EFiled: Oct 20 2014 11:55AM EDT
Filing ID 56217372
Case Number 360,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE STATE OF DELAWARE,	)	
	)	
Plaintiff Below –	)	
Appellant.	)	
	)	**Supreme Court No. 360, 2014**
v.	)	
	)	
DANIEL DIAZ,	)	
	)	
Defendant Below –	)	
Appellee,	)	
	)	

APPELLEE'S ANSWERING BRIEF

/s/ Michael W. Modica
MICHAEL W. MODICA, ESQUIRE
Bar ID # 2169
Attorney for Daniel Diaz
P.O. Box 437
Wilmington, DE 19899
(302) 425-3600

Filed: October 20, 2014

APPELLEE'S ANSWERING BRIEF
TABLE OF CONTENTS

Table of Citations..... ii

Nature and Stage of Proceedings..... 1

Summary of Argument..... 3

Statement of Facts..... 4

Argument

I. THIS APPEAL SHOULD BE DENIED BECAUSE THE STATE'S SUBSTANTIVE CLAIMS WERE NOT PRESERVED FOR APPEAL IN ACCORDANCE WITH SUPREME COURT RULE 8..... ... 6

Conclusion..... 14

TABLE OF CITATIONS

Boyer v. State, 919 A.2d 561 (Del. 2007)..... 7

Diaz v. State, 2014 WL 1017480 (Del. Mar.13, 2014)..... ....1, 4

Francis v. State, 918 A.2d 338 (Del. 2006)..... 9

Monroe v. State, 652 A.2d 560, 563 (Del.1995)..... 8

Preform Bldg.Components, Inc. v. Edwards, 280 A.2d 697 (Del. 1971)..... 7

Ross v. State, 801 A.2d 11 (Del. 2002)..... 6

State v. Lewis, 797 A. 2d 1198 (Del. 2002)..... ...9, 10

United States v. Maynard, 485 F.2d 247 (9th Circuit 1973)..... 9

Wainwright v. State, 504 A.2d 1096, 1100 (Del. 1986)..... 8

Sentac Violation of Probation Sentencing Policy..... 11, 13

Supr. Ct. R. 8.....3, 6, 8

Super. Ct. R. 35(b).....3, 9, 10

Super. Ct. Crim. R. 57(d)..... 7

Super. Ct. Civ. R. 59(e)..... 7

NATURE AND STAGE OF PROCEEDINGS

Diaz was arrested for multiple criminal offenses on June 17, 2006. On December 11, 2006 he pleaded guilty to Robbery First Degree (two counts) and Robbery Second Degree. On February 9, 2007, Diaz was sentenced to an aggregate of 12 years L5 suspended after 6 years for L4 Crest followed by 2 years 6 months L3 probation. He filed a motion for sentence modification on March 12, 2007, which was denied on March 9, 2007.

Diaz completed the L5 and L4 portions of his sentence. He was serving the L3 portion of his sentence when he was charged with violating his probation based primarily upon an April 4, 2013 arrest for drug related charges in Superior Court ID 1304006496.

Diaz was found in violation of his probation at a contested violation of probation hearing conducted on July 24, 2013. He was sentenced to serve 6 years at L5.

Diaz filed a pro se direct appeal from his violation of probation sentencing order. The Court affirmed the Superior Court judgment by Order dated March 13, 2014.[1]

[1] *Diaz v. State*, 2014 WL 1017480 (Del. Mar.13, 2014).

On January 29, 2014 a jury acquitted Diaz of all criminal charges in Superior Court ID 1304006496. He filed a motion for sentence modification on May 28, 2014 which was granted by the lower court on June 2, 2014. The modified sentencing order was filed on June 9, 2014.

The State took no action on the motion for sentence modification until it filed a motion to vacate the modified sentence on June 27, 2014. The State then filed an appeal to this Court on July 1, 2014.

This is Defendant's Answering Brief in opposition to the State's appeal.

SUMMARY OF ARGUMENT

I. DENIED. The State failed to properly raise this claim in the Superior Court, therefore it is precluded from raising this claim for the first time on appeal.[2] This case does not meet the interests of justice exception to Supr.Ct.R.8. Even if the State's claim is not barred by Supr.Ct.R.8, Defendant's acquittal for the criminal charges in Superior Court ID 1304006496 constitutes extraordinary circumstances to overcome the Super. Ct. R. 35(b) 90 day limitation for filing a motion for sentence modification. On the merits, there is a substantial basis to support the lower court's order granting Defendant's motion for sentence modification.

[2] Supr. Ct. R. 8.

STATEMENT OF FACTS

The historical facts which led to Defendant's sentence for a violation of probation are summarized in the Court's decision in his direct appeal as follows[3]:

"A contested VOP hearing was held on July 24, 2013. The State's evidence reflected that the Delaware State Police had received information from a confidential informant (CI) that Diaz was selling heroin in the Newark and New Castle areas. The CI told police that Diaz would re-supply his drugs by driving to Philadelphia in a silver Ford Taurus with Pennsylvania tags. The silver Ford previously had been observed by his probation officer parked outside Diaz's home. As a result of the CI's information, police made an undercover, controlled drug purchase from Diaz. The also obtained a warrant to place a GPS tracking device on the silver Ford. The monitoring device reflected Diaz leaving Delaware on three occasions. On the third occasion, police stopped his vehicle. After obtaining a warrant, they searched the car and found over 10,000 bags of heroin hidden in a secret compartment. At the conclusion of the State's evidence, the defendant did not contest that the State had established a basis

[3] *Diaz v. State*, 2014 WL 1017480 (Del. Mar.13, 2014).

for the VOP. The Superior Court immediately sentenced Diaz to a total of six years at Level V incarceration, which was all of the Level V time remaining to be served from his original sentence, followed by a six month transition period of probation."

ARGUMENT I

THIS APPEAL SHOULD BE DENIED BECAUSE THE STATE'S SUBSTANTIVE CLAIMS WERE NOT PRESERVED FOR APPEAL IN ACCORDANCE WITH SUPREME COURT RULE 8.

1. Question Presented

Did the State preserve its substantive claim in accordance with Supr. Ct. R. 8? Does the interest of justice exception support a review of the State's claim?

2. Standard and Scope of Review

The Court reviews the State's contentions to determine if they were preserved for appeal in accordance with Supr. Ct. R. 8. Where a party does not raise its claim in the Superior Court, the appellate court reviews the claim only for plain error.[4] To the extent that the Court reviews the lower court's order, a ruling on a motion for sentence modification is within the discretion of the trial judge and will be set aside on appeal only for abuse of discretion.

3. Merits

Delaware Supr. Ct. R. 8.entitled, "**Questions which may be raised on appeal,**" provides as follows:

---

[4] *Ross v. State*, 801 A.2d 11 (Del.2002).

> Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

In this case, the State failed to raise its claims in the Superior Court, therefore the State is precluded from raising the claim for the first time on appeal.

The facts are undisputed. On May 28, 2014 Diaz filed a motion for sentence modification. The lower court granted the motion by order dated June 2, 2014, and modified the sentencing order on June 6, 2014. Over 20 days passed before the State filed a motion to vacate the lower court's order modifying defendant's sentence. Although titled as a motion to vacate, in actuality it is more properly characterized as a motion for reargument.

A motion for reargument must be filed within five days of the Superior Court's decision.[5] This limitation is jurisdictional and cannot be enlarged.[6] This Court has addressed this rule in the context of a motion for sentence modification.[7] In *Boyer*, while the Superior Court denied defendant's motion for reargument under Super. Ct. Civ. R. 59(e) and Super. Ct. Crim. R. 57(d) relating to the denial of a motion for sentence modification under Super. Ct. Cr. R. 35 for the wrong reason (substantial

---

[5] Super. Ct. Civ. R. 59(e); Super. Ct. Crim. R. 57(d).
[6] *Preform Bldg.Components, Inc. v. Edwards*, 280 A.2d 697 (Del. 1971).
[7] *Boyer v. State*, 919 A.2d 561 (Del. 2007).

merits), the denial was affirmed on appeal because the motion for reargument was not filed within five days of the denial.

Since the State did not file its motion within five days of the lower court's order, the motion was not timely filed and Superior Court did not have jurisdiction to address it. Therefore, the State did not properly preserve this claim for appellate review because the issue was not fairly presented to Superior Court.

This case does not meet the "interests of justice" exception of Supr. Ct. R. 8. While the State failed to preserve its claim for appeal, this Court may excuse a waiver if it finds that the trial court committed plain error requiring review in the interests of justice.[8] Plain error is error that is apparent on the face of the record.[9]

There are no material defects which are apparent on the face of this record. The lower court acted within the parameters of its discretion when it granted Defendant's motion for sentence modification.

---

[8] *Monroe v. State*, 652 A.2d 560, 563 (Del.1995).

[9] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).("[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character and would clearly deprive an accused of a substantial right, or which clearly showed manifest injustice.").

In *State v. Lewis,*[10] the Delaware Supreme Court had occasion to address the scope of Superior Court Criminal Rule 35(d). It provided that Rule 35 (b) confers upon a sentencing trial judge considerable discretion over the appropriate grounds for a reduction of sentence. It provided that this discretion is comparable to the discretion to reduce a lawful sentence under Rule 35 (d) of the Fed. R. Crim. P. before it was amended in 1984. It cited *United States v. Maynard,*[11] for the proposition that "the function of Rule 35 is simply to allow the District Court to decide if, on further reflection, the original sentence now seems unduly harsh. The motion is directed to the court's discretion and is essentially a plea for leniency." The Delaware Supreme Court has also held on several occasions that a motion for reduction of sentence pursuant to Rule 35 (b) is time-barred after 90 days unless the petitioner is able to demonstrate extraordinary circumstances that specifically justify the delay.[12]

This Court has ratified a trial court's inherent authority to consider in the future a sentence modification that would otherwise be untimely under Super. Ct. Crim. R. 35(b).[13] Diaz suggests that if the lower court has inherent authority to retain jurisdiction notwithstanding the 90 day rule, then

---

[10] 797 A. 2d 1198 (Del. 2002)
[11] 485 F.2d 247 (9th Circuit 1973)
[12] *Lewis,* footnote 4, at 1203.
[13] *Francis v. State,* 918 A.2d 338 (Del. 2006).

it logically follows that it has inherent authority to address the merits of a motion for sentence modification at any time in order to serve the interests of justice.[14]

Even if Defendant was required to demonstrate extraordinary circumstances to overcome the 90 day limitations, he suggests that his acquittal on the underlying charges, which were the primary basis for the violation of probation, establish such circumstances. Rule 35 does not define "extraordinary circumstances." Defendant is not aware of any authority addressing whether acquittal on new charges underlying a violation of probation constitutes "extraordinary circumstances" for purposes of Rule 35(b).

There are strong policy reasons to rule that an acquittal on the underlying criminal charges does meet the standard of an "extraordinary circumstance." First, a defendant is at a distinct disadvantage at a violation of probation proceeding due to the expedited nature of the proceeding, the lack of any formal discovery protections, and the pressure to avoid disclosing the theory of defense at this stage of the proceedings. Moreover, it allows the judge to revisit whether a sentence was unduly harsh (here, the

[14] See also, *State v. Lewis*, 797 A.2d 1198 (Del. 2002) (No abuse of discretion in sentence reduction granted after defendant's sentence had been completely served, as extraordinary circumstances existed, including deportation proceedings that were stayed pending the sentence reduction decision).

imposition of all of Defendant's back up L5 time) in light of an acquittal on the underlying charges. Finally, ruling that an acquittal constitutes "extraordinary circumstances" to overcome the 90 day rule does not prejudice the State as it simply allows the court to consider the motion, which the State has the ability to oppose. Conversely, what harm is done by authorizing consideration of a motion for modification after an acquittal of the underlying charges supporting a violation of probation?

On the merits, there is a strong basis supporting Defendant's motion for sentence modification. First, this was his first violation while he was on probation. Second, SENTAC violation of probation sentencing policy provides that when violation of probation hearing is held and determination is made that the offender is guilty of the violation and probation is to be revoked, "it is presumed that the offender may move up only one Sentac level from his current level" except when a period of incarceration is determined to be the sanction of choice for a violation of probation when aggravating circumstances exist.[15] Sentac lists the following Aggravating Circumstances:

[15] Sentac Violation of Probation Sentencing Policy. (B-2).

A. Conviction of a new offense which was a felony, a violent misdemeanor, or an offense requiring a mandatory sentence requiring a mandatory sentence.

B. The violation is a violation of a special treatment condition,,e.g., offender willfully refuses to attend the ordered program and, as a result of such refusal, poses a substantial threat to the community or himself. Confinement in this instance should be short-term and could consist of either a level IV (quasi incarceration) or a level V (incarceration), situation until treatment is arranged.

C. The offender has demonstrated willful failure to make court ordered payments, and no other alternatives are possible, for those alternatives would depreciate the seriousness of the offense.

D. The offender is found to be in possession of a weapon, leading to the violation, and the offender has a past history of violence, drug trafficking or weapons violations.

E. The behavior of the offender represents an immediate threat to the community or an identified victim.

F. The behavior of the offender is repetitive and flagrantly defies the authority of the court.

In this case, the lower court moved the Defendant up two levels contrary to Sentac policy. The court did not list any aggravating circumstances justifying moving Diaz up more than one level consistent with Sentac policy. Only category E could apply as an aggravating circumstance, although the court did not list it as an aggravating factor. In short, SENTAC violation of probation sentencing policy provides the basis in support of the modified sentence in this case. Therefore, the lower court did not abuse its discretion in granting Defendant' motion for sentence modification, and the State's appeal should be denied.

CONCLUSION

Based upon the facts and authorities herein, Defendant respectfully urges this Court to deny the State's appeal.

/s/ Michael W. Modica
MICHAEL W. MODICA, ESQUIRE
Bar ID # 2169
Attorney for Daniel Diaz
P.O. Box 437
Wilmington, DE 19899
(302) 425-3600