IN THE SUPREME COURT OF THE STATE OF DELAWARE

DOUGLAS L. GIBBS,	§	
	§	No. 224, 2004
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court of
	§	the State of Delaware, in and
v.	§	for Sussex County in VS00-06-
	§	02-0101; VS00-05-0037-01.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Def. ID Nos. 9908024947
Appellee.	§	0004019534

Submitted: July 27, 2004
Decided: November 12, 2004

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

O R D E R

This 12th day of November 2004, upon consideration of the appellant's opening brief [1] and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The appellant, Douglas L. Gibbs, filed an appeal from the Superior Court's order dated May 18, 2004, that denied his motion for modification of sentence.[2] The appellee, State of Delaware, has moved to affirm the judgment of the Superior Court on the ground that it is manifest on

[1]The Court has not considered the appellant's letter dated October 3, 2004, that purports to supplement his opening brief with a copy of an aftercare agreement dated May 21, 2004.

[2]Super. Ct. Crim. R. 35(b).

the face of Gibbs' opening brief that the appeal is without merit. We agree and AFFIRM.

(2) In May 2000, Gibbs pleaded guilty to Driving Under the Influence (third offense) ("DUI"). He was immediately sentenced to two years at Level V suspended after serving ninety days for eighteen months at Level III. Gibbs did not appeal.

(3) In September 2000, Gibbs pleaded guilty to Attempted Rape in the Third Degree. He was immediately sentenced to fifteen years at Level V suspended after serving three years for one year at Level IV Residential Substance Abuse Treatment followed by decreasing levels of probation. Gibbs did not appeal.

(4) After a hearing on April 22, 2004, the Superior Court found Gibbs guilty of violation of probation ("VOP") and resentenced him, on the attempted rape offense, to eleven years at Level V, suspended upon successful completion of the Key Program, for Level IV Residential Substance Abuse Treatment, suspended upon successful completion of treatment, for six years at Level III aftercare.[3] Gibbs did not appeal. Instead, a few days after the VOP hearing, Gibbs filed the first in a series of motions to modify his VOP sentence.

[3]Gibbs was discharged as unimproved on the DUI probation.

(5) Citing a six-month waiting list for the Key Program and a need to support his family, Gibbs' first sentence modification request sought a change to work release and home confinement. By order dated April 29, 2004, the Superior Court denied Gibbs' request on the basis that the sentence as imposed was reasonable and appropriate given his repetitive unacceptable behavior, including continued cocaine and alcohol use.

(6) Approximately one week later, on May 6 and May 7, 2004, Gibbs moved again for a sentence modification. Gibbs again cited the Key Program's waiting list and the need to support his family. By order dated May 10, 2004, the Superior Court denied Gibbs' second request, citing the reasons previously given in the Court's April 29, 2004 order.

(7) On May 12, 2004, Gibbs requested a sentence modification from another judge of the Superior Court. By order dated May 14, 2004, the judge denied Gibbs' third modification request and directed him back to his sentencing judge.

(8) On May 18, 2004, Gibbs moved again for modification of his VOP sentence, this time requesting boot camp in lieu of the Key Program. By order dated May 18, 2004, the Superior Court denied Gibbs' fourth motion. The Court also informed Gibbs that it would not respond to future applications

seeking similar relief, and that any such applications would be considered denied. This appeal followed.

(9) In this appeal from the Superior Court's May 18, 2004 denial of sentence modification, Gibbs makes several arguments with respect to the April 22, 2004 VOP hearing and sentence. Gibbs argues that (a) the sentence imposed on April 22, 2004 constitutes cruel and unusual punishment; (b) he should not have to repeat the Crest Program; (c) all he needed was a thirty-day "tune-up"; (d) he was given insufficient time to consult with his lawyer; and (e) other defendants appearing before the Superior Court on April 22 were treated "more fairly" than he was.

(10) Gibbs' claims on appeal were not presented to the Superior Court. As a result, the claims will be reviewed only for plain error.[4] "The doctrine of plain error review only applies to 'basic, serious and fundamental' defects which are 'apparent on the face of the record' and deprive the litigants of either a 'substantial right' or clearly illustrate 'manifest injustice.'"[5]

(11) Notwithstanding Gibbs' personal belief that he was only in need of a thirty-day "tune-up," he has neither asserted nor established plain error

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[4]Del. Supr. Ct. R. 8; *Sewell v. State*, 2003 WL 22839962 (Del. Supr.).

[5]*Smith v. State*, 1990 WL 168245 (Del. Supr.) (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

with respect to the Superior Court's denial of his fourth motion for modification of sentence. Gibbs' remaining claims, that have to do with the April 22, 2004 VOP adjudication and sentence,[6] are not justiciable in this appeal from the denial of modification of sentence.[7] Moreover, those claims are untimely.[8]

(12) Superior Court Criminal Rule 35(b) provides that the Court may modify a sentence of imprisonment on a motion made within ninety days after the sentence is imposed. The Superior Court will not, however, consider repetitive requests for modification of sentence.[9]

(13) We have concluded that the Superior Court did not abuse its discretion when denying Gibbs' motion for modification of sentence. Gibbs' motion was filed within the ninety-day period; however, it was his fourth motion filed within that period, and he essentially repeated claims that were

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[6]Those claims are: (a) there was a denial of due process at the April 22, 2004 VOP hearing; (b) the sentence imposed was cruel and unusual; (c) Gibbs was given inadequate time to consult with his attorney; and (d) there was insufficient evidence to find him guilty.

[7]*Sewell v. State*, 2003 WL 22839962 (Del. Supr.); *Strawley v. State*, 2002 WL 86687 (Del. Supr.) (citing *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998)).

[8]Gibbs had an opportunity to appeal from the Superior Court's April 22, 2004 VOP adjudication and sentence, but he did not. *Strawley v. State*, 2002 WL 86687 (Del. Supr.) (citing *Carr v. State*, 554 A.2d 778 (Del. 1989)).

[9]Super. Ct. Crim. R. 35(b).

previously rejected. Thus, the Superior Court correctly denied Gibbs' latest motion as repetitive.[10]

(14) It is manifest on the face of Gibbs' opening brief that this appeal is without merit. The issues presented on appeal are controlled by settled Delaware law. To the extent that judicial discretion is implicated, clearly there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

[10] *Id.*; *Whiteman v. State*, 2003 WL 1965411 (Del. Supr.).