

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NICOLE R. HOFFMAN,	§	
	§	No. 540, 2011
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 1006008872
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 25, 2012

Decided: March 2, 2012

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 2<sup>nd</sup> day of March 2012, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Nicole Hoffman, the defendant-below (“Hoffman”), appeals from the Superior Court’s denial of her motion to reargue her challenge to a modified sentence for Manslaughter. Hoffman contends that the Superior Court erred by imposing a sentence based, in part, on factual predicates that were inaccurate or lacked minimal reliability. Hoffman also claims that the Superior Court erred in its application of the “undue depreciation of the offense” aggravator. The State responds that this Court lacks jurisdiction to consider Hoffman’s challenge to her sentence, and that Hoffman’s only claim over which we have jurisdiction is that

the Superior Court erroneously denied her motion for reargument. We conclude that this Court has jurisdiction to consider all of Hoffman's claims, and affirm the Superior Court's sentencing order.

2. On December 9, 2009, Hoffman was driving her car on Route 896 in Delaware at approximately 3:30 a.m., when she lost control and crashed. Hoffman, front-seat passenger Jourdan Poore, and rear-seat passenger Shawn Zimmerman were returning from a club in Baltimore, Maryland. Zimmerman was ejected from the car and died thereafter. Test results indicated that Hoffman's bloodstream contained "marijuana metabolites" and alcohol at levels of 11 ng/ml and .157 g/dl, respectively. Hoffman was 18 years old at the time of the accident. Records showed that Hoffman had been calling and texting on her cell phone in the minutes leading up to the collision. After reconstructing the accident scene, police determined that Hoffman was driving between 88 and 93 miles per hour when she crashed.

3. In June 2010, Hoffman pled guilty to Manslaughter. In the days immediately before her plea, Hoffman was arrested twice for "alcohol-related offenses." On September 10, 2010, she was sentenced to nine years of incarceration. At the sentencing hearing, the Superior Court judge described photographs taken from Hoffman's MySpace.com account as "glamoriz[ing] alcohol . . . [and] serv[ing] as a very painful . . . devastatingly painful insult to [the

victim's] family in some of the obscenities and the pictures.” Among the aggravating factors cited by the court were Hoffman's attempt to hide the alcohol after the accident rather than provide aid to the victim, her online postings, her marijuana use and, in the sentencing order, her “undue depreciation of the offense.”

4. On December 6, 2010, Hoffman requested modification of her sentence, on the ground that the Superior Court had based its sentencing decision on inaccurate facts. Specifically, Hoffman claimed that she attempted to help the victim, and that the pictures were posted online before (not after) the accident. In response to Hoffman's motion to amend, the Superior Court reduced her prison sentence by one year (to eight years in total).<sup>1</sup> In a July 11, 2011 amended sentencing order, the court cited Hoffman's effort to aid the victim and the fact that the online pictures were posted before the accident as reasons for the modification, but the court nonetheless considered as an aggravating factor Hoffman's failure to remove the online pictures after the accident.<sup>2</sup>

5. On July 14, 2011 Hoffman filed a motion for clarification, stating that defense counsel understood the modified sentencing order “to indicate that even though the Court now agrees the contaminating postings were pre-accident . . . the

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<sup>1</sup> *State v. Hoffman*, 2011 WL 4389604 (Del. Super. June 28, 2011).

<sup>2</sup> *State v. Hoffman*, 2011 WL 2739452 (Del. Super. July 11, 2011).

posting, nonetheless, was weighted [sic] as an aggravator vis-à-vis sentencing.” The record does not disclose any response from the Superior Court. On August 11, 2011, Hoffman filed a new motion, recasting her clarification motion as a motion for reargument. The Superior Court denied the motion for reargument on September 27, 2011. This appeal (filed October 10, 2011) followed.

6. The State contends that this Court lacks jurisdiction to hear Hoffman’s appeal of her sentence, because Hoffman’s notice of appeal specifies only the September 27, 2011 order denying her motion for reargument, but not the original or amended sentencing orders. The State further argues that any appeal from the underlying sentencing orders is time-barred.<sup>3</sup>

7. Supreme Court Rule 7, which provides that an appeal is commenced by a notice of appeal, states that the appellant shall “[d]esignate the judgment or order, or part thereof, sought to be reviewed and the date thereof. . . .” In *Trowell v. Diamond Supply Co.*,<sup>4</sup> we held that where the plaintiff elected in “clear and unambiguous language” to appeal only from an order denying the plaintiff’s motion for new trial in a personal injury case, the notice of appeal could not be

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<sup>3</sup> Supreme Court Rule 6(a)(ii) requires a direct criminal appeal to be filed within “30 days after a sentence is imposed.” It is undisputed that Hoffman’s appeal was not filed within thirty days of either sentencing order.

<sup>4</sup> 91 A.2d 797 (Del. 1952).

treated as an appeal from the underlying judgment.<sup>5</sup> This Court has not previously extended *Trowell* to preclude review of an underlying sentencing order in a criminal matter, where the notice of appeal is from the denial of a motion for reargument of the sentence being appealed. Hoffman appeals from the Superior Court’s denial of reargument of its ruling on her substantive claims. Her failure to specify the underlying sentencing orders does not, therefore, preclude this Court from considering those claims.

8. As for the timeliness issue, this Court has held that “a timely filed motion for reargument will suspend the finality of the judgment and toll the time in which to file a notice of appeal with this Court.”<sup>6</sup> Supreme Court Rule 6(a)(ii) requires a direct appeal within “30 days after a sentence is imposed.” Just as a motion for reargument suspends the finality of a judgment under Rules 6(a)(i) and 6(a)(iii),<sup>7</sup> it also logically suspends the finality of a sentencing order under Rule 6(a)(ii). Thus, if Hoffman’s July 14, 2011 motion for clarification (later restyled as

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<sup>5</sup> *Id.* at 802. See also, *Ogden v. Collins*, 2010 WL 4816059, at \*5 (Del. Nov. 29, 2010).

<sup>6</sup> *Dickens v. State*, 852 A.2d 907 (Del. 2004) (citing *Linda D.P. v. Robert J.P.*, 493 A.2d 968 (Del. 1985)); see also *Colon v. State*, 962 A.2d 916 (Del. 2008).

<sup>7</sup> *Linda D.P.* was a family case governed by Supreme Court Rule 6(a)(i), and *Colon* involved a postconviction relief motion, under Supreme Court Rule 6(a)(iii). *Dickens* involved an appeal from the Superior Court’s affirmance of a sentence imposed by the Court of Common Pleas and, therefore, did not address the direct appeal of a sentencing order imposed in the first instance by the Superior Court.

a motion for reargument) tolled the time to appeal from the modified sentencing order, her appeal of the modified sentencing order is timely.

9. We have previously recognized that a judgment is not final for purposes of appeal when a motion for clarification is pending.<sup>8</sup> It follows that a motion for clarification also tolls the time to appeal. Accordingly, Hoffman’s motion for clarification (later re-cast as a motion for reargument), which the State has not claimed was untimely filed, tolled the time to appeal from her sentencing orders. Hoffman’s October 10, 2011 notice of appeal was therefore timely.

10. Turning to the merits of Hoffman’s claims, this Court reviews a defendant’s sentence for the following: (i) unconstitutionality, (ii) factual predicates which are false, impermissible, or lack minimum indicia of reliability, (iii) judicial vindictiveness, bias, or sentencing with a “closed mind,” and (iv) any other illegality.<sup>9</sup> Otherwise, we review a defendant’s sentence to determine whether the sentence falls within the limits that the statute prescribes.<sup>10</sup> This Court reviews a sentence modification for abuse of discretion.<sup>11</sup>

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<sup>8</sup> See *Delta ETA Corp. v. University of Delaware*, 985 A.2d 389 (Del. 2009) (finding parties’ appeals interlocutory where motion for clarification still pending with Superior Court).

<sup>9</sup> *Siple v. State*, 701 A.2d 79, 83 (Del. 1997) (citing *Morales v. State*, 696 A.2d 390, 394 (Del. 1997)).

<sup>10</sup> *Id.* (citing *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992)).

<sup>11</sup> *State v. Lewis*, 797 A.2d 1198 (Del. 2002).

11. Hoffman contends that the Superior Court erred in finding that she did not render aid to the victim and instead sought to hide the alcohol in her car. But, in deciding her sentence modification motion, the Superior Court considered and accepted Hoffman's representation that she actually did attempt to aid the victim after the accident. In reducing Hoffman's prison sentence by one year, the court explained that "had it been aware at the time of sentencing that the Defendant offered aid to the victim at the accident scene, it would have considered this as a mitigator."

12. Hoffman also challenges the Superior Court's consideration of pictures on her MySpace.com page that depicted Hoffman drinking. Again, in explaining its reduction of Hoffman's sentence, the Superior Court stated that it "probably" would not have weighed the "undue depreciation of the offense" aggravator as heavily if it had known the pictures were posted before the accident, rather than after. But, the Superior Court still considered Hoffman's posting the pictures, including her failure to remove the pictures post-accident, to be an aggravating factor, especially given the fact that the victim's family viewed the pictures after the accident. The Superior Court did not abuse its discretion by making that finding.

13. Hoffman further contends that the Superior Court considered ingestion of marijuana as an aggravator since that factor lacked minimal reliability. Because

Hoffman did not present this claim to the Superior Court below, it is not properly before this Court on appeal.<sup>12</sup>

14. Finally, Hoffman argues the Superior Court’s application of the “undue depreciation” aggravator was erroneous, because Delaware courts should interpret that factor as based only on societal opinion, and not the defendant’s opinion, of the offending conduct. This Court, however, has previously upheld decisions that validated the “undue depreciation” aggravator with reference to the defendant’s state of mind.<sup>13</sup> The SENTAC guidelines provide that the aggravator is appropriately applied where “[i]t would unduly depreciate the seriousness of the offense to impose a sentence of other than total confinement.”<sup>14</sup> The Superior Court understandably cited Hoffman’s “gross exhibitions of lack of remorse” as a reason to find that anything short of confinement would unduly depreciate the gravity of Hoffman’s offense in her mind. Therefore, the Superior Court did not abuse its discretion by applying the aggravator in that manner.

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<sup>12</sup> See Del. Supr. Ct. R. 8.

<sup>13</sup> See *Baine v. State*, 933 A.2d 1249 (Del. 2007) (upholding sentence aggravator described as “[defendant’s] undue depreciation of the offenses”); *Berry v. State*, 803 A.2d 427 (Del. 2002) (referring to “[defendant’s] undue depreciation of the offense”).

<sup>14</sup> SENTAC Truth-In-Sentencing Benchbook.



NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice