

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS SPENCER, JR.,	§
	§ No. 563, 2013
Defendant Below,	§
Appellant,	§ Court Below—Superior Court
	§ of the State of Delaware,
v.	§ in and for Sussex County
	§
STATE OF DELAWARE,	§ Cr. ID Nos. 0609004429
	§ and 0603019825
Plaintiff Below,	§
Appellee.	§

Submitted: February 20, 2014

Decided: March 25, 2014

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

ORDER

This 25th day of March 2014, upon consideration of the appellant’s opening brief, the State’s motion to affirm, the parties’ supplemental memoranda, and the record below, it appears to the Court that:

(1) The defendant-appellant, Thomas Spencer (“Spencer”), appeals from a Superior Court order dated September 26, 2013, which sentenced Spencer for his fourth violation of probation (“VOP”). The Superior Court modified that order on September 30, 2014 to give Spencer credit for additional time served and to add a six-month transition period, pursuant to 11 *Del. C.* § 4204(l), requiring Spencer to spend an additional six months at the Level IV VOP Center. The State has filed a motion to affirm the Superior Court’s judgment. We asked for supplemental

memoranda concerning the propriety of the six-month transition period at the Level IV VOP Center. Although we find no merit to the first three issues that Spencer has raised in his opening brief on appeal, we nonetheless hold that the Superior Court must correct its sentencing order to impose a six-month transition period that is less restrictive than the Level IV VOP Center.

(2) The record reflects that Spencer pled guilty on November 15, 2006 in the Kent County Superior Court to one count of DUI (Fourth Offense). The Superior Court sentenced him on January 10, 2007 to four years at Level V incarceration, to be suspended after serving two years in prison for six months at Level III probation. On January 17, 2007, Spencer pled guilty to another count of DUI (Fourth Offense) and was sentenced by the Sussex County Superior Court to five years at Level V incarceration (with credit for six days served), to be suspended after serving nine months in prison for eighteen months at Level III probation.

(3) On July 8, 2009, the cases were consolidated after Spencer was charged with violating probation. On August 4, 2009, the Superior Court sentenced Spencer for his first VOP associated with his Sussex County DUI to four years at Level V, to be suspended upon successful completion of the Level V Key Program for Level IV Residential Drug Treatment, to be suspended upon successful completion of drug treatment for eighteen months at Level III probation. On the

VOP associated with his Kent County DUI, the Superior Court sentenced Spencer to two years at Level V to be suspended entirely for eighteen months at Level III probation.

(4) On September 23, 2011, the Superior Court sentenced Spencer for his second VOP. On the Sussex County DUI, the Superior Court sentenced Spencer to two years and six months at Level V incarceration, with credit for twenty-seven days served, suspended for nine months at Level IV Home Confinement followed by fifteen months at Level III probation. On his Kent County DUI, the Superior Court sentenced Spencer to two years at Level V suspended entirely for eighteen months at level III probation.

(5) On July 17, 2012, the Superior Court found Spencer guilty of his third VOP. The judge sentenced Spencer on his Sussex County DUI charge to two years at Level V incarceration, to be suspended after serving eighteen months and upon successful completion of the Key Program, with no further probation to follow. On the Kent County DUI charge, the Superior Court sentenced Spencer to two years at Level V incarceration, to be suspended entirely for one year at Level IV Residential Treatment, with the balance of the sentence to be suspended upon Spencer's successful completion of treatment for one year at Level III Aftercare. Spencer appealed that sentence. We affirmed the Superior Court's judgment.¹

¹ *Spencer v. State*, 2013 WL 434185 (Del. Feb. 4, 2013).

(6) On September 26, 2013, the Superior Court found Spencer guilty of his fourth VOP. The Superior Court discharged Spencer as having served his Sussex County sentence and, on the Kent County charge, sentenced Spencer to two years at Level V incarceration (with credit for fourteen days served) with no probation to follow. On September 30, 2013, the Superior Court issued a corrected sentencing order that gave Spencer more credit for time previously served and also added a six-month transition period pursuant to 11 *Del. C.* § 4204(l), which required Spencer to serve an additional six months at the Level IV VOP Center.² Spencer now appeals from this sentence.

(7) Spencer raises four issues in his opening brief on appeal. First, he contends his current sentence is illegal because his Kent County sentence was fully served in 2009 before he was ever charged with his first VOP. Next, he contends that his fourth VOP sentence must be vacated because he was denied due process during his third VOP proceeding. Similarly, Spencer contends that his third VOP sentence was illegal because it was ambiguous and internally contradictory. Finally, he asserts that the six-month transition period at Level IV in his fourth VOP sentence does not facilitate his transition back into society.

² 11 *Del. C.* § 4204(l) (2007). Section 4204(l) requires a sentencing court to impose a six-month transition period at a lower level of supervision whenever a court sentences a defendant to a period of incarceration totaling one year or more.

(8) Spencer's first three claims, which challenge his first and third VOP sentences, are not justiciable on this appeal from the Superior Court's sentence for Spencer's fourth VOP.³ Spencer had his opportunity to appeal from those proceedings, and in fact, did appeal (unsuccessfully) from his third VOP sentence. We will not consider these claims on this appeal.

(9) Spencer's remaining claim is that the Superior Court's imposition of a six-month transition period at the Level IV VOP Center constituted abuse of discretion. This claim has merit. In imposing a sentence for a VOP, the trial court has discretion to impose the balance of the Level V time remaining to be served from the original sentence, or any lesser period of incarceration.⁴ Moreover, pursuant to 11 *Del. C.* § 4204(l), for any prison sentence of one year or more, the sentencing court may exceed that maximum allowable period of Level V incarceration by imposing an additional six-month period of supervision at Level IV, III or II in order to facilitate the defendant's transition back into society.⁵ Section 4204(l) does not distinguish between the types of Level IV facilities to which a defendant may be sentenced. Nonetheless, this Court and the Department of Justice have both recognized that the Level IV VOP Center is qualitatively

³ See *Taylor v. State*, 2013 WL 1489392 (Del. Apr. 10, 2013) (holding that a claim arising from a prior, appealable adjudication is not justiciable in a later VOP proceeding).

⁴ *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

⁵ 11 *Del. C.* § 4204(l).

different from, and far more restrictive than, other types of Level IV facilities.⁶ For that reason, a defendant who is sentenced to serve time at the Level IV VOP Center is entitled to Level V credit against his sentence.⁷

(10) In this case, Spencer had one year, ten months and twenty days remaining to be served from his original Kent County sentence. Thus, the Superior Court's imposition of that maximum prison sentence followed by a six-month transition period at Level IV was legally proper. Nonetheless, because the Level IV VOP Center is as restrictive as a Level V facility, we are constrained to find that the Superior Court's imposition of the six-month transition period to be served at the Level IV VOP Center was an abuse of discretion. Accordingly, we remand this case for correction of the transition portion of Spencer's sentence.

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED to the Superior Court for correction of the six-month transition period of Spencer's sentence to a facility less restrictive than the VOP Center. In all other respects, the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁶ *Anderson v. State*, 2006 WL 3931460 (Del. Dec. 5, 2006).

⁷ *Id.*