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

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	**ID No. 1306026696**
	)	
DIANE E. HOFMANN,	)	
	)	
Defendant.	)	

Submitted: July 8, 2014
Decided: August 12, 2014

ORDER DENYING MOTION TO REDUCE SENTENCE

This 12th day of August, 2014, upon consideration of the Defendant's Motion for Sentence Reduction and the record in this matter, it appears to the Court that:

(1) On March 28, 2014, following a jury trial, Diane E. Hofmann was convicted of driving under the influence ("DUI") of alcohol.[1] On June 13, 2014, after completion of a presentence report, she was sentenced to serve two years imprisonment. That term of imprisonment was to be suspended after Hofmann served 3 months for a period of home confinement

[1] DEL. CODE ANN. tit. 21, § 4177 (2013) (driving under the influence). Hofmann had two prior DUI convictions so this offense, therefore, was a class G felony. *Id.* at § 4177(d)(3) (a third DUI offense is a class G felony).

and then probation with treatment and certain conditions. Hofmann filed no direct appeal from her conviction or sentence.

(2) Less than a month after she was sentenced, Hofmann filed the present motion under Superior Court Criminal Rule 35(b) requesting reduction of her Level V term.[2] Hofmann claims that her 90-day term of imprisonment should be reduced because: (1) she has certain health issues; and (2) she "was never proven to be over [the] legal limit. No breathalizer (sic), No blood test."[3] The Court may consider such a motion "without presentation, hearing or argument."[4] The Court will decide this motion on the record in this case and the papers filed.

(3) The intent of Superior Court Criminal Rule 35(b) has historically been to provide a reasonable period for the Court to consider alteration of its sentencing judgments.[5] Where a motion for reduction of sentence is filed within 90 days of sentencing, the Court has broad discretion to decide if it should alter its judgment. The reason for such a rule is to give a sentencing judge a second chance to consider whether the

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2 Super. Ct. Crim. R. 35(b) (providing a procedure under which the court may reduce a sentence of imprisonment on an inmate's motion).

3 Def. Rule 35(b) Mot. at 2.

4 Super. Ct. Crim. R. 35(b).

5 *Johnson v. State*, 234 A.2d 447, 448 (Del. 1967) (*per curiam*).

initial sentence is appropriate.[6] But, while the Court has wide discretion to reduce a sentence upon a timely Rule 35 application, the Court has no authority to reduce or suspend the mandatory portion of any substantive statutory minimum sentence.[7]

(4) The Court was constrained to impose at least a 1-year prison term for this felony DUI conviction,[8] and the Court was statutorily prohibited from suspending the first three months of that sentence.[9] Though Hofmann may suggest that the Court might resort to the provisions of 11 *Del. C.* § 4221 to address her "failing health" claim, they are not applicable here. Section 4221 requires that "the person *to be sentenced*" prove by clear and convincing evidence that: (1) she "suffers from a serious physical

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[6] *See United States v. Ellenbogan*, 390 F.2d 537, 541, 543 (2d Cir. 1968) (explaining time limitation and purpose of then-extant sentence reduction provision of Federal Criminal Rule 35, the federal analogue to current Superior Court Criminal Rule 35(b)); *see also United States v. Maynard*, 485 F.2d 247, 248 (9th Cir. 1973) (Rule 35 allows sentencing court "to decide if, on further reflection, the original sentence now seems unduly harsh" . . . such request "is essentially a 'plea for leniency.'") (citations omitted).

[7] *State v. Sturgis*, 947 A.2d 1087, 1092 (Del. 2008) ("Superior Court Rule of Criminal Procedure 35(b) provides no authority for a reduction or suspension of the mandatory portion of a *substantive* statutory minimum sentence.") (emphasis in original).

[8] DEL. CODE ANN. tit. 21, § 4177(d)(3) (2013) ("Whoever is convicted of . . . a third [DUI] offense occurring at any time after 2 prior offenses . . . be imprisoned not less than 1 year nor more than 2 years.").

[9] *Id.* (". . . the first 3 months of the sentence shall not be suspended, but shall be served at Level V and shall not be subject to any early release, furlough or reduction of any kind.").

illness, injury or infirmity"; (2) that serious malady occasions continuing treatment needs; (3) the serious illness, injury or infirmity and its concomitant continuing treatment needs make incarceration inappropriate; *and* (4) she does not constitute a substantial risk to the community.[10] Hofmann's averments fail to demonstrate the existence of any one of these four prerequisites by clear and convincing evidence.

(5) Lastly, Hofmann's complaint that she was "never proven to be over [the] legal limit" – if it is an attack on the legal integrity of her DUI conviction – is not cognizable under Rule 35. A motion to reduce a sentence under Rule 35(b) presupposes a valid conviction.[11] It is not a vehicle to attack the validity of the conviction for which the inmate is serving a sentence.[12]

(6) In turn, the Court must deny Hofmann's motion to reduce her sentence.

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[10] DEL. CODE ANN. tit. 11, § 4221 (2013) ("Notwithstanding any provision of law to the contrary, a court may modify, defer, suspend or reduce a minimum or mandatory sentence of 1 year or less, or a portion thereof, where the court finds by clear and convincing evidence . . . that the person to be sentenced suffers from a serious physical illness, injury or infirmity with continuing treatment needs which make incarceration inappropriate and that such person does not constitute a substantial risk to the community.").

[11] *State v. Rivera*, 2014 WL 3894274, at *2 (Del. Super. Ct. Aug. 11, 2014) (citing cases).

[12] *Id.*

NOW, THEREFORE, IT IS ORDERED that Diane E. Hofmann's motion for reduction of sentence is **DENIED**.

/s/ Paul R. Wallace
Paul R. Wallace, Judge

Original to Prothonotary

cc: Zachary D. Rosen, Deputy Attorney General
Ms. Diane E. Hofmann, *pro se*
Investigative Services Office