

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| JOHN E. SCHMITZ, | § | |
| | § | |
| Defendant Below, | § | No. 500, 1999 |
| Appellant, | § | |
| v. | § | Court Below: Superior Court |
| | § | of the State of Delaware, in |
| | § | and for Kent County. |
| STATE OF DELAWARE, | § | |
| | § | Cr. A. No. IK97-05-0091 |
| Plaintiff Below, | § | |
| Appellee. | § | Def. ID No. 9705000274 |

Submitted: February 7, 2000

Decided: March 21, 2000

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices.

O R D E R

This 21st day of March 2000, upon consideration of the appellant's opening brief¹ and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) On May 5, 1997, the appellant, John E. Schmitz ("Schmitz"), and co-defendant, Bruce R. Banther ("Banther"), were indicted by a Kent

¹By letter dated March 8, 2000, the appellant's counsel requested permission to supplement the opening brief with the appellant's letter requesting that a sentence "be stricken from Appellant's opening brief." The appellant is represented by counsel for purposes of briefing this appeal. The appellant has neither asked permission, nor been granted leave by this Court, to appear *pro se*. Counsel's request to supplement the opening brief with the appellant's letter, is hereby denied.

County grand jury and each charged with the following crimes: First Degree Murder, First Degree Conspiracy, Possession of a Deadly Weapon during the Commission of a Felony, Second Degree Forgery and Theft. The Superior Court severed the charges and ordered separate trials for Schmitz and Banther.² On February 23, 1999, Schmitz pled guilty to Second Degree Murder. As part of the plea agreement, the State recommended a sentence of 13 years at Level V.³ The Superior Court ordered the preparation of a Presentence Report.⁴

(2) At sentencing on May 14, 1999, the Superior Court gave Schmitz' counsel and the prosecutor an opportunity to comment on the Presentence Report. Schmitz' counsel expressed her disagreement with the presentence officer's "negative conclusions" about Schmitz.⁵ At the conclusion of counsel's comments and after hearing from Schmitz, the Superior Court sentenced Schmitz to 20 years at Level V, the statutory maximum penalty for Second Degree Murder.⁶

² Banther was tried before a jury and was convicted, on October 27, 1998, of First Degree Murder, Possession of a Deadly Weapon during the Commission of a Felony, Second Degree Forgery and Theft. After a capital murder penalty hearing, the Superior Court sentenced Banther to life in prison without probation or parole.

³ Super. Ct. Crim. R. 11(e)(1)(b).

⁴ Super. Ct. Crim. R. 32(c).

⁵ Op. Brief at 5.

⁶ 11 *Del. C.* §§ 635, 4205(b)(2).

(3) On May 20, 1999, Schmitz filed a motion for reconsideration or reduction of sentence. By order dated September 27, 1999, the Superior Court denied Schmitz' motion for reconsideration/reduction of sentence. This appeal followed.

(4) On appeal, Schmitz contends that the Presentence Report introduced constitutionally impermissible factors into the sentencing process.⁷ Specifically, Schmitz takes exception to the presentence officer's statements regarding Schmitz' refusal, justified by Schmitz on religious grounds, to discuss details of the crime with the officer.⁸ Schmitz argues

⁷ By order dated January 12, 2000, the Superior Court authorized the release of the Presentence Report, under seal, to this Court.

⁸ In the "evaluation" portion of the Report at page 23, the presentence officer wrote, in part (emphasis in original):

Mr. Schmitz has stated, '*So, I have made a decision never to discuss the details. It is between me and God.*' It is certainly Mr. Schmitz' right not to discuss the details of the murder. However, having voluntarily pled guilty to Murder in the Second Degree (F), and then to hide behind a deity that represents to professed Christians, such as the Offender, the absolute in **truth**, is to this writer unjustifiable and indefensible. At this point in time, what actually transpired on February 12, 1997 is truly between Mr. Schmitz, Mr. Banther, and God; such a triangulation does not answer the lingering questions of the victim's family, nor does it shed **true** light on who actually struck the fatal blows to [the victim].

In the discussion of applicable aggravating factors at page 24 of the Report, the presentence officer wrote:

There is an obvious need for correctional treatment in a setting of total confinement to address the outstanding substance abuse and mental health issues of the Offender. This should be considered, even though

that, because the Superior Court did not expressly disavow any portion of the Report at sentencing, this Court must assume that the Superior Court relied upon the entire report, including the presentence officer's alleged improper statements, when imposing the maximum sentence against Schmitz.

(5) “[I]n reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence was imposed on the basis of demonstrably [impermissible factors].”⁹ Schmitz concedes that the Superior Court sentenced Schmitz within the sentencing range authorized by the legislature. Schmitz contends, however, that he was sentenced on the basis of factors that are constitutionally impermissible, and thus his sentence violates due process.

(6) Upon a thorough review of the record, we find no evidence that the judge was improperly influenced by the Presentence Report. The record of the sentencing hearing indicates that the judge's decision to

the Offender is facing a minimum of 10 years incarceration, given the Offender's refusal to openly address his involvement in [the victim's] murder.

⁹ *Mayes v. State*, Del. Supr., 604 A.2d 839, 843 (1992).

impose the maximum sentence was the result of a logical and conscientious process¹⁰ and was based upon the presence of aggravating factors.¹¹ It is manifest that the Superior Court had ample basis, on the facts of this case, to sentence Schmitz to the statutory maximum. Given our review of the record, we cannot say that the trial judge's imposition of the maximum sentence was an abuse of discretion or a due process violation.

(7) It is manifest on the face of Schmitz' opening brief that the appeal is without merit. The issues raised on appeal are controlled by settled principles of law, and there was no error of law below. To the

¹⁰ The sentencing transcript provides as follows:

The Court: I've given very careful consideration to all of your comments, Mr. Schmitz, today, and the content of the presentence report and the comments of counsel. There are undisputed mitigating circumstances in your background, including your record in the Air Force and the various awards and outstanding performance reports that you received before meeting Bruce Banther.

All of these mitigating circumstances within the report and as described by your counsel, given the nature of the offense, in my view, are adequately addressed by the reduced charge to which you have been convicted. What is apparent to the Court is notwithstanding the character trait that you apparently have had in not wishing to lie to the Court, you do have within that bundle of character traits, a horrible propensity for vicious, violent, depraved cruelty and grizzly [sic] butchery. A substantial jail sentence is warranted for the protection of the public. In my view, that is the maximum sentence for this crime before the Court.

Sentencing Tr. at 11-12.

¹¹ *Siple v. State*, Del. Supr., 701 A.2d 79, 82 (1997).

extent the appeal presents issues of judicial discretion, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the motion to affirm be, and the same hereby is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh

Justice