

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. # 1012013375
	)	
MALIK BROWN,	)	
Defendant.	)	

Date Submitted: August 31, 2015  
Date Decided: September 8, 2015

*Upon Defendant's Motion for Correction of Sentence*  
**GRANTED**

*Upon Defendant's Motion for Reduction of Sentence*  
**DENIED**

This matter is before the Court on Defendant's motions to correct and modify his sentence. The State has opposed the Defendant's motion to modify but does not oppose the motion for correction of the sentence imposed. Upon consideration of Defendant's motions; the Superior Court Rules of Criminal Procedure; the facts, arguments and legal authorities set forth by the parties; statutory and decisional law; and the entire record in this case, the Court finds as follows:

**A. Procedural History**

1. By Order dated December 2, 2011, Defendant was sentenced for two felony offenses related to drug dealing as well as one misdemeanor offense. When he was first sentenced, Defendant was given the opportunity to be supervised in the

community and for access to treatment for substance abuse and/or dependence.

2. The sentence was modified by Order dated October 5, 2012, and Defendant was required to complete treatment at Level IV as a condition of the sentence.

3. Very soon thereafter, Defendant was found in violation of probation by Order dated December 21, 2012, and sentenced to a 8 years at Level V. The basis for the violation was Defendant's disruptive, disrespectful, and verbally aggressive behavior at Level IV.

4. The Level V sentence imposed on December 21, 2012 was ordered suspended upon successful completion of the KEY Program. Accordingly, whether or not Defendant served the entirety of his sentence at Level V was dependent on his cooperation and compliance with treatment at Level V.

5. Defendant was given the opportunity to complete the KEY Program in December 2013 and in June 2014. According to the Department of Corrections, as a result of Defendant's own behavior and attitude, he was removed from the program on both occasions.

6. On July 28, 2015, the DOC Classification Board once again evaluated Defendant for the KEY Program. Defendant was denied admission to the KEY Program because his continued noncompliant behavior coupled with his previous failures to complete correctional treatment programs.

## **B. Motion to Correct Sentence**

1. The motions before the Court address the sentence imposed for the felony offense of Possession With Intent To Distribute (charge #10-12-2491) on December 21, 2012, but the Court also addresses, *sua sponte*, the sentence imposed for the misdemeanor offense of Possession of Drug Paraphernalia (charge #10-12-2492) on December 2, 2011.

2. When Defendant was sentenced for the violation of probation on December 21, 2012, Defendant had already served 11 months at Level 5 for the felony offense of Possession With Intent To Distribute (charge #10-12-2491). Defendant was not granted credit for that time served and he is entitled to a credit. Accordingly, a corrected sentencing order will issue granting Defendant 11 months credit for time served as of December 21, 2012.

3. By Order dated December 2, 2011, Defendant was sentenced for the misdemeanor offense of Possession of Drug Paraphernalia (charge #10-12-2492). At the time this offense was committed by Defendant, December 19, 2010, Possession of Drug Paraphernalia was a class A misdemeanor; Defendant was sentenced to 12 months at Level 5. Effective April 20, 2011, this offense was amended to a class B misdemeanor, subjecting offenders to only 6 months at Level 5. Accordingly, a corrected sentencing order will issue sentencing Defendant to 6 months at Level 5 for this class B misdemeanor.

### C. Motion to Modify Sentence

1. Pursuant to Criminal Rule 35(b), the Court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed.<sup>1</sup> The intent of Criminal Rule 35(b) has historically been to provide a reasonable period for the Court to consider alteration of its sentencing judgments.<sup>2</sup> Where a motion for reduction of sentence is filed, under Criminal Rule 35(b), within 90 days of sentencing, the Court has broad discretion to decide if it should alter its judgment.<sup>3</sup> “The reason for such a rule is to give a sentencing judge a second chance to consider whether the initial sentence is appropriate.”<sup>4</sup>

2. Defendant filed the Rule 35 Motion more than 90 days after imposition of the sentence and is, therefore, time-barred. The Court will consider an application made more than 90 days after the imposition of sentence only in “extraordinary circumstances,” or pursuant to 11 *Del. C.* § 4217. Delaware law places a heavy burden on the moving party to establish extraordinary circumstances in order to “uphold the finality of sentences.”<sup>5</sup> The Delaware

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<sup>1</sup> Super. Ct. Crim. R. 35(b).

<sup>2</sup> *Johnson v. State*, 234 A.2d 447, 448 (Del. 1967) (per curiam).

<sup>3</sup> *Hewett v. State*, 2014 WL 5020251, at \*1 (Del. Oct. 7, 2014) (“When, as here, a motion for reduction of sentence is filed within ninety days of sentencing, the Superior Court has broad discretion to decide whether to alter its judgment.”).

<sup>4</sup> *State v. Reed*, 2014 WL 7148921, at \*2 (Del. Super. Dec. 16, 2014) (citing *United States v. Ellenbogen*, 390 F.2d 537, 541-43 (2d. Cir. 1968) (explaining the time limitation and purpose of then-extant sentence reduction provision of Fed. R. Crim. P. 35, the federal analogue to current Criminal Rule 35(b)).

<sup>5</sup> *State v. Johnson*, 2006 WL 3872849, at \*3 (Del. Super. Dec. 7, 2006).

Supreme Court defines “extraordinary circumstances” excusing an untimely Rule 35(b) motion as those which “specifically justify the delay;” are “entirely beyond a petitioner’s control;” and “have prevented the applicant from seeking the remedy on a timely basis.”<sup>6</sup> Mitigating factors that could have been presented at sentence, exemplary conduct, or successful rehabilitation while incarcerated does not constitute “extraordinary circumstances.”<sup>7</sup> The Court does not find the existence of any extraordinary circumstances in connection with Defendant’s motion. Moreover, Defendant has not demonstrated good cause certifying that Defendant’s release shall not constitute a substantial risk to the community or to Defendant.

3. The sentence was imposed after a violation-of-probation hearing was held, and the Court determined that Defendant had violated the terms of his probation. The Court found that Defendant was not amenable to community-based supervision at that time. Because of Defendant’s behavior while incarcerated, it seems that Defendant remains non-amenable to community-based supervision.

4. The Court concluded that Defendant is in need of correctional

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<sup>6</sup> *State v. Diaz*, 2015 WL 1741768, at \*2 (Del. Apr. 15, 2015) (adopting the definition provided by former Chief Justice (then Justice) Steele in his dissent in *State v. Lewis*, 797 A.2d 1198, 1205 (Del. 2002) in light of Delaware precedent).

<sup>7</sup> *State v. Liket*, 2002 WL 31133101, at \*2 (Del. Super. Sept. 25, 2002) (explaining that exemplary conduct or successful rehabilitation during incarceration does not qualify as “extraordinary circumstances” and relief for such achievements is more properly addressed to the parole board). *See also United States v. LaMorte*, 940 F. Supp. 572, 578 (S.D.N.Y. 1996); *United States v. Arcaro*, No. 89 Cr. 001, 1992 WL 73366, at \*1 (S.D.N.Y. Apr. 1, 1992) (stating that “[w]hile defendant’s educational endeavors in prison and his diligent performance of prison job assignments are laudable accomplishments, they do not justify a reduction in sentence.”).

treatment which can be most effectively provided at Supervision Level V, with a continuum of treatment to be provided at Supervision Level IV, and after-care provided on Probation Supervision Level III. Defendant's failure to complete the programs offered to him is the result of his own behavior. The sentence will not be reduced because Defendant will not cooperate. The Court concluded that, without treatment, defendant posed a high risk of recidivism and the sentence suspended upon completion of treatment addresses these concerns. Because Defendant has not completed the programs, he is required to serve the Level 5 time that was imposed. He will be supervised in the community thereafter on the second felony offense (Maintaining a Vehicle/charge #10-12-2239), as well as on the misdemeanor (Possession of Drug Paraphernalia/charge #10-12-2492).

5. The sentence is appropriate for all the reasons stated at the time of sentencing. No additional information has been provided to the Court that would warrant a reduction or modification of this sentence.

#### **D. Conclusion**

Accordingly, for the reasons stated above, this Court finds that Defendant has demonstrated cause for the relief sought in the motion for correction of sentence and an amended sentencing order will be issued; and, for the reasons stated above, this Court finds that Defendant has not demonstrated cause for the relief sought in the motion for modification of sentence.

**NOW, THEREFORE**, this 8<sup>th</sup> day of September, 2015, Defendant's Motion for Correction of Sentence is hereby **GRANTED** and Defendant's Motion for Modification of Sentence is hereby **DENIED**.

**IT IS SO ORDERED.**

*Andrea L. Rocanelli*

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**The Honorable Andrea L. Rocanelli**

Original to Prothonotary

cc: Mailk Brown (SBI#00489089)

DAG Diana Dunn

Michael W. Modica, Esquire

Investigative Services