

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NEAL GIBSON,	§
	§ No. 628, 2011
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware, in and
	§ for New Castle County
STATE OF DELAWARE,	§ Cr. ID Nos. 1005002098
	§ 1005002161
Plaintiff Below-	§
Appellee.	§

Submitted: April 10, 2012  
Decided: April 20, 2012

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

**ORDER**

This 20<sup>th</sup> day of April 2012, 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, Neal Gibson, filed an appeal from the Superior Court’s November 2, 2011 violation of probation (“VOP”) sentencing order. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court’s judgment on the ground that it is manifest on

the face of the opening brief that the appeal is without merit.<sup>1</sup> We agree and affirm.

(2) The record before us reflects that, in May 2010, Gibson entered a plea of guilty to Possession With Intent to Deliver Marijuana in Cr. ID No. 1005002098. He was sentenced to 5 years of Level V incarceration, to be suspended for 18 months at Level III probation. In January 2011, Gibson entered a plea of guilty to Burglary in the Second Degree in Cr. ID No. 1005002161. He was sentenced to 6 years of Level V incarceration, to be suspended after 1 year for 1 year at Level II probation.

(3) At a VOP hearing on November 2, 2011, the Superior Court found that Gibson had committed a VOP with respect to both of his criminal convictions. With respect to the first, he was re-sentenced to 3 years at Level V, with credit for 27 days previously served. With respect to the second, he was re-sentenced to 5 years at Level V, to be suspended after 2 years for 1 year at Level III.

(4) In this appeal, Gibson first claims that the Superior Court violated standards of due process and Superior Court Criminal Rule 32.1 at his VOP hearing. Essentially, he argues that he did not receive an adequate opportunity to defend himself against the State's charges. Second, Gibson

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<sup>1</sup> Supr. Ct. R. 25(a).

claims that the attorney who represented him at the VOP hearing provided ineffective assistance of counsel. Third, Gibson claims that his VOP sentences were unduly harsh, reflecting that the sentencing judge imposed sentence with a “closed mind.”

(5) The transcript of the VOP hearing belies Gibson’s claim of an inadequate opportunity to defend against the State’s charges. A VOP hearing is neither a criminal prosecution nor a formal trial and only minimal requirements of due process must be observed.<sup>2</sup> The transcript reflects that Gibson was represented by counsel at the VOP hearing. Counsel was prepared to address the charges against his client—new charges of Burglary in the Second Degree and Possession With Intent to Distribute Marijuana. Counsel cross-examined both police officers and the probation officer who testified on behalf of the State. Counsel also argued to the presiding judge that his client had a serious drug problem and requested a lesser sentence than the State had been requested. The transcript reflects that the evidence against Gibson was overwhelming. In the absence of any evidence that the requirements of Rule 32.1 were not met, we conclude that Gibson’s first claim is without merit.

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<sup>2</sup> *Perry v. State*, 741 A.2d 359, 362-63 (Del. 1999) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)).

(6) Gibson’s claim of ineffective assistance of counsel is equally unavailing. Even assuming that Gibson may assert an ineffective assistance of counsel claim in connection with his VOP hearing,<sup>3</sup> this Court does not entertain an ineffectiveness claim asserted for the first time on direct appeal where the trial court has not been given an opportunity to fully adjudicate it.<sup>4</sup> Gibson did not present his claim to the Superior Court in the first instance. We, therefore, decline to address it here.

(7) Finally, Gibson claims that the sentencing judge imposed sentence with a “closed mind.” This Court reviews a defendant’s sentence for a) unconstitutionality; b) factual predicates that are false, impermissible or that lack minimum indicia of reliability; c) judicial vindictiveness, bias or sentencing with a “closed mind”; or d) any other illegality.<sup>5</sup> The transcript of Gibson’s VOP hearing fails to support Gibson’s contention that the judge imposed his sentence with a “closed mind.” Although the judge stated that he did not “see any basis for leniency,” that statement was justified in light of Gibson’s violations. Also, the sentences imposed were within the statutory limits and were not illegal.<sup>6</sup> We find no error or abuse of discretion

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<sup>3</sup> *Jones v. State*, 560 A.2d 1056, 1057 (Del. 1989).

<sup>4</sup> *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

<sup>5</sup> *Siple v. State*, 701 A.2d 79, 83 (Del. 1997).

<sup>6</sup> *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

on the part of the Superior Court in imposing Gibson's sentences. Therefore, Gibson's third claim is likewise without merit.

(8) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

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

BY THE COURT:

/s/ Jack B. Jacobs  
Justice