IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. No. 1604009712
	)	
CHARLES S. KING II,	)	
	)	
Defendant.	)	

Date Submitted: January 30, 2023
Date Decided: March 7, 2023

ORDER

Upon consideration of Defendant's "Motion for Reduction" ("Motion"),[1] Superior Court Criminal Rule 35(b), statutory and decisional law, and the record in this case, **IT APPEARS THAT**:

(1) On May 3, 2016, Defendant pled guilty to two counts of Driving Under the Influence ("DUI") and Aggravated Possession.[2] By Order dated May 3, 2016,[3] effective April 15, 2016, Defendant was sentenced as follows: as to the first count of DUI, Third Offense,[4] 2 years at Level V, suspended after 8 months at Level V for 1 year at Level III; as to the second count of DUI, Third Offense, 2 years at Level

[1] D.I. 48.
[2] D.I. 2. The plea agreement encompassed charges accrued over four cases: Case ID Nos. 1511004961, 1512014487, 1604009712, and 1512003243. Defendant accrued two separate DUI charges in Case ID Nos. 1511004961 and 1512014487. Each DUI offense was charged as a "third offense." Defendant's Aggravated Possession charge arose out of Case ID No. 1604009712.
[3] D.I. 4. The Court ordered the Level III probation for each charge to run concurrently.
[4] Defendant was also ordered to pay a $500 fine and $250 in restitution.

V, suspended after 8 months at Level V for 1 year at Level III; and as to Aggravated Possession, 8 years at Level V, suspended for 1 year at Level III. Defendant was sentenced to a total of 16 months of unsuspended Level V time

(2) Since 2016, Defendant has been found in violation of probation on four separate occasions and as recently as November 22, 2022.[5] Following a hearing on November 22, 2022,[6] Defendant was found in violation and resentenced as follows: as to Aggravated Possession, 5 years at Level V, suspended for 5 years at Level IV DOC Discretion, suspended after 9 months at Level IV DOC Discretion for 1 year at Level III, and as to DUI, Fourth Offense,[7] Defendant was discharged as unimproved.[8]

(3) On January 30, 2023, Defendant filed the instant Motion for sentence modification under Superior Court Criminal Rule 35(b).[9] He asks the Court to reduce his sentence to 5 years at Level V, suspended for 6 months at Level IV, followed by 1 year at Level III.[10] Defendant also asks that the terms of his probation be modified to require that he be administered an injection of Vivitrol every month

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[5] D.I. 19; D.I. 33; D.I. 38; D.I. 46.
[6] D.I. 46.
[7] D.I.33. Defendant violated the terms of his probation by accruing additional criminal charges, and on October 31, 2019, Defendant pled guilty to DUI, Fourth Offense in Case ID No. 19011382. *Id.*
[8] D.I. 47.
[9] D.I. 48.
[10] *Id.*

while under the supervision of the DOC.[11] In support of his Motion, Defendant cites (1) the prevalence of drugs in prison; (2) his "7 plus months clean;"[12] (3) the needs of his family; (4) prior treatment; and (5) a concerning health issue.[13]

(4) Rule 35(b) governs motions for modification or reduction of sentence.[14] "Under Rule 35(b), a motion for sentence modification must be filed within ninety days of sentencing, absent a showing of 'extraordinary circumstances.'"[15] The Court "may . . .[however]. . . reduce the . . . term or conditions of partial confinement or probation at any time."[16] Rule 35(b) also mandates that "[t]he [C]ourt *will not* consider repetitive requests for reduction of sentence."[17] "[T]his bar is absolute and flatly 'prohibits repetitive requests for reduction of sentence.'"[18]

(5) Defendant's Motion is not time-barred because he is seeking a

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[11] D.I. 48. Vivitrol is a physician-administered treatment option for individuals suffering from opioid and alcohol dependence. Vivitrol, *What is Vivitrol?*, Vivitrol, https://www.vivitrolhcp.com/what-is-vivitrol-od (last visited Mar. 2, 2023).

[12] *Id.* Defendant states that he is seven months sober as of January 22, 2023. *Id.* Defendant was committed to DOC custody on June 11, 2022, seven months before filing his motion. D.I. 46.

[13] *Id.* Defendant disclosed that a 2-2.5 cm mass was found in his left breast following an ultrasound. *Id.* He states that it will take more than a month for him to have the mass biopsied, and he is concerned that "this process will take too long and [he is] not getting the proper medical treatment." *Id.*

[14] Super. Ct. Crim. R. 35(b).

[15] *Croll v. State*, 2020 WL 1909193, at *1 (Del. Apr. 17, 2020) (TABLE) (affirming the Superior Court's denial of a motion for modification of sentence where the motion was repetitive and filed beyond the 90-day limit); *see Hewett v. State*, 2014 WL 5020251, at *1 (Del. Oct. 7, 2014) ("When a motion for reduction of sentence is filed within ninety days of sentencing, the Superior Court has broad discretion to decide whether to alter its judgment.").

[16] Super. Ct. Crim. R. 35(b).

[17] *Id.* (emphasis added).

[18] *State v. Redden*, 111 A.3d 602, 609 (Del. Super. 2015) (quoting *Thomas v. State*, 2002 WL 31681804, at *1 (Del. Nov. 25, 2002)).

modification of his Level IV sentence. Defendant's motion is not procedurally barred as repetitive because this is his first motion for modification since he was resentenced on November 22, 2022.

(6) Rule 35(b) places the burden of proof on "the movant to establish cause to modify a lawfully imposed sentence."[19] Although the rule does not set forth specific criteria which must be met before the Court may grant a Rule 35(b) motion, "common sense dictates that the Court may modify a sentence if present circumstances indicate that the previously imposed sentence is no longer appropriate."[20]

(7) Based on the record, which includes a history of drug addiction and multiple violations of probation,[21] Defendant demonstrates a lack of amenability to supervision that does not justify a modification of his sentence. Moreover, no additional information has been provided to the Court that would warrant a reduction or modification of his sentence. Accordingly, the Court finds that Defendant's sentence remains appropriate.

(8) To the extent Defendant asks the Court to impose a new condition to the terms of his probation requiring that he be administered an injection of Vivitrol on a monthly basis while under the supervision of the DOC, the Court notes that

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[19] *State v. Joseph*, 2018 WL 1895697, at *1 (Del. Super. Apr. 11, 2018).
[20] *State v. Bailey*, 2017 WL 8787504, at *1 (Del. Super. Oct. 3, 2017).
[21] D.I. 19; D.I. 33; D.I. 38; D.I. 46.

Defendant's Level IV sentence is subject to DOC Discretion. The DOC is in a better position to determine what treatment programs and conditions best fit his needs. Rather than ordering a specific type of treatment, the Court will defer to the DOC to determine what type of treatment is appropriate.

(9) With respect to Defendant's health-related concerns, the Court notes that a motion under Rule 35(b) is not the appropriate vehicle for modification of one's sentence based on medical illness.[22] "Under the plain language of Rule 35(b), Section 4217 is the appropriate mechanism through which an offender may pursue a sentence modification based upon serious medical illness."[23]

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Modification of Probation is **DENIED**.

/s/ Jan R. Jurden
Jan R. Jurden, President Judge

cc: Original to Prothonotary
Christopher S. Marques, DAG
Charles S. King II (SBI# 00488858)

[22] *See Jarvis v. State*, 279 A.3d 815, 2022 WL 2276278, at *1 (Del. June 22, 2022)(TABLE); *State v. Harris*, 2022 WL 472518, at *6 (Del. Super. Feb. 14, 2022).
[23] *Jarvis*, 2022 WL 2276278, at *1.