

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAYMOND O. DEMBY, JR.,	§
	§ No. 479, 2005
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Kent County
STATE OF DELAWARE,	§ Cr. ID No. 9511007512
	§
Plaintiff Below-	§
Appellee.	§

Submitted: April 21, 2006

Decided: June 29, 2006

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

ORDER

This 29th day of June 2006, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Raymond O. Demby, Jr., filed an appeal from the Superior Court's August 29, 2005 order denying his second motion for correction of illegal sentence pursuant to Superior Court Criminal Rule 35(a). We find no merit to the appeal. Accordingly, we affirm.¹

¹ On February 17, 2006, this Court denied the State's motion to affirm. *Demby v. State*, Del. Supr., No. 479, 2005, Holland, J. (Feb. 17, 2006). In the Order denying the motion, the State was directed to a) identify the previous offense that gave rise to Demby's enhanced penalty under Del. Code Ann. tit. 16, § 4763(a) (3); and b) address whether section 4763(a) (3) applied only to a prosecution under section 4751 when the defendant was previously convicted of an offense under Chapter 47 that related to the delivery of or possession with intent to deliver a controlled substance.

(2) In March 1996, Demby was found guilty by a Superior Court jury of Delivery of a Narcotic Schedule II Controlled Substance.² He was sentenced to thirty years incarceration at Level V, to be suspended after the mandatory minimum term of fifteen years³ for fifteen years of decreasing levels of probation. This Court affirmed Demby's convictions and sentences on direct appeal.⁴ Demby previously filed three motions for postconviction relief pursuant to Superior Court Criminal Rule 61 and one motion for correction of an illegal sentence pursuant to Superior Court Criminal Rule 35, all of which were unsuccessful. The instant appeal is from the Superior Court's denial of Demby's second motion for correction of an illegal sentence.

(3) Documentation provided by the State, as requested by this Court, reflects that, in September 1989, Demby pleaded guilty to Possession With Intent to Deliver a Narcotic Schedule I or Schedule II Controlled Substance. When Demby was sentenced in 1996 for Delivery of a Controlled Narcotic Schedule II Substance, Del. Code Ann. tit. 16, § 4763(a)

(3) read as follows:

In any prosecution for violation of § 4751 or § 4761(a) (1) where a defendant has previously been convicted of any offense

² Del. Code Ann. tit. 16, § 4751(a).

³ Del. Code Ann. tit. 16, § 4763(a) (3).

⁴ *Demby v. State*, 695 A.2d 1127 (Del. 1997).

under this chapter, or under any statute of the United States or of any state relating to the delivery or possession with intent to deliver of a controlled substance or counter-feit substance classified in Schedules I or II as a narcotic drug, the minimum term of imprisonment shall be 30 years and the maximum term for such conviction shall be 99 years and 15 years of such minimum term shall be a mandatory minimum term of imprisonment and shall not be subject to suspension, . . . probation or parole during such portion of such minimum term.

(4) In this appeal, Demby does not dispute that he was eligible for enhanced sentencing, but, rather, claims that his enhanced sentence under Del. Code Ann. tit. 16, § 4763(a) (3) is illegal because the State did not provide proof at a hearing that he was a non-addict, as required under Del. Code Ann. tit. 16, § 4751(d). That statute provides that:

Where an individual is convicted of a violation of . . . this section and the Attorney General may move to sentence the defendant as a nonaddict, the court shall conduct a hearing at which the Attorney General shall have the burden of proof by a preponderance of the evidence that the defendant is a nonaddict. If the court, after hearing, is satisfied that the defendant is, and was at the time of the offense, not addicted to controlled substances, then the following enhanced penalties shall apply: . . . (2) [f]or the second . . . violation of this section a mandatory minimum sentence of 12 years to be served at Level V.

(5) Rule 35(a) permits the Superior Court to correct an illegal sentence “at any time.” Relief under Rule 35(a) is available when the sentence imposed exceeds the statutorily authorized limits, violates double jeopardy, is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by

statute, is uncertain as to its substance, or is a sentence that the judgment of conviction did not authorize.⁵

(6) In 1996, the Delaware criminal statutes provided two alternative sentencing schemes for defendants such as Demby.⁶ Under Del. Code Ann. tit. 16, § 4751(d), the prosecutor could attempt to demonstrate that the defendant was a non-addict and, if he or she were successful, the defendant would be subject to a mandatory minimum of twelve years of Level V incarceration.⁷ In the alternative, under Del. Code Ann. tit. 16, § 4763(a), the prosecutor could forego proof that the defendant was a non-addict and simply demonstrate that the defendant had been convicted of Possession With Intent to Deliver a Narcotic Schedule I or Schedule II Controlled Substance, or Delivery of a Narcotic Schedule I or Schedule II Controlled Substance, once before. Under those circumstances, the defendant would be subject to a minimum mandatory sentence of fifteen years of Level V incarceration.⁸

(7) We conclude that Demby's sentence is not illegal under Rule 35(a). At the time Demby was sentenced, the prosecutor was authorized to request that Demby's sentence be imposed pursuant to Del. Code Ann. tit.

⁵ *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

⁶ *Campbell v. State*, Del. Supr., No. 91, 2004, Steele, C.J. (June 18, 2004).

⁷ *Id.*

⁸ *Id.*

16, § 4763(a). Demby's sentence does not exceed the statutorily authorized limits or violate double jeopardy, and is not ambiguous or internally contradictory. It is a sentence that was authorized by Demby's judgment of conviction at the time he was sentenced. We, therefore, conclude that Demby's claim is without merit.

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

BY THE COURT:

/s/ Randy J. Holland
Justice