

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID R. DERRICK,	§
	§ No. 515, 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. 0606020710
	§
Plaintiff Below-	§
Appellee.	§

Submitted: November 18, 2011

Decided: December 21, 2011

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

ORDER

This 21st day of December 2011, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, David R. Derrick, filed an appeal from the Superior Court’s September 8, 2011 violation of probation (“VOP”) sentencing order. We find no merit to the appeal. Accordingly, we affirm.

(2) The record before us reflects that, in 2007, Derrick pleaded guilty to one count of Home Improvement Fraud. In exchange, the State dismissed an additional charge of Felony Theft. Derrick subsequently was sentenced to 2 years of Level V incarceration, to be suspended for 6 months of Level IV Home Confinement and 18 months of Level III probation. He also was

ordered to pay \$252,952.38 in restitution. Derrick did not file a direct appeal.

(3) Approximately three and a half months after being sentenced, Derrick violated his probation. After a VOP hearing, Derrick was re-sentenced to 2 years at Level V, to be suspended for 6 months at Level IV VOP Center, to be followed by 1 year at Level IV Work Release. Several days later, after he had made a substantial payment toward his outstanding restitution obligation, his Level IV sentence was suspended and he was sentenced to 2 years at Level III probation. In 2009, Derrick again committed a VOP. He was re-sentenced to 2 years at Level V, to be suspended for 4 years at Level I (restitution only).

(4) In May and September of 2010, Derrick again violated his probation. On the first violation, he was re-sentenced to 2 years at Level V, to be suspended for 2 years at Level I (restitution only). On the second violation, he was re-sentenced to 2 years at Level V, to be suspended for 1 year of Level IV Home Confinement and 1 year of Level III probation.

(5) In March and August of 2011, Derrick yet again violated his probation. On the first violation, he was re-sentenced to 2 years at Level V, with credit for 10 days previously served, to be suspended for 6 months at Level IV Work Release (hold at Level V pending space availability at Level

IV), to be followed by 18 months at Level III probation. On the second violation, he was re-sentenced to 2 years at Level V, with credit for 47 days previously served, to be suspended after 90 days for the balance of the sentence to be served at Level IV Work Release (hold at Level V pending space availability at Level IV), in turn to be suspended after 6 months for the balance of the sentence to be served at Level III probation. The record before us reflects that, as of the date of his latest VOP sentencing order, Derrick still owed over \$200,000 in restitution.

(6) In this appeal, Derrick claims that the Superior Court's latest VOP sentence exceeds the sentence originally imposed. He requests that his sentence be discharged and the remaining amount of his restitution be reduced to a civil judgment.

(7) Once a VOP is established, the Superior Court is authorized to impose the suspended Level V sentence or any lesser sentence.¹ This Court will not reverse a VOP sentence unless it can be demonstrated that the sentence exceeds the maximum allowed by law or is the result of vindictive or arbitrary action on the part of the sentencing judge.² Moreover, only time

¹ Del. Code Ann. tit. 11, §4334(c); *State v. Sloman*, 886 A.2d 1257, 1260 (Del. 2005).

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

spent either at Level V or Level IV VOP Center may be credited against a defendant's Level V sentence.³

(8) Derrick's VOP sentencing orders do not reflect that the Superior Court either exceeded the maximum sentence allowed by law, exceeded the amount of Level V time remaining on his original sentence or abused its discretion in sentencing him. To the extent that Derrick argues that he is entitled to credit against his Level V sentence for time spent at any level other than Level V or Level IV VOP Center, that argument is without merit.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

³ *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).