

# STATE OF DELAWARE JUSTICE OF THE PEACE COURTS

FAMILY COURT BUILDING 22 THE CIRCLE, SUITE 120 GEORGETOWN, DELAWARE 19947 TELEPHONE: (302) 856 - 5871

PATRICIA WALTHER GRIFFIN CHIEF MAGISTRATE 820 N. FRENCH STREET 11TH FLOOR WILMINGTON, DELAWARE 19801 TELEPHONE: (302) 577 - 8162

#### **LEGAL MEMORANDUM 98-234**

TO:

ALL JUSTICES OF THE PEACE

FROM:

Patricia W. Griffin PATRICIA W. GRIFFIN CHIEF MAGISTRATE

RE:

APPEAL OF SENTENCE FOR VIOLATION OF PROBATION

DATE:

**DECEMBER 1, 1998** 

In a recent case of first impression, Marsh v. Justice of the Peace Court No. 2, Del. Super., C.A. No. 98A-11-001, Graves, J. (Nov. 5, 1998), the Superior Court held that a sentence for violation of probation imposed by the Justice of the Peace Court could be appealed (when the sentence is for more than 30 days incarceration or a fine greater than \$100). The issue arose on a petition for a writ of certiorari which the Court denied stating:

In this case, there is another basis for review. In 11 Del. C. § 5920, an appeal "[f]rom any order, ruling, decision, judgment or sentence of the Court entered in a Justice of the Peace Court in a criminal action pursuant to this title" where the sentence is greater than one month shall be taken to the Court of Common Pleas. The Justice of the Peace entered an order and sentence of greater than one month. Furthermore, the order and sentence were entered in a criminal action pursuant to Title 11, specifically, 11 Del.C. § 4334. Consequently, that appeals statute provides a method of review of the Justice of the Peace's order.

*Id*, slip op. at 3.

A copy of the opinion is attached.

# PWG/crm

cc: Honorable E. Norman Veasey

Honorable Randy J. Holland

Honorable Henry duPont Ridgely

Honorable Alex J. Smalls

Honorable Vincent J. Poppiti

Honorable Alicia Howard

Keith R. Brady, D.A.G.

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P. 07

IN THE SUPERIOR COURT OF THE STATE OF DELIVERE

### IN AND FOR SUSSEX COUNTY

AMOS E. MARSH, III,

: C.A. No. 98A-11-001

Petitioner,

JUSTICE OF THE PEACE COURT

NO. 2 and HONORABLE

JENNI COFFELT,

Respondent.

MEMORANDUM OPINION

DATE SUBMITTED: November 2, 1998 DATE DECIDED: November 5, 1998

Dennis A. Reardon, Esquire, attorney for Petitioner

Justice of the Peace Court No. 2, c/o The Honorable Patricia W. Griffin

The Honorable Jenni Coffelt

Graves, J.

Petitioner Amos E. Marsh, III, ("petitioner") has filed a Verified Petition for Judicial Review by Writ of Certiorari and Order for Issuance of Writ of Certiorari ("petition"). This constitutes my decision on this petition.

#### Facis

On August 21, 1998, a Justice of the Peace found petitioner guilty of resisting arrest in violation of 11 Del. C. § 1257. The crime of resisting arrest is a class A misdemeanor. 11 Del. C. § 1257. The sentence for a class A misdemeanor may include up to one (1) year of incarceration at Level V and a fine up to \$2,300. 11 Del. C. § 4206(a). The Justice of the Peace sentenced petitioner to pay costs; to pay a fine of \$100, which was suspended; and to one year of incarceration at Level V, suspended for one year of probation at Level 1. This probation was to follow any previously imposed probation. This order could not be appealed pursuant to 11 Del. C. § 59202 or Delaware's Constitution of 1897, Art. IV, § 283

In 11 Del. C. § 1257, it is provided in pertinent part:

A person is guilty of resisting arrest when the person intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of the person or another person or intentionally flees from a peace officer who is effecting an arrest.

<sup>&</sup>lt;sup>2</sup>In 11 <u>Del. C.</u> § 5920, it is provided:

From any order, ruling, decision, judgment or sentence of the Court entered in a Justice of the Peace Court in a criminal action pursuant to this title in which the sentence shall be imprisonment exceeding 1 month or a fine exceeding \$100, the accused shall have the right of appeal to the Court of Common Pleas in and for the county wherein the offense was committed. Such appeal to the Court of Common Pleas shall be tried de novo.

since there was no fine greater than \$100 ordered and since the term of imprisonment was suspended. Tyman v. State, Del. Super., Cr. A. Nos. 97-05-0773 - 0776, Graves, J. (April 15, 1998); Freeman v. State, Del. Super., Cr. A. No. 97-07-0118, Terry, R.J. (March 19, 1998); Sinagra v. State, Del. Super., Cr. A. No. 594-08-0613, Graves, J. (January 30, 1995); Lynch v. State, Del. Super., Cr. A. Nos. K94-07-0458AC-0472KC, Ridgely, J. (December 8, 1994); Harris <u>v. State</u>, Del. Super., Cr. A. Nos. K94-05-0392AC, K94-05-0393AC, Ridgely, P.J. (December 2, 1994).

On October 27, 1998, the Justice of the Peace found petitioner guilty of violation of his Level'I probation and sentenced him to one year of incarceration at Level V pursuant to 11 Del. C. § 4204(k). Petitioner thereafter filed with the Justice of the Peace

The General Assembly may by law give to any inferior courts by it established or to be established, or to one or more justices of the peace, jurisdiction of the criminal matters following, ... such other misdemeanors as the General Assembly may from time to time, with the concurrence of two-thirds of all the Members elected to each House, prescribe.

The General Assembly may by law regulate this jurisdiction, ... and may grant or deny the privilege of appeal to the Superior Court; provided, however, that there shall be an appeal to the Superior Court in all cases in which the sentence shall be imprisonment exceeding one (1) month, or a fine exceeding One Hundred Dollars (\$100.00).

In 11 <u>Del. C.</u> § 4204(k), it is provided:

The court may direct as a condition to any sentence of imprisonment that the Department of Correction shall not permit an offender to be furloughed or be allowed to participate in work release or supervised custody outside the prison institution or facilities.

<sup>&#</sup>x27;In this constitutional provision, it is provided as follows:

Court a notice of appeal and sought a bond review. The Justice of the Peace rejected this motion on October 30, 1998.

On October 30, 1998, petitioner filed the pending petition seeking the issuance of a writ of certiorari. This is my decision on whether the writ should issue...

#### DISCUSSION

This case appears to be one of first impression. The Court did not locate any other cases dealing with the issue of what method of review is available for a person sentenced by a Justice of the Peace to a period of incarceration greater than thirty days on a violation of probation.

In order to be entitled to review by certiorari, there must be no other basis for review available to petitioner. Shoemaker v. State, Del. Supr., 375 A.2d 431, 435 (1977). In this case, there is another basis for review. In 11 Del. C. § 5920, an appeal '[f]rom any order, ruling, decision, judgment or sentence of the Court entered in a Justice of the Peace Court in a criminal action pursuant to this title" where the sentence is greater than one month shall be taken to the Court of Common Pleas. The Justice of the Peace entered an order and sentence of greater than one month. Furthermore, the order and sentence were entered in a criminal action pursuant to Title 11, specifically, 11 Del. C. \$ 4334. Consequently, that appeals statute provides a method of review of the Justice of the Peace's order.

The constitutional provision of Art. IV, § 28 providing for an appeal to the Superior Court does not conflict with this procedure since the Legislature provided for the procedure in 11

Since petitioner has a right to appeal, I deny the petition for a writ of certiorari.

IT IS SO ORDERED.

Del. C. \$ 5920 in accordance with Art. IV, \$ 28 and since ultimately, the Superior Court may review this matter pursuant to 11 Del. C. \$ 5301(c) if petitioner is sentenced to imprisonment exceeding one month or to pay a fine greater than \$100.

<sup>\*</sup>Petitioner has time to take an appeal to the Court of Common Pleas pursuant to Court of Common Pleas Criminal Rule 39.



# JUSTICE OF THE PEACE COURT

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## **LEGAL MEMORANDUM 98-234 (Supplement)**

PATRICIA WALTHER GRIFFIN CHIEF MAGISTRATE

TO:

ALL JUSTICES OF THE PEACE

FROM:

HITUCIA W. Frifty

CHIEF MAGISTRATE

RE:

APPEAL OF SENTENCE FOR VIOLATION OF PROBATION

DATE:

**SEPTEMBER 20, 2001** 

In a recent opinion, Weaver v. State, Del. Supr., No. 136, 2000 (Aug. 13, 2001), the Delaware Supreme Court held that a suspended sentence of more than one month imprisonment forms the basis for an appeal. This ruling reversed the finding concerning appeals of suspended sentences made by the Superior Court in Weaver v. State, Del. Super., Cr. A. No. MN98-04-0421, Alford, J. (Jan. 5, 2001)<sup>1</sup>, which was the subject of a caselaw summary earlier this year. In reversing, the Supreme Court stated:

In Delaware, the benchmark of a "final judgment" in a criminal case is the pronouncement of sentence. The United States Supreme Court recognized long ago that an order imposing sentence upon a defendant is a final, appealable order even if execution of the sentence is suspended for probation. Thus, in Delaware a defendant's time limit to file a direct appeal from his conviction and sentence begins to run on the date following the pronouncement of sentence, regardless of whether execution of the sentence is suspended for probation.

If a level V sentence in excess of one month, which is suspended entirely for probation, is found to be unappealable because it fails to meet the jurisdictional threshold, then a defendant effectively has forever lost the right to appeal from an underlying conviction and sentence. Even if the defendant later is found in violation of probation (VOP) and ultimately is sentenced as a result of that VOP to serve actual incarceration well in excess of the constitutional threshold, he will never have the opportunity to challenge directly the criminal conviction that forms the underlying basis of the jail sentence.

Such a result is fundamentally unfair in light of the lengthy prison sentences that may result from a VOP proceeding with its procedural informalities. A probationer has no absolute right to counsel at a VOP hearing or on appeal following a VOP adjudication. Furthermore, the trial court has broad authority to find a probation violation applying a preponderance of the evidence standard, in contrast to the standard of proof beyond a reasonable doubt required for the initial conviction. If the trial court finds the defendant

<sup>&</sup>lt;sup>1</sup> The Supreme Court affirmed the Superior Court's finding that the cost of a psychological examination does not constitute a fine for purposes of satisfying the constitutional threshold of one hundred dollars required for an appeal.

has violated probation, it may terminate the defendant's probation and reimpose a prison term "at any time." Finally, upon finding a violation of probation, the Court may impose all or any portion of the sentence originally suspended.

Balancing the informal and summary nature of VOP proceedings against the potentially harsh prison sentences that may result, we conclude that the better policy is to afford a defendant the right to appeal a level V sentence upon its imposition, without regard to whether execution of the sentence is suspended for probation. Such a result is consistent with the policy that encourages construing statutes in favor of recognizing a right to appeal.

Weaver, slip op. at 7-11.

The Court concluded by stating:

Since appeals from the Superior Court to this Court in criminal cases are subject to a parallel constitutional threshold under article IV, § 11(1)(B) of the Delaware Constitution, our holding directed to the present appeal from the Court of Common Pleas to the Superior Court has equal application to appeals from the Superior Court to this Court.

Weaver, slip op. at 11.

Although the Supreme Court did not specifically mention appeals from the Justice of the Peace Court to the Court of Common Pleas, Art. IV, § 28 of the Delaware Constitution which applies to appeals from the Court of Common Pleas to the Superior Court also applies to appeals from the Justice of the Peace Court to the Court of Common Pleas. Therefore, this holding applies equally to appeals from the Justice of the Peace Court. This holding is consistent with an earlier Superior Court opinion, March v. Justice of the Peace Court No. 2, Del. Super., C.A. no. 98A-11-001, Graves, J. (Nov. 5, 1998) (See Chief Magistrate Legal Memorandum 98-234, "Appeal of Sentence of Probation", (Dec. 1, 1998).

Accordingly, justices of the peace should advise defendants of their appeal rights whenever a period of, incarceration Level V exceeding one month is imposed, even if the sentence is suspended for probation.

#### PWG/crm

cc:

Hon. E. Norman Veasey

Hon. Joseph T. Walsh

Hon. Henry duPont Ridgely

Hon. Alex J. Smalls

Hon, Vincent J. Poppiti

Hon. Alicia Howard

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