

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL J. RICHARDSON,	§	
	§	No. 610, 2001
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in
v.	§	and for Kent County in Cr.A.
	§	No. IK00-03-0457.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0003010856

Submitted: March 22, 2002

Decided: May 9, 2002

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

ORDER

This 9th day of May 2002, upon consideration of the appellant’s opening brief, his supplemental opening brief, and the State’s motion to affirm and supplemental motion to affirm, it appears to the Court that:

(1) On June 19, 2000, Michael J. Richardson pled guilty to a charge of Possession with Intent to Deliver a Narcotics Schedule I Controlled Substance. Richardson was sentenced to three years at Level V imprisonment suspended after one year, for one year at Level III and one year at Level II probation.

(2) On November 16, 2001, Richardson was convicted of violation of probation (VOP) and was sentenced to two years at Level V incarceration suspended for one year at the Level IV Crest Program, suspended upon successful completion of the Program, for one year at Level III Aftercare. This appeal followed.

(3) In his opening and supplemental opening briefs, Richardson argues that his VOP sentence is improper because it is “open-ended.” Apparently, Richardson is concerned that he will not be credited for the time he spent at Level V waiting for bed space in the Crest Program. Richardson’s concern is unwarranted. Richardson’s sentence will expire after two years, even if there was a delay in placing him into the Crest Program.¹ Richardson has not, and will not, serve more time in prison than that to which he was originally sentenced.

(4) Richardson complains that he has not received credit for the time he spent incarcerated between his arrest by administrative warrant on November 2, 2001, and the VOP hearing on November 16, 2001.

¹*Gamble v. State*, 728 A.2d 1171 (Del. 1999).

Richardson is correct that he is entitled to credit toward his sentence for the time he spent incarcerated awaiting his VOP hearing.² He has, however, provided no factual support that the Department of Correction has failed to apply that credit to his sentence, and he has not raised the issue in the Superior Court. We therefore decline to address the claim for the first time on appeal.³

(5) Richardson claims that the VOP sentence exceeds the period of incarceration that was imposed in the original sentence. Richardson's claim is without merit. Upon finding a VOP, the Superior Court is authorized to reimpose any previously suspended prison term.⁴ In this case, the Superior Court originally sentenced Richardson to three years at Level V suspended after one year for two years of probation. Upon the subsequent finding of VOP, the Superior Court was authorized to reimpose, as it did, the two years that were suspended in Richardson's original sentence.

²Del. Code Ann. tit. 11, § 3901(c) (2001).

³Supr. Ct. R. 8.

⁴*Ingram v. State*, Del. Supr., 567 A.2d 868, 869 (1989) (citing Del. Code Ann., tit. 11, § 4334(c)).

(6) Richardson makes numerous allegations of deficiencies in the VOP hearing, including ineffective assistance of counsel. Richardson argues that, because he was not provided with competent counsel at the hearing, he was deprived of his constitutional right to due process. Richardson's claim of ineffective assistance of counsel is unavailing. It is true that the cover page of the VOP hearing transcript states that an Assistant Public Defender was present at Richardson's VOP hearing "on behalf of the defendant." The hearing transcript reveals, however, that the Assistant Public Defender did not participate in the hearing in any way. As Richardson relates in his opening brief, the Assistant Public Defender did not speak to Richardson before, during or after the hearing. Moreover, the Assistant Public Defender did not address the Superior Court, nor was his presence acknowledged by the Superior Court. In short, it does not appear that Richardson was represented by counsel at the VOP hearing.

(7) A criminal defendant does not have an absolute constitutional right to representation at a VOP hearing.⁵ Instead, this Court has held that an

⁵*Jones v. State*, 560 A.2d 1056, 1057 (Del. 1989).

indigent criminal defendant is entitled to representation at a VOP hearing when, in part, the defendant can raise:

a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.⁶

(8) In this case, Richardson admitted that he had violated probation. The reasons offered by Richardson in mitigation of the violation were not complex or otherwise difficult to develop or present. Under these circumstances, Richardson did not have a constitutional right to the assistance of counsel at the VOP hearing.

(9) Richardson complains that he had no opportunity to confront “Office Webster,” the probation officer who filed the VOP report.⁷ Richardson also argues that there was insufficient evidence to find him guilty of VOP. Richardson’s claims are unavailing. Probation Officer Kerry

⁶*Id.* at 1058 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

⁷Officer Thomas Webster did not attend the VOP hearing.

Bittenbender was present at, and participated in, Richardson's VOP hearing. Richardson was convicted on the basis of Officer Webster's report, as recited by Officer Bittenbender, and Richardson's own admissions that he had used drugs "a couple of times"⁸ during the probation period. The evidence in a VOP hearing need only be "such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation."⁹ In view of Richardson's admissions that he violated probation, it is clear that there was sufficient evidence to support the Superior Court's decision to revoke probation.

(10) It is manifest on the face of Richardson's opening brief that this appeal is without merit. The issues raised are clearly controlled by settled Delaware law, and to the extent the issues on appeal implicate the exercise of judicial discretion, there was no abuse of discretion.

⁸VOP Hr'g Tr., Nov. 16, 2001, at 5.

⁹*Brown v. State*, 249 A.2d 269 (Del. 1968) (quoting *Manning v. United States*, 161 F.2d 827, 829 (5th Cir. 1947).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm and supplemental motion to affirm are GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice