Correction.

(3) The Superior Court docket reflects that, on September 9, 2011, following the filing of the instant appeal, counsel for the State wrote to the sentencing judge and took the position that he had jurisdiction to rule upon Iacone's request for an additional 3 days of Level V credit. The docket further reflects that the judge responded to counsel on September 16, 2011, stating that he would not act on the request until this Court had ruled on the instant appeal.

(4) In this appeal from the Superior Court's denial of his second motion for sentence modification, Iacone's sole claim is that he is entitled to an additional 3 days of Level V credit. He does not address the basis for the

Superior Court's denial of his second motion for sentence modification. In its answering brief, the State concedes that Iacone is entitled to credit for additional time spent at Level V, but takes the position that the issue was not timely appealed from the Superior Court's May 31, 2011 order and may not be considered by this Court on appeal from the Superior Court's July 5, 2011 order.

(5) In the absence of any grounds for reversing the Superior Court's denial of Iacone's second motion for sentence modification, that judgment will be affirmed. However, in light of the State's concession that Iacone is entitled to credit for additional time spent at Level V, this matter will be remanded to the Superior Court for further consideration of that issue and for modification of Iacone's April 15, 2011 sentencing order, should that be warranted.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. The matter is remanded to the Superior Court for further proceedings, in accordance with this Order.

BY THE COURT:

/s/ Carolyn Berger
Justice