

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANK H. JOHNSON,	§
	§
Defendant Below-	§ No. 363, 2001
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware,
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 9904015048
	§
Plaintiff Below-	§
Appellee.	§

Submitted: January 28, 2002  
Decided: February 15, 2002

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

**ORDER**

This 15<sup>th</sup> day of February 2002, upon consideration of the appellant's opening brief, the State's motion to affirm, and the record below, it appears to the Court that:

(1) The defendant-appellant Frank Johnson filed this appeal from the Superior Court's order, dated July 9, 2001, denying in part his motion for modification of sentence. The record reflects that Johnson pleaded guilty in September 1999 to one count of trafficking in cocaine. The Superior Court entered a judgment of conviction but deferred sentencing, pursuant to 11 Del. C. § 6712(d), and diverted Johnson to the first offender's boot camp program, consisting of at

least six months at a boot camp facility followed by two and a half years of probation supervision.

(2) In March 2001, Johnson was found in violation of the terms of his probation. As required by 11 Del. C. § 6712(h), the Superior Court sentenced Johnson on his 1999 trafficking conviction to a mandatory term of three years at Level V incarceration followed by two years of probation. Johnson did not appeal from his VOP adjudication and sentence. Instead, Johnson filed a motion for modification of sentence. Johnson asserted that he was entitled to credit for time he spent at boot camp. The Superior Court denied the motion in part, but ordered that Johnson be credited with any time he spent at Level V incarceration prior to his entry into boot camp. This appeal ensued.

(3) Johnson raises two issues in his opening brief on appeal. First, Johnson contends he is entitled to credit against his minimum mandatory sentence for the time he spent at boot camp. Second, Johnson contends that he was entitled to be represented by counsel at his March 2001 VOP hearing. The State has moved to affirm the Superior Court's judgment.

(4) With respect to Johnson's first argument, it is settled law that a defendant whose sentencing is deferred pursuant to 11 Del. C. § 6712(d) may not receive credit for time served at boot camp.<sup>1</sup> Section 6712(h) specifically provides

---

<sup>1</sup> *Whitner v. State*, 762 A.2d 18, 19 (Del. 2000).

that a defendant shall not be given credit for time served at boot camp.<sup>2</sup> Accordingly, this first claim is without merit.

(5) Johnson's second claim, that he had a right to counsel at his VOP hearing, is not properly before the Court. Johnson did not file a timely appeal from the VOP proceedings, nor did he raise this issue to the Superior Court in his motion for modification of sentence. Accordingly, this Court will not consider his claim in the first instance.<sup>3</sup> Nonetheless, we note that the record does not support Johnson's contention that he was not represented at the VOP hearing. The Superior Court's sentencing worksheet, in fact, reflects that defense counsel appeared on Johnson's behalf.

(6) Accordingly, we find it manifest on the face of Johnson's opening brief that his appeal is without merit.

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

BY THE COURT:

/s/ Myron T. Steele  
Justice

---

<sup>2</sup> DEL. CODE ANN. tit. 11, § 6712(h) (2001).

<sup>3</sup> DEL. SUPR. CT. R. 8.