

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANKLIN D. FENNELL,	§	
	§	
Defendant Below-	§	No. 43, 2005
Appellant,	§	
	§	
v.	§	Court Below---Superior Court
	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. ID No. 9405000526
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: May 4, 2005
Decided: July 19, 2005

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

ORDER

This 19th day of July 2005, 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, Franklin D. Fennell, filed an appeal from the Superior Court's January 7, 2005 order denying his motion for correction of an illegal sentence pursuant to Superior Court Criminal Rule 35. The plaintiff-appellee, the State of Delaware, has moved to affirm the judgment of the Superior

Court on the ground that it is manifest on the face of Fennell's opening brief that the appeal is without merit.¹ We agree and AFFIRM.

(2) In August 1995, Fennell was found guilty by a Superior Court jury of Delivery of Cocaine, Use of a Vehicle for Keeping Controlled Substances, and Conspiracy in the Second Degree. In December 1995, Fennell was sentenced on the delivery conviction to 30 years incarceration at Level V.² Fennell's convictions were affirmed by this Court on direct appeal.³

(3) In this appeal, Fennell claims that his 30-year Level V sentence for Delivery of Cocaine is illegal because the State did not prove, at a hearing, that he previously had been convicted of delivery of cocaine and, therefore, was subject to an enhanced penalty.⁴ He alleges that, while the State introduced evidence of a previous drug offense by Fennell at trial for the limited purpose of proving the element of intent, there was no formal motion by the State requesting an enhanced penalty following the trial and no separate hearing on that motion.⁵

¹ Supr. Ct. R. 25(a).

² Del. Code Ann. tit. 16, § 4763(a) (3) (1995) (requiring a 30-year sentence for a second conviction of delivery of cocaine). Fennell was sentenced on the remaining convictions to a total of 5 years incarceration at Level V, to be suspended after 1 year for probation.

³ *Fennell v. State*, 691 A.2d 624 (Del. 1997).

⁴ Del. Code Ann. tit. 11, § 4215(a) (2001).

⁵ While Fennell claims that his sentence is illegal, in fact, he is complaining that his sentence was imposed in an illegal manner.

(4) Under Rule 35(a), the “Superior Court may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.” Under Rule 35(b), a motion for reduction of sentence must be filed within 90 days of the imposition of the sentence. Fennell’s Rule 35 motion, which was filed in December 2004, clearly was untimely given his sentencing date of December 1995. While Rule 35 provides that the Superior Court may consider an untimely motion in “extraordinary circumstances,” Fennell has alleged no such circumstances in this case. As such, we find that the Superior Court properly denied Fennell’s motion.⁶

(5) It is manifest on the face of Fennell’s 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, clearly there was no abuse of discretion.

⁶ While the Superior Court articulated a different rationale for its ruling in this case, this Court may affirm on grounds other than those relied upon by the trial court. *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice