

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| DONALD R. COCHRAN, | § |
| | § Nos. 50 and 51, 2007 |
| Defendant Below- | § CONSOLIDATED |
| Appellant, | § |
| | § Court Below—Superior Court |
| v. | § of the State of Delaware |
| | § in and for Kent County |
| STATE OF DELAWARE, | § Cr. ID No. 0102010757 |
| | § |
| Plaintiff Below- | § |
| Appellee. | § |

Submitted: August 13, 2007
Decided: September 28, 2007

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

ORDER

This 28th day of September 2007, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Donald R. Cochran, filed appeals from the Superior Court’s January 22, 2007 corrected sentencing order and its January 22, 2007 decision and order granting in part and denying in part his motion to correct an illegal sentence pursuant to Superior Court Criminal Rule 35(a).¹ Because Cochran was not present in the Superior Court with counsel when his burglary sentence was corrected, that sentence must be VACATED and this matter REMANDED to the Superior Court for further

¹ Cochran also filed a separate motion for the appointment of counsel.

proceedings in accordance with this Order. The remainder of the Superior Court's rulings are AFFIRMED, albeit on grounds different from those relied upon by the Superior Court.²

(2) In February 2003, Cochran entered a Robinson plea to Burglary in the First Degree, Assault in the First Degree, and Possession of a Deadly Weapon During the Commission of a Felony, crimes that he had committed in February 2001. On the burglary conviction, he was sentenced to 20 years at Level V, to be suspended after 6 years for decreasing levels of supervision. On the assault conviction, he was sentenced to 10 years at Level V. On the weapon conviction, he was sentenced to 2 years at Level V.

(3) In December 2006, Cochran filed a motion to correct an illegal sentence pursuant to Superior Court Criminal Rule 35(a). Cochran claimed that he should have been sentenced to no more than 10 years on his burglary conviction and that his sentence for the weapon offense should be reduced by good time. The Superior Court agreed with Cochran's first claim and issued a corrected sentencing order reducing his sentence for burglary to 10 years at Level V, but denied Cochran's second claim.

(4) In this appeal, Cochran claims that a) the Superior Court improperly denied his claim that good time credit should be applied to his

² *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

sentence on the weapon conviction; b) the Superior Court improperly imposed a 20-year sentence on the burglary conviction; c) his illegal sentences were imposed due to the ineffective assistance of his counsel; d) his plea was involuntary because his counsel gave him incorrect information about the maximum sentence he could receive; and e) the Superior Court improperly corrected his sentence for burglary without his being present in court and accompanied by counsel.

(5) Cochran's first claim, in essence, challenges the Department of Correction's ("DOC's") failure to apply good time credits to his sentence on the weapon conviction. The proper procedural vehicle for the remedy sought by Cochran is a petition for a writ of mandamus, not a Rule 35(a) motion.³ 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

³ *Ortiz v. State*, Del. Supr., No. 645, 2006, Jacobs, J. (July 2, 2007) (citing *Snyder v. Andrews*, 708 A.2d 237 (Del. 1998); *Meades v. Hosterman*, Del. Supr., No. 239, 2006, Ridgely, J. (Aug. 23, 2006); and *Clough v. State*, 686 A.2d 158, 159 (Del. 1996)).

its duty.⁴ We, therefore, conclude that the Superior Court properly denied Cochran's first claim.⁵

(6) Cochran next claims that the burglary sentence originally imposed by the Superior Court was illegal because it reflected the July 2001 amendment to the first-degree burglary statute rather than the version of the statute in effect at the time he committed his crimes.⁶ Because the Superior Court agreed with this claim, and corrected Cochran's sentence to reflect the correct version of the statute, this claim is now moot.

(7) Cochran next claims that his illegal sentences were imposed as a result of the ineffective assistance of his counsel. Specifically, Cochran alleges that, because his counsel did not know the law relating to his case, he did not challenge the imposition of the illegal sentences. An ineffective assistance of counsel claim is not cognizable under Rule 35(a). The narrow function of Rule 35 is to permit correction of an illegal sentence, not to re-examine alleged errors occurring prior to the imposition of sentence.⁷ The proper procedural vehicle for an ineffective assistance of counsel claim that was not raised in the proceedings leading to the judgment of conviction is a

⁴ *Clough v. State*, 686 A.2d at 159.

⁵ We note that, in its decision, the Superior Court incorrectly referred to a version of Del. Code Ann. tit. 11, § 1447(b) that was not yet in effect at the time Cochran committed his crimes.

⁶ Del. Code Ann. tit. 11, §§ 826, 4205(b) (3).

⁷ *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998) (citing *Hill v. United States*, 368 U.S. 424, 430 (1962)).

postconviction motion under Rule 61. We, therefore, conclude that the Superior Court properly denied this claim.

(8) Cochran next claims that his Robinson plea was involuntary because his counsel did not properly advise him concerning his sentence. This claim was not presented to the Superior Court in the first instance. For that reason, we decline to consider the claim in this appeal.⁸

(9) Cochran's final claim is that the Superior Court improperly corrected the sentence on his burglary conviction without his being present and represented by counsel. The record reflects that, after the Superior Court corrected Cochran's sentence for burglary, Cochran wrote a letter to the Superior Court complaining that he should have been present in court for the re-sentencing.

(10) This Court has previously held that, when a defendant is being re-sentenced because of an error of law in the original sentence, regardless of whether the sentence is being increased or reduced, he has a right to be present in court, with counsel, for the re-sentencing.⁹ As such, we conclude that it was erroneous for the Superior Court to correct Cochran's sentence without Cochran being present in court and represented by counsel. On

⁸ Supr. Ct. R. 8.

⁹ *Jones v. State*, 672 A.2d 554, 555-56 (Del. 1996); *Fullman v. State*, 431 A.2d 1260, 1264-65 (Del. 1981).

remand, Cochran must be re-sentenced in accordance with the requirements outlined above.¹⁰

NOW, THEREFORE, IT IS ORDERED that Cochran's burglary sentence is VACATED and the matter is hereby REMANDED to the Superior Court for further proceedings in accordance with this Order. The remainder of the Superior Court's rulings are AFFIRMED. Jurisdiction is not retained.¹¹

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

¹⁰ The State of Delaware laudably concedes this point.

¹¹ There is no constitutional right to the appointment of counsel in postconviction proceedings. *Floyd v. State*, Del. Supr., No. 194, 1992, Veasey, C.J. (July 13, 1992) (citing *Ross v. Moffitt*, 417 U.S. 600 (1974)). We do not find good cause for the appointment of counsel in this case. Therefore, Cochran's motion for the appointment of counsel is denied.