



IN THE SUPREME COURT OF THE STATE OF DELAWARE

WARREN J. WYANT,

Defendant Below,  
Appellant,

v.

No. 412, 2014

STATE OF DELAWARE,

Plaintiff Below,  
Appellee,

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S AMENDED OPENING BRIEF

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DATED: November 18, 2014

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## NATURE AND STAGE OF THE PROCEEDINGS

In November of 1983, this case went to a jury trial in the Superior Court of New Castle County, resulting in Warren Wyant's convictions for two counts of Rape First Degree and one count each of Kidnapping First Degree, Attempted Rape First Degree, and Robbery First Degree for which the Court sentenced him on March 16, 1984. An unsuccessful direct appeal to the Delaware Supreme Court followed, resulting in the affirmance of those sentences and convictions in *Wyant v. State*, 519 A. 2d 649 (Del. 1986). Wyant's subsequent post-conviction efforts were also fruitless at the trial court and appellate level.

On March 8, 2011, within a year of the decision in *Graham v. Florida*, 560 U.S. 48 (2010), Warren Wyant filed his own post-conviction Motion challenging his sentence under *Graham*. On June 9, 2011, the Trial Judge appointed counsel for Mr. Wyant. Briefing occurred without decision and the matter was stayed to await the June 12, 2012 decision of the United States Supreme Court in *Miller v. Alabama*, 132 S.Ct. 2455 (2012). Additional briefing ensued but decision was again stayed to await the legislative action in the Delaware General Assembly re-writing 11 *Del. C.* Section 4204A concerning the sentencing of "youth convicted in Superior Court," approved on June 4, 2013.

On June 26, 2013, Wyant filed a new Motion for Sentence Modification under Superior Court Criminal Rule 35A seeking his release under Section 4204A. Both sides filed legal submissions and sentencing materials. At the end of a hearing held on February 14, 2014, the trial judge granted the Motion in part and denied it in part, announcing his desire to craft a sentence which would result in Wyant's release in the year 2020. Subsequently, on July 22, 2014, after multiple communications and draft orders circulated between and among the parties, the trial judge, and others, the Court issued a Modified Sentencing Order. Appellant Warren Wyant filed a timely notice of appeal. This is Appellant's opening brief on appeal.

## **SUMMARY OF ARGUMENT**

1. The trial judge committed plain error when he issued the sentencing order out of the Defendant's presence and without his personal ability to comment on the actual sentence being imposed.
2. The trial judge abused his discretion when he failed to credit Defendant for the time he was incarcerated in juvenile detention.

## STATEMENT OF FACTS

Warren Wyant was born on November 8, 1965, and was 16 years of age when intoxicated with alcohol and illegal drugs he committed his crimes against the adult female victim in this case: two counts of rape first degree, one of attempted rape first degree, one of kidnapping first degree, and one of robbery first degree. (A1) His arrest occurred a day after the event on October 19, 1982. *Wyant v. State*, 519 A.2d 649, 652 (Del. 1986). Initially, he was in juvenile detention. However, on November 8, 2014, the day after the guilty verdicts in his trial, Wyant turned 18 years of age and was transferred from juvenile custody to adult prison. (A-3) He has been in prison continuously during the 32 years from that date to the filing of this brief.

After the completion of a pre-sentence report, the trial judge sentenced Wyant on the two counts of rape and the one count of kidnapping to three consecutive terms of life imprisonment with no parole or release for 20 years on each count; as to the attempted rape a fourth consecutive parole-able term of life imprisonment; and as to the robbery first degree 15 years of incarceration of which the first 3 years were designated as mandatory. (A-5) Under that sentence, the parties agreed that Wyant could not have achieved release until he was 80 years of age in 2046, if granted parole. (A25)



Subsequent to the passage of amended Section 4204A of Title 11, a hearing was held on February 14, 2014. Wyant was present with counsel. There was no testimony as there had been numerous and voluminous filings before the hearing. Argument of counsel was had. (A20-24) The victim spoke against release. (A20) Warren Wyant allocuted, requesting the same. (A24-25) Balancing all of these factors, the judge ultimately declined to issue a specific sentence but expressed his intent to craft one that would result in Wyant's release in 2020, six years hence. (A25-27) Defense counsel asked that the effective date of the sentence be moved from Wyant's 18<sup>th</sup> birthday on November 8, 1983 to the date of juvenile detention a year earlier on October 18, 1982. The judge opined that "I don't think we need to have the defendant back here for this. It's in his favor." (A27)

Subsequently, on February 19, 2014, the court communicated with the Department of Corrections (DOC) which opined that an aggregate 53 year 6 month sentence would result in a short time release date on January 16, 2020. (A28) Thereafter, on March 5, 2014, the Judge proposed a sentencing order based upon the earlier DOC email. (A30-35) In order to avoid confusion, defense counsel emailed the Judge proposing the calculations be clearly memorialized showing how DOC had arrived at the short time release date (STRD) goal. (A36) On March 19, 2014, counsel for the State

took the view that the result sought would be obtained by adding an additional 3 years onto the aggregate sentence totaling 56 ½ years instead of the 53 ½ years proposed by the judge. (A37-38) An office conference was scheduled for April 14, 2014 to discuss the proposed order. (A40) At that conference, the State claimed that the earlier proposed order merely represented the current STRD, but that Wyant could earn an additional 410 meritorious credit and thereby be released in 2019. The prosecutor stated his belief was that the 3 additional years would result in a 2020 release. (A41) Defense counsel pointed out that meritorious good time credits requiring the existence of programs, educational courses and other activities in the prison were frequently unavailable. (A42-43)

On June 9, 2014, the Court proposed another sentencing order in response to comments of both counsel, detailing 56 ½ years of incarceration followed by community supervision and attempting to clarify the Judge's intent that "defendant be released from Level 5 custody on or about January 16, 2020." (A48-56) While the State had no further suggested modifications, defense counsel objected to upward adjustment of Wyant's sentence based upon DOC's "current understanding of the law concerning good time credit," describing the goal release date as a "mirage" and noting that the law of good time credit and DOC's implementation change

unpredictably. (A57)

Without a hearing in Court and without the presence of the Defendant, on July 22, 2014 the Court imposed by written order mailed to counsel the 56 ½ year sentence. Additionally, the Court declined the Defendant's request to credit him the time he spent in juvenile incarceration from October 19, 2014 until he was transferred to adult prison on November 8, 1983. (A59, App. Op. Brf., Exhibit A)

## **ARGUMENT**

- I. THE JUDGE COMMITTED PLAIN ERROR WHEN HE IMPOSED THE FINAL SENTENCE BY MAILING AN ORDER TO COUNSEL.

### **QUESTION PRESENTED**

Whether under Superior Court Criminal Rule 35A, it was plain error to sentence Appellant Wyant by mailing the sentencing Order to him. It is in the interests of justice under Supreme Court Rule 8 to consider this issue because an accused's right to be personally present at the announcement of his final sentence is basic, fundamental and essential to the integrity of the sentencing process. *Turner v. State*, 5 A.3<sup>rd</sup> 612, 615 (Del. 2010).

### **STANDARD AND SCOPE OF REVIEW**

The scope of review is whether the hearing judge committed plain error by sentencing Appellant *in absentia*. Questions not fairly presented below may be considered on appeal when the interests of justice so require. Supr. Ct. R. 8. The error must be clearly prejudicial to a substantial right the denial of which impairs the integrity and fairness of the process. *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982).

### **MERITS OF ARGUMENT**

It is settled law that a criminal defendant has “a fundamental right to

be present at the imposition of final sentence following a criminal conviction.” *Jones v. State*, 672 A.2d 554, 555-556 (Del. 1996); *Hooks v. State*, 429 A.2d 1312, 1313 (Del. 1981); *Fullman v. State*, 431 A.2d 1260 (Del. 1981). Indeed, sentencing is a “critical stage” in a criminal case. *Green v. United States*, 365 U.S. 301 (1961). Superior Court Criminal Rule 43(a) mandates that “the defendant shall be present . . . at the imposition of sentence. . . .” Furthermore, Superior Court Criminal Rule 32(a)(1)(C) provides that “the court shall. . . [a]ddress the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.”

In this case on appeal, this settled and fundamental right was not afforded to the Appellant Warren Wyant. The February 14, 2014 hearing and the July 22, 2014 sentencing were the result of a procedure very similar to a re-sentencing after reversal of sentence. Section 4204A of Title 11 of the Delaware Code was the remedy the judge below was waiting for in order to deal with Wyant’s Motions and argument filed pursuant to the *Graham* and *Miller* cases. Whenever the sentencing court has any discretion in fashioning the sentence it will impose, a defendant must be present. *Fullman v. State*, 431 A.2d at 1264.

In the case at bar, the judge at the February 14, 2014 hearing did not

produce any specific sentence, stating merely his intent that Wyant be either released or able to earn his release by 2020. During the five months between that hearing and the issuance of a sentence, he experimented with various terms of incarceration, proposing during this time two orders and then issuing a third final one. In each of the sentencing orders, the judge adjusted the periods of incarceration and made legal rulings, ultimately resting upon the one that suited his intent. *Cf. Jones v. State*, 672 A.2d at 556. (“Superior Court’s amended sentence constituted a substantive legal change in Jones sentence, rather than a mere correction. . .”) But he did not sentence the Appellant Warren Wyant in person and he did not address Wyant or hear from him before he imposed the term of incarceration from which this appeal has been taken.

In *United States v. Behrens*, Justice Black made note of just how fundamental the right to be present at the final imposition of sentence is for a criminal defendant:

“It is only then that the judge's final words are spoken and the defendant's punishment is fixed. It is then that the right of the defendant to be afforded an opportunity to make a statement to the judge in his own behalf is of most importance. This right, ancient in the law, is recognized by Rule 32(a) of the Federal Criminal Rules, which requires the court to ‘afford the defendant an opportunity to make a statement in his own behalf

and to present any information in mitigation of punishment.’ This right would be largely lost . . . if for administrative convenience the defendant were not permitted to invoke it when the sentence that counts is pronounced.” 375 U.S. 162, 166 (1963).

The late Chief Justice Herrmann of the Delaware Supreme Court, in his concurrence in *Hooks v. State*, opined in the same vein that the law requires:

“the defendant in a felony case be present in the court room to ‘look upon’ the judge. . . when sentence is imposed. Our system requires more than the delivery of any such ‘message’ by mail . . . to the prisoner in his cell. Such practice engenders, I fear, a misunderstanding and bitterness against ‘the system’ on the part of a prisoner we should strive to avoid.” 429 A.2d at 1314-1315 (Del. 1981).

In this case, the Appellant Warren Wyant has sat in his prison cell for 32 years. He filed a Motion which the trial judge in part granted. He should not have received the final sentence through the mail. The interests of justice, therefore, require that the Appellant’s fundamental and substantial right to be present at the final imposition of his sentence be honored.

- II. THE JUDGE ERRED WHEN HE FAILED TO CHANGE THE EFFECTIVE BEGINNING DATE OF APPELLANT'S TERM OF INCARCERATION FROM THE DATE OF HIS TRANSFER TO ADULT PRISON ON HIS 18<sup>TH</sup> BIRTH DAY TO THE DATE HE WAS ARRESTED AND HELD IN JUVENILE DETENTION MORE THAN A YEAR EARLIER.

### **QUESTIONS PRESENTED**

Whether the Judge should have granted Appellant's request to be given credit toward his Level V sentence for time spent incarcerated in juvenile detention from October 18, 1982 to November 8, 1983. (A27)

### **STANDAR AND SCOPE OF REVIEW**

The Delaware Supreme Court reviews the Superior Court's sentencing of a criminal defendant for abuse of discretion. *Kurzmann v. State*, 903 A.2d 702, 714 (Del. 2006).

### **MERITS OF ARGUMENT**

An inmate is entitled to credit for all time served at Level V incarceration. Juvenile detention qualifies as Level V for purposes of computing time served under 11 Del. C. Section 3901(b). Wyant asked for,



and was entitled to, credit for this time he spent incarcerated “as a matter of law. *Oakley v. State*, 2008 WL 836598, \*2, 3 (Del. March 31, 2008). The trial judge, therefore, erroneously denied Wyant’s request and retained the date of Wyant’s adult incarceration as the effective date his sentence, thus denying Wyant the credit he was entitled to for the year he spent incarcerated in a juvenile facility.

## CONCLUSION

For all the foregoing reasons and authorities, the Appellant respectfully requests that his sentences be reversed and that the case be remanded for another sentencing hearing to be conducted in court with the Appellant present.

Respectfully submitted,

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DATED: November 18, 2014

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

STATE OF DELAWARE

VS.

WARREN J WYANT

Alias: No Aliases

DOB: 11/08/1965

SBI: 00176129

CASE NUMBER:

83000839DI

CRIMINAL ACTION NUMBER:

IN83-02-1502R1

RAPE 1ST(F)

IN83-02-1503R1

RAPE 1ST(F)

IN83-02-1504R1

KIDNAPPING 1ST(F)

IN83-02-1501R1

ATT-RAPE 1ST(F)

IN83-02-1505R1

ROBBERY 1ST(F)

MODIFIED SENTENCE ORDER

NOW THIS 22ND DAY OF JULY, 2014, IT IS THE ORDER OF THE COURT THAT: THE ORDER DATED March 16, 1984 IS HEREBY MODIFIED AS FOLLOWS:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN83-02-1502-R1 : NON-TIS  
RAPE 1ST

Effective November 8, 1983 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5 with credit for 8 day(s) previously served

- Suspended after 38 year(s) 6 month(s) at supervision level 5

- No probation to follow.

\*\*APPROVED ORDER\*\* 1 November 7, 2014 13:11

**Exhibit A**

STATE OF DELAWARE

VS.

WARREN J WYANT

DOB: 11/08/1965

SBI: 00176129

AS TO IN83-02-1503-R1 : NON-TIS

RAPE 1ST

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

- Suspended after 18 year(s) at supervision level 5

- For 15 year(s) supervision level 4

- Suspended after 6 month(s) at supervision level 4 DOC DISCRETION

- Followed by 14 year(s) 6 month(s) at supervision level 3

- Hold at supervision level 5

- Until space is available at supervision level 4 DOC DISCRETION

AS TO IN83-02-1504-R1 : NON-TIS

KIDNAPPING 1ST

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

- Suspended for 15 year(s) at supervision level 3

Probation is concurrent to criminal action number 83-02-1503 .

AS TO IN83-02-1501-R1 : NON-TIS

ATT-RAPE 1ST

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

- Suspended for 15 year(s) at supervision level 3

Probation is concurrent to criminal action number 83-02-1504 .

AS TO IN83-02-1505-R1 : NON-TIS

ROBBERY 1ST

- The defendant is placed in the custody of the Department of Correction for 15 year(s) at supervision level 5

\*\*APPROVED ORDER\*\*            2            November 7, 2014 13:11

STATE OF DELAWARE  
VS.  
WARREN J WYANT  
DOB: 11/08/1965  
SBI: 00176129

- Suspended for 15 year(s) at supervision level 3

Probation is concurrent to criminal action number  
83-02-1501 .

\*\*APPROVED ORDER\*\*

3

November 7, 2014 13:11

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE

VS.

WARREN J WYANT

DOB: 11/08/1965

SBI: 00176129

CASE NUMBER:

83000839DI

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Defendant shall successfully complete anger management, counseling, treatment program.

The defendant is to be evaluated for and participate in Sex Offenders program as deemed appropriate by Probation Officer.

Have no contact with victim

Zero tolerance

NOTES

=====-Modified Order=====

And now this 22nd day of July, 2014, it is the order of the Court that the original sentence dated 3/16/84 is hereby modified pursuant to 11 Del.C. 4204(A)(d). The effective date of 11/8/83 is correct and reflects the date the defendant went into adult correctional custody (he had previously been in juvenile correctional custody). The Court has conferred with the Department of Correction for advice about structuring the modified sentence so that a January 16, 2020 STRD is created, which was the Court's stated intention at the time of sentencing, with 15 years of probation to follow. Per DOC's calculation, pursuant to this modified sentence order, defendant's STRD is now 1/16/20.

The Court's intent is that defendant be released from Level 5 custody on or about January 16, 2020.

=====

The Court retains jurisdiction to further modify this sentence if it should later appear that the Defendant has earned all eligible good time credits, but that the adjusted release date becomes an operative date beyond

\*\*APPROVED ORDER\*\*      4      November 7, 2014 13:11

STATE OF DELAWARE  
VS.  
WARREN J WYANT  
DOB: 11/08/1965  
SBI: 00176129

January 26, 2020.

All original terms and conditions of previous sentencing order remain the same.

This Court incorporates by reference an email dated 5/13/14 to the undersigned judge from Rebecca McBride (Director of Offender Records, DOC) that sets forth how the Department of Correction has calculated a January 2020 release date (attached to this sentence order as a Exhibit A).

NOTE:

The intended end date of the term of imprisonment is identified pursuant to this court's discretion to specify such date under 11 Del. C. 3901(a). The court seeks to insure that each component of this sentence be carried out as intended as each is integrated into the court's overall sentencing plan in this unusual set of circumstances. See Defoe v. State, 750 A. 2d 1200, 1202 (Del. 2000).

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JUDGE RICHARD R COOCH

FINANCIAL SUMMARY

STATE OF DELAWARE  
VS.  
WARREN J WYANT  
DOB: 11/08/1965  
SBI: 00176129

CASE NUMBER:  
83000839DI

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	300.00
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	4.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	5.00
DELJIS FEE ORDERED	5.00
SECURITY FEE ORDERED	50.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	75.00
SENIOR TRUST FUND FEE	
<hr/>	
TOTAL	439.00

\*\*APPROVED ORDER\*\*      6      November 7, 2014 13:11