

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM E. AKERS,	§
	§ No. 16, 2013
Defendant Below,	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
	§ in and for New Castle County
STATE OF DELAWARE,	§
	§ Cr. ID No. 0111004063
Plaintiff Below,	§
Appellee.	§

Submitted: February 14, 2013

Decided: March 8, 2013

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 8th day of March 2013, 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, William E. Akers (“Akers”), appeals from the December 14, 2012 Superior Court modified violation of probation (“VOP”) sentencing order. The plaintiff-appellee, the State of Delaware, moves to affirm the Superior Court’s judgment on the ground that it is

manifest on the face of the opening brief that this appeal is without merit.¹

We agree and affirm.

(2) In December 2001, a grand jury indicted Akers on 40 counts of Using a Computer to Depict Child Pornography. In January 2002, Akers pleaded guilty to 2 of those counts and the State dismissed the balance of the indictment. In March 2002, Akers was sentenced on his first conviction to 8 years of Level V incarceration, to be suspended after 4 years for decreasing levels of supervision. On his second conviction, Akers was also sentenced to 8 years at Level V imprisonment, to be suspended for 8 years at Level III probation.

(3) In June 2005, Akers was found to have committed a VOP in connection with his probationary sentences. The Superior Court continued the previously-imposed sentences, directing that the Department of Correction hold Akers at a Level IV VOP Center for up to 30 days. In December 2007, Akers was found to have committed a second VOP. On the first conviction, he was re-sentenced to 4 years at Level V, to be suspended after 6 months for decreasing levels of supervision. On the second conviction, probation was continued as previously imposed. As a result of

¹ SUPR. CT. R. 25(a).

Akers' motion for sentence modification, the Superior Court then gave Akers credit for 7 days spent at Level V in default of bail.

(4) On August 27, 2008, the Superior Court found that Akers had committed a third VOP. He was re-sentenced on the first conviction to 120 days at a Level IV VOP Center. On the second conviction, probation was continued as previously imposed. In January 2009, Akers was found to have committed a fourth VOP. He was sentenced on the first conviction to 7 years at Level V, to be suspended after 1 year for decreasing levels of supervision. On the second conviction, probation was continued as previously imposed.²

(5) On October 12, 2011, Akers was found by the Superior Court to have committed a fifth VOP. He was re-sentenced on the first conviction to 3 years at Level V, to be followed by the previously-imposed sentence. On the second conviction, probation was continued as previously imposed. In June 2012, Akers moved to correct his October 12, 2011 sentence. The State responded to the motion by completely re-calculating the time Akers had spent at Level V and at a Level IV VOP Center. Based upon its calculations, the State recommended a modified VOP sentence, which the

² As the State concedes, this sentencing order appears to contain a clerical error by switching the sentences for Akers' two convictions. This apparent error does not alter the result in this case.

Superior Court imposed. The Superior Court's modified VOP sentencing order imposed a sentence of 1 year and 9 months at Level V on Akers' first conviction, and 8 years at Level V, to be suspended after 1 year and 3 months for 6 months at Level IV and 3 years of Level III probation on the second conviction.

(6) Akers appeals from this most recent Superior Court order. On this appeal, Akers claims that: a) the Superior Court improperly imposed Level V sentences for his fourth and fifth VOPs; and b) the Superior Court should have credited him with additional Level V time.

(7) Under Delaware law, a probationary sentence must not exceed the statutory limits.³ Nor may a VOP sentence exceed the term that a prior VOP sentence left suspended.⁴ Once a probationer violates the terms of his probation, the Superior Court has the authority to require the defendant to serve the original Level V sentence imposed or any lesser sentence.⁵ But, in doing so, the court must give the defendant credit for all Level V time actually served at Level V⁶ or a Level IV VOP Center.⁷

³ See *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

⁴ See *Pavulak v. State*, 880 A.2d 1044, 1045-46 (Del. 2005).

⁵ *State v. Sloman*, 886 A.2d 1257, 1260 (Del. 2005) (citing DEL. CODE ANN. tit. 11, § 4334(c)).

⁶ *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999) (citations omitted).

(8) On appeal, Akers claims that, because his third VOP sentence was for 120 days at a Level IV VOP Center, his fourth and fifth VOP sentences could not properly include Level V time. Akers' argument is not supported by Delaware law, which provides that once a VOP is committed, the Superior Court may impose any Level V time remaining on the defendant's original sentence.⁸ Moreover, the transcript of the August 27, 2008 hearing on Akers' third VOP reflects that the trial judge issued a clear warning to Akers that remaining on his sentence was Level V time that would be available to the court should Akers commit another VOP. We, therefore, conclude that Akers' first claim is without merit.

(9) Akers' second claim is that the Superior Court's modified VOP sentencing order should have given him credit for additional Level V time. Akers argues that the State conceded that he is entitled to credit for an additional 1 year and 3 months at Level V on his sentence for his fifth VOP, but the record does not support his contention. When the State re-calculated the time Akers had spent at Level V and at a Level IV VOP Center in response to Akers' motion to modify his sentence, it factored into its calculation an additional 1 year and 3 months of the time from Akers' fourth

⁷ *Longford-Myers v. State*, 2013 WL 593249, at *3 (Del. Feb. 13, 2013) (TABLE).

⁸ *Sloman*, 886 A.2d at 1260.

VOP. When the State made its sentencing recommendation to the Superior Court for his fifth VOP, that additional time was accounted for in the recommendation. Therefore, we conclude that Akers' second claim also is without merit.

(10) It is manifest on the face of the appellant's opening brief that this appeal is without merit. The issues presented on appeal are controlled by settled Delaware law.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice