



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY LONGFORD-MYERS,)	
)	
Defendant-Below,)	
Appellant,)	No. 494, 2018
)	
v.)	On Appeal from the
)	Superior Court of the
STATE OF DELAWARE,)	State of Delaware
)	
Plaintiff-Below,)	
Appellee.)	

STATE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Martin B. O'Connor (No. 3528)
Deputy Attorney General
820 North French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

Dated: January 2, 2019

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
NATURE OF PROCEEDINGS	1
SUMMARY OF ARGUMENT	9
STATEMENT OF FACTS	10
ARGUMENT	
I. THE SUPERIOR COURT DID NOT COMMIT PLAIN ERROR WHEN IT MODIFIED LONGFORD-MYERS' VIOLATION OF PROBATION SENTENCE	12
CONCLUSION	23

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Benge v. State</i> , 101 A.3d 973 (Del. 1997)	12
<i>Brittingham v. State</i> , 705 A.2d 577 (Del. 1998)	14
<i>Busic v. United States</i> , 446 U.S. 398 (1980)	18
<i>Diaz v. State</i> , 2014 WL 1017480 (Del. Mar. 13, 2014)	21
<i>Eliason v. Englehart</i> , 733 A.2d 944 (Del. 1999)	14
<i>Evans v. State</i> , 516 A.2d 477 (Del. 1986)	14
<i>Faircloth v. State</i> , 522 A.2d 1268 (Del. 1987)	20
<i>Ingram v. Thorpe</i> , 747 A.2d 545 (Del. 2000)	14
<i>Kern v. TXO Prod. Corp.</i> , 738 F.2d 968 (8th Cir. 1984)	12
<i>Kurzmann v. State</i> , 903 A.2d 702 (Del. 2006)	21
<i>Longford-Myers v. State</i> , 2013 WL 593249 (Del. Feb. 13, 2013)	3
<i>Monroe v. State</i> , 652 A.2d 560 (Del. 1985)	13
<i>Nave v. State</i> , 783 A.2d 120 (Del. 2001)	20
<i>Oliver v. State</i> , 2012 WL 1187742 (Del. Apr. 5, 2012)	15, 16
<i>Owens v. State</i> , 2013 WL 6536758 (Del. Dec. 9, 2013)	21
<i>Parker v. State</i> , 2001 WL 213389 (Del. Feb. 26, 2001)	12
<i>Patel v. State</i> , 2018 WL 6729478 (Del. Dec. 21, 2018)	21
<i>Pavulak v. State</i> , 880 A.2d 1044 (Del. 2005)	21

<i>Richardson v. Wile</i> , 535 A.2d 1346 (Del. 1988)	14
<i>Shoates v. State</i> , 2018 WL 3912033 (Del. Aug. 14, 2018)	21
<i>Spielberg v. State</i> , 558 A.2d 291 (Del. 1989)	14
<i>State v. Lewis</i> , 797 A.2d 1198 (Del. 2002)	12, 14
<i>United States v. Bentley</i> , 850, F.2d 327 (7th Cir. 1988)	19
<i>United States v. Henry</i> , 709 F.2d 298 (5th Cir. 1983)	17, 18
<i>United States v. Pimienta-Redondo</i> , 874 F.2d 9 (1st Cir. 1994)	19
<i>Weber v. State</i> , 655 A.2d 1219 (Del. 1995)	20
<u>Statutes</u>	
11 <i>Del. C.</i> § 1447A	3, 14, 15
11 <i>Del. C.</i> § 1448(e)	15, 16
11 <i>Del. C.</i> § 4334(c)	21
Del. Supr. Ct. R. 8	13
Super. Ct. Crim. R. 35	13, 19

NATURE AND STAGE OF THE PROCEEDINGS

On October 25, 2010, a New Castle County grand jury indicted Jerry Longford-Myers (“Longford-Myers”) for Maintaining a Vehicle to Keep Controlled Substances, Possession of Marijuana, Possession of Drug Paraphernalia, and Failure to use a Turn Signal.¹ (B1-8). On December 13, 2010, Longford-Myers pled guilty to Possession of Marijuana (IN-10-09-0297).² (B-2). The Superior Court sentenced Longford-Myers to six months incarceration, suspended for one year Level II probation. (B9-11).

On April 26, 2011, Longford-Myers was arrested for more drug charges. (A1). On July 18, 2011, a New Castle County grand jury indicted Longford-Myers for Possession with Intent to Deliver Cocaine, Maintaining a Dwelling to Keep or Deliver Controlled Substances, Conspiracy Second Degree, and Criminal Impersonation.³ (A1). On August 10, 2011, Longford-Myers pled guilty to Maintaining a Dwelling to Keep Controlled Substances (IN11-05-1987), and the Superior Court found Longford-Myers in violation of his 2010 probation.⁴ (A2). On August 10, 2011, the Superior Court sentenced Longford-Myers in IN11-05-1987 to

¹ These offenses relate to Superior Court Case No. 1008015710.

² The State entered a *nolle prosequi* on the remaining charges.

³ These offenses relate to Superior Court Case No. 1104021979.

⁴ The State entered a *nolle prosequi* on the remaining charges.

two years Level V suspended for one year Level III probation. (B12-14). On August 11, 2011, the Superior Court sentenced Longford-Myers for the VOP, VN-10-09-0297-01, to six months incarceration, suspended for six months Level IV probation.⁵ (B15-16).

On August 25, 2011, Probation and Parole filed an Administrative Warrant in Case No. 1008015710 (Possession of Marijuana -- VN10-09-0297-02) and Case No. 1104021979 (Maintaining a Dwelling to Keep Controlled Substances – VN11-05-1987-01). (A2). On September 1, 2011, the Superior Court found Longford-Myers in violation of probation, and as to VN10-09-0297-02, the Superior Court sentenced him to six months incarceration, suspended for six months Level IV probation (Work Release), followed by six months Level III probation. (B-19). For VN11-05-1987-01, the Superior Court sentenced Longford-Myers to two years incarceration, suspended for one year Level III probation. (B19-20).

On June 4, 2012, a New Castle County grand jury indicted Longford-Myers for Drug Dealing, Possession of a Firearm During the Commission of a Felony (“PFDCF”), Possession of a Deadly Weapon by a Person Prohibited (“PDWBPP”), Possession of Firearm Ammunition by a Person Prohibited (“PFABPP”), and

⁵ The original VOP Sentence Order indicated the effective date was August 11, 2011. Subsequently, on August 24, 2011, the Superior Court issued a Corrected VOP Sentence Order changing the effective date to August 10, 2011. B17-18.

Possession of Drug Paraphernalia.⁶ (A12). Due to this indictment, Longford-Myers incurred two VOPs – VN10-09-0297-03 and VN11-05-1987-02. On August 1, 2012, the Superior Court found Longford-Myers in violation of probation and sentenced him, for VN10-09-0297-03, to six months imprisonment at Level V, the maximum sentence remaining for this VOP. (B-22). For VN11-05-1987-02, the Superior Court sentenced Longford-Myers to two years imprisonment at Level V, followed by one year Level II probation.⁷ (B-22). The two-year term of imprisonment was the maximum sentence remaining for this VOP.

On November 7, 2012, Longford-Myers pled guilty in Case No. 1205003223 to PFDCF (IN12-05-1016) and Drug Dealing (IN12-05-1017). (A12). The Superior Court sentenced Longford-Myers, for IN12-05-1016, to eight years Level V, suspended after serving three years, followed by six months Level IV probation, followed by one year Level III probation.⁸ (B24-28). For IN12-05-1017, the

⁶ These charges relate to Superior Court Case No. 1205003223.

⁷ Longford-Myers appealed to this Court, challenging the sufficiency of the evidence supporting the Superior Court’s finding that he violated the terms of his probation, and claiming the Superior Court abused its discretion by imposing the maximum sentence for his VOP. *Longford-Myers v. State*, 2013 WL 593249, at *1 (Del. Feb. 13, 2013). This Court affirmed the judgment of the Superior Court, but remanded the matter for re-sentencing, noting that Longford-Myers was not given credit for time served. *Id.* at *3. On April 8, 2013, the Superior Court issued a Modified VOP Sentence Order, crediting Longford-Myers for 90 days previously served. B29-31.

⁸ The original sentence Order in Case No. 1205003223, for the PFDCF offense, expressly provides “All time imposed is mandatory. PFDCF 11 *Del. C.* § 1447A.”

Superior Court sentenced Longford-Myers to eight years Level V, suspended for eighteen months Level III probation. (B-25).

While serving two VOP sentences in VN10-09-0297-03 and VN11-05-1987-02, and the three year mandatory Level V sentence for IN12-05-1016, Longford-Myers filed several motions in the Superior Court. On July 11, 2013, Longford-Myers filed a *pro se* Motion for Correction of an Illegal Sentence (A12, DI 20), which the Superior Court denied on July 26, 2013 (A12, DI 21); on July 9, 2014, Longford-Myers filed a *pro se* Motion for Modification/Correction of Sentence (A12, DI22), which the Superior Court denied August 18, 2014. (A12, DI 23).

Longford-Myers was released from Level V, and began serving the probationary portion of his sentences. On October 2, 2017, a New Castle County grand jury indicted him for Assault Second Degree, PFBPP, Drug Dealing, Tier 1 Possession, Resisting Arrest, and Conspiracy Second Degree.⁹ (A17). On January 30, 2018, Longford-Myers pled guilty to Assault Second Degree (IN17-08-1433) (A19), and the Superior Court sentenced Longford-Myers to eight years Level V, suspended after one year, followed by one year Level III probation.¹⁰ (B32-35).

But, the Superior Court also erroneously imposed a suspended prison term, after Longford-Myers served three years Level V. (B-24).

⁹ These charges relate to Superior Court Case No. 1707021914.

¹⁰ The State entered a *nolle prosequi* on the remaining charges.

On February 6, 2018, based upon Longford-Myers' plea in IN17-08-1433, the Superior Court found Longford-Myers in violation of probation, and sentenced him: for VN11-05-1987-03, two years at Level V, suspended after serving one year (with successful completion of the Key Program), followed by one year Level III probation (Crest Aftercare). (A31, B36). For VN12-05-1016-01, four years at Level V, suspended after serving one year, followed by one year Level III probation. (A31, B36-37). For VN12-05-1017-01, five years Level V, suspended after serving one year, for one year Level III probation.¹¹ (A31, B-37).

On March 22, 2018, Longford-Myers filed a *pro se* Motion for Credit Time Served (A6, DI 41), which the Superior Court denied on April 10, 2018. (A6, DI 43). On April 19, 2018, Longford-Myers filed a Motion to Correct an Illegal Sentence, claiming the Superior Court's sentence Order, dated February 6, 2018, was illegal as to Superior Court Case No. 1104021979, VN11-05-1987-03, because he had served the maximum sentence for that charge. (A6, DI 44). The Superior Court requested the State respond to Longford-Myers' Rule 35 Motion. (A7, DI 45).

On June 1, 2018, the State responded to the Superior Court: (1) conceding that Longford-Myers had served the maximum Level V sentence for VN11-05-1987; (2)

¹¹ At sentencing, Longford-Myers requested concurrent sentencing for the VOPs. (A31). Based upon the defendant's criminal record the Superior Court denied Longford-Myers' request. (A31).

recognizing the original sentence the court had imposed on November 7, 2012 for PFDCF was illegal because 11 *Del. C.* § 1447A(d) does not permit the imposition of a suspended sentence, and that Longford-Myers had already served the three year mandatory sentence; and (3) Longford-Myers had one remaining VOP, VN12-05-1017-01, for which he could be re-sentenced. (A7, DI 49). To correct the VOP sentence order to reflect the intent of the Superior Court's February 6, 2018 VOP sentence Order, the State recommended Longford-Myers be re-sentenced, for VN12-05-1017-01, to five years Level V suspended after serving three years at Level V, (including successful completion of the Key Program), followed by one year of Level III Crest Aftercare. (A7, DI 49). The State recommended Longford-Myers receive an aggregate sentence in VN 12-05-1017-01, commensurate with the Superior Court's February 6, 2018 VOP sentence order. (A7, DI 49).

On June 11, 2018, the Superior Court issued a Corrected Sentence Order. (A7, DI 52; B39-43). The Superior Court modified Longford-Myers' original sentence in Case No. 1205003223, dated November 7, 2012, as follows: (1) as to IN12-05-1016, PFDCF, three years Level V, "all time imposed is mandatory;" and (2) as to IN12-05-1017, Drug Dealing, eight years Level V suspended for six months Level IV (DOC discretion) followed by one year Level III probation. (A7, DI 52; B39-40).

Additionally, the Superior Court modified the February 6, 2016 sentence Order to reflect that VN11-05-1987-03, in Case No. 1104021979, was discharged as unimproved, and that Longford-Myers had served that three year sentence in VN12-05-1016-01, Case No. 1205003223. (B44-47). Finally, the court modified its sentence in VN12-05-1017-01, Drug Dealing, to five years Level V suspended after serving three years Level V, with successful completion of the Key program while at Level V followed by one year Level III Crest Aftercare.” (B44-47). On June 12, 2018, the Superior Court granted Longford-Myers’ Motion to Correct an Illegal Sentence. (A7, DI 50).

On August 22, 2018, Longford-Myers requested that the Superior Court vacate its June 11, 2018 sentence order to facilitate an appeal to this Court, but only limiting the appeal to “the portion of the Order which granted the State’s request for modification.” (A8, DI 53). On August 23, 2018, the Superior Court vacated its June 11, 2018 VOP sentence order, and modified the following prior sentence Orders: (1) in Case No. 1205003223, the November 7, 2012 Sentence Order -- PFDCF (IN12-05-1016) – three years Level V; for Drug Dealing (IN12-05-1017) – eight years level V suspended for six months Level IV (DOC discretion), followed by one year Level III probation; (2) for VN11-05-1987-03, a February 8, 2016 Sentence Order -- discharged as unimproved; and (3) for VN12-05-1016-01, the

November 12, 2012 Sentence Order -- three years Level V (time served). (A8-A9, DI 55, DI 56; A100-101).

Longford-Myers filed a timely notice of appeal, followed by an opening brief and appendix. This is the State's answering brief.

SUMMARY OF THE ARGUMENT¹²

- I. Appellant's claim is denied. The Superior Court did not commit plain error in modifying Longford-Myers' VOP sentence to comport with its intent with sentencing him for his VOP.

¹² The State will address both of Longford-Myers' claims in one argument.

STATEMENT OF FACTS

On July 29, 2017, Longford-Myers was arrested for Possession of Ammunition by a Person Prohibited, Drug Dealing, Possession of a Controlled Substance in a Tier I quantity, Assault Second Degree, Conspiracy Second Degree, and Resisting Arrest. (A22). On January 30, 2018, Longford-Myers pled guilty to Assault Second Degree. (A22). Probation Officer Amanda Miller (“Officer Miller”) filed a VOP report, claiming Longford-Myers violated three conditions of probation. (A21-A22). Longford-Myers was on Level III probation when arrested on July 29, 2017, and the Superior Court scheduled a VOP hearing for February 6, 2018. (A21). At the hearing, Longford-Myers admitted the VOP. (A25, A27).

During the hearing, Officer Miller told the Superior Court that Longford-Myers was serving “two other [probationary] sentences.” (A23). The first probationary sentence, from 2011, was for Maintaining a Dwelling to Keep Controlled Substances. The second sentence was for “a [2012] gun charge and a drug dealing charge.” (A23). On the 2011 probationary sentence, Officer Miller recommended Longford-Myers be resentenced to two years Level V, suspended after serving one year, followed by one year Level III probation. (A23-A24). For the 2012 PFDCF VOP, Officer Miller recommended Longford-Myers receive a sentence of eight years Level V, suspended after serving one year, followed by one year Level III probation. (A24). And, for the 2012 Drug Dealing VOP, Officer

Miller recommended Longford-Myers be resentenced to 8 years Level V, suspended after one year, followed by one year Level III probation. (A24). Probation Officer Miller was recommending an aggregate eighteen-year Level V sentence, suspended after serving three years, followed by probation.

The Superior Court sentenced Longford-Myers to an aggregate sentence of eleven years imprisonment, suspended after serving three years imprisonment (including completion of the Key Program), followed by probation supervision. (A34-A35).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT MODIFIED LONGFORD-MYERS' SENTENCES.

QUESTION PRESENTED

Whether the Superior Court committed plain error in modifying Longford-Myers' VOP sentence order.

STANDARD AND SCOPE OF REVIEW

Longford-Myers filed a Motion to Correct an Illegal Sentence on April 19, 2018, requesting the Superior Court “correct the sentence imposed on February 6, 2018, as the terms of the sentence related to VN11-05-1987 were illegal.” (A6, DI 44). The Superior Court granted Longford-Myers' Motion. (A7, DI 50). To the extent he is now challenging the Superior Court's decision as to that VOP, this Court reviews a trial court's decision on a motion for modification of sentence under an abuse of discretion standard.¹³ Under this highly deferential standard, the test is whether “the trial court acted within a zone of reasonableness or stayed within a range of choice.”¹⁴

¹³ *Benge v. State*, 101 A.3d 973, 977 (Del. 1997) (citing *State v. Lewis*, 797 A.2d 1198, 1202 (Del. 2002); *Parker v. State*, 2001 WL 213389 at *1 (Del. Feb. 26, 2001)).

¹⁴ *Id.*, citing *Lewis*, 797 A.2d at 1202 (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968 (8th Cir. 1984)).

But, Longford-Myers specifically appeals the Superior Court’s correction of an illegal sentence as to the PFDCF charge, as well as the court’s decision to correct his sentence by re-apportioning the Level V sentences to one remaining VOP. Longford-Myers did not present either of these claims to the Superior Court. Therefore, the plain error standard of review applies, and Longford-Myers’ claims are waived absent a finding that the Superior Court committed plain error requiring review in the interest of justice.¹⁵

MERITS OF THE ARGUMENT

Longford-Myers argues the Superior Court committed error by modifying the 2012 original sentence in Case No. 1205003223, and two subsequent VOP sentences. He argues the original suspended sentence for PFDCF was legal and the Superior Court lacked jurisdiction to modify the legal portion of the sentence. Longford-Myers is incorrect.

Superior Court Criminal Rule 35(a) permits the Superior Court to correct an illegal sentence “at any time.”¹⁶ An “illegal sentence” exceeds statutorily authorized limits, violates the Double Jeopardy Clause, “is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term

¹⁵ Del. Supr. Ct. R. 8; *Monroe v. State*, 652 A.2d 560 (Del. 1985).

¹⁶ Super. Ct. Crim. R. 35(a).

imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.”¹⁷

The Superior Court originally imposed a suspended prison sentence for a violation of 11 *Del. C.* § 1447A(d), when it sentenced Longford-Myers to eight years Level V, suspended after serving three years Level V, followed by probation. This sentence is illegal, because section 1447A(d) prohibits the imposition of a suspended sentence, and the language of 11 *Del. C.* § 1447A(d) is clear and unambiguous. Section 1447A(d) provides:

Any sentence imposed for a violation of this section shall not be subject to suspension and no person convicted for a violation of this subsection shall be eligible for good time, parole or probation during the period this sentence is imposed.¹⁸

In evaluating the construction of a statute, this Court “established as its standard the search for legislative intent.”¹⁹ Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language of the statute controls, making statutory interpretation unnecessary.²⁰ The Delaware Code

¹⁷ *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

¹⁸ 11 *Del. C.* § 1447A(d) (emphasis added).

¹⁹ *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989) (citing *Richardson v. Wile*, 535 A.2d 1346, 1348 (Del. 1988)).

²⁰ *Id.* (citing *Evans v. State*, 516 A.2d 477, 478 (Del. 1986)); also see *Lewis*, 797 A.2d at 1201 (citing *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000); *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

expressly provides any sentence imposed for a violation of section 1447A “shall not be subject to suspension.”²¹

The Superior Court did not commit plain error in modifying Longford-Myers’ 2012 sentence, because the Superior Court cannot impose a suspended sentence for a violation of § 1447A. Curiously, by arguing otherwise, Longford-Myers would expose himself to five additional years’ potential imprisonment upon any future violation of probation. And, given Longford-Myers’ history of violating every probationary sentence since 2010, his exposure to serving an additional five additional years imprisonment is not a purely hypothetical possibility. Longford-Myers’ request to interpret 11 *Del. C.* § 1447A(d) is inconsistent with the clear and unambiguous language of the statute and clearly not in his best interest.

Longford-Myers reliance on *Oliver v. State*²² is misplaced. In *Oliver*, the defendant argued that his Possession of a Deadly Weapon By a Person Prohibited sentence was illegal because he received an eight year Level V sentence, suspended after serving three years in prison, followed by probation. *Oliver* claimed this sentence was in contravention of 11 *Del. C.* § 1448(e)(4), which provides:

Any sentence imposed for a violation of this subsection shall not be subject to suspension and no person convicted for a violation of this

²¹ 11 *Del. C.* § 1447A(d).

²² 2012 WL 1187742 (Del. Apr. 5, 2012).

subsection shall be eligible for good time, parole or probation during the period of the sentence imposed.²³

This Court rejected Oliver's claim, concluding:

We find no merit to Oliver's argument. As the Superior Court correctly pointed out, Section 1448(e)(4) prohibits the Superior Court from suspending any period of the minimum mandatory term required to be imposed under Section 1448(e)(1), which in Oliver's case was a three year minimum mandatory term.²⁴

The limitation imposed by Section 1448(e)(4) only applied to sentences imposed pursuant to Section 1448(e)(1), which requires the defendant to possess a specific type of deadly weapon, a firearm, after being previously convicted of a violent felony, or convicted of a prior violent felony within 10 years, or having been convicted of more than one prior violent felony.²⁵ Pursuant to 11 Del. C. § 4205(e), the Superior Court was permitted to suspend any portion of Oliver's sentence in excess of the mandatory minimum sentence.

Here, the language of Section 1447A(d) applies to all PFDCF convictions. The language of the PFDCF statute, and the application of Section 1447A(d) is clear and unambiguous. No sentence imposed pursuant to section 1447A shall be subject to suspension. Longford-Myers' cannot demonstrate plain error.

²³ 11 *Del. C.* § 1448(e)(4).

²⁴ *Oliver*, 2012 WL 1187742 at *1.

²⁵ 11 *Del. C.* § 1448(e)(1)(a-c).

Longford-Myers further argues that the Superior Court erroneously modified his VOP sentence, and Rule 35(a) should be interpreted to only allow the trial court to excise the “illegal” portion of the sentence from the sentence order, and not amend other portions of the sentence to reflect the intent of the sentencing judge. In support of his position, he cites *United States v. Henry*²⁶ for the proposition that the court should refrain from “increasing the legal part of the sentence to compensate for a vacated illegal sentence.”²⁷

In *Henry*, the defendant was convicted, at trial, of three offenses: conspiring to assault federal officers and using a firearm in the commission of a felony, in violation of 18 U.S.C. § 371; assaulting and interfering with federal officers, in violation of 18 U.S.C. § 111, and using a firearm to commit a felony, in violation of 18 U.S.C. § 924(c)(1).²⁸ At sentencing, Henry received five years imprisonment for violating § 371, seven years imprisonment for violating § 111, and five years imprisonment for violating § 924(c)(1).²⁹ The first two sentences were ordered to be served concurrently, so Henry’s aggregate sentence was 12 years imprisonment.³⁰

²⁶ 709 F.2d 298 (5th Cir. 1983).

²⁷ Op. Br. at 17.

²⁸ *Henry*, 709 F.2d at 301.

²⁹ *Id.*

³⁰ *Id.*

A subsequent Supreme Court decision concluded that a defendant could not be convicted for violating §§ 111 and 924(c)(1) based upon the same conduct, so one of these two offenses had to be vacated.³¹ Henry moved for resentencing pursuant to Rule 35, arguing the district court could only resentence him on the § 111 conviction, because in his Rule 35 motion, he claimed the conviction under § 924 was illegal.³² The district court denied Henry's motion, concluding it could exercise discretion in deciding which invalidated crime it would vacate.³³

While pending *en banc* review in the Fifth Circuit, the United States Supreme Court decided *Basic v. United States*,³⁴ holding that Henry could only be convicted and sentenced under § 111. The district court subsequently (1) vacated Henry's conviction under § 924, (2) altered the seven year sentence imposed from § 111 to run consecutive to the five year sentence from § 371, making it a twelve year prison sentence, and then (3) reduced the seven year sentence from § 111 to a five year sentence, effectively imposing an aggregate ten year sentence.³⁵

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ 446 U.S. 398 (1980).

³⁵ *Henry*, 709 F.2d at 302.

Henry is distinguishable from *Longford-Myers*, and is in conflict with other circuit court decisions.³⁶ *Henry*'s conviction for violation of 18 U.S.C. § 924 was vacated, while *Longford-Myers* had already served the maximum sentence for each expired VOP in VN12-05-1016 and VN11-05-1987, making re-sentencing on those offenses illegal. The language of Rule 35 allows the Superior Court to correct an illegal sentence, but the rule is not interpreted as narrowly as *Longford-Myers* argues here. Rule 35 is not meant to correct only parts of a sentence deemed illegal, but also allows the Superior Court to correct a sentence as a whole.³⁷ *Longford-Myers*' continued criminal conduct, convoluted criminal history, probation history and prison sentences, contributed to the court's original VOP sentence order. At the June 11, 2018 VOP hearing, the Superior Court's intent was to impose a three-year term of imprisonment for *Longford-Myers*' repeated violations of probation and new criminal convictions.

³⁶ See *United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1994) (“[W]hen a defendant is found guilty on a multicount indictment, there is a strong likelihood that the district court will craft a disposition in which the sentences on the various counts form part of an overall plan. When the conviction on one or more of the component counts is vacated, common sense dictates that the judge should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture upon remand, within applicable constitutional and statutory limits, if that appears necessary in order to ensure that the punishment still fits both crime and criminal.” (citing *United States v. Bentley*, 850, F.2d 327, 328 (7th Cir. 1988)).

³⁷ Super. Ct. Crim. R. 35(c).

Longford-Myers' objection is to the Superior Court reallocation of the aggregate three year prison sentence imposed in the court's February 6, 2018 VOP sentence to the Drug Dealing VOP – VN12-05-1017-01. The Superior Court's sentence modification did not impose a greater sentence upon Longford-Myers than the one he received in the court's February 6, 2018 Sentence Order, and did not exceed the period of incarceration originally imposed by the Superior Court. Further, the modifications to the June 11, 2018 sentence order did not prejudice Longford-Myers in any way, and in fact, by modifying the illegal PFDCF sentence in VN12-05-1016-01, Longford-Myers is no longer subject to potential future Level V imprisonment on a subsequent VOP for that offense. And, the Superior Court *reduced* the potential Level V exposure Longford-Myers faced on a future VOP for VN12-05-1017-01, because although he was originally sentenced to eight years Level V, the Superior Court imposed a maximum five year Level V sentence upon resentencing for the VOP.

This Court has long recognized that “the imposition of a sentence is within the discretion of the trial court, and whenever possible, effect should be given to its intent.”³⁸ Indeed:

³⁸ *Nave v. State*, 783 A.2d 120, 121 (Del. 2001) (citing *Weber v. State*, 655 A.2d 1219, 1221 (Del. 1995), *Faircloth v. State*, 522 A.2d 1268, 1272-73 (Del. 1987)).

Appellate review of a sentence is extremely limited and generally ends upon a determination that the sentence is within statutory limits.³⁹ When sentencing a defendant for a VOP, the Superior Court can impose any period of incarceration – up to an including the balance of incarceration remaining on the original sentence – so long as the defendant is given credit for all incarceration previously served and the sentence does not exceed the incarceration that a prior iteration of the sentence left suspended.⁴⁰

Longford-Myers' argument implies the Superior Court cannot correct his illegal sentence, but is only able to strike the illegal portions of the sentence from the Sentence Order. Not so. In *Owens v. State*, this Court concluded the Superior Court can correct an illegal sentence at any time, and its authority to do so is not limited by the time limitations imposed by Superior Court Criminal Rule 35(c).⁴¹ Here, like in *Owens*, the original sentence was illegal, and not the result of an arithmetical or technical error.⁴² The trial court was allowed to reapportion its sentence to reflect its intent for Longford-Myers to serve an aggregate three years incarceration for a new felony conviction while on probation.

³⁹ *Patel v. State*, 2018 WL 6729478 (Del. Dec. 21, 2018).

⁴⁰ *Patel*, 2018 WL 6729478, at *1, (citing *Shoates v. State*, 2018 WL 3912033 (Del. Aug. 14, 2018) (citing *Kurzmann v. State*, 903 A.2d 702, 714 (Del. 2006)); *Pavulak v. State*, 880 A.2d 1044, 1046 (Del. 2005)); 11 *Del. C.* § 4334(c). See also *Diaz v. State*, 2014 WL 1017480, at *2 (Del. Mar. 13, 2014).

⁴¹ *Owens v. State*, 2013 WL 6536758 (Del. Dec. 9, 2013).

⁴² *Id.* at *2. The Superior Court is not limited to correcting an illegal sentence within seven days of the imposition of sentence. *Id.*

In correcting Longford-Myers' prior Sentence Orders, the Superior Court gave him credit for all incarceration previously served, and did not exceed the suspended period of incarceration Longford-Myers was eligible to serve on VN12-05-1017-01. Longford-Myers does not claim otherwise, and given the extremely limited appellate review of a sentence, and the fact that the Superior Court corrected an illegal sentence, Longford-Myers cannot demonstrate plain error.

CONCLUSION

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

/s/ Martin B. O'Connor
Martin B. O'Connor, ID # 3528
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

Date: January 2, 2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY LONGFORD-MYERS,)	
)	
Defendant-Below,)	
Appellant,)	No. 494, 2018
)	
v.)	On Appeal from the
)	Superior Court of the
STATE OF DELAWARE,)	State of Delaware
)	
Plaintiff-Below,)	
Appellee.)	

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT
AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4,301 words, which were counted by Microsoft Word 2016.

Dated: January 2, 2019

/s/ Martin B. O'Connor