SUPERIOR COURT OF THE STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2 SUSSEX COUNTY COURTHOUSE GEORGETOWN, DE 19947

May 29, 2012

Ben Roten SBI# 520 James T. Vaughn Correctional Center 1181 Paddock Road Smyrna, DE 19977

RE: State of Delaware v. Ben Roten, Def. ID# 0401005180

DATE SUBMITTED: May 9, 2012

Dear Mr. Roten:

Pending before the Court is a motion for correction of sentence which defendant Ben Roten ("defendant") has filed. The motion is denied as untimely filed.

On August 6, 2004, defendant pled guilty to the crimes of assault in the first degree, a lesser-included offense of attempted murder, and aggravated menacing. After unsuccessfully seeking to withdraw his guilty plea, he was sentenced on the charges. The sentencing took place on September 24, 2004. The Court sentenced him on the assault conviction to twenty-five years at Level 5 with credit for time served. It sentenced him on the aggravated menacing conviction to five years at level 5 and upon successful completion of the Key Program, the balance is suspended for six months at Level 4, Crest, followed by twelve months at Level 3, Aftercare.

Defendant thereafter sought a sentence reduction, which this Court denied. State v. Roten,

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Del. Super., Def. ID# 0401005180, Stokes, J. (May 18, 2005).

Defendant appealed this Court's decision denying his motion to withdraw his guilty plea. The Supreme Court affirmed that decision. *Roten v. State*, 884 A.2d 512, 2005 WL 2254202 (Del. Sept. 15, 2005) (TABLE).

Since that time, defendant has filed two motions for postconviction relief, which have been denied, *State v. Roten*, 2006 WL 1360513 (Del. Super. May 18, 2006), *aff'd*, 922 A.2d 415, 2007 WL 773389 (Del. March 15, 2007); *State v. Roten*, 2011 WL 3116938 (Del. Super. July 25, 2011), *aff'd*, 2011 WL 6916540 (Del. Dec. 28, 2011), as well as several motions for sentence reduction, which also have been denied, *State v. Roten*, Del. Super., Def. ID# 0401005180, Stokes, J. (May 4, 2009); *State v. Roten*, Del. Super., Def. ID# 0401005180, Stokes, J. (May 27, 2009); *State v. Roten*, Del. Super., Def. ID# 0401005180, Stokes, J. (June 18, 2009), *aff'd*, 977 A.2d 899, 2009 WL 2185824 (Del. July 23, 2009); *State v. Roten*, Del. Super., Def. ID# 0401005180, Stokes, J. (September 22, 2009).

On January 13, 2012, defendant filed the pending motion pursuant to Superior Court Criminal Rule 35.

¹Unfortunately, this motion initially was assigned to the wrong judge. Upon discovery of the mistake, it was reassigned to this judge for consideration.

²In Superior Court Criminal Rule 35, it is provided in pertinent part as follows:

⁽a) Correction of sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

⁽b) Reduction of sentence. The Court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed. ... The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances The Court will not consider repetitive requests for reduction of sentence. ... A motion for reduction of sentence will be considered without presentation, hearing or argument unless otherwise ordered by the court.

Defendant asserts that the Court imposed an illegal sentence, which may be corrected at any time. Super. Ct. Crim. R. 35(a). He argues the sentence imposed is an illegal one because this judge exhibited a "closed mind" and "relied on demonstrably false and unreliable information that lacked a minimum indicia of reliability to consider the appropriate sentence for the defendant."

Although defendant labels the sentence to be an illegal one,³ it is the Court's role to categorize the argument. *See Wilson v. State*, 900 A.2d 102, 2006 WL 1291369, *1 n.3 (May 9, 2006). Despite the label, defendant actually is arguing that the sentence was imposed in an illegal manner. *Wilson v. State, supra*, at *3. Consequently, he was required to file his motion within 90 days of sentencing. Super. Ct. Crim. R. 35(a) and (b). Failing to do that, it was his burden to show extraordinary circumstances require a consideration of this motion. Super. Ct. Crim. R. 35(b). He has not attempted to make such a showing. Furthermore, he could not make such a showing because his claims could have been raised the day after he was sentenced. *See Wilson v. State, supra*, at *3 n.20.

The pending motion is time-barred. Consequently, the Court denies it.

IT IS SO ORDERED.

³As the Supreme Court explained in *Wilson v. State*, *supra* at *3:

A sentence is illegal when the sentence imposed exceeds the statutorily authorized limits, violates the Double Jeopardy Clause, is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize. [Footnote and citation omitted.]

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office Melanie C. Withers, Esquire James D. Nutter, Esquire