

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JIMMIE LEE MURPHY,	§
	§ No. 226, 2006
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Kent County
STATE OF DELAWARE,	§ Cr.A. Nos. IK95-09-0365; 0366
	§
Plaintiff Below-	§
Appellee.	§

Submitted: June 15, 2006

Decided: July 27, 2006

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

**ORDER**

This 27<sup>th</sup> day of July 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) The defendant-appellant, Jimmie Lee Murphy, filed an appeal from the Superior Court's April 10, 2006 order denying his motion for correction of sentence pursuant to Superior Court Criminal Rule 35. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of Murphy's opening brief that his appeal is without merit.<sup>1</sup> We agree and affirm.

(2) In May 1996, Murphy was found guilty by a Superior Court jury of Delivery of Cocaine and Maintaining a Dwelling for Keeping Controlled Substances. He was sentenced as a habitual offender to life imprisonment.<sup>2</sup> Murphy's convictions and sentences were affirmed by this Court on direct appeal.<sup>3</sup>

(3) In this appeal, Murphy claims that: a) his sentence is illegal under Rule 35(a) because the Superior Court's finding that he was a habitual offender was not supported by evidence of the requisite number of prior offenses; and b) the Superior Court abused its discretion and violated Murphy's constitutional rights by summarily denying his motion and by deciding the motion on the basis of Rule 35(b) rather than Rule 35(a).

(4) 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

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<sup>1</sup> Supr. Ct. R. 25(a).

<sup>2</sup> Del. Code Ann. tit. 11, § 4214(b).

<sup>3</sup> *Murphy v. State*, Del. Supr., No. 388, 1996, Hartnett, J. (May 30, 1997).

statute, is uncertain as to its substance, or is a sentence that the judgment of conviction did not authorize.<sup>4</sup>

(5) Murphy's first claim is that his sentence as a habitual offender is illegal under Rule 35(a) because Attempted Delivery of Cocaine is not a proper requisite offense for habitual offender status. Murphy is incorrect as a matter of law. Attempted Delivery of Cocaine constitutes an offense of the same grade and degree as Delivery of Cocaine under Del. Code Ann. tit. 16, § 4751.<sup>5</sup> A defendant who has twice been convicted of violating that statute, first, by being convicted of Delivery of Cocaine and, second, by being convicted of Attempted Delivery of Cocaine, is eligible, following his third violation, for habitual offender status and the imposition of a life sentence.<sup>6</sup> Murphy's first claim is, thus, without merit.

(6) Murphy's second claim is that the Superior Court erred and abused its discretion by deciding his motion for correction of illegal sentence under Rule 35(b) rather than Rule 35(a). Although Murphy is correct that the Superior Court apparently decided his motion under the wrong subsection of Rule 35, that error was harmless. Murphy's sentence is not

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<sup>4</sup> *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

<sup>5</sup> Del. Code Ann. tit. 11, § 531 ("Attempt to commit a crime is an offense of the same grade and degree as the most serious offense which the accused is found guilty of attempting.")

<sup>6</sup> Del. Code Ann. tit. 11, § 4214(b) ("Any person who has been two times convicted of a felony or an attempt to commit a felony [such as Del. Code Ann. tit. 16, § 4751] is declared to be an habitual criminal, and the court . . . shall impose a life sentence . . . .")

illegal and we find that the Superior Court correctly so determined.<sup>7</sup> Murphy's second claim is, thus, without merit.

(7) It is manifest on the face of Murphy'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.

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/ Jack B. Jacobs  
Justice

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<sup>7</sup> *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (This Court may affirm on grounds different from those relied upon by the trial court).