

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WESTON D. BAILEY,	§	
	§	
Defendant Below-	§	No. 537, 2004
Appellant,	§	
	§	
v.	§	Court Below---Superior Court
	§	of the State of Delaware,
	§	in and for Sussex County
STATE OF DELAWARE,	§	Cr. ID Nos. 92S01984DI
	§	9311005743
Plaintiff Below-	§	
Appellee.	§	

Submitted: April 29, 2005

Decided: June 20, 2005

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices

ORDER

This 20th day of June 2005, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Weston D. Bailey, filed an appeal from the Superior Court's November 8, 2004 order denying his motion for sentence modification. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In June 1992, Bailey pleaded guilty to Assault in the Second Degree (Cr. ID No. 92S01948DI). He was sentenced to 5 years incarceration at Level V, to be suspended after 9 months for 4 years of Level II probation. In December 1993, Bailey was found to have committed a violation of probation ("VOP"). His probation was revoked and he was sentenced to 3 years incarceration at Level V, to

be suspended after 18 months for probation. The VOP sentencing order provided that Bailey would be permitted to petition for review of his sentence following completion of either the Reshape Program or the Key Program.

(3) In April 1994, Bailey pleaded guilty to Robbery in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, and Assault in the First Degree (Cr. ID No. 9311005743). He was sentenced to a total of 20 years incarceration at Level V, to be followed by probation. In December 1997, Bailey's sentencing order was modified to permit him to enter the Key Program or the Key South Program to the extent he might be eligible under Department of Correction criteria.

(4) Between 2001 and 2004, Bailey made numerous unsuccessful requests to modify his sentences. The record reflects that Bailey's requests to the Superior Court, and the Superior Court's responses, referenced both Cr. ID Nos. 92S01984DI and 9311005743 and, therefore, were docketed under both numbers. A review of the filings reflects that Bailey sought to reduce his jail time in connection with 9311005743 based upon his extraordinary rehabilitative efforts in connection with 92S01984DI. On May 11, 2004, the Superior Court denied Bailey's most recent motion after reviewing a letter from the Department of Justice. The letter strongly opposed any reduction in the amount of Bailey's jail

time due to the serious nature of the crimes to which he pleaded guilty in April 1994.

(5) On October 19, 2004, Bailey filed a “Motion for Review of Sentence” in the Superior Court, this time requesting that his December 1993 VOP sentence in 92S01984DI be suspended because of his participation in the Greentree Program. The Superior Court denied his request, again referring to the State’s strong opposition to any reduction in his jail time.

(6) On November 5, 2004, Bailey filed a “Notice of Clarification for Motion to Review Sentence,” in which he advised the Superior Court that his previous motion had sought review solely of his December 1993 VOP sentence, which had been imposed prior to the commission of the crimes to which he pleaded guilty in April 1994. The Superior Court continued to deny Bailey’s request.¹

(7) In this appeal, Bailey claims that the Superior Court committed error and abused its discretion by denying his motion for review of sentence. He contends that the Superior Court should not have considered crimes committed after his 1993 VOP sentence was imposed, but should only have considered the

¹ After Bailey’s opening brief was filed, the State filed a motion to affirm pursuant to Supreme Court Rule 25(a). By Order dated March 11, 2005, this Court denied the motion to affirm and directed the State to “address why it was proper for the Superior Court to take the robbery case into consideration when it decided Bailey’s motion for review of sentence in the assault case, and why the disposition in the assault case was also docketed in the robbery case.”

fact that he completed one of the programs referred to in the 1993 VOP sentencing order. Bailey further contends that, in denying his motion, the Superior Court acted vindictively and with a closed mind.

(8) Superior Court Criminal Rule 35(b) provides that a court may modify a sentence of imprisonment on a motion made within 90 days after the sentence is imposed. On a motion filed more than 90 days after the sentence is imposed, the court will consider a sentence modification “only in extraordinary circumstances” or if the Department of Correction (“DOC”) applies for such modification.²

(9) In this case, the Superior Court was not required to view Bailey’s most recent request for a sentence modification separately from his previous requests or from his April 1994 guilty plea. It was well within the Superior Court’s discretion to consider events subsequent to the entry of the December 1993 VOP sentencing order in deciding whether to grant Bailey’s request to modify that order.³ Moreover, the record reflects that, far from displaying vindictiveness or a closed mind, the Superior Court judge went out of his way to accommodate

² Del. Code Ann. tit. 11, § 4217 (2001) (establishing a procedure for the DOC to apply for modification for good cause shown, including “exceptional rehabilitation” when the DOC certifies that the release of the offender will not constitute a substantial risk to the community or the offender).

³ *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992); *Weber v. State*, 655 A.2d 1219, 1222 (Del. 1995).

Bailey's requests.⁴ Under these circumstances, we find no error or abuse of discretion on the part of the Superior Court.

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

BY THE COURT:

/s/Henry duPont Ridgely
Justice

⁴ *Bailey v. State*, 450 A.2d 400, 405 (Del. 1982) (it is the movant's burden to show that the judge imposed sentence with a "closed mind").