IN THE SUPREME COURT OF THE STATE OF DELAWARE

KARL OWENS,	§	
	§	No. 59, 2013
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	ID No. 1109022416
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: October 21, 2013
Decided: December 9, 2013

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

O R D E R

On this 9th day of December 2013, it appears to the Court that:

(1) Defendant-Below/Appellant Karl Owens appeals from a Superior Court sentencing order following a guilty plea to one count of Possession of a Firearm by a Person Prohibited ("PFBPP"). After a direct appeal and remand by this Court, Owens was sentenced to eight years at Level V incarceration, suspended after eighteen months without the benefit of any form of early release pursuant to 11 *Del. C.* § 4204(k), followed by eighteen months of Level III supervision. Owens argues that this final sentence was made in error because it expanded his original sentence to include an additional eighteen months of probation. He also

contends that the trial court violated rule 35(c) by altering his sentence more than seven days after it was handed down. We find no merit to Owens' appeal and affirm.

(2) Owens was indicted with Possession of a Firearm by a Person Prohibited and three counts of Possession of Ammunition by a Person Prohibited. Owens pled guilty to the PFBPP charge, and the State entered a *nolle prosequi* on the remaining charges. Immediately thereafter, the Superior Court sentenced Owens to eighteen months at Level V incarceration. Pursuant to the Delaware Code, the court's order provided that the sentence "shall be served without the benefit of any form of early release."[1] Owens filed a motion under Superior Court Criminal Rule 35(a)[2] claiming that the sentence was illegal because Section 4204(k) could only be applied to a Level V sentence of one year or less or to a Level V sentence equal to the statutory maximum available for that crime. The statutory maximum sentence for a Class D PFBPP felony charge is eight years at Level V supervision.[3] The State conceded that the sentence was illegal but argued that the trial court needed only modify the sentence, imposing eight years at Level V and suspending all but

[1] Appellant's Opening Br. Appendix at A18 (quoting 11 *Del. C.* § 4204(k)).
[2] "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Super. Ct. Crim. R. 35(a).
[3] 11 *Del. C.* §§ 1448(c), 4205(b)(4).

eighteen months of the sentence. Thereafter, the Superior Court issued a modified sentencing order implementing the State's recommendation.

(3) Owens appealed to this Court, and we found that because the modified sentencing hearing "substantively changed the sentence imposed [in March], Owens had a right to be present with counsel."[4] Accordingly, we vacated the sentence and ordered it be remanded for a new hearing.[5] In January 2013, the Superior Court held a new sentencing hearing at which both Owens and his attorney were present. At the conclusion of the hearing, the court sentenced Owens to eight years at Level V incarceration, suspended after eighteen months without the benefit of any form of early release pursuant to 11 *Del. C.* § 4204(k), followed by an eighteen month period of Level III supervision. This appeal followed.

(4) Owens contends that his new sentence unjustly expands his original sentence to include an additional eighteen months of probation, which puts him at risk of receiving an additional six and a half years of prison time if he were to violate that probation. He further argues that the sentencing court may only correct a sentence within seven days of its imposition under Superior Court Rule 35(c). "Appellate review of a sentence is limited to whether the sentence is within the statutory limits prescribed by the General Assembly and whether it is based on

[4] *Owens v. State*, 2013 WL 85185, at *1 (Del. Jan. 7, 2013).
[5] *Id.*

factual predicates which are false, impermissible, or lack minimal reliability, judicial vindictiveness or bias, or a closed mind."[6] This Court reviews questions of law and statutory construction *de novo*.[7] If the sentence is within the statutory limits, we will not find an abuse of discretion unless the "sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability."[8]

(5) Owens' sentence was within the statutory limits of 11 *Del. C.* § 4204 and did not constitute an abuse of discretion on the part of the trial court. In relevant part, 11 *Del. C.* § 4204(k) provides:

> (1) Except as provided in this subsection, notwithstanding any statute, rule, regulation or guideline to the contrary, the court may direct as a condition to a sentence of imprisonment to be served at Level V or otherwise that all or a specified portion of said sentence shall be served without benefit of any form of early release, good time, furlough, work release, supervised custody or any other form of reduction or diminution of sentence.
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> . . . .
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> (3) The provisions of this subsection shall be applicable only to sentences of imprisonment at Level V for 1 year or less, or to sentences of imprisonment at Level V which are equal to the

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[6] *Cruz v. State*, 990 A.2d 409, 416 (Del. 2010) (quoting *Weston v. State*, 832 A.2d 742, 746 (Del. 2003)).
[7] *Cordero v. Gulfstream Dev. Corp.*, 56 A.3d 1030, 1035 (Del. 2012).
[8] *Mayes v. State*, 604 A.2d 839, 843 (Del. 1992) (citing *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982)).

> statutory maximum Level V sentence available for the crime or offense.[9]

Read together, subsections 4204(k)(1) and (3) allow a trial court to suspend a portion of the maximum sentence and refuse to award specified benefits that would effectively diminish the unsuspended portion of the sentence. Here, the trial court took exactly such action by sentencing Owens to the maximum sentence of eight years at Level V, suspended after eighteen months. In lieu of serving the remaining six and a half years of his sentence, Owens was required to serve only eighteen months of probation concurrent with other his probation sentences for separate convictions. The trial court did no more than what was permitted by the plain language of section 4204 and thus remained soundly within its statutory limits.

(6) Further, 11 *Del. C.* § 4204(l) requires a court to include a probationary period of no less than six months whenever it imposes a period of incarceration at Level V custody for an offense that totals more than a year.[10] Accordingly, the trial court's failure to include a period of probation in Owens' original sentence was an error. But this error was cured on resentencing by including a period of eighteen months probation in Owens' new sentence. It is also relevant to note that Owens

[9] 11 *Del. C.* § 4204(k)(1), (3).
[10] *Id.* § 4204(*l*).

will be serving the eighteen-month probation period concurrent with his probation in another case. Thus, he will not be subjected to any additional loss of liberties.

(7) Finally, Owens argues that pursuant to Superior Court Criminal Rule 35(c), a sentencing correction can only be made within seven days of the imposition of the sentence. Owens' argument is meritless. Superior Court Rule 35(c) limits only the court's authority to "correct a sentence that was imposed as a result of arithmetical, technical, or other clear error."[11] In contrast, Superior Court Rule 35(a) provides that "[t]he court may correct an illegal sentence at any time."[12] Because the original sentence was illegal and there is no suggestion that the sentence was imposed as a result of an arithmetical or technical error, the trial court could correct Owens' sentence at any time. Thus, the trial court's resentencing was proper and not an abuse of discretion.

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[11] Super. Ct. Crim. R. 35(c).
[12] Super. Ct. Crim. R. 35(a).