IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL T. BARNES, §

§

Defendant Below- § No. 588, 2013

Appellant,

§

v. § Court Below—Superior Court

§ of the State of Delaware,

STATE OF DELAWARE, § in and for Kent County

§ Cr. ID 1102012506

> Submitted: November 22, 2013 Decided: January 7, 2014

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

ORDER

This 7th day of January 2014, 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, Michael Barnes, filed this appeal from his Superior Court sentence for a violation of probation (VOP). The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Barnes' opening brief that his appeal is without merit. We agree and affirm.
- (2) The record reflects that Barnes pled guilty on June 15, 2011 to one count of Identity Theft and two counts of Unlawful Use of a Credit Card (UUCC). Barnes conceded that he was eligible to be sentenced as a habitual offender. The

Superior Court sentenced Barnes on the charge of Identity Theft to two years at Level V incarceration with credit for 118 days served. On the first count of UUCC, the Superior Court sentenced Barnes to three years at Level V incarceration to be suspended immediately for one year at Level IV Work Release followed by one year at Level III probation. On the second count of UUCC, the Superior Court sentenced Barnes to three years at Level V incarceration to be suspended immediately for one year at Level III probation. The sentence further provided that Barnes could flow down from Work Release to probation upon payment of his financial obligations. Barnes did not appeal that sentence.¹

- (3) In September 2013, an administrative warrant was issued charging Barnes with violating several conditions of his Work Release. The Superior Court held a hearing on October 4, 2013 and found Barnes had committed the VOP. He was resentenced to a total period of six years at Level V incarceration to be suspended after serving 120 days at Level V for eighteen months at Level III probation. Barnes appeals from that VOP sentence.
- (4) Barnes has enumerated eleven points for the Court's consideration in his four-page opening brief on appeal. These points can be fairly grouped into four

On December 2, 2011, the Superior Court modified Barnes' sentence to include an order of restitution of \$292.50 payable to one of the victims. That order of restitution was subsequently modified on March 21, 2012 to reflect the correct amount of restitution to the second victim as \$112.55. Barnes did not appeal from either modified sentence.

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distinct arguments. First, Barnes contends that his VOP sentence implicates double jeopardy because he already had been penalized by the Department of Correction for the same institutional infractions that formed the basis of the VOP charges. Barnes next asserts that if he had been properly credited with restitution payments in a timely manner, he would not have been on Level IV Work Release, and thus could not have been charged with violating the terms of his Work Release, in September 2013. Barnes also contends that his VOP sentence exceeded the sentencing guidelines, was unfair, and constitutes cruel and unusual punishment for his first VOP. Finally, Barnes contends that his defense counsel was ineffective. This latter claim, however, is not an issue that this Court will consider for the first time on direct appeal.²

(5) Barnes' first claim is that his VOP sentence violates double jeopardy principles because he was already penalized by the Department of Correction for the same conduct that formed the basis of the VOP charges. We find no merit to this contention. The Department of Correction's discretionary decision to penalize a defendant for institutional infractions in order to compel a defendant's future compliance with institutional rules is not punitive in nature and thus does not implicate double jeopardy concerns.³ To the extent Barnes asserts that the DOC

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² Foster v. State, 2009 WL 1456992 (Del. May 26, 2009).

³ See Helman v. State, 784 A.2d 1058, 1076-77 (Del. 2001) (citing Hudson v. United States, 522 U.S. 93, 99 (1997)).

punished his Work Release infractions by confining him at the VOP Center, he may be entitled to seek credit for that time against his VOP sentence from the Superior Court.⁴ The record before us, however, is insufficient for us to review that particular assertion.

- (5) The record also is insufficient to review Barnes' claim that, but for the DOC's failure to timely apply his restitution payments, he should have been at Level III probation at the time he was charged with violating the terms of his Level IV sentence. Because Barnes failed to request preparation of the VOP hearing transcript, we cannot evaluate whether this claim was raised to or considered by the Superior Court below. As the Court has held many times, the failure to include adequate transcripts of the proceedings, as required by the rules of the Court, precludes appellate review of a defendant's claims of error in the proceedings below.⁵
- Finally, with respect to his sentencing claim, the Superior Court was (6) authorized to impose any period of incarceration up to and including the balance of the Level V time remaining to be served on Barnes' original sentence.⁶ Contrary to Barnes' suggestion, the Superior Court has the authority to revoke a

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⁴ Anderson v. State, 2006 WL 3931460 (Dec. 5, 2006). ⁵ Tricoche v. State, 525 A.2d 151, 154 (Del. 1987).

⁶ 11 Del. C. § 4334(c) (2007).

probationary sentence even if the defendant has not yet begun to serve it.⁷ In this case, the Superior Court suspended all of the Level V time remaining on Barnes' sentence, except for 120 days, and ordered him to serve eighteen months at Level III probation. This sentence was well within statutory limits, was not excessive, and in no way reflects a closed mind by the sentencing judge.8

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

BY THE COURT:

/s/ Carolyn Berger Justice

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⁷ Smith v. State, 2007 WL 1328843 (Del. May. 7, 2007). ⁸ See Weston v. State, 832 A.2d 742, 746 (Del. 2003).