IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS SPENCER, JR., §

§

Defendant Below- § No. 432, 2012

Appellant,

§

v. § Court Below—Superior Court

§ of the State of Delaware,

STATE OF DELAWARE, § in and for Sussex County

§ Cr. ID Nos. 0609004429

Plaintiff Below- § and 0603019825

Appellee. §

Submitted: November 20, 2012 Decided: February 4, 2013

Before STEELE, Chief Justice, HOLLAND, and RIDGELY, Justices.

ORDER

This 4th day of February 2013, upon consideration of the appellant's opening brief, the State's motion to affirm, and the record below, it appears to the Court that:

(1) The defendant-appellant, Thomas Spencer, filed this appeal from a Superior Court order, dated July 17, 2012, which sentenced Spencer for a violation of probation (VOP). Spencer argues in this appeal that he was denied due process, that the transcript contains errors, and that the Superior Court judge sentenced him with a closed mind. We find no merit to any of these claims. Accordingly, we affirm the Superior Court's judgment.

- (2) The record reflects that Spencer pled guilty on November 15, 2006 in the Kent County Superior Court to one count of DUI (Fourth Offense). The Superior Court sentenced him on January 10, 2007 to four years at Level V incarceration, to be suspended after serving two years in prison for six months at Level III probation. On January 17, 2007, Spencer pled guilty to another count of DUI (Fourth Offense) and was sentenced this time by the Sussex County Superior Court to five years at Level V incarceration (with credit for six days served), to be suspended after serving nine months in prison for eighteen months at Level III probation. On July 8, 2009, the cases were consolidated after Spencer was charged with violating probation. On August 4, 2009, the Superior Court sentenced Spencer for his first VOP. The Superior Court sentenced Spencer for his second VOP on September 23, 2011.
- (3) Thereafter, Spencer was charged with his third VOP. The Superior Court held a hearing on July 17, 2012, at which Spencer was represented by counsel. Spencer admitted on the record that he had violated probation by drinking. The judge informed Spencer that Spencer's wife had sent a letter to the court requesting a "no contact" provision be added to the new sentencing order. The judge then sentenced Spencer on the first DUI charge to two years at Level V incarceration, to be suspended after serving eighteen months and upon successful completion of the Key Program, with no further probation to follow. On the

second charge, the Superior Court sentenced Spencer to two years at Level V incarceration, to be suspended entirely for one year at Level IV Residential Treatment, with the balance of the sentence to be suspended upon Spencer's successful completion of treatment for one year at Level III Aftercare. This appeal followed.

- (4) In his opening brief on appeal, Spencer contends that the trial court violated his due process rights by sentencing him without first allowing Spencer to present evidence in mitigation. Spencer next asserts that the trial court committed reversible error when it failed to accurately record everything that was said at the VOP hearing. Finally, Spencer contends that the trial judge exhibited a closed mind at sentencing.
- (5) With respect to Spencer's first claim, the record reflects that Spencer admitted the violation at the outset of the hearing. Given his admission, the State was not required to present any additional affirmative evidence in order to establish the violation.¹ Thus, to the extent Spencer argues that he was not permitted the right to confront adverse witnesses against him, there is simply no merit to that argument. Furthermore, to the extent Spencer contends that the Superior Court refused to allow him to present any evidence in mitigation, the transcript of the hearing reflects that Spencer made no request to present any

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¹ See Collins v. State, 897 A.2d 159, 160-61 (Del. 2006) (holding that a VOP need only be proven by "some competent evidence" and that a defendant's admission was sufficient competent evidence).

evidence in mitigation despite his counsel's invitation to Spencer to speak on his own behalf. Nor does Spencer identify in his opening brief what mitigating evidence he was prepared to present to the Superior Court. Under these circumstances, we find no merit to Spencer's argument that the Superior Court denied him the right to present mitigating evidence.

- Spencer next asserts that the Superior Court reporter did not (6) accurately transcribe everything that was said at the VOP hearing. This Court previously has observed that the law does not guarantee that every word uttered during a hearing will be accurately transcribed because minor omissions do occur from time to time.² The issue is whether the alleged error or omission is essential for presentation of a particular issue on appeal.³
- In this case, Spencer contends that the judge referred to him as "Mr. (7) Two Fourth Offense DUIs," and that this comment was not transcribed. He contends that the comment reflected judicial bias. Even if we assume, without deciding, that the judge had referred to Spencer as "Mr. Two Fourth Offense DUIs," that comment alone is not sufficient evidence of any judicial bias. Spencer, in fact, was before the judge for violating his probationary sentences for two Fourth Offense DUIs. He admitted violating his probation, and the Superior Court's sentence for Spencer's third VOP was far less than the four years and three

² Bass v. State, 720 A.2d 540, 541 (Del. 1984). ³ Id.

months of Level V time remaining to be served on his original sentences. Under these circumstances, any alleged omission from the transcript is insignificant in the context of this appeal.⁴ We thus reject Spencer's claim of reversible error.

- Spencer's final claim is that the trial judge relied on impermissible (8) factors and sentenced him with a closed mind. Specifically, Spencer asserts that the only information relief on by the judge in sentencing him was a letter from Spencer's wife requesting that a no contact order be made part of Spencer's sentence. Spencer argues that this letter lacked any minimum indicia of reliability.
- The record, however, does not support Spencer's contention. A judge (9)sentences a defendant with a closed mind when the sentence is based upon a preconceived bias rather than consideration of the nature of the offense and the character of the defendant.⁵ In this case, the judge noted that the violation report indicated that Spencer had removed an alcohol monitoring device that he was required to wear as part of his probation and began drinking, in clear violation of the terms of his probation. The judge noted that the Treatment Access Center (TASC) had tried everything to help Spencer and was losing interest in him. The judge also noted Spencer's history of DUI offenses. Thus, the Superior Court clearly considered the nature of Spencer's violation, as well as Spencer's character, and imposed a sentence, which included completion of the Key Program and

⁴ See Lloyd v. State, 2012 WL 3775681 (Del. Aug. 29, 2012).
⁵ Weston v. State, 832 A.2d 742, 746 (Del. 2003).

residential treatment, that was tailored to Spencer's violation and history. Under these circumstances, we find nothing in the record to support Spencer's contention that the judge sentenced him with a closed mind.

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

BY THE COURT:

/s/ Myron T. Steele Chief Justice