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

RONALD G. JOHNSON	)	
	)	
Defendant-below,	)	
Appellant,	)	
	)	**Case No. 1009008371**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-below,	)	
Appellee.	)	

ON APPEAL FROM A DECISION
OF THE COURT OF COMMON PLEAS
AFFIRMED

Submitted: February 10, 2011
Decided: May 4, 2011

OPINION AND ORDER

Appearances:

Pro Se for Appellant.

Brian F. Rick, Esquire, Wilmington, Delaware, Attorney for Defendant-below.

Danielle Blount, Esquire, Wilmington, Delaware, Attorney for Appellee, Plaintiff-below.

STREETT, J.

This is an appeal from the November 5, 2010 violation of probation conviction and sentencing of Ronald G. Johnson ("Defendant") in the Court of Common Pleas following Defendant's admission, with an explanation, to the violation of probation.

Defendant was found to have violated his September 24, 2010 sentence of one year at Level 5 suspended for one year at Level 3 with credit for 14 days, each, for the charges of Theft under $1,500 and Resisting Arrest. Based on this violation, Defendant was then sentenced to 120 days Level 5 with credit for 42 days with the balance to be served at the Level 4 VOP Center and no probation to follow on both of his Theft and Resisting Arrest charges.

On appeal, Defendant contends that the presiding Commissioner ("the Commissioner") was biased and should have recused herself, that the proceedings were improper, that he was pressured into admitting that he violated probation, and that his sentence was excessive.

FACTS

On September 24, 2010, Defendant entered a guilty plea to Theft under $1,500 and Resisting Arrest stemming from an arrest on September 9, 2010 for Burglary Third Degree, Possession of Burglary Tools, Attempted Theft $1,500 or greater, Conspiracy Second Degree and Resisting Arrest. His sentence, as previously noted, placed him on probation.

Defendant was released from prison on October 4, 2010 and received an "Offender's Probation Notice". Defendant, as directed in the notice, telephoned his assigned probation officer on October 6, 2010. It is undisputed that the probation officer told Defendant to report to probation that same day and Defendant refused to appear.[1] The probation officer testified that Defendant stated that "he would report when he wanted to and when it was convenient to him."[2]

[1] *State of Delaware v. Ronald G. Johnson*, No. 1009008371, at 10-11 (Del. Com. Pl. Nov. 5, 2010) (TRANSCRIPT).
[2] TRANSCRIPT at 4.

She characterized his attitude as "combative" over the phone and stated that he also said "I am not going to show up and when you find me I will only have to do 10 days."[3]

Defendant claims that he informed the probation officer that he lacked the money and means to appear that day.[4] The conversation ended. Ultimately, Defendant did not report to the probation office that day (or the next), despite a direct order to report.[5]

Instead, on October 7, 2010, Defendant went to the New Castle County Courthouse on an unrelated matter.[6] Defendant was arrested in the Courthouse for Criminal Contempt of a Domestic Violence Protection Order.[7] Probation filed an administrative warrant for Defendant on October 11, 2010. The warrant cited the October 7, 2010 arrest and Defendant's failure to appear as directed on October 6, 2010.[8]

On November 5, 2010, Defendant appeared before the Commissioner concerning the administrative warrant/violation of probation allegation. Defendant was represented by Brian Rick, Esquire, a member of the Public Defenders Office.[9] Defendant's counsel began the proceeding by informing the Court that "Mr. Johnson is fine with having the VOP hearing before Your Honor, the Commissioner."[10] Later during the proceeding, counsel said that Defendant also wanted to speak and the Court allowed Defendant to speak.[11] The probation officer also testified concerning Defendant's October 6 conversation with her and Defendant's attitude and

---

[3] TRANSCRIPT at 4.
[4] TRANSCRIPT at 11.
[5] TRANSCRIPT at 8-9.
[6] TRANSCRIPT at 2.
[7] TRANSCRIPT at 2.
[8] Defendant's Exhibit at 13.
[9] TRANSCRIPT at 2.
[10] TRANSCRIPT at 2.
[11] TRANSCRIPT at 5-6.

refusal to report that day.[12]

Defendant insisted that he complied with the offender instruction sheet because it only directed him to *call* probation.[13] This was also argued by Defendant's attorney.[14] Defendant also said that he told the probation officer that he could not appear that day for several reasons, including that there was no appointment date or time written on the offender instruction sheet.[15] Defendant also acknowledges that he did not report that day.[16] He told the Court, "Okay. Yes, I acknowledge I didn't come in October the 6th", and then proceeded to offer an explanation.[17]

The Court told Defendant that if he wanted to contest the matter, a hearing would be scheduled for a later date.[18] Defendant stated that he was not asking for a contested hearing.[19]

The Court then found Defendant in violation of probation and sentenced Defendant.[20] The Court explained that since he had been on Level 3 probation, which was the highest level of probation, she would follow the probation officer's recommendation and place him on 120 days at Level 4 VOP Center with no probation to follow.[21]

Defendant, referring to the Delaware Sentencing Accountability Commission Benchbook 2010 (the "Benchbook"), asked the Court to instead sentence him to 30 days at Level 5 with no probation to follow.[22] He posited that if he had been a third time offender, he would have been

---

[12] TRANSCRIPT at 3-4, 9-10.
[13] TRANSCRIPT at 7, 11.
[14] TRANSCRIPT at 9, 18.
[15] TRANSCRIPT at 7-8.
[16] TRANSCRIPT at 8-9.
[17] TRANSCRIPT at 11, 14.
[18] TRANSCRIPT at 12-13.
[19] TRANSCRIPT at 14.
[20] TRANSCRIPT at 15.
[21] TRANSCRIPT at 16, 19.
[22] TRANSCRIPT at 16.

sentenced to 15 days on each charge.[23] Defendant's attorney also offered the same argument.[24] The Court explained that this was not a sentencing on an original offense but, rather, a violation of Level 3 probation from the original offense which was "apart from [his] criminal history."[25] As such, the Court viewed a violation of probation differently.

Accordingly, the Court followed the probation officer's recommendation.[26] The Commissioner revoked the sentence imposed on September 24, 2010 and sentenced Defendant to Level 5 (with 42 days credit for time served), to be followed by Level 4.[27] The Commissioner calculated that he would actually serve 78 more days.[28] Whereupon Defendant stated "You're a bitch" as he was leaving the courtroom.[29]

Defendant's attorney then waived Defendant's appearance[30] as the Court, counsel, and probation worded Defendant's sentence to avoid confusion at the prison.[31] Defendant was then brought back into the courtroom to clarify his sentence and The Commissioner told him that he would not be held in contempt for his outburst.[32] Defendant' now appeals the conviction and sentence.

DEFENDANT'S CONTENTIONS

In his appeal of his conviction and sentence on the violation of probation, Defendant raises several arguments. Defendant alleges that the presiding Commissioner was biased, the

[23] TRANSCRIPT at 16.
[24] TRANSCRIPT at 17.
[25] TRANSCRIPT at 19.
[26] TRANSCRIPT at 23.
[27] TRANSCRIPT at 20, 23, 29.
[28] TRANSCRIPT at 23.
[29] TRANSCRIPT at 24.
[30] TRANSCRIPT at 25.
[31] TRANSCRIPT at 26-27.
[32] TRANSCRIPT at 28-29.

conduct of the proceedings was irregular, he was pressured into admitting the violation, and his sentence was excessive. Although the thrust of his challenge is directed toward the Commissioner, Defendant's arguments can be separated into three parts.

Defendant first claims that the Commissioner was biased against him and therefore had a conflict of interest that should have prevented her from hearing his violation of probation.[33] Defendant states that he appeared before the Commissioner numerous times for prior arrests and further alleges, without specific reference or documentation, that this Commissioner had been "asked to resign" three times from his cases in the past, had tried to coerce him into accepting felony charges, and that their disagreements on past occasions caused him to curse at the Commissioner and call her "ungodly names."[34] Defendant also alleges that under Delaware law, he cannot be sentenced for a violation of probation by the same Commissioner who sentenced him to probation.[35] Defendant accuses the Commissioner of "railroading" him by stopping his VOP "trial" after it was underway.[36] Defendant further claims that the Commissioner pressured him into admitting that he missed an appointment with his probation officer and then gave him an ultimatum: either plead guilty to the violation or have the case rescheduled for a later hearing.[37]

Second, Defendant challenges the court proceedings, claiming that he was unrepresented, that proceedings took place out of his presence, and that the Court based its decision on undisclosed documents (including a copy of the probation officer's written recommendation)[38]

---

[33] Appeal at 1.
[34] Appeal at 1-2.
[35] Appeal at 1.
[36] Appeal at 3.
[37] Appeal at 3.
[38] Appeal at 3.

and refused his evidentiary exhibits.[39] Additionally, Defendant argues, "[the] Commissioner … let it be known to the probation officer that 'He will not be sentenced to 10 days like he told you'".[40] Thereby "showing they had talked out of my presents (which is illegal!) [sic]."[41]

Third, Defendant claims that his sentence was excessive because he had only committed a technical violation, it was his first violation of this probation, and if he had been a third time offender, the Benchbook would have sentenced him to 15 days on each (underlying) charge instead of the 120 days at Level 5 suspended for Level 4 on a violation.[42] Defendant reiterates his claim that the Commissioner harbored an animus against him that motivated this sentence.[43]

STANDARD AND SCOPE OF REVIEW

The Superior Court sits as an intermediate court when reviewing appeals from the Court of Common Pleas, and its function mirrors that of the Supreme Court.[44] The Court reviews questions of law *de novo*, but examines questions of fact to see if they are supported by sufficient evidence.[45] Additionally, the Court reviews decisions on the admissibility of evidence for abuse of discretion.[46] "An abuse of discretion occurs when the trial court has 'exceeded the bounds of reason in view of the circumstances' or 'so ignored recognized rules of law or practice so as to

---

[39] Appeal at 2-3.
[40] Appeal at 2.
[41] Appeal at 2.
[42] Appeal at 4-5, 8-9.
[43] Appeal at 4-5.
[44] *Webb-Buckingham v. State*, 2009 WL 147020, at *2 (Del. Super. Jan. 22, 2009); *see e.g.*, *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985); *State v. Richards*, 1998 WL 732960, at *1 (Del. Super. May 28, 1998).
[45] *Guest v. State*, 2009 WL 2854670, at *1 (Del. Super. Sept. 4, 2009)(citing *State v. Cagle*, 332 A.2d 140, 142-3 (Del. 1974)).
[46] *Guest*, 2009 WL 2854670, at *1 (citing *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).

produce injustice.'"[47] This Court's role is to "correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process."[48]

Under 11 *Del. C.* § 4334(a), a Defendant may be charged with violation of probation for violating any of the conditions of probation or suspension of sentence. It is well established that "probation is an 'act of grace,'" and that "revocation of probation is an exercise of broad discretionary power."[49] Accordingly, this Court's review of the Court of Common Pleas' revocation of defendant's probation is limited to whether there has been an abuse of discretion.[50]

DISCUSSION

Defendant's Allegations of Judicial Bias

Defendant believes that the Commissioner who presided over his violation of probation appearance and sentence was biased because he had appeared before her numerous times and she previously "resigned" three times from some of his cases, thereby evincing a conflict of interest. He also alleges that the Commissioner "railroaded" him into admitting his violation of probation, rejected his evidence, accepted "lies" from the probation officer, and was influenced by extrinsic evidence – namely his lengthy arrest history.

Canon 3(C)(1) of the Delaware Judges' Code of Judicial Ethics provides, in pertinent part, that "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might be reasonably questioned …" However, the Delaware Supreme Court has held

[47] *Webb-Buckingham*, 2009 WL 147020, at *2 (citing *Lily v. State*, 649 A.2d 1055, 1059 (Del. 1994)).
[48] *Steelman v. State*, 2000 WL 972663, at *1 (Del. Super. May 30, 2000)(quoting *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).
[49] *Collins v. State*, 897 A.2d 159, 160 (Del. 2006)(quoting *Brown v. State*, 249 A.2d 269, 271 (Del. 1968)).
[50] *Steelman*, 2000 WL 972663, at *1 (quoting *Brown v. State*, 249 A.2d 269, 271 (Del. Super. 1968)).

that "no *per se* or automatic disqualification is required" where there are allegations that a judge "has a personal bias or prejudice concerning a party."[51] Moreover, the fact that a judge has presided over prior proceedings involving a party does not require disqualification,[52] and a judge's prior adverse ruling against a party does not create bias and is almost never a valid *per se* basis for disqualification.[53] For a judge's personal bias against a defendant to be disqualifying, it "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[54]

As to the first thrust of this complaint (longstanding bias, numerous prior recusals, and coercion), Defendant has failed to present any evidence to support these claims and his alleged dissatisfaction with the Commissioner is belied by the record. In his appeal, Defendant contends, "How can I ever forget a judge who tried to railroad me …" and states that the Commissioner's "cold frown and smerks [sic] … made [him] know who she was."[55] However, at the start of the VOP hearing, Defendant's attorney told the Court that, "Mr. Johnson's fine with having the VOP heard before Your Honor, the Commissioner."[56] Although a vague undercurrent of distrust might be inferred from his attorney's pronouncement, neither the Defendant nor his attorney asked the Commissioner to recuse herself during his VOP hearing, nor did either one, during the proceeding, allege bias.[57]

---

[51] *Los v. Los,* 595 A.2d 381, 384 (Del. 1991)(quoting Canon 3 (C)(1)).

[52] *Id.* (citing *Steigler v. State*, 277 A.2d 662, 668 (Del. 1971); *Weber v. State*, 547 A.2d 948, 952 (Del. 1988)).

[53] *State v. Deangelo*, 2007 WL 2472262, at *4 (Del. Super. Aug. 31, 2007)(quoting *In re Wittrock*, 649 A.2d 1053, 1054 (Del. 1994)(citations omitted)).

[54] *Los*, 595 A.2d at 384 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).

[55] Appeal at 2.

[56] TRANSCRIPT at 2.

[57] In *Los v. Los*, the Delaware Supreme Court held that a judge who is faced with a motion to recuse or a claim of personal bias pursuant to the Delaware Judges' Code of Judicial Ethics, the

Correspondingly, the Commissioner did not articulate or exhibit any antipathy towards Defendant during this VOP hearing. Rather, it was Defendant who called the Commissioner a "bitch."[58] Moreover, the Commissioner did not react to Defendant's outburst, did not increase his sentence, and instead chose to "give [Defendant] a break" and not find him in contempt.[59]

Defendant has also failed to support his suspicion that the Commissioner based her finding and sentence on anything other than what was proffered at the November 5, 2010 hearing. Rather, the Court, after listening to probation, Defendant, and Defendant's attorney, convicted Defendant of a violation of probation and sentenced him accordingly based on the evidence presented. Defendant had admitted his refusal to go to the probation office on October 6, 2010 as directed by the probation officer and proffered a detailed explanation concerning his claimed inability to appear at the probation office that day.[60] The Court is not bound to excuse malfeasance merely because a Defendant offers an explanation for that malfeasance. Non-compliance and/or failure to report to probation is sufficient for a violation of probation conviction.[61] Defendant's conviction was not an abuse of discretion.

Defendant also alleges that under Delaware law, he cannot be sentenced for a violation of

---

judge is required to engage in a two-part analysis: "First, he must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the judge believes that he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality. On appeal of the judge's recusal decision, the reviewing court must be satisfied that the trial judge engaged in the subjective test and will review the merits of the objective test." *Los*, 595 A.2d at 384-85 (internal citations omitted). Because the Commissioner in this case was never faced with any allegations of bias or motion to recuse, the *Los* two-part analysis does not apply.

[58] TRANSCRIPT at 24.

[59] TRANSCRIPT at 28-29.

[60] TRANSCRIPT at 8-9, 11-14.

[61] Pursuant to 11 *Del. C.* § 4334(a), a Defendant may be charged with violation of probation for violating any of the conditions of probation or suspension of sentence.

probation by the same Commissioner who sentenced him to probation.[62] Defendant has failed to cite any authority to support his position.

Additionally, Defendant's allegation of bias, based on his claim that the Commissioner allegedly railroaded him by stopping his VOP trial and pressuring him to admit the violation, is contradicted by the record. The transcript reflects that the Court carefully explained to Defendant that, "[I]f you admit the violation then it's uncontested and then we proceed. If you're not admitting the violation that you failed to report to probation then it's a contested hearing and we would … likely need to reschedule it."[63] The Court further explained, "You would be put under oath, you would be a witness, the probation officer would, we would take testimony under oath each side to present evidence and then I would make a decision."[64] The Court then repeatedly asked Defendant whether he wished to admit to the violation or have a contested violation of probation hearing at a later date.[65] Defendant responded, "Ok, Your Honor. I admit to the violation …"[66] After again asking Defendant to clarify whether he admitted to the violation, Defendant again responded, "Yeah, I admit that – I'm not contesting the fact that I didn't show up."[67]

> THE COURT: Okay. So, in other words, you admit it, you've given your explanation why –
> DEFENDANT: Yes.
> THE COURT: - but you admit that you failed to report to probation as required?
> DEFENDANT: Yes.
> THE COURT: Correct?
> DEFENDANT: Yes. Due to –
> THE COURT: Okay. So, you're not asking for a contested hearing?

---

[62] Appeal at 1.
[63] TRANSCRIPT at 12.
[64] TRANSCRIPT at 13.
[65] TRANSCRIPT at 13.
[66] TRANSCRIPT at 13.
[67] TRANSCRIPT at 14.

DEFENDANT: No.
THE COURT: Okay. All right. I just want to be clear.[68]

There is no evidence that the Commissioner pressured Defendant into admitting his violation.

Defendant's Allegations that the VOP Hearing was Conducted Improperly

The second portion of Defendant's complaints, concerning the conduct of the hearing, is contradicted by the record.

Defendant alleges that he was unrepresented by an attorney and had appeared before the Commissioner *pro se*. Defendant's claim is belied by the transcript. Indeed, Brian F. Rick, Esquire represented Defendant throughout the proceeding. Though Mr. Rick stated that Defendant "said he wanted to represent himself," Mr. Rick continued to represent Defendant *and* also allowed Defendant to speak on his own behalf.[69]

Also, contrary to Defendant's speculation, the Commissioner did not conspire with others after Defendant left the courtroom. The record reflects that Defendant called the Commissioner a "bitch" after he was sentenced and as he walked out.[70] The Delaware Supreme Court has recognized:

> A defendant's due process rights at a VOP hearing are not unlimited. In *Illinois v. Allen,* the United States Supreme Court held that: [T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant ... (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.[71]

---

[68] TRANSCRIPT at 14.

[69] TRANSCRIPT at 5-6.

[70] TRANSCRIPT at 24.

[71] *Martini v. State*, 2007 WL 4463586, at *2-3 (Del. Dec. 21, 2007)(quoting *Illinois v. Allen*, 397 U.S. 337, 337 (1970)).

Here, Defendant appears to have exited the courtroom of his own volition. The Commissioner then asked that he be held outside the courtroom while she finished drafting the sentencing order, stating that Defendant had "absented himself … by virtue of his behavior," to which Defendant's attorney agreed.[72] After clarifying the intricacies of Defendant's sentence, Defendant was brought back into the courtroom and told what had taken place in his absence.[73]

So too, the record reflects that Defendant's other claims are unsupported. Contrary to Defendant's complaint that the Court ignored his exhibits, the record reflects that the Court did not refuse Defendant's exhibits. The hearing transcript shows that the Defendant wanted to present exhibits to support his explanation for missing his probation appointment,[74] and the Court, seeking clarification, asked Defendant if he wished to contest that he missed his appointment and violated probation.[75] The Court then explained that he would be permitted, at a contested VOP hearing, to present evidence to support the reasons(s) for his absence.[76] Defendant rejected this option and stated repeatedly that he admitted missing the appointment and did not wish to have a contested VOP hearing.[77]

Finally, Defendant's claim that the Commissioner had discussions with the probation officer outside of his presence and based her decision on secret probation documents is a mischaracterization of the facts. Defendant quotes the Commissioner as saying, "I wondered why the probationer [sic] officer put down that he said he would only get 10 days for this VOP"

[72] TRANSCRIPT at 25.
[73] TRANSCRIPT at 28-29.
[74] TRANSCRIPT at 12.
[75] TRANSCRIPT at 12.
[76] TRANSCRIPT at 13.
[77] TRANSCRIPT at 13-14.

at the November 5, 2010 hearing.[78] He speculates that this indicates that the Commissioner relied on a written statement made by the probation officer and he argues that he never received a copy of that statement. This is an incorrect extrapolation. The Delaware Supreme Court has recognized that "Several provisions found in Chapter 43 of Title 11 (Sentencing, Probation, Parole and Pardons) either require or authorize probation officers to submit reports to the court"[79] and that "Delaware law … authorizes a communication between a judge and [a] probation officer without the defendant present."[80] Moreover, Defendant's argument that he never saw the probation officer's written report or recommendation is undercut by the fact that Defendant came prepared with paperwork to refute the probation officer's allegations.[81]

Defendant also says that the Commissioner stated, "He will not be sentenced to 10 days like he told you," which he alleges shows that the Commissioner and probation officer spoke out of his presence.[82] Defendant has misquoted the Commissioner's words. Rather, the Commissioner said, "It's not going to be the 10 days that the probation officer reports that you predicted, that you said, she indicates you said you would only have to do 10 days."[83] This was a reiteration of the testimony at the hearing.[84]

---

[78] Appeal at 3.

[79] *Carrigan v. State*, 945 A.2d 1073, 1078 (Del. 2008) (Citing 11 *Del. C.* § 4321(c) (Stating that probation officers "shall make … reports in writing and perform … other duties which the rules and regulations of the Department [of Correction] require, or which the court … may require"); § 4332(a) (providing, relevantly, that "before any … conditions [of probation] are modified, a report by the Department [of Correction] shall be presented to and considered by the court"); § 4334(c) (referring to the violation of probation report which must be submitted to the court "in writing")).

[80] *Carrigan*, 945 A.2d at 1078 (quoting *Carrigan v. State*, 2007 WL 3378657, at *4 (Del. Super. Aug. 17, 2007).

[81] TRANSCRIPT at 12.

[82] Appeal at 2.

[83] TRANSCRIPT at 19.

[84] TRANSCRIPT at 4.

Defendant's Allegation that his Sentence was Excessive

The third prong of Defendant's appeal concerns the length of his sentence. Defendant alleges that because this was his first violation of probation and because this was a technical violation (not a new arrest), he should have received a lesser sentence of 15 days at Level 5. Defendant offers the SENTAC Bench Book as the basis for this claim. He also claims that he did not receive a lesser jail sentence because the Commissioner was biased.

Pursuant to 11 *Del. C.* §4334(c), if an offender is found in violation of probation, "the court may continue or revoke the probation or suspension of sentence, and may require the probation violator to service the sentence imposed, or any lesser sentence." The Delaware Supreme Court summarized Delaware law regarding appellate review of a sentence:

> Appellate review of a sentence is limited to whether the sentence is within the statutory limits prescribed by the General Assembly and whether it is based on factual predicates which are false, impermissible, or lack minimal reliability, judicial vindictiveness or bias, or a closed mind. When the sentence is within the statutory limits, this Court will not find an abuse of discretion unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind. A judge sentences with a closed mind when the sentence is based on a preconceived bias without consideration of the nature of the offense or the character of the defendant. … The judge must have an open mind for receiving all information related to the question of mitigation.[85]

In this case, Defendant was sentenced to 120 days Level 5 with credit for 42 days with the balance to be served at the Level 4 VOP Center for violating probation on his original sentences of one year at Level 5 suspended for one year at Level 3 (with credit for 14 days on one charge) for his Theft under $1,500 and Resisting Arrest charges. This Court reviews sentencing of a criminal defendant for abuse of discretion.[86] This sentence is appropriate under 11 *Del. C.* §4334(c).

---

[85] *Weston v. State*, 832 A.2d 742, 746 (Del. 2003)(internal footnotes omitted).

[86] *Martini v. State*, 2007 WL 4463586, at *4 (Del. Dec. 21, 2007).

Next, Defendant repeatedly points to the Benchbook as the basis for his claim that his sentence is excessive. However, the Benchbook guidelines are "voluntary, non-binding, and as such, in the absence of constitutional violations, are not generally subject to appeal."[87] It is only necessary to consider whether the sentence is within the statutory maximum limits, which are set forth in the Benchbook.[88] Here, Defendant's November 5, 2010 VOP sentence fell within the statutory limits.[89]

Additionally, Appellant has not demonstrated that his sentence was "based on factual predicates which are false, impermissible, or lack minimal reliability, judicial vindictiveness or bias, or a closed mind."[90] In *Weston v. State*, the Delaware Supreme Court examined a defendant's claim that the sentence he received for violation of probation was excessive and that the sentencing judge exhibited a closed mind.[91] The Court held that the lower court's sentence of four and a half years of incarceration was appropriate and that the "judge's reasoning was logical and rational" because the judge had considered the nature of the violation, the presence of drugs and weapons in the defendant's home, the defendant's history of violent behavior, and the mitigating information offered by the defendant before imposing his sentence.[92] Similarly, in *Guest v. State*, the Delaware Superior Court found that a Court of Common Pleas judge had not sentenced with bias or a closed mind because the judge gave consideration to both parties'

---

[87] Delaware Sentencing Accountability Commission Benchbook 2010, at 18.

[88] *Weston*, 832 A.2d at 746.

[89] The statutory maximum sentence for a violation of probation stemming from the underlying offense of Theft under $1,500 is 1 year at Level V and a fine of up to $2,300. The statutory limit for a violation of probation stemming from the underlying offense of Resisting Arrest is also 1 year at Level V and a fine of up to $2,300. Defendant's sentence of 120 days Level 5 with credit for 42 days with the balance to be served at the Level 4 VOP Center and no probation to follow is well within the statutory limits prescribed by the legislature.

[90] *Weston*, 832 A.2d at 746.

[91] *Id.*

[92] *Id.* at 746-747.

arguments, permitted the defendant to speak on his own behalf, and weighed the nature of the offense and the aggravating and mitigating factors before sentencing the defendant.[93]

In this case, the transcript of the violation of probation hearing belies Defendant's claim that the Commissioner sentenced him based on preconceived bias. Before imposing Defendant's sentence, the Commissioner permitted Defendant to speak on his own behalf and gave consideration to the probation officer's and Defendant's recommendations, Defendant and his Counsel's arguments regarding the Benchbook guidelines, Defendant's criminal history, the fact that Defendant violated the Level 3 probation (the highest level), and the amount of time Defendant had already served in custody. When determining an appropriate sentence, "a sentencing court has broad discretion to consider information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which the defendant was convicted."[94] Thus, a sentencing court can take a defendant's arrest history into consideration when formulating a sentence. Here, the factors considered by the Court were all permissible. The Commissioner also specifically stated that she would not consider the violation of the no-contact order allegation because it had been subsequently dismissed.[95] Additionally, the Commissioner chose not to sanction Defendant for calling her a "bitch."

Moreover, Defendant's contention that his sentence was excessive because this was his first violation lacks merit. The Delaware Supreme Court has upheld a lower court's decision to impose a much harsher violation of probation sentence on a first-time violator. In *Kurzmann v. State*, the Court upheld a Superior Court judge's decision to sentence the defendant to serve the *full* seven year suspended Level 5 term after he assaulted his wife while serving Level 3

---

[93] *Guest*, 2009 WL 2854670, at *3.

[94] *Foreman v. State*, 2010 WL 2163854, at *2 (Del. May 11, 2010)(citing *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992)).

[95] TRANSCRIPT at 6.

probation.[96] In that case, the defendant had been on probation for nearly a year and a half with no violations.[97] Here, Defendant violated within the first days of beginning his probation and was sentenced to serve only a portion of the suspended Level 5 term from his original sentence.

Finally, the sentencing judge did not deviate from the Benchbook guidelines in imposing Defendant's sentence. The Benchbook states that where a judge finds "that the offender is guilty of the violation and probation is to be revoked, it is presumed that the offender may move up only one SENTAC level from his/her current level", however an offender "may have his/her level of supervision raised more than one level if ... aggravating circumstances exist."[98] Here, the Defendant was serving Level 3 probation at the time of his arrest. After finding that Defendant violated probation, the sentencing guidelines recommend that he be sentenced to Level 4 supervision. The Commissioner properly credited Defendant for the Level 5 time that he served while awaiting sentencing and then gave Defendant incarceration at the Level 4 VOP Center for the balance of his 120 day sentence.[99] For these reasons, there is no evidence that Defendant's sentence was excessive or motivated by judicial bias or a closed mind.

[96] 903 A.2d 702, 714-16 (Del. 2006).
[97] *Id.* at 714-15.
[98] *See* Delaware SENTAC Handbook, at 104 (2006), Violation of Probation Sentencing Policy.
[99] *C.f.*, *Martini v. State*, 2007 WL 4463586, at *4 (Del. Dec. 21, 2007).

CONCLUSION

There is no evidence of bias in either the VOP conviction or the sentence imposed that would have warranted judicial disqualification in this case, nothing in the record indicates that the VOP hearing was conducted improperly, and Defendant's sentence is within the statutory limits. Accordingly, for the above reasons, the Court of Common Pleas acted within its discretion in convicting Defendant of a violation of probation and sentencing him to 120 days at Level 5 (with 42 days credit for time served) balance at Level 4 VOP Center. Appellant's conviction and sentence are hereby **AFFIRMED**.

IT IS SO ORDERED.

/s/ Diane Clarke Streett
Diane Clarke Streett
Judge

Original to Prothonotary
cc: Dep. Atty. Gen. Danielle S. Blount
Brian Rick, Esquire
Ronald G. Johnson