IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEORGE JOHNSON,	§
	§ No. 528, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID Nos. 0809008171
	§ 0809008231
Plaintiff Below-	§
Appellee.	§

Submitted: January 7, 2013 Decided: February 12, 2013

Before HOLLAND, BERGER and JACOBS, Justices

ORDER

This 12th day of February 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, George Johnson, filed an appeal from the Superior Court's September 13, 2012 violation of probation ("VOP") sentencing order. The plaintiff-appellee, the State of Delaware, has moved 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) The record before us reflects that, in November 2009, Johnson pleaded guilty to two counts of Burglary in the Third Degree arising from two different indictments. He was sentenced on the first count to 3 years of Level V incarceration, with credit for 30 days previously served, to be suspended for 1 year at Level II probation. On the second count, he was sentenced to 3 years at Level V, to be suspended for 1 year at Level II probation, to be served concurrently.² Johnson did not file a direct appeal.
- (3) After committing two previous VOPs, Johnson appeared for a VOP hearing in the Superior Court on September 13, 2012. Johnson's violation consisted of escaping his work detail while at the Sussex Community Corrections Center, a charge to which he pleaded guilty in the Court of Common Pleas. Johnson did not contest the VOP at the hearing in the Superior Court. After finding that Johnson had committed a VOP, the Superior Court re-sentenced him on his first conviction to 2 years and 10 months at Level V, to be suspended after 6 months for 18 months at Level IV Work Release followed by 1 year of Level III probation. Johnson was to

¹ Supr. Ct. R. 25(a).

² Johnson's sentencing order was modified on January 11, 2010 solely to reflect the amount of his restitution obligation.

be held at Level V pending placement. Johnson was re-sentenced on his second conviction to restitution only.

- (4) In his appeal, Johnson claims that a) his attorney failed to recommend that the violation be dismissed or that he receive only Level III probation; b) his Level V sentence was invalid or excessive; and c) under the guidelines in the SENTAC Benchbook, Level IV Work Release should not have been imposed because of his previous escape.
- (5) The transcript of the VOP hearing reflects that Johnson admitted to the judge that he had escaped from his work detail on August 31, 2012 while on Level IV Work Release and that he had pleaded guilty to a charge of Escape in the Court of Common Pleas, for which he received a sentence of 30 days at Level V.
- (6) The transcript also reflects that the judge reviewed a letter written by Johnson, which stated that he had absconded from his work detail so that he could appear before the judge and ask a question regarding his sentence. The judge checked the file and ascertained that Johnson already had received an answer to his question regarding his sentence. The judge then asked Johnson if there was anything else he wanted to say and Johnson said, "No, sir."

- (7) It is well-established that probation is an "act of grace" and that the sentencing judge has broad discretionary power when deciding whether or not to revoke probation.³ In order to revoke probation, there need only be "some competent evidence" to "reasonably satisfy" the judge that "the conduct of the probationer has not been as good as required by the conditions of probation." Given Johnson's admission at the VOP hearing and plea of guilty to the charge of Escape, we conclude that the Superior Court did not abuse its discretion when it revoked Johnson's probation.
- (8) Once a probationer violates the terms of his probation, the Superior Court has the authority to require him "to serve the sentence imposed, or any lesser sentence." We find no support in the record for Johnson's claim that his sentence is either invalid or excessive. The record in this case, including the transcript of the VOP hearing, reflects that he had 2 years and 10 months remaining on his first Level V sentence at the time he was sentenced on his latest VOP. As such, his latest VOP sentence is within the statutory limits.
- (9) Johnson's claim that he should not have been sentenced to Level IV Work Release on the ground that the SENTAC Benchbook states

³ Kurzmann v. State, 903 A.2d 702, 716 (Del. 2006).

⁴ Id

⁵ State v. Sloman, 886 A.2d 1257, 1260 (Del. 2005) (citing Del. Code Ann. tit. 11, §4334(c)).

that work release should not be imposed if an inmate has been convicted of Escape is without merit. It is well-settled that, even where a SENTAC

guideline is applicable, such a guideline is voluntary, non-binding and does

not provide a basis for appeal.⁶

(10) To the extent that Johnson seeks to claim ineffective assistance

of counsel with respect to his counsel's performance at the VOP hearing,

this Court will not entertain a claim of ineffective assistance of counsel that

is asserted for the first time on direct appeal.⁷ For that reason, any claim of

ineffective assistance of counsel Johnson seeks to assert will not be

considered in the instant proceedings.

(11) It is manifest on the face of the opening brief that this appeal 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.

NOW, THEREFORE, IT IS ORDERED that the State's motion to

affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger

Justice

⁶ Mayes v. State, 604 A.2d 839, 845-46 (Del. 1992).

⁷ Desmond v. State, 654 A.2d 821, 829 (Del. 1994).

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