IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN H. McQUAY,	§	
	§	
Defendant Below,	§	
Appellant,	§	No. 200, 2004
	§	
v.	§	Court Below – Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr.A. Nos. 03-11-0385 through
Plaintiff Below,	§	0390
Appellee.	§	

Submitted: August 11, 2004
Decided: November 12, 2004

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

O R D E R

This 12th day of November 2004, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

1) The appellant, John H. McQuay, filed an appeal from the Superior Court's order dated September 5, 2003, that denied his motion for correction of sentence. The appellee, State of Delaware, has moved to affirm the judgment of the Superior Court on the ground that it is manifest on the face of McQuay's Opening Brief that the appeal is without merit. We agree and affirm the judgment of the Superior Court.

2) On September 17, 2002, McQuay was indicted by a Sussex County grand jury on five counts of Rape in the Second Degree without consent, and two counts of Unlawful Sexual Contact in the Third Degree. McQuay pleaded guilty to the lesser-included offense of Rape in the Third Degree (with injury) on March 24, 2004.

3) On May 23, 2003, the Superior Court sentenced McQuay to be incarcerated for twenty years at Level V, with credit for sixty-two days previously served, suspended after serving seven years at Level V for eight years at Level III. No appeal was taken from that sentence.

4) On August 13, 2003, McQuay filed a motion for modification of sentence. McQuay alleged that the sentencing judge relied on inaccurate and unreliable information at the hearing. On September 5, 2003, the Superior Court denied the motion, ruling that the alleged inaccurate and unreliable information concerning McQuay's victim played no part in the sentencing decision. No appeal was taken from that judgment.

5) On April 5, 2004, McQuay filed a motion for correction of sentence, pursuant to Delaware Superior Court Criminal Rule 35(a). According to that motion, the sentencing judge had a closed mind, as evidenced by the sentencing order. In that regard, McQuay asserted that the sentencing order had been typed prior to the hearing. The Superior Court

denied the motion, stating that the sentencing order was "neither printed, approved nor signed by [the judge] until the clerk's and the judge's worksheets [had] been proofread for accuracy."

6) In this appeal, McQuay argues that the Superior Court judge took the bench "with a closed mind as to at least the extent of receiving all information bearing on the question of mitigation." In support of his request that his sentence be stricken and the case remanded for imposition of a new sentence, McQuay relies upon *Osburn v. State*, 224 A.2d 52 (Del. 1966).

7) It is manifest on the face of the Opening Brief that the Superior Court did not abuse its discretion in denying McQuay's Rule 35(a) motion.

8) It is well established that the imposition of a sentence by a judge with a "closed mind" is improper.[1] A defendant making such a challenge, however, must demonstrate there was a closed mind on the part of the judge.[2] McQuay's reliance upon *Osburn* is not supported by the record.

9) The record reflects that the judge imposed a sentence which focused on the nature of the crime for which McQuay had been convicted. In particular, the judge pointed to the vulnerability of McQuay's victim, who has Down's Syndrome and who had regarded McQuay as a father figure. The record also reflects that prior to pronouncing McQuay's sentence, the

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[1] *Bailey v. State*, 450 A.2d 400, 405 (Del. 1982).
[2] *Id*. at 405-06.

judge listened to the arguments of McQuay's attorney and to McQuay's own expressions of remorse. The judge also read letters of support written by McQuay's brother and neighbor. The record does not support McQuay's claim that the sentencing order was typed prior to the hearing. Accordingly, McQuay has failed to demonstrate that the judge had a closed mind.[3]

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

BY THE COURT:

/s/ Randy J. Holland
Justice

[3] *See*, *e.g.*, *Myrks v. State*, 1991 WL 57117 (Del., Apr. 1, 1991).