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Case Number 360,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE'S REPLY BRIEF

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ARGUMENT

I. THE STATE PRESERVED ITS CLAIM FOR APPEAL WHEN IT FILED ITS MOTION TO VACATE.

In his Answering Brief, Diaz contends that this Court should not consider this appeal because "the State's substantive claims were not preserved for appeal."[1] Consequently, he claims, this Court can only consider the appeal under the Supreme Court Rule 8 "interests of justice" exception.[2] Diaz misapprehends the procedural history of the case and mischaracterizes the State's filing in the Superior Court.

Diaz filed his Rule 35 motion on Wednesday, May 28, 2014. The motion was received in chambers on Friday, May 30, 2014. On Monday, June 2, 2014, the Superior Court issued its Order granting Diaz's motion under Rule 35. The State was denied the opportunity to respond to Diaz's Rule 35 motion prior to the Superior Court ruling on it. Deprived of its opportunity to initially object to Diaz's motion, the State raised the issue, properly preserving it for appeal, by filing a Motion to Vacate on June 27, 2014. The Superior Court did not rule on the State's Motion to Vacate prior to the deadline for the State to file the instant appeal.

[1] *Ans. Brf.* at 6.

[2] *Id.*

Diaz first argues that the State failed to file a motion for reargument within the five-day limit prescribed by Superior Court Civil Rule 59(e) and Superior Court Criminal Rule 57.[3] In support of this argument, Diaz cites *State v. Boyer*.[4] In *Boyer*, the defendant filed a motion for sentence reduction which was denied by the Superior Court.[5] Twelve days later, Boyer filed a motion for reargument, which the Superior Court denied.[6] On appeal, this Court found that Boyer's motion for reargument was not timely filed pursuant to Civil Rule 59(e).[7] Accordingly, this Court dismissed the appeal because the Superior Court did not have jurisdiction to consider Boyer's untimely motion.[8] *Boyer* is distinguishable on its facts and procedural posture.

Here, Diaz argues that this Court should consider the State's Motion to Vacate as a Motion for Reargument. In doing so, he claims that the State's motion

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[3] Superior Court Civil Rule 59(b) is made applicable to criminal cases by Superior Court Criminal Rule 57(d). *Guardarrama v. State*, 2006 WL 2950494, *3 (Del. Oct. 17, 2006). *But see Lamborn v. State*, 1990 WL 38276, *4 (Del. Feb. 20, 1990) (stating "[a] critical question thus becomes, does Criminal Rule 57 *require* the trial judge to apply Civil Rule 59(e)? On its face, it appears that it does not. Rule 57 uses permissive language: 'If no procedure is specifically prescribed by rule, the Court *may* proceed in accordance with the corresponding Superior Court Civil Rule or in any lawful manner not inconsistent with these rules, with the rules of the Supreme Court, or any applicable statute.'"(citing Super. Ct. Crim. R. 57)).

[4] 2007 WL 452300 (Del. Feb. 13, 2007).

[5] *Id.* at *1.

[6] *Id.*

[7] *Id.*.

[8] *Id.*

was not filed within the five-day time limit for a motion for reargument under Criminal Rule 57(d) and Civil Rule 59(e). In support of this contention he offers no reasons to explain why this Court should consider the State's Motion to Vacate as a Motion for Reargument. The State's Motion to Vacate can hardly be considered a Motion for Reagrument because State did not have an opportunity to make an *initial* argument in opposition of Diaz's Rule 35 motion. The State's Motion to Vacate was the appropriate motion to file as it challenged the Superior Court's Order rather than directly objecting to Diaz's Rule 35 motion.

In *State v. Sloman*, this Court addressed an appeal in a similar procedural posture which raised the same issues.[9] Sloman was convicted of felony DUI and related offenses and sentenced to an aggregate 3 ½ years incarceration.[10] Less than three months after being sentenced, Sloman filed a *pro se* motion for sentence reduction under Superior Court Criminal Rule 35(b).[11] The sentence reduction motion was initially denied by the Superior Court.[12] However, at a "fast track" conference, a Superior Court Commissioner imposed the additional condition that

[9] *State v. Sloman*, 886 A.2d 1257 (Del. 2005).

[10] *Id.* at 1258.

[11] *Id.*

[12] *Id.*

Sloman successfully complete the TASC alcohol program.[13] Thereafter, a Superior Court judge adopted the Commissioner's recommendation imposing the additional condition and ordering that the balance of Sloman's Level V time be suspended after successful completion of the Level V TASC program.[14] The State was unaware of the request for modification and was not present at the "fast track" conference.[15] Unsatisfied with the modification, Sloman filed a subsequent *pro se* motion to modify his sentence.[16] The Superior Court denied Sloman's second motion.[17] While preparing its response to the second motion, the State learned that the Superior Court modified Sloman's sentence in the first instance.[18] The State then sought an order to vacate the court's modification of Sloman's sentence.[19] The State's "motion to vacate" was denied by the Superior Court after a hearing, and a new sentencing order was issued; keeping Sloman's modified sentence in-

[13] *Id*. at 1259. The *Sloman* court described the proceeding as an "exploratory/modification" request.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id*.

tact.[20] The State appealed, claiming that the Superior Court erred by modifying Sloman's sentence in the first instance.[21] On appeal, the parties framed the issue as "whether the modification of Sloman's sentence was illegal because it was not supported by 'extraordinary circumstances' as required by Rule 35(b)."[22] However, the *Sloman* Court declined to reach the issue, instead considering "whether or not to give effect to the original sentencing judge's initial sentencing Order."[23] Citing the "bizarre set of circumstances" present in the case, the *Sloman* Court held that "where a judge, in his sentencing Order, reserves that authority to modify a sentence upon the occurrence of certain conditions, Rule 35(b) is not implicated at all."[24]

Here, as in *Sloman*, the State was not given the opportunity to respond to the defendant's request for modification in the first instance. It was only after the Superior Court granted the modification that the State filed a motion to vacate. Here, as in *Sloman*, the State's Motion to Vacate came after the five-day time limit placed on a "motion for reargument." Sloman did not argue that the State's motion

[20] *Id*.

[21] *Id*. at 1260.

[22] *Id*. at 1262.

[23] *Id*.

[24] *Id*. at 1265.

was untimely under Civil Rule 59(e) and this Court nonetheless considered the appeal. This case is in a similar procedural posture. In *Sloman*, the State appealed the Superior Court's modification of Sloman's sentence after its motion to vacate was denied. Here, the State is appealing the Superior Court's modification of Diaz's sentence; however, the Superior Court did not rule on the State's Motion to Vacate within the time for the State to appeal the court's Order modifying Diaz's sentence. That distinction makes no difference. Because the State's Motion to Vacate was not a motion for reargument, it was not subject to the time limitations set forth in Civil Rule 59(e). By filing its Motion to Vacate, the State properly preserved the issue for appeal.

Diaz claims that even if this Court were to forgive the State's "untimely" Motion to Vacate, the case does not meet the "interests of justice" exception to Supreme Court Rule 8. When Diaz filed his motion under Rule 35, he triggered an adversarial process. The Superior Court, however, did not provide the State with an opportunity to advocate its position. The "interests of justice" are not served when a party to an adversarial proceeding is deprived of its opportunity to present its position. Indeed, it is in the "interests of justice" for this Court to consider the instant case for that very reason.

Diaz next contends that the Superior Court had inherent authority to modify his sentence without finding that extraordinary circumstances existed.

Notwithstanding the plain language of Rule 35(b), Diaz claims "if the lower court has inherent authority to retain jurisdiction notwithstanding the 90 day rule, 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."[25] Diaz's reading of Rule 35(b) renders its language meaningless. Indeed, under his theory, a motion for sentence modification made under Rule 35(b) can be made at any time and for any reason and a defendant need not demonstrate extraordinary circumstances for the court to consider the motion. However, this Court has never interpreted the "extraordinary circumstances" language of Rule 35 to be surplusage. To the contrary, this Court has consistently held that a defendant moving for modification of his sentence after the 90-day period must demonstrate "extraordinary circumstances" to warrant consideration of the motion.[26] Here, Diaz failed to demonstrate (and the Superior Court failed to find) the existence of extraordinary circumstances which would warrant consideration of his untimely motion under Rule 35(b).

Diaz additionally contends that he demonstrated extraordinary circumstances by virtue of his acquittal on the charges underlying his VOP. As Diaz concedes,

[25] *Ans. Brf.* at 9-10.

[26] *Railford v. State*, 83 2014 WL 44031, *1 (Del. Jan 2, 2014); *Morris v. State*, 2014 WL 641988, *1 (Del. Feb. 6, 2014); *DeShields v. State*, 2012 WL 1072298, *1 (Del. Mar. 30, 2012); *Morgan v. State*, 2012 WL 3115539, *1 (Del. July 31, 2012); *Colon v. State*, 900 A.2d 635, 638 (Del. 2006); *State v. Lewis*, 797 A.2d 1198, 1201 (Del. 2002).

there is no authority to support his position that acquittal on the underlying charges constitutes extraordinary circumstances for purposes of a Rule 35 motion. In fact, in *Lopez v. State*,[27] this Court found that the ultimate disposition of the charges underlying a VOP was not dispositive of the Superior Court's finding that a defendant violated the terms of his probation. In *Lopez*, this Court affirmed a finding of violation of probation in a case where some of the charges underlying the VOP were *nolle prossed* by the State.[28] The same analysis is applicable to claims made under Rule 35(b). In other words, the ultimate disposition of the charges underlying a VOP is not dispositive when the Superior Court considers whether extraordinary circumstances exist under Rule 35(b). Delaware courts have found extraordinary circumstances in a limited number of cases.[29] The

[27] 2014 WL 2927347 (Del. June 25, 2014).

[28] *Lopez*, 2014 WL 2927347, at *5 (suggesting that ultimate disposition of the underlying charges is not dispositive because "[a]ll that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation." (quoting *Brown v. State*, 249 A.2d 269, 271–72 (Del. 1968) (internal quotations omitted)).

[29] *See, e.g.*, *State v. Lewis*, 2000 WL 33113932, *1 (Del. Super. Oct. 27, 2000), *aff'd*, 797 A.2d 1198 (Del. 2002) (in a case where terms of defendant's sentence had expired, collateral consequence of deportation and its impact on defendant's family constituted exceptional circumstances); *State v. Rodriguez*, 2010 WL 6039844, *2 (Del. Super. Dec. 13, 2010) (the possibility of deportation "sufficient grounds" on which to modify unincarcerated defendant's sentence to one day less than six months at Level V suspended for probation); *State v. DeRoche*, 2003 WL 22293654 (Del. Super. Aug. 29, 2003) (extraordinary circumstances found where defendant claimed he was not receiving adequate medical care at Delaware Correctional Center for severe health problems including heart problems and high blood pressure).

overwhelming majority of cases recite a wide array of situations which do not constitute extraordinary circumstances.[30] This case falls into the latter category.

Diaz finally argues that modification of his sentence was appropriate because the sentencing judge exceeded the SENTAC VOP sentencing policy by increasing his level of supervision more than the suggested single-level increase. In *Quandt v. State*,[31] this Court rejected a similar argument in an appeal from the Superior Court's denial of a sentence modification motion made under Rule 35(b) where the sentence being challenged exceeded the TIS guidelines.[32] Affirming the Superior Court's denial of the defendant's Rule 35(b) motion, the *Quandt* Court

[30] *See, e.g.*, *DeShields*, 2012 WL 1072298, at *1 (participation in various educational and rehabilitative programs did not constitute extraordinary circumstances); *State v. Liket*, 2002 WL 31133101, at *2 (Del. Super. Sep. 25, 2002)(exemplary conduct and/or successful rehabilitation while imprisoned do not constitute extraordinary circumstances); *Johnson v. State*, 1999 WL 652049, *1 (Del. Aug. 16, 1999) (totally disabled defendant who was a former police officer and corrections officer with two young children who successfully completed two drug rehabilitation programs while incarcerated did not present extraordinary circumstances warranting relief under Rule 35(b)); *Sweeten v. State*, 2011 WL 2362597, *1 (Del. June 13, 2011) (defendant who claimed that his status as an informant presented a danger and prevented him from participating in programs while incarcerated did not demonstrate extraordinary circumstances); *Roten v. State*, 2009 WL 2185824, *1 (Del. July 23, 2009) (letters from a third party insinuating that victim was a liar did not constitute extraordinary circumstances); *Hubbard v. State*, 2011 WL 5009772, *1 (Del. 2011) (defendant's unsupported claim that he was diagnosed with glaucoma and declared legally blind did not constitute extraordinary circumstances); *Hubbard v. State*, 2009 WL 2999178, *1 (Del. Sep. 21, 2009) (defendant's transfer to protective custody while incarcerated as a result of threats he received from other inmates did not constitute extraordinary circumstances); *Shockley v. State*, 2007 WL 2229022, *1 (Del. Aug. 2, 2007) (defendant's unsupported claim that that he contracted Hepatitis-C and was being denied treatment while incarcerated did not constitute extraordinary circumstances).

[31] 2007 WL 2229017 (Del. Aug. 3, 2007).

[32] *Id.* at *1.

stated that a "sentencing judge [is] not prohibited from imposing a harsher sentence on [a defendant] as long as vindictiveness played no part in the decision to impose the harsher sentence."[33] Here, Diaz has not alleged or demonstrated vindictiveness or any other improper basis for the Superior Court's imposition of the original VOP sentence. And, as this Court stated in Diaz's direct appeal, "the sentence was authorized by law, was neither arbitrary nor excessive, and does not reflect any evidence of a closed mind by the sentencing judge."[34]

[33] *Id.* at *2.

[34] *Diaz v. State*, 2014 WL 1017480, *2 (Del. Mar. 13, 2004).

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be vacated and the matter be remanded for an opportunity for the State to respond Diaz's Motion for Reduction of Sentence.

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CERTIFICATION OF SERVICE

The undersigned certifies that on November 3, 2014, he caused the attached *State's Reply Brief* to be delivered electronically via Lexis/Nexis File and Serve to the following person:

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