

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ORVILLE SMULLEN,	§
	§ No. 656, 2012
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0803022425A
Plaintiff Below-	§
Appellee.	§

Submitted: February 26, 2013

Decided: March 5, 2013

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

ORDER

This 5th day of March 2013, upon consideration of the State's motion to remand, the appellant's response, and the parties' respective responses to the Superior Court's modified sentencing order, it appears to the Court that:

(1) The appellant, Orville Smullen, pled guilty in September 2008 to Possession of Heroin Within 1000 Feet of a School. On February 20, 2009, the Superior Court sentenced Smullen as a habitual offender to five years at Level V incarceration, to be suspended after serving three years in prison for eighteen

months at Level IV, to be suspended after serving six months at Level IV for one year at Level III probation.¹

(2) On October 12, 2012, Smullen filed a motion for correction of illegal sentence, arguing that the Superior Court could not have suspended any portion of his February 20, 2009 sentence because he had been sentenced as a habitual offender. Smullen asked the Court to correct his sentence to eliminate the suspended time and discharge him from further supervision. Rather than granting the relief that Smullen requested, the Superior Court modified its February 20, 2009 sentencing order by reimposing the full five year sentence without any suspension.² This appeal followed.

(3) The State filed a motion requesting that the matter be remanded to the Superior Court. The State acknowledged that the Superior Court issued its November 19, 2012 modified sentencing order, which imposed a harsher punishment than its original February 20, 2009 sentencing order, without giving Smullen the opportunity to be present and heard. The State thus filed a motion requesting that Smullen's case be remanded to the Superior Court for resentencing. Smullen filed a response agreeing that a remand was appropriate.

¹ In a related case case, Smullen pled guilty and was sentenced on March 5, 2009 to Possession of a Weapon in a School Zone. The Superior Court sentenced Smullen on that conviction to eight years at Level V incarceration, to be suspended after serving three years in prison for two years at Level III probation.

² The Superior Court issued its modified sentencing order on October 25, 2012. It reissued the same order on November 19, 2012. Thus, Smullen's notice of appeal, which was filed on December 14, 2012, was timely filed from the Superior Court's modified sentencing order.

(4) Before the Court had an opportunity to rule on the motion for remand, the Superior Court issued another modified sentencing order dated February 14, 2013. That sentencing order imposed a sentence of three years at Level V imprisonment to be followed by six months at Level IV Plummer House. In his response to the Superior Court's modified sentencing order, Smullen acknowledges that he was brought before the Superior Court on February 14, 2013 for resentencing and that the modified sentence imposed the relief he requested. Nonetheless, Smullen appears to object to dismissal of his appeal as moot.

(5) This Court may dismiss an appeal for mootness under Supreme Court Rule 29(b).³ Under the mootness doctrine, although there may have been a justiciable controversy at the time the litigation commenced, the action will be dismissed if that controversy ceases to exist.⁴ In the instant case, once the Superior Court granted Smullen's request for sentence modification, a justiciable controversy no longer existed and, therefore, the appeal became moot. Moreover, this case does not fall within the exception to the mootness doctrine for cases involving the public interest that are capable of repetition yet evading review.⁵ While the factual circumstances presented in this case are capable of repetition,

³ *Stotland v. GAF Corp.*, 469 A.2d 421, 423 (Del. 1983).

⁴ *General Motors Corp., v. New Castle County*, 701 A.2d 819, 823 (Del. 1997).

⁵ *Radulski v. Del. State Hosp.*, 541 A.2d 562, 566 (Del. 1988).

there is no impediment to future review by this Court of the issue raised by Smullen. We, therefore, conclude that Smullen's appeal must be dismissed.

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to Supreme Court Rules 3(b) and 29(b), that the within appeal is DISMISSED.

BY THE COURT:

/s/ Carolyn Berger
Justice