

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
)
 v.) ID# 91009844DI
)
 CHRISTOPHER R. DESMOND,)
)
 Defendant.)
)

Submitted: October 28, 2019
Decided: November 27, 2019

On Defendant’s “Motion to Run All Sentences Concurrent Pursuant to 11 Del. C. §
3901(d) as Amended by 150th Delaware General Assembly’s HB#5”
DENIED.

ORDER

Maria T. Knoll, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Christopher R. Desmond, 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 November 9, 1992, a Superior Court jury convicted Defendant of twenty-nine criminal charges, including ten counts of Robbery in the First Degree and ten counts of Possession of a Deadly Weapon During the Commission of a Felony, as well as other related offenses. On January 15, 1993, Defendant was sentenced to more than seventy-eight years in prison. The Delaware Supreme Court affirmed Defendant's convictions and sentences on direct appeal.¹ Since his convictions, Defendant has filed numerous motions seeking postconviction relief, habeas corpus relief, and modification of his sentence.² Now Defendant again seeks modification of his sentence by asking this Court to modify his sentences to run concurrently.
2. On July 2, 2019, Defendant filed a motion titled "Motion to Run All Sentences Concurrent Pursuant to 11 Del. C. § 3901(d) as Amended by 150th Delaware General Assembly's HB#5." In this motion, "[Defendant] seeks to correct the injustice imputed upon him which [House Bill #5] was [enacted] for defendants like him who the State stacked charges upon them to obtain long sentences."³ Defendant asserts that, since "[t]here is no expressed legislative intent in HB#5 that would prohibit the Court from retroactive application of § 3901(d) (2019)[,]" the Court must modify his sentence retroactively to allow for his sentences to run concurrently. Defendant supports this contention by stating "[t]he Court must apply the synopsis when reading the intent of the application in (HB#5) [*Carper v. New Castle County*], 432 A.2d

¹ *Desmond v. State*, 654 A.2d 821 (Del. 1994).

² *See, e.g., Desmond v. State*, 49 A.3d 1192 (Del. Aug. 9, 2012) (affirming the Superior Court's dismissal of Defendant's eighth motion for postconviction relief as procedurally barred); *State v. Desmond*, I.D. No. 9100984DI, Del. Super., June 18, 2019 (ORDER) (summarily dismissing Defendant's twelfth motion for postconviction relief); *State v. Desmond*, 2018 WL 3409916 (Del. Super. Ct. July 10, 2018) (dismissing Defendant's eleventh motion for postconviction relief); *State v. Desmond*, I.D. No. 9100984DI, Del. Super., Jan. 10, 2014 (LETTER ORDER) (denying Defendant's tenth motion for conviction relief as repetitive and procedurally barred); *State v. Desmond*, 2013 WL 1090965 (Del. Super. Ct. Feb. 26, 2013) (denying Defendant's ninth motion for postconviction relief as procedurally barred as untimely and repetitive); *State v. Desmond*, 2011 WL 91984 (Del. Super. Ct. Jan. 5, 2011) (detailing Desmond's history of postconviction applications up to and including his seventh motion under Superior Court Criminal Rule 61).

³ Mot. at p. 2.

1202 (Del. 1981) (synopsis of Bill is a proper source of legislative intent.)”

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 “HB#5” or “House Bill #5.” House Bill #5 refers to the recent 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
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

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)).

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

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 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

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.

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)).

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 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

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.

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.”).

Therefore, despite Defendant's assertion that the legislative intent inferred from the "synopsis" of "HB#5" permits retroactive applicability and grants this Court the ability to modify Defendant's sentences to run concurrently, "the General Assembly neither provided for such retroactivity explicitly nor included special procedures to address its retrospective application."²³ As such, retroactive applicability of "HB#5" is prohibited.

10. Therefore, Defendant's "Motion to Run All Sentences Concurrent Pursuant to 11 Del. C. § 3901(d) as Amended by 150th Delaware General Assembly's HB#5" is **DENIED**.

IT IS SO ORDERED.



Richard R. Cooch, R.J.

cc: Prothonotary
Investigative Services

²³ *Thomas*, at p. 14 (Del. Super. October 31, 2019).