

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

v.

ZAAHIR SMITH,

Defendant.

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I.D. Nos. 1605014734A
1605014734B

ORDER

Submitted: April 30, 2020

Decided: August 3, 2020¹

AND NOW TO WIT, this 3rd day of August, 2020, upon consideration of Defendant Zaahir Smith’s (“Defendant”) Motion for Reduction/Modification of Sentence presented through Defense Counsel, the State’s Response, the sentence imposed upon the Defendant, and the record in this case, it appears to the Court that:

1. Defendant’s case involved extensive litigation including pre-trial motion practice related to various violent crimes that connected Defendant and his co-defendants to a series of gang-related activity, including but not limited to multiple executed and attempted robberies, assaults, and the murder-shooting of

¹ The United States of America and the State of Delaware declared states of emergency due to COVID-19 that resulted in court closures to address public safety concerns. Per Administrative Directives of the Supreme Court of the State of Delaware and the Delaware Superior Court, and the national and local states of emergency, “[u]nder the authority of 10 *Del. C.* § 2004, the judicial emergency for all State courts and their facilities in Delaware [was] extended for another 30 days effective July 8, 2020” Administrative Order No. 8 Extension of Judicial Emergency (Del. July 6, 2020).

fourteen year old, Brandon Wingo, killed in broad daylight as he walked home from school. This Court presided over the trial of co-defendant, Diamonte Taylor (Taylor), found guilty of the Murder First Degree and other gang-related crimes. Taylor received a life sentence for the Wingo murder.

2. On March 8, 2019, Defendant entered into a Plea Agreement with the State.² He pled guilty to one count of Robbery First Degree, one count of Attempted Robbery First Degree, one count of Assault First Degree, two counts of Possession of a Firearm During the Commission of a Felony (“PFDCF”), one count of Conspiracy First Degree as to the murder of Brandon Wingo, and one count of Gang Participation.³

3. After an appropriate colloquy with Defendant in open court, the Court determined that he understood the nature of the charges to which he was pleading guilty, and the consequences of his plea.⁴ Defendant fully acknowledged when he entered into the plea that he understood the range of possible penalties, including a minimum fourteen year-period of incarceration and up to 136 years in prison.

² Trial Calendar/Plea Hearing: Pled Guilty/ PSI Ordered, *State of Delaware v. Zaahir Smith*, Crim. ID No. 1605014734A, D.I. 56 (Del. Super. Ct. Mar. 8, 2019) [hereinafter “Def.’s Plea”].

³ *See id.*

⁴ *See* DEL. SUPER. CT. CRIM. R.11(c)(1).

4. Sentencing took place on January 31, 2020. The Court reviewed sentencing memoranda, a pre-sentence investigation report, and took into consideration the recommendations from Defendant and the State.

5. In consideration of his severance from the trial of Taylor and his guilty plea, the State agreed to cap its recommendation to twenty-five years of incarceration. The State submitted its sentencing memoranda and its basis for the recommendation. It further recommended that the Court impose the maximum statutory penalty of eight years for Conspiracy First Degree as to the Murder of Brandon Wingo, and that it be served under 11 *Del. C.* § 4204(k)(1) without the benefit of good or credit time.⁵

6. Defense Counsel argued for the minimum mandatory sentence of fourteen years and for concurrent sentencing under 11 *Del. C.* § 3901(d).⁶ The statutory changes—effective after Defendant accepted his plea agreement but prior to sentencing—provided the Court discretion to consider whether some of Defendant’s sentences would run concurrently.

⁵ See 11 *Del. C.* § 4204(k)(1) (providing for the sentencing of Level V time “without benefit of any form of early release, good time, furlough, work release, supervised custody or any other form of reduction or diminution of sentence.”).

⁶ See 11 *Del. C.* § 3901 (providing for the fixing of terms of imprisonment within the Court’s discretion to direct).

7. The Court imposed a sentence of twenty-one years of incarceration followed by transitioning levels of probation.⁷ On April 27, 2020, Defendant, through Defense Counsel, filed this motion for reduction under Delaware Superior Court Criminal Rule 35(b).⁸ He asks this Court “to consider and weigh [Defendant’s] respective involvement [in the crimes at the core of his case] and reduce his sentence accordingly.”⁹ On April 30, 2020, the State filed its Response opposing any reduction of Defendant’s sentence, reiterating Defendant’s role in the crimes at the base of his sentence and stating that the sentence imposed was well within the presumptive guidelines.¹⁰

8. Under Superior Court Criminal Rule 35(b), the Court may reduce a sentence of imprisonment on a motion made within ninety days after the imposition

⁷ Defendant was sentenced as follows: (1) For the Robbery First Degree charge, twenty-five years at Level V, suspended after ten years at Level V, for fifteen years at Level IV DOC Discretion, suspended after six months at Level IV DOC Discretion, for two years at Level III; (2) For the Attempted Robbery First Degree charge, three years at Level V, no probation to follow; (3) For the Assault charge, two years at Level V, no probation to follow; (4) For each PFDCF charge, three years at Level V, no probation for follow; (5) For the Conspiracy charge, one year at Level V, suspended for one year at Level III; (6) For the Gang Participation charge, one year at Level V, suspended for one year at Level II. Sentencing Calendar: Defendant Sentenced, *State of Delaware v. Zaahir Smith*, Crim. ID No. 1605014734A, D.I. 57 (Del. Super. Ct. Jan. 31, 2020). Defendant’s sentence calls for probation to run concurrently and his Level V sentences to run consecutively. *Id.*

⁸ See Defendant’s Motion for Modification, *State of Delaware v. Zaahir Smith*, Crim. ID No. 1605014734A, D.I. 58 (Del. Super. Ct. July 31, 2020) [hereinafter “Def.’s Mot.”]; see also DEL. SUPER. CT. CRIM. R. 35(b).

⁹ Def’s Mot. ¶ 6.

¹⁰ See State’s Response to Defendant’s Motion for Modification, *State of Delaware v. Zaahir Smith*, Crim. ID No. 1605014734A, D.I. 59 (Del. Super. Ct. July 31, 2020) [hereinafter “State’s Resp.”].

of the sentence.¹¹ Defendant is not time-barred. “Rule 35(b) allows for a reduction of sentence without regard to the existence of a legal defect.”¹² Thus, relief under Rule 35(b) is within the sound discretion of the Sentencing Court.¹³ Accordingly, a timely and non-repetitive Rule 35(b) motion is “essentially a ‘plea for leniency.’”¹⁴

9. Defendant argues for leniency and asks the Court to impose on Robbery First Degree two to five years.¹⁵ This argument is without merit. Defendant’s argument for reduction of sentence downplays his role in the string of criminal activity that led to his incarceration.¹⁶ The Court granted leniency when it rejected the State’s recommendation of twenty-five years imprisonment. Additional lenity was offered when it declined to impose the maximum penalty recommended as to the Conspiracy First Degree as to the Murder of Brandon Wingo under 11 *Del. C.* § 4204(k)(1) where Defendant would have lost the benefit of good or credit time.

10. In the alternative, he again argues for concurrent sentencing.¹⁷ This argument is also without merit. Defendant is serving a fourteen-year minimum mandatory sentence and cannot obtain relief under Rule 35(b) where the rule provides no authority for a reduction or suspension of the mandatory portion of a

¹¹ DEL. SUPER. CT. CRIM. R. 35(b).

¹² *State v. Lewis*, 797 A.2d 1198, 1201 (Del. 2002).

¹³ *Id.*

¹⁴ *Id.* at 1202 (quoting *United States v. Maynard*, 485 F.2d 247, 248 (9th Cir. 1973)).

¹⁵ See Def.’s Mot. ¶ 3.

¹⁶ See State’s Resp. at 1.

¹⁷ See Def.’s Mot. at ¶ 7.

substantive statutory minimum sentence.¹⁸ As for the remaining non-minimum mandatory sentence, Defendant again seeks concurrent sentencing.¹⁹

11. The Court considered this request at sentencing and though no statutory reference is cited in this Motion, the Court again reviews his request under 11 *Del. C.* § 3901.²⁰ Under § 3901(d), the Court retains discretion to direct Defendant's Level V sentence terms to be served concurrently.²¹ Defendant's PFDCF sentences and Assault sentence are not eligible to run concurrently.²² The 2019 amendment removed some of Defendant's offenses from the 2014 Amended Sentencing Act list, previously prohibited from having concurrent sentences.²³ Although the remaining Robbery, Conspiracy, and Gang Participation sentences are concurrent-eligible, his request is, again, denied.

¹⁸ *State v. Sturgis*, 947 A.2d 1087, 1092 (Del. 2008).

¹⁹ Def.'s Mot. ¶ 7.

²⁰ *See* 11 *Del. C.* § 3901 (providing for the fixing of terms of imprisonment within the Court's discretion to direct).

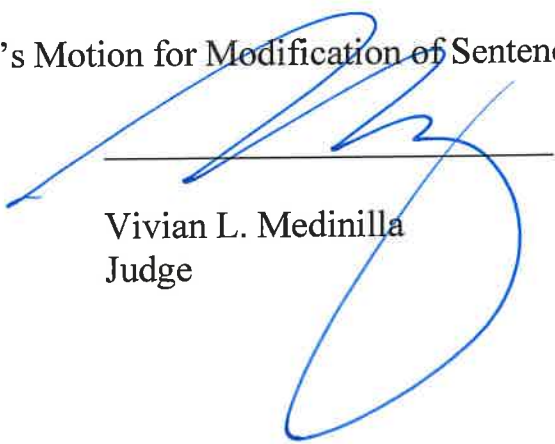
²¹ *See* 11 *Del. C.* § 3901(d).

²² *See id.*

²³ *See* 82 Del. Laws ch. 66, § 1 (2019).

12. No additional information warrants reduction of the sentence of imposing concurrent sentences. The sentences remain appropriate for the reasons stated at the time of sentencing, imposed within the presumptive guidelines.

IT IS SO ORDERED that Defendant's Motion for Modification of Sentence is **DENIED**.



Vivian L. Medinilla
Judge

oc: Prothonotary
cc: Defendant
Michael C. Heyden, Esquire
Department of Justice
Investigative Services