

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAROLD W. SMITH, JR.,	§
	§
Defendant Below-	§ No. 581, 2013
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 9907005746
Plaintiff Below-	§
Appellee.	§

Submitted: January 15, 2014

Decided: February 6, 2014

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

**ORDER**

This 6<sup>th</sup> day of February 2014, upon consideration of the appellant’s opening brief and the State’s motion to affirm, it appears to the Court that:

(1) The defendant-appellant, Harold Smith, filed this appeal from the Superior Court’s sentence for his second 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 Smith’s opening brief that his appeal is without merit.

We agree and affirm.

(2) The record reflects that, in November 1999, Smith entered a *Robinson*<sup>1</sup> plea to one count of Rape in the Third Degree. The Superior Court sentenced him to a total period of twenty years at Level V incarceration to be suspended after serving four years for fourteen years of probation. Following his release from prison in 2004, Smith signed a document imposing special conditions to his probation as a sex offender. One of those conditions prohibited Smith from having access to or possessing sexually explicit and/or obscene material. In 2012, Smith was charged with his first VOP after officers found a pornographic movie in his residence during the course of an administrative search. The Superior Court found Smith in violation and sentenced him to sixteen years at Level V incarceration to be suspended entirely for five years at Level III probation. The Superior Court ordered Smith to re-sign the special probation conditions applicable to sex offenders and included a zero tolerance provision for any violations of the special conditions.

(3) In September 2013, Smith's estranged wife reported to his probation officer that Smith had sent her a photograph of his penis. During the VOP hearing, Smith admitted that he had sent the photograph to his wife, although he asserted that she had requested it. He stated that he knew the photograph was sexually explicit and that sending it to his wife constituted a violation of his special

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<sup>1</sup> *Robinson v. State*, 291 A.2d 279 (Del. 1972).

conditions of probation. The Superior Court found Smith in violation and sentenced him to five years and eleven months at Level V incarceration, to be suspended upon successful completion of the Level V Transitions program for one year at Level IV (Home Confinement or Work Release), followed by five years at Level III probation. Smith appeals that sentence.

(4) Smith raises three points in his opening brief on appeal. First, he contends that the State failed to properly investigate the charge against him. Second, Smith asserts that the photograph at issue was three years old and that his wife only reported having it in order to send Smith back to jail. Finally, Smith contends that the original indictment against him was defective and, thus, the Superior Court lacked jurisdiction over the subsequent VOP.

(5) After careful consideration, we find no merit to Smith's appeal. In a VOP hearing, 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 of the probationer has not been as good as required by the conditions of probation."<sup>3</sup> The transcript of the VOP hearing in this case reflects that Smith admitted to the charged violation of possessing sexually explicit

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

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

material. That admission alone is sufficient evidence to justify the Superior Court's finding of a violation and to reject Smith's first two arguments on appeal.<sup>4</sup> Furthermore, by pleading guilty to the charge of Rape in the Third Degree, Smith waived any claim that the information filed against him in 1999 was defective.<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>4</sup> *Jenkins v. State*, 8 A.3d 1147, 1154 (Del. 2010).

<sup>5</sup> *Downer v. State*, 543 A.2d 309, 312 (Del. 1988).