

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID R. DiSTEFANO,	§
	§ No. 294, 2006
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 92003282DI
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 27, 2006  
Decided: November 17, 2006

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

**ORDER**

This 17<sup>th</sup> day of November 2006, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, David R. DiStefano, filed an appeal from the Superior Court's May 17, 2006 order denying his motion for credit for Level IV time served. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In December 1992, DiStefano pleaded guilty to Unlawful Sexual Penetration in the Second Degree and Unlawful Sexual Contact in the First Degree. He was sentenced to a total of 11 years incarceration at Level V, to be suspended after 8 years for 3 years of Level III probation. In

March 2004, May 2005 and December 2005, DiStefano was found to be in violation of probation (“VOP”). The record reflects that DiStefano was erroneously re-sentenced to 3 years of Level V incarceration after his second VOP, but that the Superior Court corrected that error by sentencing him to only 2 years at Level V after his third VOP, thereby correctly crediting him with the amount of Level V time he previously had served. After unsuccessfully moving for sentence modification in March 2006, DiStefano filed a motion for credit for Level IV time served.

(3) In this appeal, DiStefano claims that Level IV time is equivalent in many ways to Level V time and, for that reason, he, and others like him, should be given credit for all Level IV, as well as Level V, time previously served when probation is revoked and a Level V sentence is re-imposed. Specifically, DiStefano argues that he is entitled to credit for 5 months of Level IV time he previously served.

(4) Upon a finding of a VOP, the Superior Court is authorized to revoke the defendant’s probation and re-impose the periods of incarceration that were suspended in his prior sentence.<sup>1</sup> In so doing, the Superior Court is required to credit the defendant with all Level V time previously served,

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<sup>1</sup> Del. Code Ann. tit. 11, § 4334(c).

including time spent at the VOP Center following a probation violation.<sup>2</sup> Although Level IV punishment is considered “quasi-incarceration” in the Truth in Sentencing Benchbook and is subject to greater custodial oversight than Levels I through III, this Court consistently has held that time spent at Level IV will not be credited against a re-imposed Level V sentence.<sup>3</sup>

(5) Moreover, while the record reflects that DiStefano was erroneously sentenced to 3 years at Level V following his second VOP, the Superior Court corrected that error when it sentenced him to only 2 years at Level V following his third VOP. DiStefano has, thus, provided no factual basis for his argument that he is entitled to credit for an additional 5 months against his Level V sentence.

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

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>2</sup> Del. Code Ann. tit. 11, § 3901(c); *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

<sup>3</sup> *Gamble v. State*, 728 A.2d at 1172.