

IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                    |   |                              |
|--------------------|---|------------------------------|
| THOMAS HARPER,     | § |                              |
|                    | § | No. 94, 2012                 |
| Defendant Below-   | § |                              |
| Appellant,         | § |                              |
|                    | § |                              |
| v.                 | § | Court Below—Superior Court   |
|                    | § | of the State of Delaware,    |
| STATE OF DELAWARE, | § | in and for New Castle County |
|                    | § | Cr. ID 0108001171            |
| Plaintiff Below-   | § |                              |
| Appellee.          | § |                              |

Submitted: October 12, 2012

Decided: November 27, 2012

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

**ORDER**

This 27<sup>th</sup> day of November 2012, upon consideration of the opening brief, the State's motion to affirm, and the record on appeal, it appears to the Court that:

(1) The defendant-appellant, Thomas Harper, filed this appeal from the Superior Court's sentence for a violation of probation (VOP). The State of Delaware has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Harper's opening brief that his appeal is without merit. We agree and affirm.

(2) Harper pled guilty in January 2003 to four counts of Unlawful Sexual Contact in the Second Degree. The Superior Court sentenced him on all four convictions to a total period of eight years at Level V incarceration, to be suspended

after serving eighteen months in prison for decreasing levels of supervision. The conditions of his sentence included a no contact order with any child under the age of 16, no internet access, and successful completion of sex offender treatment. Harper did not appeal his convictions or sentence. In February 2012, Harper was charged with his third VOP. At the VOP hearing, Harper admitted that he had been in possession of a cell phone with internet access and that he had had contact with his girlfriend's child. The Superior Court found Harper in violation and sentenced him on one count to two years at Level V incarceration with credit for six days served. On the second count,<sup>1</sup> the Superior Court continued his Level III probation as previously ordered. This appeal followed.

(3) While it is not entirely clear, Harper appears to argue on appeal that the cell phones found in his possession did not belong to him and that he should not have been found in violation for possessing them. He also appears to suggest that this probation officer said things at the VOP hearing that were not true.

(4) We find no merit to Harper's appeal. In a VOP hearing, unlike a criminal trial, the State is only required to prove by a preponderance of the evidence that the defendant violated the terms of his probation.<sup>2</sup> A preponderance of evidence means "some competent evidence" to "reasonably satisfy the judge that the conduct

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<sup>1</sup> Between the time of his original sentencing and his third VOP hearing, Harper had completed serving sentences associated with two of his original charges.

<sup>2</sup> *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006).

of the probationer has not been as good as required by the conditions of probation.”<sup>3</sup>

In this case, Harper admitted having a cell phone with internet access in his possession and to having contact with his girlfriend’s child. The Superior Court was entitled to rely on these admissions and did not err in finding that Harper had violated probation.

(5) Having determined that Harper had violated his probation, the Superior Court was authorized to impose any period of incarceration up to and including the balance of the Level V time remaining to be served on the original sentence.<sup>4</sup> There were four years of suspended time remaining on Harper’s original sentence. The Superior Court’s two-year sentence for Harper’s third VOP, thus, was within statutory limits, was not excessive, and in no way reflected a closed mind by the sentencing judge.<sup>5</sup>

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

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice

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<sup>3</sup> *Id.* (quoting *Collins v. State*, 897 A.2d 159, 160 (Del. 2006)).

<sup>4</sup> DEL. CODE ANN. tit. 11, § 4334(c) (2007).

<sup>5</sup> See *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).