

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICK A. HENRY,	§	
	§	
Defendant Below-	§	No. 596, 2001
Appellant,	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr.A. Nos. S97-01-0044I
Plaintiff Below-	§	S97-01-0046I
Appellee.	§	S97-05-0474I

Submitted: April 26, 2002

Decided: June 21, 2002

Before **WALSH, HOLLAND** and **BERGER**, Justices

ORDER

This 21st day of June 2002, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Patrick A. Henry, filed an appeal from the Superior Court's November 19, 2001 order denying Henry's request for a modification of his sentence for violating his probation. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In May 1997, Henry pleaded guilty to Possession of a Firearm During the Commission of a Felony, Conspiracy in the Second Degree and Assault in the Second Degree. In November 1999, while on probation in connection with those offenses, Henry pleaded guilty to Rape in the Fourth

Degree and was charged with violating his probation. On February 11, 2000, Henry was sentenced for the probation violations to a total of 5 years incarceration at Level V, to be suspended upon successful completion of the Key Program for the remainder of the Level V time at decreasing levels of probation.

(3) In this appeal, Henry claims that the Superior Court abused its discretion in denying his request for a modification of his sentence so that he might be moved from his current facility to another facility in order to complete the Key Program. He contends it is unfair for him to wait at Level V incarceration until a slot in the Key Program becomes available.¹

(4) Henry's claim in this appeal was not presented to the Superior Court in the first instance.² We, therefore, decline to address it in this appeal.³ Henry's appeal is meritless in any case. There was no abuse of discretion on the part of the Superior Court in refusing to modify Henry's sentencing order. Henry presented no evidence that the sentence as

¹The record reflects that Henry entered the Key Program in March 2000, but left after 3 days for "failure to participate." His reclassification back into the Key Program was then delayed because of an open rape charge that was dismissed in August 2001.

²The claim that resulted in the Superior Court's November 19, 2001 order was Henry's request to be sent to the Crest Program rather than the Key Program.

³SUPR. CT. R. 8.

originally imposed on February 11, 2000 was illegal or inappropriate.⁴ Moreover, the sentence clearly contemplated that Henry would remain at Level V until he entered the Key Program, which is, in fact, what has occurred.

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

BY THE COURT:

/s/ Randy J. Holland
Justice

⁴*Tatem v. State*, 787 A.2d 80, 81 (Del. 2001); *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992).