

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IVORY NICKERSON,	§
	§
Defendant Below,	§ No. 275, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware, in and
STATE OF DELAWARE,	§ for New Castle County
	§ Cr. ID 0805000099
Plaintiff Below,	§
Appellee.	§

Submitted: November 18, 2011

Decided: January 26, 2012

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

ORDER

This 26th day of January 2012, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, Ivory Nickerson, filed this appeal from the Superior Court's imposition of sentence following his second violation of probation (VOP). Nickerson contends that the sentence imposed by the Superior Court fails to credit him with all of the time he previously served on the original sentence. The State concedes that the Superior Court's VOP sentence fails to properly credit Nickerson with all of the time previously served. Accordingly, we conclude that this matter must be remanded to the Superior Court for further proceedings.

(2) The record reflects that Nickerson was arrested on April 30, 2008. He pled guilty on July 21, 2008 to one count each of second degree robbery and resisting arrest. The Superior Court immediately sentenced Nickerson, effective April 30, 2008, as follows: (i) on the second degree robbery charge, to five years at Level V incarceration, suspended immediately for one year at Level IV Crest, suspended upon successful completion of Crest for one year at Level III probation; and (ii) on the resisting arrest charge, to one year at Level V incarceration, suspended immediately for one year at Level II probation.

(3) On April 21, 2010, the Superior Court found Nickerson in violation of the terms of his probation and sentenced him, effective February 24, 2010, as follows: (i) on the second degree robbery charge, to five years at Level V incarceration, suspended immediately for six months at Level IV home confinement or work release¹ followed by eighteen months at Level III probation; and (ii) on the resisting arrest charge, to one year at Level V incarceration, suspended immediately for one year at Level II probation.

(4) On May 4, 2011, Superior Court again found Nickerson in violation of the terms of his probation and sentenced him, effective

¹ The alternative provision for work release was added in an amended VOP sentencing order issued by the Superior Court on July 23, 2010 because Nickerson did not have a suitable host for home confinement.

December 12, 2010, as follows: (i) on the second degree robbery charge, to five years at Level V incarceration, suspended after serving four years in prison for six months at Level IV VOP Center followed by one year at Level III probation; and (ii) on the resisting arrest charge, to one year at Level V incarceration, suspended immediately for one year at Level II probation. It is from this sentence that Nickerson now appeals.

(5) In his opening brief on appeal, Nickerson argues that the Superior Court's second VOP sentence did not properly credit him with all of the time he previously served on the original sentence. Nickerson contends that he is entitled to credit for approximately 25 months that he previously served. The State agrees that the Superior Court's sentence fails to credit Nickerson with all of the time he previously served. The State contends, however, that Nickerson is only entitled to credit for one year and ten days which he previously served at either Level V or at a Level IV VOP Center.

(6) It is well settled that, upon finding a defendant has violated probation, the Superior Court is authorized to reimpose any previously suspended prison term, giving credit for all time previously served.² We agree with State's contention that the Superior Court's May 4, 2011

² *Ingram v. State*, 567 A2d 868, 869 (Del. 1989) (citing DEL. CODE ANN. tit. 11, § 4334(c)).

sentencing order failed to credit Nickerson with one year and ten days that Nickerson previously spent at Level V and at Level IV VOP Centers. A defendant is entitled to receive credit toward a VOP sentence for any time spent at Level V on the underlying charge, including time spent at Level V awaiting space in a Level IV program.³ A defendant also is entitled to credit for time spent at the Level IV VOP Center,⁴ although the defendant is not entitled to credit for time spent at Level IV work release or home confinement.⁵ Accordingly, we conclude that this matter must be remanded to the Superior Court to issue a new sentencing order crediting Nickerson with all the time he previously served on his original sentence.

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED for further proceedings consistent with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

³ *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

⁴ *Anderson v. State*, 2006 WL 3931460 (Del. Dec. 5, 2006).

⁵ *Gamble v. State*, 728 A.2d at 1172.