IN THE SUPREME COURT OF THE STATE OF DELAWARE

TORY M. JENKINS, § Defendant Below-No. 564, 2013 § Appellant, § Court Below—Superior Court v. § of the State of Delaware, STATE OF DELAWARE, § in and for Sussex County § Cr. ID 1208015207 Plaintiff Below-§ Appellee.

> Submitted: November 18, 2013 Decided: January 2, 2014

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

ORDER

This 2nd day of January 2014, upon consideration of the appellant's opening brief and the State's motion to affirm, it appears to the Court that:

- (1) The appellant, Tory Jenkins, filed this appeal from the Superior Court's denial of his motion for sentence reduction. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Jenkins' opening brief that his appeal is without merit. We agree and affirm.
- (2) The record reflects that Jenkins pled guilty in October 2013 to Resisting Arrest, Assault in the Third Degree, and Offensive Touching. The Superior Court sentenced Jenkins to a total period of three years at Level V

incarceration, with credit for forty-seven days served, to be suspended after serving sixty days in jail for one year of probation. In November 2012, Jenkins was charged with a violation of probation (VOP). On May 1, 2013, the Superior Court found Jenkins had committed a VOP and sentenced him to a total period of one year and eight months at Level V incarceration, to be suspended upon successful completion of the Boot Camp program for one year and six months of Level III Aftercare. Jenkins did not appeal his VOP sentence.

- (3) Instead, Jenkins filed a motion for sentence reduction in August 2013, which the Superior Court denied. Jenkins did not appeal. Jenkins filed a second motion for modification of sentence arguing that the prison term imposed in his VOP sentence exceeded the Level V time remaining to be served from his original sentence, that his VOP sentence was too severe, and that his VOP sentence exceeded the SENTAC guidelines. The Superior Court denied Jenkins' motion on that ground his sentence was reasonable and appropriate. This appeal followed.
- (4) In his opening brief on appeal, Jenkins again contends that his VOP sentence is erroneous as a matter of law because the Level V time imposed exceeded the Level V time remaining to be served from his original

sentence. He also contends that the Superior Court erred in deviating from the SENTAC guidelines without setting forth particular reasons.

- With respect to his first argument concerning the legality of his (5) sentence, we find no merit to Jenkins' argument. Upon finding a defendant in violation of the terms of his probation, the Superior Court is authorized to reimpose any previously suspended prison term.¹ In this case, the Superior Court initially sentenced Jenkins to a total period of three years at Level V incarceration, with credit for forty-seven days served, to be suspended after serving sixty days for probation. Thus, Jenkins still had approximately two years and eight months of Level V time remaining to be served on his original sentence. Upon finding that Jenkins had committed a VOP, the Superior Court sentenced Jenkins to one year and eight months at Level V, to be suspended upon successful completion of Boot Camp for one year and six months at Level III Aftercare. Accordingly, because the Level V time imposed in the VOP sentence did not exceed the Level V time remaining to be served from the original sentence, there is no merit to Jenkins' first claim on appeal.
- (6) Jenkins' second argument is that the Superior Court erred in deviating from the SENTAC sentencing guidelines without providing

¹ Gamble v. State, 728 A.2d 1171, 1172 (Del. 1999).

particular reasons for doing so. The SENTAC sentencing guidelines are voluntary and nonbinding.² Thus, a judge's deviation from the guidelines does not alone support a claim that a sentence is illegal.³ Although judges are supposed to state their reasons when they deviate from the guidelines,⁴ the failure to do so does not support a claim that the sentence itself is illegal but that the sentence was imposed in an illegal manner.⁵ Superior Court Criminal Rule 35(a) requires such a claim to be raised within ninety days of sentencing.⁶ Jenkins, however, failed to raise this issue in a timely manner. Accordingly, we find no abuse of discretion in the Superior Court's denial of his motion below.

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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² Ward v. State, 567 A.2d 1296, 1297 (Del. 1989).

³ Kurzmann v. State, 2008 WL 241804 (Del. June 19, 2008).

⁴ Martini v. State, 2007 WL 4463586 (Del. Dec. 21, 2007).

⁵ See, e.g., Webb v. State, 2007 WL 2810994 (Del. Sept. 28, 2007).

⁶ See Del. Super. Ct. Crim. R. 35(a) (2013).