

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LARRY N. BROWN, III,	§
	§ No. 599, 2012
Defendant Below,	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
	§ in and for Sussex County
STATE OF DELAWARE,	§
	§ Cr. ID 0210006454
Plaintiff Below,	§
Appellee.	§

Submitted: February 5, 2013

Decided: March 4, 2013

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

ORDER

This 4th day of March 2013, upon consideration of the appellant's opening brief, the State's motion to affirm, and the record on appeal, it appears to the Court that:

(1) The appellant, Larry Brown, appeals from the Superior Court order dated October 16, 2012 that denied Brown's motion for correction of illegal sentence and motion for postconviction relief. The State of Delaware moved to affirm the judgment below on the ground that it is manifest on the face of Brown's opening brief that the appeal is without merit. We agree and affirm.

(2) A Superior Court jury convicted Brown in December 2003 of Assault in the First Degree and Possession of a Firearm During the Commission of a Felony. The Superior Court sentenced Brown on both charges on February 27, 2004 to a total period of twelve years at Level V incarceration, with credit for 317 days served, to be suspended after six years for probation. In September 2010, Brown was charged with violating his probation as a result of his arrest on new criminal charges in Kent County. He pled guilty on the new charges to one count of Assault in the First Degree on April 5, 2011. Thereafter, on June 2, 2011, the Superior Court in Sussex County found Brown guilty of violating the probationary term of his 2004 sentence. The Superior Court sentenced him on the VOP to six years at Level V incarceration, which was the entire remaining time left to be served on his original 2004 sentence. The Superior Court imposed the six-year sentence pursuant to 11 Del. C. § 4204(k), which requires the sentence to be served without an opportunity for early release.

(3) Brown did not appeal from his VOP sentence. Instead, he filed a motion for correction of illegal sentence in August 2011, which was denied. He also filed a motion for postconviction relief in February 2012, which was granted. The Superior Court amended Brown's sentence to eliminate the mandatory time imposed pursuant to 11 Del. C. § 4204(k). In July 2012,

Brown filed another motion for correction of illegal sentence and motion for postconviction relief. In each motion, Brown alleged that his VOP sentence was illegal, because it was increased by more than one level and violated the SENTAC guidelines. The Superior Court denied Brown's motions, noting that the SENTAC guidelines are not binding. The Superior Court also noted that Brown had violated his probation by committing a new, violent crime, which was identical to the crime for which he was on probation. Brown's repetitive criminal conduct reflected a strong probability that he would re-offend and justified the imposition of a sentence in excess of what was suggested in the sentencing guidelines. Brown appeals from that sentencing decision.

(4) In his opening brief on appeal, Brown's sole contention is that he was denied due process, because he was never notified in writing of the VOP charge against him. Brown has failed to raise any argument in his opening brief challenging the Superior Court's decision with respect to the claims he raised below. Thus, he has waived any right to review of those claims on appeal.¹ Moreover, because Brown failed to raise any due

¹ *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

process claim in the motions he filed in the Superior Court, this claim may only be reviewed on appeal for plain error.²

(5) We find no plain error in this case. The VOP charges in Sussex County were deferred pending the disposition of Brown's new criminal charges in Kent County. A violation report was filed on April 15, 2011. The VOP hearing, at which Brown was represented by counsel, was held on June 2, 2011. We find no basis for Brown's claims that he never received notice of the violation or had the opportunity to retain counsel.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

² See DEL. SUPR. CT. R. 8 (2012); *DeJesus v. State*, 655 A.2d 1180, 1198 (Del. 1995), *superceded by statute on other grounds*, 11 *Del.C.* § 301, as recognized in *Wright v. State*, 953 A.2d 188, 191-92 (Del. 2008).