

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY LONGFORD-MYERS,	§	
	§	No. 477, 2012
Defendant Below-	§	
Appellant	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE	§	
	§	Cr. ID Nos. 1008015710
Defendant Below-	§	1104021979
Appellee	§	

Submitted: December 19, 2012
Decided: February 13, 2013

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

On this 13th day of February 2013, it appears to the Court that:

(1) Defendant-below/Appellant Jerry Longford-Myers (“Myers”) appeals from his Superior Court sentence for violation of probation (“VOP”). Myers raises two claims on appeal. First, Myers challenges the sufficiency of the evidence which formed the basis for the Superior Court’s VOP conviction. Second, Myers contends the Superior Court abused its discretion by acting with a closed mind in imposing the maximum sentence for Myers’ VOP. We find no merit to Myers’ appeal and affirm on the claims Myers raises. But because it appears that the

Superior Court may not have provided Myers years with credit for all prior time served, we REMAND for a determination of that issue.

(2) In August of 2011, Myers pled guilty to Maintaining a Dwelling for Keeping Narcotics, which violated his probation for an earlier possession of marijuana conviction. Myers was sentenced to two years at Level V supervision, suspended for one year at Level III supervision for the Maintaining a Dwelling for Keeping Narcotics conviction, and was sentenced to six months at Level V supervision, suspended for six months at Level IV supervision for the VOP on his earlier possession conviction.

(3) Less than a month after his sentence, Myers violated his probation again. Myers was resentenced to two years incarceration at Level V supervision, suspended for one year at Level III supervision on the VOP for Maintaining a dwelling, and to six months at Level V supervision, suspended for six months at Level IV work release, followed by six months at Level III supervision on the VOP for the Possession of Marijuana sentence. Myers was released from incarceration in February of 2012 to begin his probation for the two sentences.

(4) On May 4, 2012, as part of Operation Safe Streets, officers employed by the Wilmington Police Department and Delaware Probation and Parole conducted a curfew check on Myers at the residence of Myers' mother. Myers had told his probation officer he was staying in the living room of the residence following his

release from incarceration. As the probation officers were walking to the front door of the residence, Myers exited a black Lincoln parked on the street. Upon approaching the car, the officers smelled the odor of burnt marijuana emanating from the vehicle. Myers admitted to smoking marijuana in the vehicle. The officer searched the vehicle but found no marijuana inside. The officers then accompanied Myers into the residence and immediately detected a strong, “overwhelming” odor of unburned marijuana. When questioned about the odor, Myers admitted there was marijuana in the house and directed the officers to a gym bag in the living room where he slept. The bag contained three plastic baggies of a dry green vegetable matter, which tested positive for marijuana and in total weighed 230 grams. Officers located further contraband in the living room, including: a six-shot revolver hidden in a shoebox; another shoebox containing \$600 comprised of dollars in varying denominations; and ammunition for a .32 caliber gun. Elsewhere in the residence officers discovered various drug paraphernalia including numerous baggies consistent with the bags of marijuana located in the living room, two scales, and a heat-sealing machine, as well as eight additional bags of a substance that tested positive for marijuana and weighed a total of 14.5 grams.

(5) Myers was transported to the police station, where, during an interview, he admitted he had purchased a quarter-pound of marijuana in a drug transaction in

Pennsylvania. Myers also admitted that the revolver, \$600, and ammunition found in the living room belonged to him. Myers was subsequently indicted on numerous charges arising from the search including drug dealing and possession of a firearm during the commission of a felony.

(6) A fast-track VOP hearing was held on August 1, 2012. The Superior Court concluded that there was “no doubt” Myers violated his probation based on “ample evidence on [the] record” of Myers’ possession of marijuana, the firearm, and ammunition. The Superior Court heard mitigation arguments from Myers’ counsel and comments from Myers himself before imposing a sentence. Following the recommendation of Myers’ probation officer, the Superior Court revoked Myers’ probation and sentenced Myers to his entire back-time of two-and-a-half years of Level V incarceration, followed by one year of Level II probation. This appeal followed. On November 7, 2012 Myers pleaded guilty to the drug dealing and possession of a firearm during a felony charges in exchange for dismissal of the remaining charges on which he was indicted.

(7) Myers first contends that the Superior Court abused its discretion in finding that Myers violated his probation. Myers argues that there was insufficient evidence submitted at the hearing to establish that Myers in fact possessed the marijuana and firearm seized at his mother’s residence. The State responds that

Myers' subsequent guilty plea to two of the charges which formed the basis for his VOP renders Myers' evidentiary challenge moot.

(8) We review a trial court's revocation of a defendant's probation for abuse of discretion.¹ The State's burden of proof at a VOP hearing is preponderance of the evidence.² We have interpreted this burden as requiring the state to provide "some competent evidence" to prove the asserted VOP.³ In *Collins v. State*, we stated that a defendant's admission of a crime is sufficient competent evidence to revoke probation.⁴

(9) In *Frady v. State*, we held that a guilty plea to crimes which formed the basis for a defendant's earlier VOP conviction rendered the defendant's evidentiary appeal of his VOP hearing moot.⁵ When confronted with similar facts in *Dejesus v. State*, we applied our holding in *Frady*, stating:

[In *Frady*], by pleading guilty to a crime as part of a plea agreement, the defendant's prior appeal from the VOP hearing was moot. We explained that the defendant's voluntary plea established guilt for the crime charged, whether or not his conduct actually satisfied the elements of the offense. . . .Dejesus' claim mirrors the defendant's claim in *Frady*. Dejesus was arrested and charged with several crimes. As a result, the Superior Court found him in violation of the terms of his probation. Subsequently, Dejesus pled guilty to one charge. . . arising out of the conduct leading to his arrest. Like

¹ *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006).

² *Jenkins v. State*, 8 A.3d 1147, 1152 (Del. 2010)

³ *Collins v. State*, 897 A.2d 159, 160 (Del. 2006) (*quoting Brown v. State*, 249 A.2d 269, 272 (Del. 1968)).

⁴ *Id.* 160-161 (internal citation omitted).

⁵ *Frady v. State*, 765 A.2d 951, 2000 WL 1897395 at *1 (Del. Dec. 19, 2000) (TABLE).

the defendant in *Frady*, Dejesus' guilty plea supports the Superior Court's finding that he violated the terms of his probation and renders his appeal from that determination moot.⁶

We need not consider Myers' arguments regarding sufficiency of the evidence, because this claim is moot. The facts of this case mirror those of *Frady* and *Dejesus*. While on probation, Myers was arrested and charged with several crimes. The Superior Court subsequently found him in violation of his probation as a result of those charges. Following his VOP hearing, Myers pled guilty to two of those charges. Accordingly, Myers' plea supports the Superior Court's VOP determination, rendering his evidentiary challenge moot.

(10) Myers' second claim on appeal is that the Superior Court abused its discretion by acting with a closed mind in sentencing Myers to the maximum sentence. Myers contends that the Superior Court's sentence exceeds the Sentencing Accountability Commission ("SENTAC") guidelines without articulating why, demonstrating a preconceived bias against Myers in imposing the maximum sentence without considering any mitigating factors. The State responds that the record does not demonstrate that the "closed mind" standard has been met in this case, and that the Superior Court properly exercised its discretion in imposing the maximum sentence.

⁶ *Dejesus v. State*, 977 A.2d 797, 799-800 (Del. 2009) (internal citations omitted).

(11) Our review of a VOP sentence is extremely limited.⁷ When a sentence is within statutory limits, there is no abuse of discretion unless it is clear that the sentencing judge “relied on impermissible factors or exhibited a closed mind.”⁸ A trial judge’s departure from SENTAC guidelines cannot provide the sole basis for an appeal.⁹ A sentence results from the trial judge’s “closed mind” when the sentence is “based a preconceived bias without consideration of the nature of the offense or the character of the defendant.”¹⁰

(12) There is no evidence in the record that the Superior Court acted with a closed mind or otherwise abused its discretion in imposing the maximum sentence on Myers. The fact that it departed from SENTAC guidelines does not alone demonstrate an abuse of discretion. Further, there is no evidence that the Superior Court based its sentence on a preconceived bias against Myers, without considering the nature of Myers’ offense or his character. To the contrary, the Superior Court first heard the probation officer’s recommended sentence, then heard argument from Myers’ counsel on mitigating factors, and finally, solicited comments from Myers himself and asked him questions about his offense before imposing the sentence. Nothing in the record suggests that the Superior Court

⁷ *Kurzmann*, 903 A.2d at 714 (citing *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992)).

⁸ *Weston v. State*, 832 A.2d 742, 746 (Del. 2003) (citing *Samuel v. State*, 694 A.2d 48, 1997 WL 317362, at *1 (Del. 1997) (TABLE)).

⁹ *Siple v. State*, 701 A.2d 79, 83 (Del. 1997).

¹⁰ *Weston*, 832 A.2d at 746 (citing *Ellerbe v. State*, 755 A.2d 387, 2000 WL 949625, at *1 (Del. 2000) (TABLE)).

acted with a closed mind in imposing its sentence. This argument is therefore without merit.

(13) In its Answering Brief, the State points out that the Superior Court's sentence does not provide Myers credit for time served.¹¹ Myers was incarcerated for a total of 90 days, split between the Howard R. Young Correctional Institute from April to May, 2011 and the Sussex VOP Center from August to October as well as November to December of 2011. We have held that when a defendant is sentenced on a VOP, he is entitled to credit for time spent incarcerated at a Level V facility and Level IV VOP center.¹² When the State has acknowledged sentencing errors on appeal, we have remanded to the Superior Court for resentencing under plain error review, without otherwise reversing the sentence.¹³

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED** and this matter is **REMANDED** to the Superior Court for further proceedings consistent with this order. Jurisdiction is not retained.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

¹¹ State's Answering Br. at 10 n. 1 (“[T]he sentence appears not to provide Myers credit for the time that he was detained in the Howard R. Young Correctional Institute...a total of 90 days.”).

¹² *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999); *Green v. State*, 996 A.2d 793, 2010 WL 2278251, at *2 (Del. June 7, 2010)).

¹³ See *Williamson v. State*, 981 A.2d 1174, 2009 WL 2959562, at *1, *5 (Del. Sept. 16, 2009) (TABLE) (finding the State conceded error in the calculation of the defendant's sentence and remanding the case to the Superior Court for recalculation of defendant's credit for time served).