

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HARRY J. SMITH,	§
	§ No. 37, 2007
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. A. No. IN83-09-1627
	§
Plaintiff Below-	§
Appellee.	§

Submitted: March 22, 2007

Decided: May 7, 2007

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

ORDER

This 7th day of May 2007, 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, Harry J. Smith, filed an appeal from the Superior Court’s December 29, 2006 order modifying his VOP sentence. 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 the opening brief that the appeal is without merit.¹ We agree and AFFIRM.

¹ Supr. Ct. R. 25(a).

(2) In May 1984, Smith pleaded guilty to Burglary in the First Degree and Unlawful Imprisonment in the First Degree. He was sentenced on the burglary conviction to 20 years of Level V incarceration, to be suspended after 10 years for 10 years of probation. He was sentenced on the unlawful imprisonment conviction to 7 years of Level V incarceration.

(3) While on parole from his 1984 convictions, Smith was arrested in December 1998, and charged with two counts of Robbery in the First Degree and related offenses. In January 2000, Smith pled guilty to two counts of Robbery in the First Degree and two weapon offenses. At sentencing, the Superior Court revoked the probationary portion of Smith's 1984 burglary sentence and sentenced him to 6 years at Level V. The Board of Parole subsequently revoked Smith's parole with respect to his 1984 burglary conviction and ordered him to serve 2 years, 4 months and 21 days at Level V, representing the remainder of his Level V sentence.

(4) Smith then filed a motion to vacate his VOP sentence on the ground that the Superior Court did not have the authority to revoke his probation while he was on parole status. In response, the Superior Court issued a modified VOP sentencing order reducing the VOP sentence from 6 years at Level V to 3 years, 7 months and 9 days. The sentence ordered by the Board of Parole was allowed to stand. The effect of the Superior Court's

order was to impose a sentence totaling 6 years at Level V. While the Superior Court did not find Smith's sentence to be illegal, it found it to be "unusual" and modified it in order "to avoid what appears to be a double punishment between the violation of probation and the violation of parole."

(5) Contrary to Smith's argument, the Superior Court has the authority to revoke a probationary sentence that a defendant has not yet begun to serve.² In this case, the Superior Court reduced Smith's VOP sentence so that his total sentence did not exceed 6 years at Level V. The Superior Court did so as a matter of fairness in the exercise of its discretion. We do not find in the particular circumstances of this case that the Superior Court acted improperly or abused its discretion and, therefore, we will not disturb the Superior Court's ruling.

(6) It is manifest on the face of Smith'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, there clearly was no abuse of discretion.

² *Williams v. State*, 560 A.2d 1012, 1015 (Del. 1989).

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/ Carolyn Berger _____
Justice