

In the Supreme Court of Delaware


Martins E. Foustain,  
Appellant

State of Delaware,  
Appellee.

No. \_\_\_\_\_, 2015

Appellant's Opening Brief

Dated: June 18, 2015

  
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## Nature And Stage Of The Proceedings

On September 10, 2003, the appellant was convicted in the Superior Court of Delaware, and sentenced to 30 years at level 5 incarceration, suspended after 15 years. Followed by probation. On March 16, 2015, the appellant filed in the Superior Court a motion for concurrent sentencing pursuant to 11 Del. C. § 3901 (c). . . . And on April 28, 2015, the State filed its motion to deny. After only one (1) day of receiving the State's motion, did dismiss the appellant's motion. This appeal follows.

# I. The Superior Court Abused Its Discretion In Denying Appellant Relief Pursuant To Statute Amendment Authorizing Relief By Concurrent Sentencing.

## Standard And Scope Of Review

Superior Court's Denial Of Defendant's Motion Without A Hearing Violated Appellant's Right To Due Process.

## Argument


The record indicates that the herein appellant filed in the Superior Court a motion for concurrent sentencing, pursuant to 11 Del. C. § 3901(c), on March 16, 2015. To which the State filed its motion to deny on April 28, 2015. Just one (1) day after the Court received the State's motion, the Court showed a closed mind and dismissed the appellant's motion. See *State v. Fountain*, DN # 201505515 (2015). On May 6, 2015, the appellant filed a motion to acquit judgment, pursuant to Superior Court Civil Rule 60(d)(6) under clear error of law and fact, see *State vs. Benson*, Case No 9700021684 (Del. Super. 2015) (Relief granted pursuant to 11 Del. C. § 3901(c)). The State's contestment under *State v. Ismael*, 870 A.2d at 651, 652 (Del. Super. 2005) is without merit. Ismael was based on an amendment statute to 11 Del. C. § 4333 under probationary sentencing.

This Court held under Delaware's saving clause (11 Del. C. § 11)(b)(2001) of the criminal code as was interpreted by the federal precedents of *Norden v. Marjono*, 417 U.S. at 661 (1974) could not be applied to the implementing the amended statute to Ismael, because of the incorporated effect's date written in the language therein. However, as the appellant has shown through the original motion. In both *Douglas v. State*, 3A.3d 196 n. 3 (Del. 2010), and *Oliver v. State*, 41A.2d 430 n. 4 (Del. 2012). Two cases deciding the cases on amendments of statute's enacted after the defendant's convictions, with two different rulings. In *Douglas*, this Court held that the defendant was precluded from using the amended statute due to the "expressed" language that was written into the statute amendment excluding a court with jurisdiction from implementing it. But in *Oliver*, this Court gave an opposite ruling, noting that while the appellant claim would fall

as without merit. Because the Superior Court was within its authority to sentence him to a period of minimum mandatory incarceration pursuant to 11 Del. C. § 1448(c)(4), this Court made clear, nevertheless, that pursuant to 11 Del. C. § 4205(c), enacted two (2) years after appellant's conviction. Nothing "precluded" the Court under the amended statute, that a court with jurisdiction could suspend any portion of the defendant's sentence not giving under minimum mandatory basis. Because no expressed language in the amended statute "expressly" prohibited the Court from doing so. Recently, in Benson, the Superior Court interpreted the language in 11 Del. C. § 390(d) to give it the same authority. Because, like Oliver the statute as amended held no "expressed" language prohibiting the Court's authority. The land-scope of the law in Delaware is "Stare Decisis" (to abide by former decisions. The maxim or principle followed by courts, that when a point has been settled by decision, it forms a precedent which is to be followed when some point arises again in litigation).

Wherefore, based upon Benson the appellant request respectfully, that the Superior Court's ruling be vacated, and this case removed for the appropriate proceeding granting relief.

Dated: June 18, 2015

  
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Certificate of Service

I, Martin E. Foustain hereby certify that I have served a true and correct cop(ies) of the attached Appellant's Opening Brief

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BY PLACING SAME IN A SEALED ENVELOPE, and depositing same in the United States Mail at the James T. Vaughn Correctional Center, Smyrna, DE 19977.

On this 18 day of JUNE, 2015

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