IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
v.	)	ID# 1007023229
SHAUN MITCHELL,	)	
Defendant.	)	

Submitted: October 16, 2019
Decided: November 27, 2019

On Defendant's Motion for Concurrent Sentencing.
DENIED.

ORDER

Matthew C. Bloom, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Shaun Mitchell, Smyrna, Delaware, Defendant, *pro se*.

COOCH, R.J.

This 27th day of November, 2019, upon consideration of Defendant's Motion, it appears to the Court that:

1. On February 11, 2011, a Superior Court jury convicted Defendant of Assault in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony, Attempted Robbery in the First Degree, and two counts of Reckless Endangering in the Second Degree. On May 13, 2011, Defendant was sentenced to eleven years in prison. On January 12, 2012, the Delaware Supreme Court affirmed Defendant's convictions and sentences on direct appeal.[1]

2. On July 2, 2019, Defendant filed this motion to modify his sentences to run concurrently. In this motion, Defendant stated "So I would like to know if you could run the rest of my time concurrent sir?"[2] Defendant additionally asserts that he is not from this State, that he would like to return his home in Virginia, that Delaware has "got their time outta me," that he is "ready to do right[,]" that he "did basically all [of his] time[,]" that he has a job "working with [his] Dad[,]" and that he would have to be "out in the world" to begin designing sneakers and clothes.[3]

3. The Court must determine, when addressing a sentence modification request, whether the procedural mechanism is available in that particular circumstance.[4] Defendant asks this court to modify his sentence by ordering his sentences to run concurrently in light of the recent passage of legislation of the 150th General Assembly that further expanded a Delaware sentencing court's authority to impose concurrent, rather than consecutive, terms of confinement.[5]

---

[1] *Mitchell v. State*, 2012 WL 112602, at *2 (Del. Jan. 12, 2012).
[2] Def.'s Mot. for Concurrent Sentencing at p. 1.
[3] *Id.*
[4] *State v. Tollis*, 126 A.3d 1117, 1119 (Del. Super. Ct. 2016) *See e.g., State v. Culp*, 152 A.3d 141 (Del. 2016) (Delaware Supreme Court examines the several sources of authority a trial court might have – but that were then inapplicable or unavailable – when the trial court reduced sentence); *see also State v. Redden*, 111 A.3d 602, 606 (Del. Super. Ct. 2015) (When considering requests for sentence modification, "this Court addresses any applicable procedural bars before turning to the merits.").
[5] *See* Del. H.B. 5 § 1, 150th Gen. Assem. 82 Del. Laws Ch. 66, § 1 (2019) (*amending* Del. Code Ann. Tit. 11, § 3901(d)).

4. Although Defendant does not specifically cite Superior Court Criminal Rule 35(b) ("Rule 35(b)") in his motion, this motion is clearly a request to modify his sentence to run all sentences concurrently and governed under Rule 35(b). "There is no separate procedure, other than that which is provided under Superior Court Criminal Rule 35, to reduce or modify a sentence."[6] However, "Rule 35(b) is not [...] an instrument for re-examination of previously imposed sentences in light of subsequent statutory changes."[7] The purpose of Rule 35(b) is to provide this Court a reasonable period to consider alteration of its sentencing judgment.[8] "The reason for such a rule is to give a sentencing judge a second chance to consider whether the initial sentence is appropriate."[9] Additionally, "[a] request for leniency and reexamination of the sentencing factors [in existence when the original sentence was imposed are] precisely the stuff of which a proper and *timely* Rule 35(b) motion is made."[10] An untimely Rule 35(b) motion is permitted only when a Defendant demonstrates "extraordinary circumstances" for consideration.[11] This term, "extraordinary circumstances," is defined as "[a] highly unusual set of facts that are not commonly associated with a particular thing or event."[12] For purposes of Rule 35(b) motions, "extraordinary circumstances" have been found only "when an offender

---

[6] *Jones v. State*, 2003 WL 21210348, at *1 (Del. May 22, 2003).

[7] *State v. Thomas*, 2019 WL 5704287 (Del. Super. October 31, 2019).

[8] *Redden*, 111 A.3d at 606.

[9] *State v. Reed*, 2014 WL 7148921, at *2 (Del. Super. Ct. Dec. 16, 2014) (citing *United States v. Ellenbogen*, 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).)); *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). *See also State v. Tinsley*, 928 P.2d 1220, 1223 (Alaska Ct. App. 1996) (explaining that under Alaska's like sentence-review rule, court's "authority can be exercised even when there is no reason to reduce the sentence other than the judge's decision to reconsider and show mercy.").

[10] *State v. Remedio*, 108 A.3d 326, 331-32 (Del. Super. Ct. 2014) (emphasis in original).

[11] *State v. Lewis*, 797 A.2d 1198 (Del. 2002); *State v. Diaz*, 2015 WL 1741768, at *2 (Del. Apr. 15, 2015) ("In order to uphold the finality of judgments, a heavy burden is placed on the defendant to prove extraordinary circumstances when a Rule 35 motion is filed outside of ninety days of the imposition of a sentence.").

[12] *Diaz*, 2015 WL 1741768, at *2 (citing BLACK'S LAW DICTIONARY (10th ed. 2014)); *id.* (observing also that, in the Rule 35(b) context, "'extraordinary circumstances' are those which 'specifically justify the delay;' are 'entirely beyond a petitioner's control;' and 'have prevented the applicant from seeking the remedy on a timely basis.'"); *Remedio*, 108 A.3d at 332.

faces some genuinely compelling change in circumstances that makes a resentencing urgent."[13]

5. Delaware Criminal Code §3901 provides for the fixing of terms of imprisonment. Initially, before the legislative change in recent years, § 3901(d) read: "No sentence of confinement of any criminal defendant by any court of this State shall be made to run concurrently with any other sentence of confinement imposed on such criminal defendant."[14] This ban on concurrent terms of incarceration was removed on July 9, 2014, when the General Assembly amended § 3901(d) to provide:

> The court shall direct whether the sentence of confinement of any criminal defendant by any court of this State shall be made to run concurrently or consecutively with any other sentence of confinement imposed on such criminal defendant. Notwithstanding the foregoing, no sentence of confinement of any criminal defendant by any court of this State shall be made to run concurrently with any other sentence of confinement imposed on such criminal defendant for any conviction of [certain enumerated] crimes.[15]

6. The retroactive applicability of § 3901 of the Delaware Criminal Code does not exist in the legislative change made with regards to "House Bill #5." In *State v. Thomas*,[16] this Court provided a very recent and exemplar explanation:

> The Delaware Supreme Court's decision in *Fountain v. State*[17] is both instructive and controlling here. The Court first thoroughly examined and explained Delaware's general rule of prospectivity (and its possible exceptions).[18] Then, more importantly here, the Court went on to point out that any retroactive application of a sentencing change to those already serving a sentence would "have a large effect on segments of the public, law enforcement and defense resources, and the judiciary itself."[19] And, as a consequence, before retroactively applying any such statutory

---

[13] *Fountain v. State*, 139 A.3d 837, 842 n.20 (Del. 2016).
[14] DEL. CODE ANN. tit. 11, § 3901(d) (1977) (as amended by enactment of 61 DEL. LAWS ch. 158 (1977)).
[15] 79 DEL. LAWS ch. 297 (2014) (*amending* DEL. CODE ANN. tit. 11, § 3901(d)) (hereinafter "2014 Amended Sentencing Act").
[16] *State v. Thomas*, 2019 WL 5704287 (Del. Super. October 31, 2019).
[17] 139 A.3d 837 (Del. 2016).
[18] *Id.* at 841-42.
[19] *Id.* at 843.

> sentencing change, a Court must be sure that the enacting legislation "provide[s] for retroactivity explicitly and...include[s] special procedures to address its retrospective application."[20]
>
> The General Assembly's non-retroactive intent is even clearer with the 2019 Amended Sentencing Act. For the General Assembly is presumed to have known—when it further amended § 3901(d) to allow greater discretion to concurrently sentence—of these judicial decisions on the retroactivity of such amendments.[21] In the face of that clear, existing, and recent case law, the General Assembly then would have—if it wanted review and modifications for sentenced inmates—provided for new § 3901(d)'s retroactivity explicitly and included special procedures to address its retrospective application. The General Assembly did not. And this Court cannot in its stead.[22]

"[T]he General Assembly neither provided for such retroactivity explicitly nor included special procedures to address its retrospective application."[23] As such, retroactive applicability of Delaware Criminal Code § 3901 is prohibited.

7. Therefore, Defendant's Motion for Concurrent Sentencing is **DENIED.**

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotary
Investigative Services

[20] *Id.*
[21] *State v. Cooper*, 575 A.2d 1074, 1076-77 (Del. 1990); *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 239 n. 13 (Del. 1982); *Husband v. Wife,* 367 A.2d 636, 637 (Del. 1976).
[22] *Evans v. State*, 212 A.3d 308, 314 (Del. Super. Ct. 2019) (Court is not free to interpret or add to statutes to obtain what a party claims "would be a more 'workable' result or sound public policy.").
[23] *Thomas*, at p. 14 (Del. Super. October 31, 2019).