

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN L. TUNNELL	§	
	§	No. 344, 2005
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware in and
v.	§	for Kent County
	§	
STATE OF DELAWARE,	§	Def. ID Nos. 0407012047
	§	0410017752
Plaintiff Below,	§	0302012375
Appellee.	§	

Submitted: March 16, 2006
Decided: June 2, 2006

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

ORDER

This 2nd day of June 2006, 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) On April 5, 2005, the appellant, Brian L. Tunnell, pled guilty to one count each of Forgery in the Second Degree, Theft by False Pretense, and Possession of Cocaine.¹ The Superior Court sentenced Tunnell to two years at Level V imprisonment suspended after successful completion of the Short Term Key Program followed by probation.

¹The plea agreement disposed of a total of thirteen charges under three separate indictments. The State entered a nolle prosequi on the remaining ten charges.

(2) On June 28, 2005, Tunnell filed a motion for modification of sentence pursuant to Superior Court Criminal Rule 35(b). Tunnell sought to modify his sentence on the basis that the Department of Correction had not placed him into the Short Term Key Program.²

(3) By order dated July 14, 2005, the Superior Court denied Tunnell's motion for modification of sentence. This appeal followed.

(4) Tunnell argues on appeal that the Department of Correction's failure to place him into the Short Term Key Program violated the Superior Court's April 5, 2005 sentencing order.³ Contrary to Tunnell's argument, however, his disqualification from the Short Term Key Program as a result of prison write-ups does not entitle him to a modification⁴ of an otherwise valid sentence.⁵

²Tunnell also alleged that a modification was necessary because (i) the sentence did not impose a period of custodial supervision as required by title 11, section 4204(l) of the Delaware Code; (ii) the State had not filed a habitual offender motion under title 11, section 4214(a) of the Delaware Code; and (iii) his trial counsel was ineffective.

³Tunnell's failure to brief the other issues that he raised in his motion for modification of sentence constitutes a waiver of those issues on appeal. *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

⁴*See, e.g., Phillips v. Kearney*, 2003 WL 2004392, at *7 (D. Del.) (determining that Key Program was not a mandatory part of the defendant's sentence but rather was "a prerequisite for the *possibility* of reduced levels of incarceration") (citation omitted).

⁵"Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature." *Mayer v. State*, 604 A.2d 839, 842 (Del. 1992) (quoting *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989)). *See* Del. Code

(5) It is manifest on the face of Tunnell's opening brief that the appeal is without merit. The issues raised on appeal are clearly controlled by settled Delaware law. To the extent the issues on appeal implicate the exercise of judicial discretion, 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/ Myron T. Steele
Chief Justice

Ann. tit. 11, §§ 861(b)(2), 4205(b)(7) (2001) (providing for sentence of up to two years for Forgery in the Second Degree, a class G felony); Del. Code Ann. tit. 11, §§ 843, 4206(a) (2001) (providing for sentence of up to one year for Theft by False Pretense, a class A misdemeanor); Del. Code Ann. tit. 16, § 4753 (2003), Del. Code Ann. tit. 11, § 4206(a) (2001) (providing for sentence of up to one year for Possession of Cocaine, a class A misdemeanor).