

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM K. PHILHOWER,	§
	§
Defendant Below-	§ No. 442, 2004
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0207000008
Plaintiff Below-	§
Appellee.	§

Submitted: June 17, 2005
Decided: August 22, 2005

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

ORDER

This 22nd day of August 2005, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, William Philhower, filed this appeal from his sentence for a violation of probation (VOP). Philhower raises a number of claims alleging that the Superior Court violated his due process rights. We find no merit to Philhower's claims. Accordingly, we affirm the judgment of the Superior Court.

(2) The record reflects that Philhower pled guilty in December 2002 to DUI (fourth offense). The Superior Court sentenced him to two years at Level V supervision to be suspended after serving six months at

Level V for eighteen months at Level III probation. The sentencing order also gave Philhower credit for five months and six days previously served. On March 24, 2004, a *capias* was issued for Philhower for violating probation. The *capias* was returned on August 25, 2004, and a VOP hearing was held on September 10, 2004. After the hearing, during which Philhower was represented by counsel, the Superior Court found Philhower in violation of the terms of his probation and sentenced him to eighteen months at Level V incarceration, with credit for seventeen days served, with the balance to be suspended upon successful completion of the Level V Key Program. This appeal followed.¹

(3) Although not easily deciphered, Philhower's opening brief appears to assert that the Superior Court VOP proceedings violated his due process rights in several respects. Philhower's brief alleges the following errors: (i) upon being released from incarceration, he was never provided with instructions about reporting to probation or about the conditions of his probation; (ii) he called the probation office and was told he did not have to report; (iii) he did not receive a preliminary hearing or VOP hearing within ten days; (iv) defense counsel was ineffective; (v) the Superior Court judge

¹ After filing his appeal, Philhower requested to discharge his court-appointed counsel and to proceed *pro se* on appeal. After remanding to the Superior Court for an evidentiary hearing, this Court granted Philhower's motion.

violated his rights by compelling Philhower, a mentally deficient and physically handicapped man, to give incorrect testimony against himself in violation of his Fifth Amendment rights; (vi) the Superior Court's VOP finding was based on unreliable and inaccurate information; and (vii) his sentence is illegal.

(4) Although a defendant accused of a probation violation is not entitled to a formal trial,² the United States Supreme Court has held that there are certain "minimum requirements of due process" that must be met in a violation proceeding.³ In Delaware, those requirements are set forth in Superior Court Criminal Rule 32.1, which provides that a defendant accused of a probation violation is entitled to: (i) a bail hearing; (ii) written notice of the alleged violation; (iii) disclosure of the evidence against the person; (iv) an opportunity to appear and present evidence; (v) an opportunity to question adverse witnesses; and (vi) notice of the right to retain counsel.⁴

(5) The record in this case reflects that Philhower was released from custody in June 2003. After failing to report for probation in accordance with his sentence, the probation office sent two separate certified letters to Philhower at two different addresses he had provided. Both letters

² See 11 *Del. C.* § 4334(c) (providing that a VOP hearing may be informal or summary).

³ *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

⁴ Del. Super. Ct. Crim. R. R. 32.1 (2005).

were returned unclaimed. The violation report was filed in the Superior Court in March 2004 and a *capias* was issued. Philhower was not picked up on the *capias* until August 24. On August 25, a bail hearing was held. On September 10, Philhower appeared with his court-appointed counsel at the VOP hearing. The transcript of the VOP hearing reflects that Philhower's counsel stated that Philhower did not contest the allegation that he had never reported for his court-ordered probation. The judge asked Philhower a few questions, and then found him in violation of his probation for failing to report. The judge sentenced Philhower to eighteen months incarceration, which represented the suspended portion of his original sentence. Upon successful completion of the Key Program program, the balance of Philhower's sentence was ordered suspended for residential drug treatment and aftercare.

(6) Under these circumstances, there simply is no merit to Philhower's claims that his due process rights were violated. Philhower was notified of the charges against him. Bail was set. Counsel was appointed. Philhower had notice of the VOP hearing, appeared with counsel, and did not contest the charge that he had failed to report to serve his probationary

sentence. The record supports the judge's finding of a probation violation, and the sentence imposed comports with Delaware law.⁵

(7) Philhower's final claim asserts that his court-appointed counsel was ineffective for failing to investigate and contest the VOP charge. Because this issue was not raised to the Superior Court in the first instance, this Court will not consider it for the first time on appeal.⁶

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

BY THE COURT:

/s/ Randy J. Holland
Justice

⁵ See 11 Del. C. § 4334(c) (authorizing a judge, upon a finding a violation of probation, to reimpose the suspended portion of the defendant's original sentence); *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

⁶ See *Wright v. State*, 633 A.2d 329, 336 (Del. 1993).