IN THE SUPREME COURT OF THE STATE OF DELAWARE

> Submitted: September 27, 2012 Decided: November 16, 2012

Before STEELE, Chief Justice, BERGER and JACOBS, Justices.

ORDER

This 16th day of November 2012, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Kenneth T. Deputy, appeals from a Superior Court June 29, 2012 order denying his third Superior Court Criminal Rule 35(a) motion for a correction of an illegal sentence. The plaintiff-appellee, the State of Delaware, moves to affirm the Superior Court

order on the ground that it is manifest on the face of Deputy's opening brief that this appeal is without merit. We agree and affirm.

- (2) In September 1997, Deputy was found guilty by a Superior Court jury of Attempted Robbery in the First Degree, Assault in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony. He was sentenced to 27 years of Level V incarceration, to be suspended after 22 years for decreasing levels of supervision. This Court affirmed Deputy's convictions on direct appeal.² Since that time, Deputy has sought postconviction relief on numerous occasions. This Court affirmed the two previous Superior Court orders denying his earlier Rule 35(a) motions.³
- (3) On appeal, Deputy claims that the Superior Court abused its discretion by denying his motion as untimely and repetitive, because his sentence is illegal due to his counsel's ineffective assistance during the sentencing phase of his trial. The "narrow function of Rule 35 is to permit correction of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence."

¹ Supr. Ct. R. 25(a).

² Deputy v. State, 718 A.2d 527, 1998 WL 700168 (Del. Aug. 10, 1998) (TABLE).

³ Deputy v. State, 889 A.2d 283, 2005 WL 3358527 (Del. Dec. 8, 2005) (TABLE); Deputy v. State, 872 A.2d 959, 2005 WL 1076511 (Del. May 6, 2005) (TABLE).

⁴ Brittingham v. State, 705 A.2d 577, 578 (Del. 1998).

- (4) A sentence is illegal when it exceeds the statutorily-imposed limits, violates double jeopardy, is ambiguous or contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence that the judgment of conviction did not authorize.⁵ Deputy does not claim that his sentence is deficient in any of the above respects. Rather, he claims that the ineffective assistance of his counsel during his sentencing proceedings rendered his sentence illegal under Rule 35(a). He argues that because Rule 35(a) permits correction of an illegal sentence "at any time," the Superior Court abused its discretion in denying his motion on the basis of untimeliness and repetitiveness.
- (5) Deputy's argument that a claim of ineffective assistance of counsel can properly support a claim of an illegal sentence is wrong. Such a claim is cognizable only as a timely-filed, Rule 61 postconviction motion.⁶ In the absence of any factual or legal support, Deputy's illegal sentence claim is without merit, because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

⁵ *Id.* (internal quotations and citations omitted).

⁶ *Tatem v. State*, 787 A.2d 80, 81-82 (Del. 2001). Deputy previously filed in the Superior Court two Rule 61 postconviction motions, both of which this Court later affirmed. *Deputy v. State*, 822 A.2d 396, 2003 WL 1890011 (Del. Apr. 17, 2003) (TABLE); *Deputy v. State*, 748 A.2d 913, 2000 WL 313437 (Del. Mar. 9, 2000) (TABLE).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The order of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs Justice