

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HUBERT E. PARKER,	'	
	'	
Defendant Below,	'	No. 244, 2000
Appellant,	'	
	'	
v.	'	Court Below: Superior Court
	'	of the State of Delaware, in
	'	and for Sussex County
STATE OF DELAWARE,	'	Cr.A.Nos. S99-01-0063, 0065,
	'	0067; S99-04-0266, 0270,
Plaintiff Below,	'	0272; S99-02-0603.
	'	Appellee.
	'	Def. ID Nos. 9812020293
	'	9902013946
	'	9903018902

Submitted: June 27, 2000

Decided: July 26, 2000

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

**ORDER**

This 26<sup>th</sup> day of July 2000, upon consideration of the appellant's opening brief and the State of Delaware's motion to affirm,<sup>1</sup> it appears to the Court that:

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<sup>1</sup> On July 6, 2000, the appellant filed a response to the State's motion to affirm. On July 14, 2000, appellant filed an amended response to the State's motion to affirm. The Court has not considered the appellant's unsolicited responses. *See* Supr. Ct. R. 25(a) (providing that there shall be no briefing, argument or response to the motion [to affirm], unless requested by the Court).

(1) The defendant-appellant, Hubert Parker (AParker@), has filed this appeal from an order of the Superior Court denying Parker's motion for correction of sentence pursuant to Superior Court Criminal Rule 35(a) (ARule 35(a)@). The State of Delaware has moved to affirm the judgment of the Superior Court on the ground that it is manifest on the face of Parker's opening brief that the appeal is without merit.<sup>2</sup> We agree and affirm.

(2) On March 16, 1999, Parker was charged by Information with Possession of Cocaine and Possession of Drug Paraphernalia. By separate Information on the same date, Parker was charged with one count each of Second Degree Burglary, Third Degree Burglary, and Second Degree Conspiracy, three counts of Theft, and two counts of Criminal Mischief. By Information filed on May 7, 1999, Parker was charged with three counts of Criminal Mischief, and two counts each of Third Degree Burglary, Second Degree Conspiracy, and Theft.

(3) On January 24, 2000, Parker pleaded guilty, under Superior Court Criminal Rule 11(e)(1)(c) (ARule 11(e)(1)(c)@), to seven charges contained in the three

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<sup>2</sup> Supr. Ct. R. 25(a).

Informations.<sup>3</sup> In return for Parker's plea, the State agreed to *nolle prosequere* the remaining 12 charges.

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<sup>3</sup> Parker pleaded guilty to two counts each of Third Degree Burglary and Theft, and one count each of Possession of Cocaine, Second Degree Conspiracy and Criminal Mischief.

(4) As part of the written plea agreement, Parker stipulated that he qualified for sentencing as an habitual offender pursuant to 11 *Del. C.* ' 4214(a).<sup>4</sup> Parker agreed that he would be sentenced, as an habitual offender, to a term of five years imprisonment for one of two Third Degree Burglary convictions. Furthermore, Parker agreed to pay restitution to the victims, in amounts to be determined by a presentence investigation completed within six months.

(5) Accordingly, on January 24, 2000, the Superior Court declared Parker an habitual offender and sentenced him, in accordance with the plea agreement, to 17 years at Level V, suspended after five years mandatory incarceration, for one year at a Level IV residential substance abuse treatment program, suspended upon successful completion of the program, for ten years at Level III and one year at Level II. As contemplated by the plea agreement, on February 29, 2000 and again on March 1,

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<sup>4</sup> 11 *Del. C.* ' 4214(a) provides, in pertinent part:

Any person who has been 3 times convicted of a felony . . . and who shall thereafter be convicted of a subsequent felony of this State is declared to be an habitual criminal, and the court in which such 4<sup>th</sup> or subsequent conviction is had, in imposing sentence, may in its discretion, impose a sentence of up to life imprisonment upon the person so convicted.

2000, the Superior Court issued amended sentencing orders specifying the amounts of restitution.

(6) On March 14, 2000, Parker, appearing *pro se*, filed a motion for correction of sentence. Parker claimed that the agreed-upon five-year sentence for Third Degree Burglary violated Truth-In-Sentencing guidelines. By order dated May 16, 2000, the Superior Court denied Parker's motion. This appeal followed.

(7) In his opening brief on appeal, Parker reiterates the Truth-in-Sentencing claim that he made in his Rule 35(a) motion. In addition, on appeal Parker complains for the first time that: (i) the Superior Court did not conduct an habitual offender hearing, as required by 11 *Del. C.* ' 4215(b); (ii) the Superior Court's amended sentencing orders violated Parker's right of due process; and (iii) Parker did not qualify for sentencing as an habitual offender. Parker's claims are procedurally flawed and/or substantively without merit.

(8) Parker's Truth-in-Sentencing claim is without merit. Parker is correct that five years at Level V is beyond the Truth-in-Sentencing guidelines for Third Degree Burglary. Indeed, as reflected in the written plea agreement, five years at Level V is beyond the statutory penalty for Third Degree Burglary, which is a class F felony.<sup>5</sup> It was, however, the sentence agreed to by Parker when he entered his plea. Presumably, in an effort to avoid the possible imposition of a life sentence, Parker agreed, under Rule 11(e)(1)(c), to plead guilty and to be sentenced, as an

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<sup>5</sup> 11 *Del. C.* ' 4205(b)(6) (providing that up to three years to be served at Level V for a class F felony).

habitual offender, to a mandatory five-year term of imprisonment for Third Degree Burglary. Parker is bound by this agreement.

(9) The remainder of Parker's claims were neither raised in, nor considered by, the Superior Court. Absent plain error, this Court does not consider claims not fairly presented in the trial court.<sup>6</sup>

(10) Parker claims that he was denied due process because the Superior Court did not hold a hearing to declare Parker an habitual offender. Parker's claim is without merit. Parker's status as an habitual offender was agreed upon, and stipulated to, in the plea agreement. By accepting this plea agreement, Parker waived his right to have a separate hearing to determine his status as an habitual criminal.<sup>7</sup>

(11) Parker claims that Third Degree Burglary is not a qualifying felony under 11 *Del. C.* ' 4214(a). Parker's claim is without merit. Third degree burglary is classified as a felony.<sup>8</sup> Under 11 *Del. C.* ' 4214(a), the triggering felony is Aa

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<sup>6</sup> Supr. Ct. R. 8.

<sup>7</sup> *Marshall v. State*, Del. Supr., No. 339, 1998, Walsh, J., 1998 WL 977123 (Nov. 20, 1998) (ORDER).

<sup>8</sup> See 11 *Del. C.* ' 824 (providing that Third Degree Burglary is a class F felony).

subsequent felony<sup>9</sup> and is not limited to violent felonies, as Parker seems to suggest.<sup>9</sup>

(12) Finally, Parker complains that the Superior Court exceeded its authority and violated due process when it amended the January 24, 2000 sentencing order to provide for restitution. Parker's claim is without merit. It is clear from the record that, as part of the plea agreement, Parker agreed that the Superior Court would issue an amended order establishing restitution in an amount to be determined by the presentence office.<sup>10</sup>

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<sup>9</sup> *Oney v. State*, Del. Supr., 446 A.2d 389, 394 (1982).

<sup>10</sup> The transcript of the January 24, 2000, guilty plea hearing reflects the following exchange:

THE COURT: The understanding is that the restitution will be determined by the Presentence

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Office. When that is done, the sentencing order will be amended to reflect the amount of the restitution as determined by the Presentence, and that would be the end. There will be no hearings. It is going to be up to the Presentence people to come up with a number, and that number is fine. Is that the understanding?

PROSECUTOR: With regard to Mr. Parker, there is also an issue B the reason I mentioned the co-defendant is because there is going to be a decrease in the total amount.

THE COURT: Pro-rata?

PROSECUTOR: Exactly.

THE COURT: Whatever that number is from the Presentence Office would be pro-rata. If it is a million dollars, Mr. Parker would owe five hundred thousand dollars. Do you understand what I am saying?

PROSECUTOR: Yes.

DEFENSE COUNSEL: Do you understand, Mr. Parker, what he is saying? You are just going to take the word of the Presentence officer?

THE DEFENDANT: Right.

THE COURT: I don't want to come back on a hearing on restitution. . . .  
Hr-g Tr. at 8-9.

(13) It is manifest on the face of Parker's opening brief that the appeal is without merit. The issues raised are clearly controlled by settled Delaware law, and to the extent the issues on appeal implicate the exercise of judicial discretion, there was no abuse of discretion.

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/ E. Norman Veasey\_\_\_\_\_

Chief Justice