

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEIGHTON FRANCIS,	§	
	§	No. 245, 2006
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0402005944
Appellee.	§	

Submitted: September 22, 2006
Decided: December 22, 2006

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

ORDER

This 22nd day of December 2006, upon consideration of the briefs on appeal and the Superior Court record, it appears to the Court that:

(1) On July 28, 2004, the appellant, Leighton Francis, pleaded guilty to four drug offenses and was sentenced to a total of sixteen years at Level V imprisonment suspended after serving three and one-half years for probation. The July 28, 2004 sentencing order (“the sentencing order”) provided that the Superior Court would “consider a sentence modification after minimum mandatory[,] if defendant successfully completes drug treatment.”¹

¹See *State v. Francis*, Del. Super. Ct., Cr. ID No. 0402005944, Slights, J. (July 28, 2004) (order) (imposing sentence for drug offenses, including trafficking). See Del. Code

(2) In January 2005 and again in February 2005, Francis requested that the Superior Court modify the sentencing order to include TASC supervision.² The Superior Court denied the requests on the basis that the sentencing order was appropriate as written; however, the Court indicated that it would consider adding TASC supervision once Francis completed Level V or Level IV.

(3) In April 2006, Francis filed a motion for modification of sentence pursuant to Superior Court Criminal Rule 35(b).³ Francis reported that he had served minimum mandatory and had successfully completed drug treatment. In support of his motion, Francis recited the language in the sentencing order which indicated that the Superior Court would “consider a sentence modification after minimum mandatory[,] if defendant successfully completes drug treatment.”

(4) By order dated April 16, 2006, the Superior Court denied Francis’ motion for modification of sentence on the basis that the sentence was

Ann. tit. 16, § 4753A(a)(2)(a) (2003) (providing for two-year minimum mandatory term of imprisonment for trafficking).

²TASC is the acronym for “Treatment Access Services Center.” TASC coordinates substance abuse evaluation and treatment provided to criminal defendants. Del. Code Ann. tit. 11, § 6582(c) (2001).

³Del. Super. Ct. Crim. R. 35(b) (2006).

appropriate, and the motion was repetitive and untimely. Nonetheless, the Superior Court indicated that it would “look favorably upon a recommendation for modification submitted [by the Board of Parole] pursuant to 11 Del. C. § 4217.”⁴

(5) On appeal, Francis argues that, in view of the express reservation of jurisdiction to modify the sentencing order, the Superior Court’s denial of his sentence modification motion as untimely under Rule 35(b) was an abuse of discretion. Moreover, Francis argues that the Superior Court’s reference to a sentence modification under title 11, section 4217 of the Delaware Code imposed a new condition that was not previously a part of the sentencing order.

(6) In a case such as this, where the Superior Court has invoked its inherent authority to retain jurisdiction to modify a sentence, the ninety-day time limitation of Rule 35(b) does not apply.⁵ Nonetheless, the Superior Court’s exercise of its inherent authority to consider in the future a sentence modification that would otherwise be untimely under Rule 35(b) does not

⁴See Del. Code Ann. tit. 11, § 4217 (2001) (providing for modification of sentence upon recommendation of Board of Parole).

⁵*State v. Sloman*, 886 A.2d 1257, 1265 (Del. 2005).

thereafter mandate a modification of sentence.⁶ Rather, a sentence modification is directed to the sound judicial discretion of the Superior Court.⁷ (7)

Contrary to Francis' argument, the Superior Court's indication that it would look favorably upon an application for sentence modification under section 4217 of the Delaware Code did not impose a new condition in the sentencing order. Rather, the Superior Court's reference to section 4217 was simply a recognition that, if and when such an application was submitted, the Superior Court would consider it on the merits.⁸

(8) The record reflects that Francis' sentence is within the statutory limits. Francis can show no vindictive or arbitrary action by the sentencing judge.⁹ We hold that the Superior Court's denial of Francis' motion for modification of sentence was not an abuse of discretion.

⁶*Compare Jones v. State*, 2006 WL 3054633 (Del. Supr.) (vacating denial of sentence modification as untimely under Rule 35(b) where trial court had expressly anticipated suspension of incarceration upon completion of a specific drug program) and *Layton v. State*, 2006 WL 1223121 (Del. Supr.) (vacating denial of sentence modification where trial court had expressly retained jurisdiction over sentence and denial of sentence modification was based solely on procedural time bar of Rule 35(b)).

⁷*Mayes v. State*, 604 A.2d 839 (Del. 1992).

⁸Francis had indicated in his motion for modification of sentence that his prison counselor had attempted to submit a sentence modification request pursuant to section 4217.

⁹*Coleman v. State*, 1993 WL 557943 (Del. Supr.) (citing *Mayes v. State*, 604 A.2d 839 (Del. 1992)).

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

BY THE COURT:

/s/ Randy J. Holland
Justice