

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID JENKINS,	§
	§ No. 410, 2005
Defendant Below,	§
Appellant,	§ Court Below – Superior Court
	§ of the State of Delaware,
v.	§ in and for New Castle County
	§ Cr.A. No. 0104000981
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: June 28, 2006

Decided: July 10, 2006

Before **STEELE**, Chief Justice, **HOLLAND**, **JACOBS** and **RIDGELY**,
Justices, and **NOBLE**, Vice Chancellor,¹ constituting the Court *en Banc*.

O R D E R

This tenth day of July 2006, it appears to the Court that:

1) This is an appeal by the defendant-appellant, David Jenkins, from a final judgment of the Superior Court. Jenkins was sentenced to be incarcerated following a violation of probation (“VOP”) hearing. Jenkins argues that the Superior Court erred by considering “any evidence of the purported criminal conduct” that led to his arrest and the charge that he had violated his probation. We have concluded that argument is without merit because it was waived by Jenkins in the Superior Court.

¹ Sitting by designation pursuant to Del. Const. art. IV, § 12 and Supr. Ct. R. 2 and 4.

2) In November 2001, Jenkins entered pleas of guilty to Trafficking in Cocaine and Maintaining a Vehicle for Keeping Controlled Substances. He was sentenced to a period of incarceration followed by probation. In April 2005, Jenkins was charged with violating the terms and conditions of his probation after he was arrested on the new drug charges.

3) A VOP hearing was scheduled for June 28, 2005. Prior to the hearing, Jenkins' attorney moved to suppress the evidence that led to the new criminal charges on the grounds that the police lacked a reasonable suspicion or probable cause to detain him. The pretrial motion to suppress the evidence that resulted in the new criminal charges was also scheduled for June 28, immediately preceding the VOP hearing.

4) On June 28, Jenkins, who had posted bond, appeared at the courthouse with his attorney for case review prior to the presentation of the suppression motion and the VOP hearing. When Jenkins' motion and VOP hearing were called, however, his attorney told the judge that Jenkins had left the courthouse. The Superior Court issued a bench warrant for Jenkins' arrest and denied the suppression motion "for failure to prosecute." Prior to denying the motion to suppress, the Superior Court judge told Jenkins' attorney, "The defense can make whatever application it wants to make after

the fugitive has been taken back into custody and the Court has him in front of the Court.”

5) Jenkins was apprehended and the bench warrant was returned on July 22, 2005. Another VOP hearing was scheduled for August 2. At that VOP hearing, the motion to suppress evidence was not renewed. Following testimony by the police officer who arrested Jenkins for the new drug charges, defense counsel conceded that the probation violation had been established.

[Defense Counsel]: I agree [with the prosecutor]. I believe there was more than enough evidence. There was cocaine found on the defendant at the stop, I don't think we need to get into that. They proved their case.

The trooper testified honestly. My client didn't put on any evidence. He violated probation.

The Superior Court found Jenkins in violation of his probation and sentenced him to a period of incarceration.²

6) Following the VOP hearing, the new criminal charges that led to Jenkins' arrest continued to proceed. Trial on the new drug charges was scheduled for December 2005. Before trial, Jenkins asked to renew the suppression motion with regard to the new criminal charges. That motion

² At the VOP hearing, Jenkins' probation officer testified that Jenkins had also violated the conditions of his probation by being arrested on several minor charges, changing his address without notifying the probation department, and violating curfew. Jenkins did not contest these violations.

was granted. Following a hearing, the evidence was suppressed and the new criminal charges were dismissed.

7) In this appeal, Jenkins argues the Superior Court's finding that he violated his probation must be reversed because that finding was based on evidence that was later suppressed in the new criminal proceeding. Paragraph 8 of Jenkins' motion to resubmit the Motion to Suppress in the new criminal case stated:

The defendant foolishly left his VOP hearing, as he was truly distraught and irrational over the length of time the prosecutor was recommending in the event he was found in violation. Defendant was being offered what he believed was a very harsh total sentence of 12 years, and he emotionally flipped and could not deal with it, so he left the courtroom. But Mr. Jenkins does have a good suppression argument and did not believe he would waive it in his underlying case, merely his VOP case.

Thus, the record reflects that Jenkins waived presenting a motion to suppress in the VOP proceedings.

8) Although Jenkins asked the Superior Court to reconsider the suppression issue with regard to the new criminal charges, Jenkins never requested to renew his motion to suppress in the revocation proceedings. Therefore, that issue can only be reviewed on appeal for plain error. However, plain error review assumes oversight.³ The record reflects that

³ *Tucker v. State*, 564 A.2d 1110, 1118 (Del. 1989).

Jenkins waived renewing the motion to suppress in the VOP hearing and confirmed the VOP waiver when the motion to suppress was renewed in the new criminal proceedings.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court is affirmed.

BY THE COURT:

/s/ Randy J. Holland
Justice