

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRYAN K. BURTON,	§	
	§	
Defendant Below-	§	No. 183, 2002
Appellant,	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr.A. Nos. IN87-08-0586-02
Plaintiff Below-	§	IN87-08-0578-02 §
Appellee.		IN87-08-0576-02
	§	IN87-08-0352-02
	§	IN87-08-0282-02

Submitted: September 24, 2002

Decided: November 20, 2002

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices

ORDER

This 20th day of November 2002, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Bryan K. Burton, filed an appeal from the Superior Court’s March 7, 2002 order finding him in violation of probation (“VOP”) and reimposing sentences for two previous convictions for Forgery in the Second Degree (IN87-08-0586 and IN87-08-0578). Burton received a sentence of 3 years incarceration at Level V for violating probation on the first

forgery conviction and a 3-year suspended sentence at Level III for violating probation on the second forgery conviction. On three additional second degree forgery convictions (IN87-08-0576, IN87-08-0352, and IN87-08-0282), Burton was discharged from probation as unimproved.

(2) In this appeal, Burton claims that the Superior Court erred in sentencing him for a VOP because the two sentences for second degree forgery it reimposed had expired in 1991 and were, therefore, unavailable to be reimposed. He, therefore, asks that the Superior Court's finding of a VOP and the VOP sentences it imposed be vacated.

(3) On April 22, 1988, Burton was convicted of one count of Burglary in the Second Degree and five counts of Forgery in the Second Degree. On the burglary conviction (IN87-08-0574), the Superior Court imposed a sentence of 3 years incarceration at Level V, to be suspended for 3 years at Level III. Burton was given credit for 196 days previously served at Level V. The sentencing order stated that the probationary period would expire on April 21, 1991. On each of the forgery convictions, the Superior Court imposed a sentence of 3 years incarceration at Level V, to be suspended for 3 years at Level III probation. The

non-incarcerative portions of the sentences for forgery were to be served concurrently with the non-incarcerative portion of the sentence for burglary.

(4) On September 1, 1988, the Superior Court found Burton to be in violation of his Level III probation in connection with the burglary conviction, sentencing him to 1 year at Level IV Plummer House. The sentencing order explicitly stated that, after serving his sentence for burglary, Burton would continue on Level III probation in connection with the forgery convictions, as imposed in the original sentencing order.

(5) On September 29, 1989, Burton again was found in violation of his probation on the burglary conviction and was sentenced to 1 year at Level V, with credit for 35 days previously served. The sentencing order noted that the sentence would not begin until March 13, 1990, the expiration date of another sentence that Burton was then serving.¹ This sentencing order, unlike the previous one, did not reimpose sentence for the forgery convictions.

¹The sentencing order did not specify the sentence Burton was serving.

(6) On March 16, 1990, the Superior Court sentenced Burton to 10 years incarceration at Level V for Robbery in the First Degree. The robbery took place after Burton absconded from the Plummer Center where he was serving his Level IV burglary sentence. The sentencing order noted that the burglary sentence would be served consecutively to the sentence Burton was currently serving.² As in its prior sentencing order, the Superior Court did not reimpose sentence for the forgery convictions.

(7) Burton subsequently filed a motion to reduce his robbery sentence. By letter dated September 20, 1990, the Superior Court denied the motion, but stated that it would “use the transition provisions in 11 Del. C. § 4216(c) by suspending the remainder of the prior non-Truth in Sentencing Level V sentences”³ In February 1997, Burton was released from prison early, apparently as the result of a recalculation of good time credits by the Department of Correction.

²Again, the sentencing order did not specify the sentence Burton was serving.

³The sentences explicitly referred to were the 1988 burglary sentence and an apparently unrelated Municipal Court sentence.

(8) On March 7, 2002, approximately five years after his release from prison, a VOP hearing was held in the Superior Court. According to the probation officer, Burton's violations consisted of failing to report a February 2002 arrest for Assault in the Third Degree, make court-ordered payments, arrange to be evaluated for substance abuse problems, and sign up for probation. The probation officer testified that Burton should have begun serving his probationary sentence on his forgery convictions immediately after a term of conditional release related to the robbery sentence ended on March 15, 2000. He also testified, however, that, due to an "administrative oversight," it was not until March 2001 that he was told to supervise Burton. Burton testified at the hearing that, after his release from Level V incarceration in 1997, he was not told, nor was he aware, that he had any term of conditional release or any further term of probation to serve.

(9) The State does not dispute Burton's testimony that it never informed Burton of any conditions imposed on his early release from prison in 1997. Nor does the State dispute that it never informed Burton that, beginning in March 2000, he still had a probationary sentence from his 1988 forgery

convictions to serve. Finally, the State does not dispute that it did not attempt to supervise Burton until approximately four years after his release from prison.

(10) Whether Burton was serving a probationary sentence in connection with his 1988 second degree forgery convictions at the time he committed the violations alleged by the probation officer at the March 7, 2002 VOP hearing depends upon the intent of the prior Superior Court sentencing orders.⁴ In ascertaining the Superior Court's intent, it must be presumed that each element of a sentence imposed by the Superior Court contributes logically to its overall "sentencing scheme."⁵

(11) The language of the Superior Court's September 20, 1990 letter is the key to understanding the sentencing scheme it intended to impose in its sentencing orders. The letter states as follows:

. . . I conclude that the motion [for reduction of the robbery sentence] should be denied. In the plea agreement, the State agreed to recommend that the defendant be sentenced within the applicable guidelines. This sentence is within those guidelines. Although the presumed sentence for robbery first degree without aggravating factors is up to 5 years, there are at least two aggravating factors in this case. For one

⁴*Nave v. State*, 783 A.2d 120, 123 (Del. 2001).

⁵*Nave v. State*, 783 A.2d at 122-23; *Defoe v. State*, 750 A.2d 1200, 1202 (Del. 2000).

thing, Mr. Burton has been convicted of one prior violent felony, burglary second degree. Moreover, he committed this offense after absconding from the Level IV sentence (Plummer Center) to which I had sentenced him for violation of probation.

The one thing I will do is use the transition provisions in 11 Del. C. § 4216(c) by suspending the remainder of the prior non-Truth in Sentencing [TIS] Level V sentences imposed by Municipal Court (M89-08-0926 and 0927) and Superior Court (IN87-08-0574).

(12) It is apparent from this language that the Superior Court intended to simplify its sentencing scheme for Burton by discharging him from his prior non-TIS sentences and instead imposing a single sentence for robbery, which was enhanced in light of Burton's previous convictions and violations of probation. The fact that the Superior Court did not violate Burton on any of his prior sentences also indicates its desire to streamline its sentencing scheme by eliminating all but the single enhanced robbery sentence. Moreover, although the Superior Court did not specifically refer to the five sentences for second degree forgery, those sentences (as evidenced in its original April 22, 1988 sentencing order) clearly were subsidiary to the burglary sentence (IN87-08-0574), to which the Superior Court did refer explicitly. The fact that the Superior Court did not mention the second degree forgery convictions in its September

29, 1989 and March 16, 1990 sentencing orders is also consistent with their subsidiary position in its sentencing scheme.⁶

(13) Thus, because the Superior Court intended, in line with its overall sentencing scheme, to discharge Burton from his prior non-TIS sentences, including the 1988 sentences for second degree forgery, at the time it imposed the enhanced sentence for robbery, Burton was not on probation in connection with those sentences at the time the probation violations were allegedly committed and the Superior Court's March 7, 2002 finding of a VOP and the VOP sentences it imposed must be vacated.

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED to the Superior Court for further proceedings in accordance with this Order.

BY THE COURT:

s/ Joseph T. Walsh
Justice

⁶It is notable that the State itself does not appear to have considered Burton a probationer until approximately four years after his release from prison.

