

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHNAS ORTIZ,	§
	§ No. 645, 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. 0308001824
	§
Plaintiff Below-	§
Appellee.	§

Submitted: April 23, 2007
Decided: July 2, 2007

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 2nd day of July 2007, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Johnas Ortiz, filed an appeal from the Superior Court’s November 14, 2006 order denying his motion for modification of sentence pursuant to Superior Court Criminal Rule 35, which requested the Superior Court to compel the Department of Correction (“DOC”) to apply good time credits to his sentence for a violation of probation (“VOP”). We find no merit to the appeal. Accordingly, we affirm.

(2) In October 2003, Ortiz pleaded guilty to Possession of Burglar Tools and Criminal Impersonation. He was sentenced to three years at Level V, to be suspended after sixty days for six months of Level IV home confinement followed by two years at Level III. At the time of sentencing, Ortiz also was found to have committed a VOP in connection with two earlier probationary sentences for drug possession and conspiracy.

(3) In January 2004, Ortiz was found to have committed a VOP in connection with his October 2003 probationary sentence. His probation was revoked and he was sentenced to two years and nine months at Level V, to be suspended for six months Level IV work release followed by one year at Level III.

(4) In September 2004, a second VOP hearing was held. Again, Ortiz was found to have committed a VOP in connection with his October 2003 probationary sentence. His probation was revoked and he was sentenced to two years and nine months at Level V, to be suspended for successful completion of the Key Program, to be followed by six months of Level IV Plummer Center, with the balance of the sentence to be served at Level III.

(5) In June 2006, Ortiz pleaded guilty to Felony Theft and admitted to having committed another VOP. He was sentenced on the VOP to two

years, nine months at Level V, with credit for time served, to be suspended after four months and three days for one year at Level III. In August 2006, Ortiz was again sentenced for a VOP to eighteen months at Level V, to be suspended after six months, this time in connection with the probationary sentence attached to his conviction for Possession of Burglar Tools.

(6) The record reflects that Ortiz earned statutory good time credit while serving his September 2004 and June 2006 sentences.¹ Ortiz asserts that he requested officials of the Department of Correction to apply the good time credit he had accumulated while serving his sentences to the VOP sentence he is now serving and that his request was denied.

(7) In this appeal, Ortiz claims that the Superior Court had the authority to compel the DOC to apply his good time credits to his VOP sentence under Rule 35 and that its denial of his Rule 35 motion was, therefore, improper.

(8) The record reflects that Ortiz' motion did not challenge the legality of his sentence, which is the proper purpose of a Rule 35 motion. Rather, it challenged the DOC's failure to apply his good time credits to his VOP sentence and requested the Superior Court to compel the DOC to do so. As such, the proper procedural vehicle to seek the remedy sought by

¹ Del. Code Ann. tit. 11, § 4381.

Ortiz was by means of a petition for a writ of mandamus.² But only if Ortiz can demonstrate that the DOC had a duty to apply his good time credits to his VOP sentence, will he prevail.

(9) Because the remedy sought by Ortiz was not available by means of a motion for modification of sentence under Rule 35, we conclude that the Superior Court's denial of Ortiz' motion was proper and must be affirmed.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

² Del. Code Ann. tit. 10, § 564; *Snyder v. Andrews*, 708 A.2d 237 (Del. 1998); *Meades v. Hosterman*, Del. Supr., No. 239, 2006, Ridgely, J. (Aug. 23, 2006); *Clough v. State*, 686 A.2d 158, 159 (Del. 1996) (A writ of mandamus is a means for the Superior Court to compel a public agency such as the DOC to perform a duty where: the petitioner has a clear right to the performance of the duty; no other adequate remedy is available; and the public agency has arbitrarily failed or refused to perform its duty.)