

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT DONOVAN,	§
	§ No. 220, 2024
Defendant Below,	§
Appellant,	§ Court Below—Superior Court
	§ of the State of Delaware
v.	§
	§ Cr. ID Nos. S2106013062
STATE OF DELAWARE,	§ S2106013115
	§
Appellee.	§
	§

Submitted: July 25, 2024
Decided: September 30, 2024

Before **SEITZ**, Chief Justice; **VALIHURA** and **GRIFFITHS**, Justices.

ORDER

Upon consideration of the appellant’s opening brief, the appellee’s motion to affirm, and the record below, it appears to the Court that:

(1) The appellant, Robert Donovan, filed this appeal from his sentencing for a violation of probation (“VOP”). The State has moved to affirm the judgment below on the ground that it is manifest on the face of Donovan’s opening brief that his appeal is without merit. We agree and affirm.

(2) The Superior Court sentenced Donovan for a VOP on May 3, 2024. After Donovan filed this appeal from his VOP sentence, he filed in the Superior Court a motion for recusal of the Superior Court judge. Donovan asserted that it had recently come to his attention that the judge, who was a public defender before

becoming a judge, had represented Donovan in another case approximately ten years earlier.

(3) The Superior Court judge ruled that the motion was moot because no matters were pending before him and the matter was on appeal to this Court. He further explained that he would decline to recuse himself even if the VOP were still before him. The judge stated that court records indicated that he had represented Donovan in a case that was accepted in Superior Court in November 2012 and resolved by a guilty plea in March 2013. Distinguishing the circumstances in *Craig v. State*,¹ the judge concluded that recusal would not be required because the case in which he had represented Donovan was entirely separate from the current matter. The judge further stated that he did not remember Donovan or the prior case.

(4) In his opening brief, Donovan states that he is not challenging the VOP adjudication. Rather, he is seeking a modification of sentence, apparently to reduce the probationary portion of his sentence from Level III to Level I, restitution only. He reasserts the Superior Court judge's alleged conflict.

(5) Assuming the recusal issue is properly before us, we find no reversible error. Rule 2.11 of the Delaware Judges' Code of Judicial Conduct sets forth the circumstances in which a judge should recuse or disqualify himself or herself. Specifically, Rule 2.11(A)(4) provides that a judge is disqualified when the judge:

¹ 2021 WL 5140997 (Del. Nov. 4, 2021).

(a) served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it, or the judge was associated in the practice of law within the preceding year with a law firm or lawyer acting as counsel in the proceeding; [or]

(b) served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.²

In *Craig*, applying Rule 2.11(A)(4)(a), this Court vacated a Superior Court order denying a motion for sentence correction because the judge who entered the order had represented the defendant in the proceedings that gave rise to the motion for correction of sentence. Here, in contrast, the current VOP matter is entirely unrelated to the matter in which the judge formerly represented Donovan. The judge was not disqualified under Rule 2.11(A)(4).

(6) More generally, Rule 2.11(A) provides that a judge is disqualified “in a proceeding in which the judge’s impartiality might reasonably be questioned,” including when the “judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.”³ The Superior Court judge stated that he did not remember Donovan or the previous case

² DEL. JUDGES’ CODE JUD. COND. R. 2.11(A)(4).

³ *Id.* R. 2.11(A)(1).

and was not biased for or against Donovan, and we find no objective appearance of bias or partiality.⁴

(7) As to Donovan’s request for a sentence modification, “[i]t is well-established that appellate review of sentences is extremely limited.”⁵ Our review of a sentence generally ends upon a determination that the sentence is within the statutory limits prescribed by the legislature.⁶ When sentencing a defendant for a VOP, the trial court may impose any period of incarceration up to and including the balance of the Level V time remaining to be served on the original sentence.⁷ Donovan does not contend that the sentence imposed exceeded the Level V time remaining on his sentence. The Superior Court acted within its discretion when sentencing Donovan for the violation of probation.

⁴ See generally *Jones v. State*, 940 A.2d 1, 18 (Del. 2007) (describing the two-step disqualification analysis articulated in *Los v. Los*, 595 A.2d 381 (Del. 1991)); Del. Jud. Ethics Adv. Comm., Op. 2014-1, at 5-9 available at <https://courts.delaware.gov/forms/download.aspx?id=77888> (opining that a judge/former prosecutor who prosecuted a criminal case is not *per se* disqualified from presiding over a later, unrelated criminal matter involving the same defendant, and setting forth considerations for a disqualification analysis in such circumstances); *id.* at 7 (“A judge is not required to monitor his or her docket in real-time for any Prior Criminal Matter that might create a potential issue of disqualification. In most instances it is the obligation of a party to seek disqualification of the judge”); Ill. Jud. Ethics Comm., Op. 2003-02 (opining, as to Illinois judicial ethics rule similar to Delaware Rule 2.11(A)(4)(a), that a judge who was formerly a public defender is not disqualified from presiding over cases involving defendants that the judge formerly represented unless the judge “personally participated in the . . . defense of the case currently before the court”).

⁵ *Kurzmann v. State*, 903 A.2d 702, 714 (Del. 2006).

⁶ *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

⁷ 11 Del. C. § 4334(c); *Pavulak v. State*, 880 A.2d 1044, 1046 (Del. 2005).

NOW, THEREFORE, IT IS ORDERED that the Motion to Affirm is GRANTED and the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Chief Justice