IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY CHEEKS,	§	
	§	
Defendant Below,	§	No. 6, 2000
Appellant,	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for New Castle County
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr.A. No. IN98-12-1735
Appellee.	§	IN99-01-0149
	§	

Submitted: August 15, 2000
Decided: September 25, 2000

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

O R D E R

This 25th day of September 2000, upon consideration of the briefs of the parties, it appears to the Court that:

(1) Anthony Cheeks appeals his sentence on two counts of Second Degree Assault for physically abusing his eight year old son in the course of disciplining him for getting in trouble at school one Friday. The original indictment involved six felony counts of Assault Second Degree[1] and one felony charge of Endangering the Welfare of a Minor.[2] As part of a plea agreement *outside* of

[1] 11 *Del C.* § 612.

[2] 11 *Del C.* § 1102(b)(2).

Del. Super. Crim. R. 11(e)(1)(c),[3] Cheeks pleaded guilty to two counts of Assault Second Degree involving the following acts: rupturing his son's intestinal track and fracturing four of his son's ribs.

(2) At the sentencing hearing, both defense counsel and the prosecutor told the court that Cheeks had been investigated fourteen months earlier by the Division of Family Services for excessive discipline. Defense counsel acknowledged that his client was on notice that, should another incident occur, a court would be unlikely to treat him as a first time offender. The factual summary offered at sentencing indicates that because Cheeks' son had told the principal that he was scared of being physically disciplined if sent home early from school, the principal phoned Cheeks and warned him not to physically discipline the child and emphasized that the principal expected to see the child back in school the following Monday. Nonetheless, Cheeks physically disciplined his son that Friday, did not seek medical attention for his son for the entire weekend, and called the school Monday to say that his son was sick and would not be coming to school. Cheeks finally took his son to the hospital after being contacted by DFS, which had received a report from the school. The

[3] Apparently, Cheeks wanted to be able to argue for no jail time, thus he was unwilling to agree to a specific sentence as part of the plea. Therefore, the plea bargain prevented the State from recommending a sentence longer than three years at level V.

hospital report indicated that had the son not received prompt medical treatment, he would have died.

(3) During sentencing, Cheeks argued that several mitigating factors existed, based primarily on expert witness reports presented by Cheeks. Those factors included the "sincere remorse" felt by Cheeks, his decision to voluntarily undergo 23 sessions of counseling,[4] various physical[5] and mental impairments,[6] and the fact that Cheeks was gainfully employed.

(4) After argument, the trial judge sentenced Cheeks to five years imprisonment at level V. The length of that sentence was two years more than the maximum sentence recommended by prosecutors of three years at level V

[4] The social worker performing the counseling wrote that "Anthony Cheeks' participation in 8 months of treatment with me does NOT fit the profile I have come to expect" of men attending therapy because of domestic violence or abuse of family members. "His acceptance of responsibility, remorse, openness to change, and cooperation with his treatment plan simply do not point to an individual for whom incarceration would be the optimal disposition or consequence."

[5] Primarily, diabetes and injuries suffered when he was on a bus that was involved in an accident.

[6] Primarily, "high depression and high anxiety"(Dr. Nigro's report) and "Adjustment Disorder with Disturbed Conduct, Alcohol Abuse, Marijuana Abuse, [ ] Prescription Narcotic Analgesic Abuse" and "low self-esteem related to his seizures, ridicule from other children, and lack of attention from his own father." (Dr. Mechanick's report). Additionally, Dr. Mechanick concluded that "Mr. Cheeks was also more prone to using physical force to punish [his son] because he experienced similar discipline during his own childhood."

but 11 years *less* than the maximum possible sentence of 16 years at level V for the two offenses.[7]

(5) In imposing this sentence, the trial judge made the following two statements relied on by Cheeks in this appeal:

> This Court hears a lot of horrible cases, rape, robbery, murder. There is no case worse than beating a defenseless child. I can't think of one.
>
> . . . .
>
> The aggravating factor here is the vulnerability of the victim. I find no mitigating factors.

(6) Cheeks argues that these statements indicate that the trial judge had a closed mind and wrongly relied on his general perception of child abuse cases instead of focusing on the specific facts at issue. Consequently, Cheeks argues that the trial court abused its discretion by failing to acknowledge any of the mitigating factors advanced by him.

(7) This Court reviews sentencing of a defendant in a criminal case under an abuse of discretion standard.[8] Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by

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[7] Each count to which Cheeks pleaded guilty is a Class D Felony with a maximum statutory sentence of 8 years at level V. *See* 11 *Del. C.* §§ 612, 4205 (b)(4).

[8] *Walt v. State*, Del. Supr., 727 A.2d 836, 840 (1999) (citing *Mayes v. State*, Del. Supr., 604 A.2d 839, 842-43 (1992)).

the legislature.[9] Thus, in reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability.[10] In reviewing a sentence within the statutory guidelines, this Court will not find error unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind.[11]

(8) The five year sentence falls within the 16 year statutory maximum. Thus Cheeks's challenge to the sentence reduces itself to an argument that the trial judge had a "closed mind." As this Court explained just over four months ago, "theoretically at least, the imposition of a sentence by a judge with a 'closed mind' (*i.e.*, sentencing based on preconceived bias without consideration of the nature of the offense or the character of the defendant) could constitute an abuse of discretion."[12] Here, Cheeks essentially argues that the trial judge's

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[9] *Mayes v. State*, 604 A.2d at 842 (quoting *Ward v. State*, Del. Supr., 567 A.2d 1296, 1297 (1989)).

[10] *Mayes v. State*, 604 A.2d at 843, *quoted in Walt v. State*, Del. Supr., 727 A.2d at 840.

[11] *Samuel v. State*, Del. Supr., No. 252, 1996, 1997 WL 317362, *1 (April 16, 1997) (ORDER) (per curiam).

[12] *Ellerbe v. State*, Del. Supr., No. 215, 1999, 2000 WL 949625, *1 (May 11, 2000) (ORDER).

"preconceived bias" that "no case is worse than beating a defenseless child" prevented the judge from recognizing and considering the mitigating factors raised by Appellant. Cheeks' argument is unpersuasive.

(9) The record implies that the judge's language should not be taken literally.[13] Therefore, this Court does not read the judge's language literally as displaying a "closed mind" to the possibility that mitigating factors can exist in a child abuse case like this one.

(10) Even though the judge may have brought some of his previous experience with such cases to sentencing, that is not enough to say that he used extraneous outside information. When a judge decides what is a fair and appropriate sentence, that evaluation process is necessarily informed, in a general way, by that judge's previous experience. This inherent characteristic of judicial sentencing contributes to the fair administration of justice because a judicial memory of how other defendants were treated makes it more likely that, over time, similar defendants will be treated similarly. Consequently, the facts here are insufficient to show that the judge was closed-minded or that he used impermissible extraneous information.

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[13] In fact, at one point in the sentencing after Cheeks interrupted the judge to clarify that he had to "do five years," the judge told Cheeks: "I can give you up to 16 years in prison. Don't think that just reading this report I wasn't tempted to do this, because I was. If you give me some problems today, I'm going to re-think it."

(11) The record indicates that the judge read all of the reports submitted by Cheeks and the State and that the judge listened to the argument at sentencing. Even if the reports offered by Cheeks are uncontradicted by competing analyses offered by experts for the State, no case law was presented to suggest that the judge must accept the conclusions in those reports just because they were written by experts. A sentencing hearing is not a motion for summary judgment in which a judge accepts uncontested affidavits as true. At sentencing, a judge is supposed to make evaluations about the evidence, and therefore is free to find expert reports unpersuasive and unworthy of constituting mitigating factors.

(12) In reading the expert reports, we find that the contents therein do not necessarily constitute mitigating factors. Cheeks may have had problems, but his problems do not seem unique among defendants in criminal cases. A judge would not abuse his or her discretion by minimizing these arguments in weighing mitigating factors. While insight into Cheeks' psychological condition may help his therapy, understanding why he hurt his son does not require a court to weigh those factors heavily as mitigating ones. Such evaluations are properly left to the trial court's discretion, particularly during sentencing—a phase in which the trial court is given extraordinary deference.

(13) Although it may be a good argument, in the abstract, that Cheeks should be given some credit for voluntarily attending counseling, the evidence is insufficient to find that the trial court abused its discretion by deciding against giving weight to that factor in this case.

(14) Consequently, Cheeks has failed to prove that the trial court committed reversible error in sentencing him.

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

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice