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Case Number 690,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANK DAVENPORT,	)	
	)	
Defendant Below,	)	
Appellant,	)	Case No. 690, 2015
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: April 4, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

On January 27, 2014, a New Castle County grand jury indicted Appellant Frank Davenport with manslaughter, aggravated menacing and two counts of possession of a firearm during the commission of a felony (PFDCF). DI 1 at A-1.[1] On May 27, 2015, Davenport pleaded no contest to manslaughter and PFDCF. DI 113 at A-16; A-29. The Superior Court ordered a presentence investigation and sentenced Davenport on November 20, 2015 as follows: (i) for manslaughter, to 25 years of Level V incarceration, suspended after 15 years for 10 years of Level IV at Department of Correction discretion, suspended after six months for two years of Level III probation with GPS monitoring; and (ii) for PFDCF, to five years at Level V. Ex. C to Op. Br. Davenport appealed and filed his opening brief. This is the State's Answering Brief.

[1] "DI" refers to Superior Court docket entries in *State v. Frank Davenport*, ID No. 1401014417 (A-1-15).

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The State did not breach the terms of the plea agreement with the information it provided in the Case Summary and in the prosecutor's statements during sentencing, and by recommending a sentence of 10 years, "and not a day less." Notwithstanding the fact that Davenport waived his claim that the State's recommendation breached the plea agreement because he did not object to it at sentencing, there is no factual basis to support his argument that the State violated the terms of the agreement. None of the State's arguments, nor the information provided by it, were prohibited by the terms of the agreement, nor were they otherwise improper. Prosecutors were free to argue for a sentence of up to 10 years, which is what they did.

II. Appellant's second claim is DENIED. The Superior Court did not sentence Davenport on the basis of information, which was either false or lacked minimal indicia of reliability. This Court does not recognize a right of appeal based on a court's deviation from the SENTAC Guidelines. Moreover, the record does not support Davenport's claim that the Superior Court relied on false or unreliable information in sentencing him.

III. Appellant's third claim is DENIED. The Superior Court did not err in awarding restitution to the Victim's Compensation Assistance Program. Davenport waived this issue on appeal because he did not request a restitution

hearing below. Moreover, the ruling in *State, Victims' Compensation Assistance Program v. Chianese*[2] does not apply to Davenport's case because the General Assembly has since changed the law to permit an order of restitution to VCAP. Unlike in *Chianese*, Davenport's restitution decision occurred after the effective date of the change in the law.

[2] 128 A.2d 628 (Del. 2015).

STATEMENT OF FACTS[3]

On January 16, 2010, in the early morning hours, police responded to a 911 call at a residence in Wilmington. B234. The caller, Davenport, reported that his girlfriend, Holly Wilson, had shot herself in the head. *Id.* Upon arrival, officers found Wilson lying face-up on the stairs in her house with a gunshot wound to her left temple. *Id.* Wilson was still breathing, but died a few hours later in the hospital. *Id.*

Davenport told police that he and Wilson had been living together for about five years, and he gave a statement about the events leading up to the shooting. B23. He and Wilson had been arguing that night (January 15, 2010) while out drinking at a bar. *Id.* They then split up and went to separate bars. *Id.* Davenport later found Wilson at Dude's bar, but she refused to come home with him. *Id.* Davenport went home, and someone else brought Wilson home a little while later. *Id.* When she got home, Wilson was still angry. *Id.* She went upstairs, got her gun, threatened Davenport with it and then said she was going to kill herself. *Id.* As Wilson came down the steps from the upstairs, Davenport heard a noise as if someone was falling, and then heard a bang and saw a flash. *Id.* Moments later, he realized that Wilson had shot herself in the head and he called 911. B23-24.

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[3] Because Davenport took a plea in this case, the facts are taken from the Presentence Investigation Report, the police reports (which were attached to the Presentence Investigation Report) and other documents that were available to the Superior Court.

An autopsy was performed, and the Assistant Medical Examiner, Dr. Jennie Vershvovsky, found that Wilson's cause of death was a tight contact gunshot wound to the forehead above the left eye. B12, 17, 237. She was unable, however, to determine manner of death, because, based on the forensic evidence, she felt it was possible that Wilson could have shot herself. *Id.* A few months later, the Chief Medical Examiner, Dr. Richard Callery, reviewed the case and ruled it a homicide based on the totality of the circumstances. *Id.*

In the months following the shooting, police conducted an extensive investigation. *See* B236-37. They learned that Davenport and Wilson had had a tumultuous relationship. B20, 65, 70-71. Friends and coworkers believed that Davenport was abusing Wilson. B45-46, 65, 67, 81. She had changed in the years in which she had been dating him. B65, 71. She often came to work crying or with bruises on her body. B15, 45-46, 65, 68.

On one occasion, a neighbor saw Wilson walking barefoot down the street on a cold day, crying. B71. Wilson told the neighbor: "[H]e broke my arm. Look at what he did to my face." *Id.* A woman who had been engaged to Wilson's son, and who had lived with Wilson and Davenport for a time, reported that Davenport would threaten Wilson a lot, curse at her and call her nasty names. B18. She heard him threaten to kill Wilson more than once, telling Wilson at one point: "I

haven't decided if I am going to shoot you with my bow and arrow or let you pick one of my guns." *Id.*

Officers also learned that Davenport had been arrested twice before for abusing Wilson. On December 10, 2008, Wilson called the police after Davenport pushed her several times when they were arguing. B11. Davenport was arrested and charged with offensive touching. *Id.* The charge was later dismissed. B254.

Three months before the shooting, on October 18, 2009, Wilson's son, Stephen McElwee, called 911 because Wilson told him that Davenport had threatened her with a gun. B11. When police arrived at the Wilson-Davenport residence, however, Wilson denied that she had been threatened. *Id.* But the responding officers found a note on the floor that contradicted Wilson's denial. *Id.* In it she had written:

> I went up to the Marshall's Shopping Center - that's where I slept all nite – who was I to call – you had my phone – liar that you said you didn't. I was to come home after you threatened to kill me shoot me again for the second time this weekend. Shoot my brains out – tonite you died! That's what you kept saying to me – and you think I was going to come back home you are crazy!

A-59; B234. Police arrested Davenport and charged him with terroristic threatening. B11. As a result, a court ordered Davenport to have no contact with Wilson. *Id.* The charges and no contact order were still outstanding when the shooting in this case occurred. B234.

On the evening leading up to the shooting, witnesses told police they saw Wilson first at Murph's Irish Pub with Davenport. B48-49, 55. A bar employee witnessed Davenport getting upset with Wilson, telling her that she was not "going to embarrass him in front of his friends and in his bar," and threatening to kill her. B49. Davenport then stood up and began choking Wilson. *Id.* The employee intervened, and Wilson and Davenport left the bar a short time later. *Id.*

Later in the evening, witnesses saw Wilson at Dude's Sports Bar without Davenport. B74, 81. Davenport showed up and watched Wilson through a window of the bar. *Id.* After a while Davenport went inside and began arguing with Wilson. B22, 37, 74. He accused her of kissing and hugging the man who was sitting with her at the bar. B22, 37. The owner of the bar told Davenport to leave, which he did. *Id.* Wilson left a short time later. *Id.* Sometime after midnight, an Elsmere police officer saw Wilson walking on the side of the road by herself. B14. He drove her home. *Id.* That was the last time, anyone other than Davenport saw Wilson conscious.

Police arrested and charged Davenport later that morning with violation of a no contact order. B24. Because of the disagreement between the Chief and Assistant Medical Examiners as to cause of death, the State did not indict Davenport for Wilson's murder. B107-08. In 2013, the State retained Vincent DiMaio, M.D., a consultant in forensic pathology, to render an opinion as to

whether Wilson could have committed suicide. A-71. He opined that "[b]ased on the circumstances leading up to and surrounding the death; the description of the shooting by Mr. Davenport; the deformity of [Wilson's] left wrist injury; the location and contact nature of the wound and trajectory of the bullet through the head," the death was a homicide. A-74. Thereafter, the State indicted Davenport with charges stemming from the murder. A-1; B108-09.

Ultimately, Davenport pleaded no contest to manslaughter and PFDCF. DI 113 at A-16. During the plea colloquy, the State told the Superior Court that as part of the plea agreement, it had agreed to cap its sentence recommendation to "total unsuspended Level V time at ten years." B210. The court then asked Davenport:

> Do you appreciate and understand, sir, that while the State has agreed to recommend no more than ten years of unsuspended time and your lawyers have committed to you that they will argue for less, that the Court . . . will have discretion to sentence you within the full range of the sentencing . . . , which is minimum mandatory five years and up to 50 years sir?

B214. Davenport responded, "I understand, Your Honor." *Id.* In pleading no contest, Davenport conceded that the State would have had enough evidence at a trial to convince a jury that he was guilty of manslaughter and PFDCF beyond a reasonable doubt. B215. The court accepted Davenport's plea as knowingly, intelligently, and voluntarily entered and deferred sentencing pending a presentence investigation. *Id.*

Sentencing was eventually scheduled for November 20, 2015. DI 135 at A-18. On November 9, 2015, the State sent to the court, the presentence investigation office and defense counsel a case summary (Case Summary).[4] DI 134 at A-18. In the summary, the State provided 1) information about the history of Davenport's and Wilson's turbulent relationship; 2) a summary of the events leading to Davenport's October 18, 2009 terroristic threatening charge; 3) a description of the events of the night of January 15, 2010; 4) a summary of Davenport's varying statements about the shooting itself; 5) a summary of the expert evidence, including Dr. DiMaio's opinion; 6) a recommendation of "10 years Level V and not a day less;" 7) and a list of the "SENTAC aggravators," excessive cruelty, undue depreciation of offense, vulnerability of the victim and prior abuse of the victim. A-31-43. Exhibits to the summary included photographs of the scene, including those of the wounded Wilson (A-45-55), a copy of a reenactment report from Carl Rone of the Delaware State Police Forensic Firearms Services Unit (A-62-69), and a copy of Dr. DiMaio's report (A-71-74).

Davenport provided a mitigation report to the Investigative Services Office. B217-31, 248. The report included information collected from Davenport, "interviews with family and friends, and documentation from numerous sources including the United States Army, the Social Security Administration, medical

[4] The court's copy of the summary was docketed on November 13, 2015. DI 134 at A-18.

entities, and Thresholds, Inc." B217. The Investigative Services Office prepared a presentence investigation (PSI) report, to which it attached as exhibits, *inter alia*, the police report, Davenport's criminal history, the mitigation report, victim impact letters, and a written statement from Davenport. B238-39, 248.

At sentencing, the prosecutor, in making her sentence recommendation, argued that "[a]ny sentence less than 10 years would unduly depreciate and ignore the violence and the abuse Holly Wilson endured at the hands of the defendant."[5] A-77. Davenport argued for five years of incarceration to include the Key Program, followed by the Crest Program. A-84. The court sentenced Davenport to 20 years of incarceration, finding:

> It is most significant to this judicial officer that a justice of the peace magistrate issued a no contact order on October 18, 2009. On October 18, 2009, Frank Davenport was charged with terroristic threatening. The victim of that charge was Holly Wilson.
>
> The year before, on December 9th, 2008, he was charged with offensive touching. The victim of that crime was Holly Wilson. That case was dismissed, as we sometimes see in domestic cases, for various reasons.
>
> The terroristic threatening in October of '09 was dismissed, eventually, but the no contact order was in place. Because the charge wasn't dismissed until February 5th, 2010, on January 15 and 16, 2010, there was a no contact order in place. And on March 31, 2010, in the New Castle County Court of Common Pleas, Frank Davenport pled guilty to breach of conditions of release by having contact with Holly Wilson in violation of that order.

[5] The prosecutor also stated, "any sentence less than 10 years at Level V would be another tragedy for Holly Wilson and for the loved ones that sit in this courtroom today." A-79.

. . .

I find the aggravating factors as follows: Prior violent criminal conduct with respect to Holly Wilson as an identified victim; repetitive criminal conduct with respect to Holly Wilson as a [sic] identified victim; prior abuse of the victim; and vulnerability of the victim.

I find mitigation in childhood trauma.

A-85-86.

ARGUMENT

I. THE STATE DID NOT BREACH THE TERMS OF THE PLEA AGREEMENT.

Question Presented

Whether the State breached the terms of the plea agreement with the information it provided in the Case Summary and in the prosecutor's statements during sentencing, and by recommending a sentence of 10 years, "and not a day less."

Standard and Scope of Review

Because a plea agreement is based on contract principles, a trial judge's interpretation of the agreement involves questions of law that this Court reviews *de novo*.[6] Any rulings involving factual determinations with regard to a plea agreement are reviewed for abuse of discretion.[7] To the extent, however, that Davenport did not argue the State had breached the terms of the plea agreement below, his claim must be reviewed for plain error. The 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 which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."

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[6] *Scarborough v. State*, 945 A.2d 1103, 1111 (2008).

[7] *Chavous v. State*, 953 A.2d 282, 285-86 (Del. 2008).

Merits of the Argument

On appeal, Davenport claims the State breached the terms of its plea agreement with him in violation of the Due Process Clause of the Fourteenth Amendment. Op. Br. at 6. Specifically, he claims the State breached the agreement (1) through representations the prosecutors made in a pre-sentence submission to the court, i.e., the Case Summary, (2) through representations made during sentencing, and (3) in the prosecutor's ultimate recommendation. *Id.* at 5-22.

As a preliminary matter, the record shows that Davenport, by making no objection to the State's recommendation, waived any claim of a breached plea agreement by expressly accepting on the record that the prosecutor's statements were, in fact a recommendation of a 10-year sentence. A-77, 79. There is no factual basis to support Davenport's arguments that the State violated the terms of the plea agreement. The record demonstrates otherwise. Moreover, Davenport cannot complain that he was denied the benefit of his bargain when the court was well aware of the State's agreement to cap its recommendation at 10 years, and, in any event, the sentencing judge was not bound by the parties' recommended sentence.[8] The State recommended a 10-year sentence at Level V as it promised.

[8] *See, e.g., Wingate v. State*, 2004 WL 692050 (Del. Mar. 25, 2001); *Fisher v. State,* 2003 WL 423449 (Del. Feb. 19, 2003).

The fact that the Court chose not to follow the recommendation after an independent assessment does not provide any basis for appeal.

By pleading guilty to manslaughter and PFDCF, both Class B felonies, Davenport faced a potential sentence of a minimum mandatory of five years and up to 50 years.[9] For those two charges, the SENTAC Guidelines recommended a sentence of five to 10 years.[10] While the State agreed to cap its sentence recommendation at 10 years, the parties were still free to argue for a sentence of anywhere between five and 10 years. As such, prosecutors had to convince the court to sentence Davenport to the maximum SENTAC recommended sentence.

While prosecutors are not at liberty to strike foul blows, they are still expected to prosecute with earnestness and vigor.[11] Here, the State consistently argued for a sentence of "10 years Level V and not a day less." *See* A-42. Although the prosecutor argued against "any sentence less than 10 years" (A-77, 79) she never requested, nor even implied, that the court should sentence

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[9] *See* 11 *Del. C.* § 632 (manslaughter is a Class B felony); 11 *Del. C.* § 1447A (PFDCF is a Class B felony and carries a minimum mandatory sentence of 3 years); 11 *Del. C.* § 4205(b)(2) (sentence range for Class B felonies is 2 to 25 years).

[10] *See* 2014 Delaware Sentencing Accountability Commission Benchbook at 34-35 (SENTAC Benchbook (2014)).

[11] *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[A prosecutor] may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *quoted in Cole v. State*, 922 A.2d 354, 360 (Del. 2005)).

Davenport to more than 10 years.[12] Moreover, the court was well aware that the State had agreed to cap its sentence recommendation to 10 years. The cap was shown on the plea agreement itself (A-29), and the court discussed the cap with the State and Davenport during the plea hearing (B210-11, 214). In addition, the investigative services officers noted in the PSI report that the State had agreed to cap its level V recommendation to 10 years. B233. And notably, Davenport did not object to the State's sentence recommendation during the sentencing hearing.[13]

Davenport argues, however, that the State undermined its agreement to cap the sentence recommendation because, in its case summary and in its presentation to the court, it (1) "extensively referenc[ed] uncharged alleged conduct by the defendant;" (2) referenced dismissed charges of the indictment; (3) attached "inflammatory" photos of the decedent; and, (4) enclosed home movies of the decedent taken years prior to her death. Op. Br. at 7.

Plea agreements are governed by contract principles.[14] As such, the implied covenant of good faith and fair dealing applies.[15] "[T]he implied covenant requires

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[12] *Cf. United States v. Salazar*, 453 F.3d 911, 914-15 (7th Cir. 2006) (finding government did not substantially breach plea agreement in arguing defendant was "cold-blooded killer" when it did not request a higher sentence or remind the judge that he need not abide by the agreement).

[13] *Cf. Teti v. State*, 2006 WL 1788351, at *2 (Del. June 27, 2006) (finding no support in record for defendant's claim that State breached plea agreement when court recognized and restated State's recommendation and defendant addressed court and did not object to comments by the State).

[14] *Scarborough*, 945 A.2d at 1112.

[15] *Cole v. State*, 922 A.2d 354, 359 (Del. 2005).

a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[16]

Under the terms of Davenport's plea agreement, both parties were free to argue for a sentence (between five and 10 years) that each believed was appropriate. *See* B211 (defense counsel noting State had agreed to 10-year cap, but that defense was also free to argue for less than that). In fact, Davenport argued for a five-year sentence. A-84. He also submitted a mitigation report, which included, *inter alia*, a description of the family trauma he suffered as a child, his health problems, and his military and work history. B217-21. The State submitted its own report, the Case Summary, to support its argument for a 10-year sentence. None of the State's arguments, nor the information provided in the State's report, were prohibited by the terms of the plea agreement, nor were they otherwise improper.

"[A] sentencing court has broad discretion to consider 'information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted.'"[17] Thus, the court

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[16] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005), *quoted in Cole*, 922 A.2d at 359.

[17] *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992) (citations omitted).

may rely on dropped counts of the indictment,[18] uncharged allegations,[19] and "responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstance."[20] It follows that if the court can consider this type of information, the parties are not prohibited from presenting it to the court.[21] The State's Case Summary accurately reflected facts learned during the criminal investigation of this case. Thus, all information provided was supported by witness interviews (noted in the police report), expert opinions, or other records. *See* A-21-28 (Davenport's Charge Summary); A-62-69 (Rone Rep.); A-71-74 (DiMaio Rep.); B10-82 (Police Rep.).

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[18] *See Id.* at 845 (finding sentencing court was entitled to rely on allegations contained in the indictment, which went beyond the crimes to which defendant had pled guilty "because the indictment itself provides sufficient reliability to meet the constitutional standard").

[19] *Id.* (finding court did not abuse its discretion in sentencing defendant when it considered allegations in a presentence investigation report "made by the victim and her family to the effect that defendant had committed many more serious crimes over an extended period of years than those to which he had pled guilty, and beyond those for which he had been indicted"). *See also United States v. Robinson*, 520 F. App'x. 20, 22 (2d Cir. 2013) (noting court may receive and consider evidence of uncharged crimes for purpose of imposing an appropriate sentence).

[20] *Mayes*, 604 A.2d at 844-45 (quoting *State v. Huey*, 505 A.2d 1242, 1246 (Conn. 1986)). *See also United States v. Reese*, 33 F.3d 166, 174 (2d Cir. 1994) ("[W]hen determining sentence, a sentencing court is free to consider hearsay evidence, evidence of uncharged crimes, dropped counts of an indictment and criminal activity resulting in acquittal."); 18 U.S.C. § 3661 ("[N]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offenses which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

[21] *Cf. Moncavage v. State*, 2010 WL 4108832, at *2 (Del. Oct. 9, 2010) (finding no prosecutorial misconduct in prosecutor's portrayal of circumstances of prior conviction because police report established facts and information was of type judge had discretion to consider in sentencing).

Here, the judge was already thoroughly familiar with much of the evidence in this case from pretrial motions she had decided.[22] For example, the parties had provided the judge with the expert reports, to which were attached crime scene photographs of the decedent and an internal Department of Justice memorandum that discussed in detail the facts of the case and past incidents of abuse inflicted on Wilson by Davenport. B128-35, 137-40, 192-202. *See also* B83-207 (Davenport's Mot. to Dismiss; State's Resp. to Mot. to Dismiss; State's Resp. to Mot. to Dismiss for Pre-indictment Delay). When defense counsel objected to the State's Case Summary, suggesting that the only reason the State provided it and its exhibits was to "attempt to inflame the court," the court disagreed, noting: "I am not a jury, I am not a lay person. I am an experienced, trained judicial officer and let me assure you that I addressed this case with an open mind and I am very aware of the conflict in positions."

Moreover, the State did not breach the terms of the plea agreement by submitting home movies of the decedent from a happier time. "Delaware law provides that victim impact evidence is relevant to the sentencing authority."[23] Such evidence serves a legitimate purpose in determining a sentence.[24]

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[22] *See State v. Davenport*, 2014 WL 6671277 (Del. Super. Ct. Nov. 17, 2014); *State v. Davenport*, 2014 WL 7474220 (Del. Super. Ct. Dec. 31, 2014); *State v. Davenport*, 2015 WL 994837 (Del. Super. Ct. Mar. 4, 2015).

[23] *Johnson v. State*, 983 A.2d 904, 934 (Del. 2009) (citing 11 *Del. C.* § 4331).

[24] *Id.* (citation omitted).

Davenport's abuse of Wilson took a toll on Wilson's well-being and on her relationship with her family. A-76-77. The ultimate product of that abuse was Davenport's killing of Wilson. And, Wilson's family was affected by Davenport and his abuse before Wilson was killed. At sentencing, Wilson's son told the court, that although Davenport had physically killed Davenport on January 16, 2010, he had taken her away from the family even before then. A-76. "He robbed her of her beauty, her laughter, her confidence, her strength and the most important thing in her life, her family." *Id.* The home videos served a relevant purpose to show the court the impact of the loss of Wilson on her family, and the State was not prohibited from, and did not breach the terms of the plea agreement by presenting such evidence.

In sum, the State did not breach its agreement to cap its sentence recommendation at 10 years. The information provided by prosecutors in the Case Summary and during sentencing was not provided in an attempt to undermine the agreement, but rather, as part of the State's obligation to argue for the 10-year sentence and to provide the court with evidence to support its argument.

II. THE SUPERIOR COURT DID NOT SENTENCE DAVENPORT ON THE BASIS OF INFORMATION WHICH WAS EITHER FALSE OR LACKED MINIMAL INDICIA OF RELIABILITY.

Question Presented

Whether the information the Superior Court relied upon in sentencing Davenport was false or lacked minimal indicia of reliability.

Standard and Scope of Review

This Court reviews a lower court's sentencing of a defendant for abuse of discretion.[25]

Merits of the Argument

Davenport claims his Fourteenth Amendment due process rights were violated because the Superior Court sentenced him on the basis of information that was false or that lacked minimal indicia of reliability. Op. Br. At 23. Specifically, Davenport argues the aggravating factors cited by the State in its case summary and the aggravating factors relied upon by the court in sentencing Davenport were either incorrectly defined or inapplicable to him. *Id.* at 24. Davenport's claim is unavailing, first, because there is no right of appeal based on a court's deviation from the SENTAC Guidelines, and, second, because the information relied upon by the court was not false, nor did it lack minimal indicia of reliability.

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[25] *Walt v. State*, 727 A.2d 836, 840 (Del. 1999).

Appellate review of a sentence is limited to a determination of whether the sentence is within the statutory limits or "whether it is based on factual predicates which are false, impermissible, or lack minimal reliability, judicial vindictiveness or bias, or a closed mind."[26] When a sentence is within the statutory guidelines, the Court "will not find error unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind."[27] "[T]he due process clause of the Fifth Amendment prohibits a criminal defendant from being sentenced on the basis of information which is either false or which lacks minimal indicia of reliability."[28]

The SENTAC Guidelines provide a list of aggravating and mitigating factors that the court may consider when imposing a sentence.[29] The Guidelines explicitly state, however, that the listed factors "are provided as examples and are not intended to be exclusive."[30] This Court has consistently held that "SENTAC guidelines, while advisory, are neither mandatory nor binding upon a sentencing judge."[31] Moreover, "there is no constitutional or statutory right in Delaware to

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[26] *Kurzmann v. State*, 903 A.2d 702, 714 (Del. 2006) (citations omitted).

[27] *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).

[28] *Mayes v. State*, 604 A.2d 839, 843 (Del. 1992).

[29] SENTAC Benchbook (2014) at 127-31.

[30] *Id.* at 127.

[31] *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989). *See also Fuller v. State*, 860 A.2d 324, 332 (Del. 2004) ("Although there are voluntary sentencing guidelines, the sentencing judge is not bound by them.").

appeal a criminal punishment on the sole basis that it deviates from the SENTAC sentencing guidelines."[32]

Davenport takes issue with the Superior Court's reliance on the aggravating factors, "repetitive criminal conduct," "prior violent criminal conduct," "vulnerability of the victim," and "prior abuse of the victim." Davenport's claim lacks merit. Notwithstanding the fact that Davenport has no right to appeal his sentence based on the fact that the court deviated from the SENTAC Guidelines, the record does not support his argument that the court relied on false or unreliable information.

A. Repetitive Criminal Conduct.

The SENTAC Benchbook defines "repetitive criminal conduct" as "conviction or adjudication for the same or similar offense on two or more previous, separate occasions."[33] While Davenport had not, at the time of his sentence, been convicted or adjudicated of two or more similar offenses, he had been arrested for two similar offenses, involving abuse of Wilson – offensive touching in 2008 and terroristic threatening in 2009. A-25-26; B2-3, 6-8. In addition, prior to his sentencing, he had pleaded guilty to violation of the no

[32] *Siple v. State*, 701 A.2d 79, 83 (Del. 1997).

[33] SENTAC Benchbook (2014) at 129.

contact order stemming from his terroristic threatening arrest.[34] The court was aware of Davenport's arrests for abusing Wilson through the police report attached to the PSI, the State's Case Summary, and its consideration of Davenport's Motion *in Limine* seeking to exclude Wilson's statements to her son and police, and her handwritten letter about the October 2009 incident when Davenport threatened her with a gun.[35] A-33-34; B11.

"'[R]epetitive criminal conduct' is an aggravating factor which realizes that repeat offenders may deserve a greater sentence within the prescribed statutory range than a first-time criminal offender."[36] The State concedes that Davenport did not meet the technical definition in the SENTAC Guidelines for "repetitive criminal conduct." This oversight by the court, however, was not an abuse of discretion, as the court did not mistakenly believe that Davenport had two prior similar convictions. Indeed, the court was aware of Davenport's criminal history, and that Davenport had never been convicted for the prior abuse-related charges. A-85. Here, because Davenport's sole complaint is the Superior Court's deviation from the SENTAC Guideline's definition of "repetitive criminal conduct," his claim is unavailing. As noted above, "this Court has consistently held that it is

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[34] Contrary to Davenport's claim that his conviction for noncompliance with bond does not satisfy the requirements of this aggravator, this Court has held that prior convictions need only precede sentencing to constitute "repetitive criminal conduct." *Siple*, 701 A.2d at 85.

[35] *See Davenport*, 2015 WL 994837.

[36] *Siple*, 701 A.2d at 85.

without appellate jurisdiction in criminal cases to review challenges on the sole basis that a punishment deviated from the SENTAC sentencing guidelines."[37]

B. Prior Violent Criminal Conduct.

The SENTAC Benchbook defines "prior violent criminal conduct" as "[d]efendant has demonstrated, by his prior criminal history, a propensity for violent criminal conduct."[38] Davenport's claim that he did not have a prior violent criminal history is belied by the record. Davenport's criminal history revealed he had twice before been arrested for abusing or threatening Wilson. A-25-26. Although offensive touching and terroristic threatening are not violent crimes as defined by the criminal code,[39] the circumstances of those arrests, as well as the nature of Davenport's relationship with Wilson, sufficiently showed that Davenport had a propensity for violent criminal conduct when it came to Wilson. As noted above, and in the court's sentencing decision, the court was well aware of circumstances surrounding Davenport's offensive touching and terroristic threatening arrests. *See* A-85.

C. Vulnerability of the Victim.

The SENTAC Benchbook defines "vulnerability of victim" as "[T]he defendant knew, or should have known, that the victim of the offense was

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[37] *Id.* at 83.

[38] SENTAC Benchbook (2014) at 128.

[39] *See, e.g.*, 11 *Del. C.* § 4201(c) (listing violent felonies).

particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health."[40] The State, in its Case Summary, opted to depart from the standard SENTAC aggravator, choosing instead to define the aggravator to include a victim who was vulnerable due to a destructive and abusive relationship. A-42. As noted above, the Benchbook's list of aggravators is non-exclusive. Thus, the State's decision to present the court with an aggravator not included in the Benchbook was neither prohibited, nor inappropriate. Evidence provided through witness statements in the police reports and by Davenport's criminal history supported the idea that Wilson was vulnerable because of abuse. Despite the fact that Davenport had abused her and threatened to kill her in the past, she seemed unable to extricate herself from the relationship, even going so far as to lie to police to protect him.[41]

It is not clear whether the court relied on the State's definition or SENTAC's definition of "vulnerability of victim," however, either definition was supported by the evidence. The court was also presented with evidence that Wilson had a deformed left wrist that she could not use. *See* A-73. The court's reliance on this aggravator was not a violation of Davenport's Due Process right.

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[40] SENTAC Benchbook (2014) at 129.

[41] *Cf. State v. Elvin*, 481 N.W.2d 571, 576 (Minn Ct. App 1992) (finding record supported vulnerability of victim finding by court as aggravating sentencing factor when record reflected repeated attacks by defendant on victim, after which she would return to him and continue the relationship).

D. Prior Abuse of the Victim.

The SENTAC Benchbook defines "prior abuse of victim" as "[o]n prior occasions, the defendant has harassed, threatened, or physically abused the victim of the current offense."[42] In support of this aggravator, the State pointed out that Davenport had previously injured Wilson and threatened her with a gun. A-43. And, at the time of her death, there was a no contact order in place. *Id.* In addition, a number of people who knew Wilson believed that she was in an abusive relationship. *Id.*

Davenport argues he could not refute the State's claims of past abuse because the State's allegations were vague and the supporting sources were unknown. Op. Br. at 28. Although the judge found prior abuse of Wilson to be an aggravating factor, she did not cite to any vague allegations of abuse in her sentencing decision. *See* A-85. She mentioned the two prior incidents for which Davenport had been arrested and charged for abusing or threatening Wilson. *Id.* She also pointed to the events of the evening leading up to Wilson's death, when, despite the no contact order, witnesses had seen Davenport outside of Dude's Sports Bar, peering through the window, watching Wilson. *Id.* These facts were all corroborated by Davenport's own arrest record, his statements, and the statements witnesses had provided to police. The court had access to the police

[42] SENTAC Benchbook (2014) at 129.

report, which included a number of witness interviews about the events of the night of January 15, 2010, and which included a number of interviews with family members and friends who had seen Davenport abuse or threaten Wilson, or who had spoken to Wilson about the abuse. *See* B15, 18, 20, 45-46, 65, 67-68, 70-71, 81.

The record simply does not support Davenport's claim that the court found the prior abuse aggravator based on vague or unreliable information. And, even if the court did base its finding on the other alleged, uncharged acts of abuse mentioned by the State and by the witnesses in the police report, such finding was supported by reliable information and not mere allegation.[43] A sentencing court may rely on uncharged allegations and "responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstance."[44]

Davenport's claim that he could not refute the uncharged allegations of abuse because he did not know where the information came from is disingenuous. The police report provided a wealth of information from witnesses about the abusive nature of Davenport and Wilson's relationship. *See* B10-82. The

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[43] *Mayes*, 604 A.2d at 843 ("Our task, therefore, is to review the disputed information contained in the presentence report upon which the court relied and determine whether this information met the test of 'some minimal indicium of reliability beyond mere allegation.'" (quoting *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982))).

[44] *Mayes*, 604 A.2d at 844-45 (citation omitted).

information in the State's Case Summary was consistent with the information provided by the witnesses to police and recorded in the police report. The State had provided Davenport with the police report during discovery. B154, 156. In addition, during sentencing, Stephen McElwee provided a statement about how his mother had changed as a result of Davenport's abuse. A-76-77. Other than challenging the State's conclusions about the forensic evidence, Davenport did not request a continuance or the opportunity to present additional evidence to rebut the State's allegations.[45] *See* A-79-81. Therefore, Davenport waived any claim as to the propriety of the court's consideration of the prior, uncharged acts of abuse.[46]

[45] Although Davenport claims he did not receive the State's Case Summary until the day before sentencing (scheduled for November 20, 2015), the State sent a copy of the Summary to defense counsel at the same time it sent the Summary to the Superior Court. *See* A-31. The court docketed its copy on November 13, 2015. DI 134 at A-18. The State does not know why defense counsel would not have received the report until the day before sentencing.

[46] *Cf. Larson v. State*, 1995 WL 389718, at *3 (Del. June 23, 1995) (finding defendant had waived claim as to propriety of sentencing hearing because he failed to request continuance or opportunity to rebut information in presentence report); Supr. Ct. R. 8.

III. THE SUPERIOR COURT DID NOT ERR IN AWARDING RESTITUTION TO THE VICTIMS' COMPENSATION ASSISTANCE PROGRAM.

Question Presented

Whether the Superior Court erred in awarding restitution to the Victims' Compensation Assistance Program.

Standard and Scope of Review

This Court reviews a challenge to a restitution order based upon a legal question, *de novo*.[47] An alleged infringement of a constitutional right is reviewed *de novo*.[48]

Merits of the Argument

As part of its sentence order in this case, the Superior Court ordered Davenport to pay $7,339.89 to the Victims' Compensation Assistance Program (VCAP). Ex. C to Op. Br. Davenport did not challenge the restitution amount or request a restitution hearing. Davenport now argues that the court's restitution was improper given this Court's decision in *State, Victims' Comp. Assistance Program v. Chianese*.[49] In *Chianese*, this Court held that the Court of Common Pleas correctly found that it could not order restitution to be paid to VCAP, because it was not a victim. Specifically, the Court noted, "[b]efore the recent amendments

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[47] *Moore v. State*, 15 A.3d 1240, 1244 (Del. 2011).

[48] *Harris v. State*, 956 A.2d 1273, 1275 (Del. 2008).

[49] 128 A.3d 628 (Del. 2015).

to Chapter 90 [of Title 11], it had been the rule that restitution could only be awarded to victims of crimes, not third parties."[50]

Because Davenport did not raise this issue below, he was waived it on appeal.[51] However, Davenport's claim also fails because *Chianese* is not applicable to this case. Effective August 12, 2014, the General Assembly changed the law to permit compensation to VCAP of restitution amounts.[52] Davenport entered his plea on May 27, 2015. DI 113 at A-16. The Superior Court entered its restitution order on November 20, 2015, well after the effective date of the law change. DI 133 at A-18. The *ex post facto* law does not prohibit the law change from applying to Davenport's case, because it did not increase the punishment for his crime.[53] It merely shifted the defendant's burden of paying restitution from the victim to VCAP. The Superior Court did not err in awarding restitution to VCAP.

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[50] *Id.* at 633. The restitution hearing in *Chianese* had been held before the amendments to Chapter 90 of Title 11. Id. at 620.

[51] *Cf. Gruwell v. State*, 2008 WL 5195351, at *2 (Del. Dec. 12, 2008) (finding Superior Court did not err or abuse its discretion in ordering restitution in amount requested by State when defendant did not challenge the amount at sentencing and never requested a hearing on the issue); Supr. Ct. R. 8.

[52] *See* 79 *Del. Laws*, c. 404 (eff. Aug. 12, 2014); 11 *Del. C.* § 9104(c) (providing VCAP may be awarded restitution from defendant for compensation paid to victim).

[53] *See Snyder v. Andrews*, 708 A.2d 237, 248 (Del. 1998) ("Article 1, § 10 of the United States Constitution forbids any State from passing an "ex post facto Law." An ex post facto law is one that retroactively alters the definition of a crime or increases the punishment for criminal acts." (citations omitted)).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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DATED: April 4, 2016

CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on April 4, 2016, she caused the attached *State's Answering Brief* and *Appendix to State's Answering Brief* to be delivered to the following persons in the form and manner indicated:

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