

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN ZIMMERMAN,	§
	§
Defendant Below-	§ No. 620, 1999
Appellant,	§
	§
v.	§ Court Below— Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. 90-06-0091
Plaintiff Below-	§ 90-06-0093
Appellee.	§ 92-03-1585

Submitted: February 11, 2000

Decided: March 20, 2000

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

ORDER

This 20th day of March 2000, 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 defendant-appellant, John Zimmerman (“Zimmerman”), filed this appeal from an order of the Superior Court denying his motion for correction of sentence pursuant to Superior Court Criminal Rule 35(a) (“Rule 35(a)”). The State of Delaware has moved to affirm the judgment of the Superior Court on the ground that it is manifest on the face of Zimmerman’s opening brief that the appeal is without merit. We agree and **AFFIRM**.

(2) In this appeal, Zimmerman claims that the sentence imposed by the Superior Court was illegal because it exceeded the sentence he agreed to in his plea agreement. He contends that the Superior Court's imposition of an additional period of 2 years probation was a "direct consequence" of his sentence that should have been explained to him prior to the entry of his guilty plea. Zimmerman requests that the probationary portion of his sentence be vacated.

(3) In March 1992, Zimmerman entered pleas of guilty to burglary in the first degree, assault in the third degree and bribery. The State entered a nolle prosequi on an additional charge of conspiracy in the second degree and other related unindicted offenses. Zimmerman was sentenced to 4 years imprisonment at Level V on the burglary charge, 1 year imprisonment at Level V on the assault charge, to be suspended for 1 year of probation at Level III, and 1 year imprisonment at Level V on the bribery charge, to be suspended for 1 year of probation at Level II. Zimmerman did not file a direct appeal of his convictions or sentences.

(4) “Rule 35(a) permits the Superior Court to correct an illegal sentence ‘at any time.’”¹ “Relief under Rule 35 is available ‘when the sentence imposed exceeds the statutorily-authorized limits, [or] violates the Double Jeopardy Clause’”² “A sentence is also illegal if it ‘is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.’”³

(5) Zimmerman does not contend that his sentence exceeded the statutory authorization, constituted double jeopardy, or was ambiguous or contradictory. The only contention in his Rule 35(a) motion is that his sentence exceeded what was reflected in the plea agreement. As such, no relief is available to Zimmerman under Rule 35(a).⁴

(6) To the extent Zimmerman’s motion can be construed as a motion for postconviction relief pursuant to Superior Court Criminal Rule 61, it is

¹*Brittingham v. State*, Del. Supr., 705 A.2d 577, 578 (1998).

²*Id.* (quoting *United States v. Pavlico*, 961 F.2d 440, 443 (4th Cir. 1992)).

³*Id.* (quoting *United States v. Dougherty*, 106 F.3d 1514, 1515 (10th Cir. 1997)).

⁴*Id.* (citing *Hill v. United States*, 368 U.S. 424, 430 (1962)).

barred as untimely and as formerly adjudicated.⁵ Moreover, there is no evidence that consideration of his claim is warranted in the interest of justice or that there was a miscarriage of justice due to a constitutional violation.⁶

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

BY THE COURT:

s/Joseph T. Walsh
Justice

⁵Super. Ct. Crim. R. 61(i) (1) and (4).

⁶Super. Ct. Crim. R. 61(i) (4) and (5). At the time of sentencing in March 1992, the Superior Court advised Zimmerman that he had the right to withdraw his plea if the sentence imposed by the Superior Court exceeded the sentence agreed upon. Super. Ct. Crim. R. 11(e) (1) (C). Zimmerman does not explain why over seven years passed before he filed his postconviction motion to withdraw his guilty plea.