

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHNAS ORTIZ,	§	
	§	
Defendant Below-	§	No. 420, 2004
Appellant,	§	
	§	
v.	§	Court Below---Superior Court
	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. A. No. VN03-08-1132-02
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: April 29, 2005

Decided: July 11, 2005

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

ORDER

This 11th 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, Johnas Ortiz, filed a pro se appeal from the Superior Court's September 13, 2004 violation of probation ("VOP") sentencing order.¹ We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In October 2003, Ortiz pleaded guilty to Possession of Burglar's Tools and Criminal Impersonation. He was sentenced to 3 years incarceration at

¹ Following an evidentiary hearing in the Superior Court, Ortiz was permitted to proceed pro se in this appeal by Order of this Court dated February 22, 2005. Supr. Ct. R. 19(c) and 26(d) (iii).

Level V, to be suspended after 60 days for 6 months of Level IV home confinement followed by 2 years of Level III probation.²

(3) At a hearing on January 22, 2004, Ortiz was found to have committed a VOP in connection with his October 2003 probationary sentences. His probation was revoked and he was sentenced to 2 years and 9 months of Level V imprisonment, to be suspended for 6 months Level IV work release followed by 1 year of Level III probation.³

(4) On September 13, 2004, a second VOP hearing was held. Again, Ortiz was found to have committed a VOP in connection with his October 2003 probationary sentences. His probation was revoked and he was re-sentenced to 2 years and 9 months of Level V imprisonment, to be suspended for successful completion of the Level V Key Program, to be followed by 6 months of Level IV Plummer Center, with the balance of the sentence to be served at Level III probation.

(5) In this appeal, Ortiz claims that his second VOP hearing was conducted in violation of his due process rights.⁴ Specifically, he argues that he did not receive proper written notification of the hearing, was denied his right to

² At the time of sentencing, Ortiz also was found to have committed a VOP in connection with two earlier probationary sentences for drug possession and conspiracy.

³ Because the sentencing order contained an erroneous effective date, a corrected order was entered on July 16, 2004.

⁴ Super. Ct. Cr. R. 32.1(a).

present evidence and cross examine witnesses and was denied his right to counsel of his choice. Ortiz also claims that his VOP sentence is illegal because it does not specify when it terminates and does not give him credit for Level V time previously served. Finally, Ortiz claims that the Superior Court judge conducted the VOP hearing with a “closed mind.”

(6) The transcript of the VOP hearing reflects that, before the proceedings began, Ortiz stated that he wished to be represented by private counsel rather than the public defender. When the Superior Court judge denied Ortiz’ request to retain private counsel, Ortiz stated that he had “no problem” going forward with the hearing anyway, which is what occurred. The transcript further reflects that Ortiz conceded he missed seven of his scheduled weekly appointments with his probation officer between the dates of June 29 and August 10, 2004.⁵ Given Ortiz’ willingness to proceed with the hearing without private counsel and his admission that he did not attend the appointments with his probation officer, we find that there was a sufficient basis for the Superior Court’s finding of a VOP⁶ and no plain error in connection with the proceedings.

⁵ While Ortiz testified that his job prevented him from making the appointments, the Superior Court judge, noting that Ortiz was familiar with how probation works, did not find that testimony to be credible.

⁶ *Brown v. State*, 249 A.2d 269, 272 (Del. 1968).

(7) Ortiz' claim that his VOP sentence is illegal is without merit. The judge's ruling from the bench and the sentencing order appropriately specify the effective date and duration of the sentence. The total amount of time Ortiz must spend at Level V is dependent upon how quickly he completes the Key Program. Moreover, Ortiz' sentence was reduced from 3 years at Level V to 2 years and 9 months at Level V, reflecting credit for the 60 days of Level V time Ortiz originally served. Ortiz has presented no evidence that he has not been credited with the appropriate amount of Level V time served.

(8) Ortiz' final claim that the Superior Court acted with a "closed mind" at the VOP hearing is not supported by the record. While the judge found that Ortiz' explanation for failing to appear for his appointments with his probation officer was not credible, there is no indication that the judge either failed to permit Ortiz and his counsel to make the appropriate arguments on his behalf or failed to weigh the evidence fairly.⁷

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

BY THE COURT:

/s/ Myron T. Steele
Justice

⁷ *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").