IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL C. EVANS,

Defendant Below,
Appellant,

V.

Court Below—Superior Court
of the State of Delaware,
STATE OF DELAWARE,

Sin and for New Castle County

§ Cr. ID 1012007227

Plaintiff Below, § Appellee. §

Submitted: December 16, 2013 Decided: February 17, 2014

Before BERGER, JACOBS, and RIDGELY, Justices.

ORDER

This 17th day of February 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 Evans, filed this appeal from his Superior Court sentence for his fifth violation of probation ("VOP"). The State has moved to affirm the judgment below on the ground that it is manifest on the face of Evans' opening brief that his appeal is without merit. We agree and affirm.
- (2) The record reflects that Evans pled guilty on July 11, 2011 to one count each of Aggravated Menacing and Intimidation. The Superior Court sentenced Evans immediately to ten years at Level V incarceration, to be suspended entirely

at decreasing levels of supervision. Evans did not appeal. Between November 2011 and September 2012, Evans was found in violation of the terms of his probation on four separate occasions and was sentenced accordingly. In July 2013, Evans was charged with his fifth VOP. On August 15, 2013, the Superior Court sentenced him for the VOP associated with his Aggravated Menacing conviction to three years at Level V incarceration, to be suspended after serving two and a half years in prison for six months at Level IV supervision. This appeal followed.

- (3) Evans raises four claims in his single-page opening brief on appeal. First, he claims that his sentence was excessive because his violation was only "technical." Second, he argues that the Superior Court erred by not accepting his probation officer's recommended sentence of eleven months. Third, he contends that although his violation was based on a positive drug test (cocaine), he was never offered the opportunity for drug treatment. Finally, he claims that the Superior Court erred by exceeding the SENTAC sentencing guidelines.
- (4) The record shows that Evans was charged with violating probation because he failed to report to his probation officer, tested positive for cocaine use, submitted diluted urine samples for drug testing on three occasions, failed to attend his substance abuse evaluation, and missed two appointments with domestic

¹ The Superior Court previously had discharged Evans as unimproved from the probationary sentence associated with his Intimidation conviction.

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violence counselors. Evans does not challenge the Superior Court's finding that he

violated the terms of his probation. Evans' only claims on appeal relate to his

sentence.

(5) It is well-established that upon finding a defendant in violation of

probation, the Superior Court is authorized to impose any period of incarceration

up to and including the Level V time remaining to be served on the original

sentence.² Here, the Superior Court imposed the entire three years remaining to be

served from Evans' original 2011 sentence. This sentence was within statutory

limits, was not excessive, and in no way reflects that the sentencing judge had a

closed mind.³ The trial court did not err or abuse its discretion in rejecting the

probation officer's recommendation or in exceeding the sentencing guidelines for

Evans' fifth VOP in two years.4

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior

Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

² 11 *Del. C.* § 4334(c) (2007).

³ See Weston v. State, 832 A.2d 742, 746 (Del. 2003).

⁴ See Wynn v. State, 23 A.3d 145, 148-49 (Del. 2011).

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