



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY LONGFORD-MYERS,)
)
 Defendant Below,)
 Appellant,)
) No. 494, 2018
 v.)
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

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

APPELLANT'S REPLY BRIEF

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DATED: January 22, 2019

TABLE OF CONTENTS

TABLE OF CITATIONS ii

ARGUMENT1

**I. THE TRIAL COURT COMMITTED REVERSIBLE
ERROR BY MODIFYING ITS SENTENCE IN THE
DRUG AND FIREARM CASE AS THE ORIGINAL
SENTENCE WAS NOT ILLEGAL AND THE COURT
LACKED JURISDICTION TO MODIFY THE LEGAL
PORTION OF THE VIOLATION OF PROBATION
SENTENCE1**

CONCLUSION.....13

TABLE OF CITATIONS

Cases

<i>Allen v. State</i> , 2016 WL 152923 (Del. Supr. Jan. 8, 2016).....	2-3
<i>Fletcher v. State</i> , 2004 WL 1535728 (Del. Supr. July 2, 2004).....	5
<i>Matthews v. Eldridge</i> , 424 U.S. 319 (1976).....	2
<i>Mays v. State</i> , 2003 WL 231615 (Del. Supr. Jan. 31, 2003).....	6
<i>Oliver v. State</i> , 2012 WL 1187742 (Del. Supr. Apr. 5, 2012).....	3-4, 6
<i>Owens v. State</i> , 2013 WL 85185 (Del. Supr. Jan. 7, 2013).....	11
<i>Owens v. State</i> , 2013 WL 6536758 (Del. Supr. Dec. 9, 2013).....	10-11
<i>State v. Fletcher</i> , 2007 WL 2792245 (Del. Super. Ct. Sep. 26, 2007).....	5
<i>State v. Mays</i> , 2006 WL 2560184 (Del. Super. Ct. Aug. 28, 2006).....	6
<i>United States v. Henry</i> , 709 F.2d 298 (5th Cir. 1983).....	8-9
<i>United States v. Pimienta-Redondo</i> , 874 F.2d 9 (1st Cir. 1994).....	8-9
<i>United States v. Sacco</i> , 367 F.2d 368 (2d Cir. 1966).....	10
<i>United States v. Welty</i> , 426 F.2d 615 (3d Cir. 1970).....	9-10
<i>Vessels v. State</i> , 2009 WL 4847619 (Del. Supr. Dec. 16, 2009).....	5

Rules and Statutes

11 <i>Del. C.</i> § 1447A.....	3-6
11 <i>Del. C.</i> § 1448.....	3-6
<i>Fed. R. Crim. P.</i> 35.....	8-10
<i>Super. Ct. Crim. R.</i> 35.....	6-7, 11

ARGUMENT

CLAIM I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY MODIFYING ITS SENTENCE IN THE DRUG AND FIREARM CASE AS THE ORIGINAL SENTENCE WAS NOT ILLEGAL AND THE COURT LACKED JURISDICTION TO MODIFY THE LEGAL PORTION OF THE VIOLATION OF PROBATION SENTENCE.

Standard of Review

The State contends that Mr. Longford-Myers's claims are waived "absent a finding that the Superior Court committed plain error requiring review in the interest of justice."¹ While the Appellant maintains that this Court should apply an abuse of discretion standard², the interests of justice require review under a plain error standard as Mr. Longford-Myers's right to due process was violated.

The Appellant filed a Motion to Correct Illegal Sentence on April 19, 2018.³ The motion was limited to the sentence imposed in the Maintaining a Dwelling Case.⁴ One week later, the Superior Court directed the State to respond to Mr. Longford-Myers's motion.⁵ The State filed such response on June 1, 2018.⁶ In its response, the State did more than merely reply to the Appellant's claims, as it

¹ Ans. Br. at 13.

² Op. Br. at 10.

³ A006; A037.

⁴ A006; A037.

⁵ A007; A065.

⁶ A007; A066.

raised a new challenge to the sentence originally imposed in the Drug and Firearm Case.⁷ The State’s response was effectively a cross-motion filed pursuant to Rule 35 seeking the correction of an illegal sentence imposed nearly six years earlier.⁸ Ten days later—and without seeking a response from Mr. Longford-Myers as to the State’s new application for correction of an illegal sentence—the Superior Court issued its decision, granting both the Appellant’s original request for modification as well as the State’s supplemental request made on June 1, 2018.⁹

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹⁰ The State moved the trial court to modify the sentence imposed in the Drug and Firearm Case. Without allowing the Appellant an opportunity to be heard, the trial court granted the State’s request. The denial of Mr. Longford-Myers’s right to due process was plain error and warrants reversal.¹¹

⁷ A068.

⁸ A068 (“It is the State’s position that the November 7, 2012 sentence on the PFDCF (IN12-05-1016) is an illegal sentence which is not referenced in Defendant’s current motion but requires the Court to enter a modified sentencing order that is consistent with 11 *Del. C.* §1447A(d).”).

⁹ A007; A015; A094-95.

¹⁰ *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citations omitted).

¹¹ *See, e.g., Allen v. State*, 2016 WL 152923 at *2 (Del. Supr. Jan. 8, 2016) (“Allen’s claim regarding the legality of the Superior Court’s June 2015 modified VOP sentencing order does have merit. The Superior Court did not give Allen notice or an opportunity to be heard on the DOC’s petition to increase the Level V portion of Allen’s sentence and to discharge him from further probation. Allen was entitled to be present, with counsel, at a hearing before the Superior

The Original Sentence in the Drug and Gun Case was Legal.

The State contends in its Answering Brief that the language of Section 1447A(d) is “clear and unambiguous” and argues that a sentencing court is precluded from suspending any period of incarceration for a person convicted of PFDCF, not just the mandatory time prescribed by statute.¹² In so arguing, the State contends that identical language in two separate statutory sections do not have identical meanings.¹³

The State attempts to distinguish *Oliver v. State*¹⁴ by arguing that the “limitation imposed by Section 1448(e)(4) only applied to sentences imposed pursuant to Section 1448(e)(1),” while “the language of Section 1447A(d) applies to all PFDCF convictions.”¹⁵ The State offers no precedent to support its proposed distinction, nor does it posit a rationale as to why the legislature used language in

Court exercised its discretion to resentence him. Accordingly, the modified VOP sentence must be vacated and this matter must be remanded for further proceedings. On remand, the Superior Court either must hold a hearing on the DOC's petition for modification at which Allen has the right to be present with counsel, or it must reinstate its original VOP sentence.”).

¹² Ans. Br. at 15.

¹³ Ans. Br. at 15-16.

¹⁴ 2012 WL 1187742 (Del. Supr. Apr. 5, 2012).

¹⁵ Ans. Br. at 16.

Section 1448(e) to mean one thing, and identical language in Section 1447A to mean another.¹⁶

The statutory language within Section 1448 at issue in *Oliver* states that “[a]ny sentence imposed for a violation of this [subsection (e) of Section 1448] 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 of the sentence imposed.”¹⁷ Subsection (e) of Section 1448 is the only portion of the statute that prescribes a mandatory period of incarceration, and requires increasing periods of incarceration contingent on a defendant’s prior criminal convictions.¹⁸ In interpreting the statutory language proscribing the suspension of a Level V sentence, the *Oliver* Court held that the code only “prohibits the Superior Court from suspending any period of the minimum mandatory term required to be imposed,” thus rendering the sentence imposed by the trial court—eight years of Level V incarceration, suspended after serving the mandatory three years in prison for decreasing levels of supervision—legal.¹⁹

¹⁶ Ans. Br. at 15-16.

¹⁷ 11 *Del. C.* § 1448(e)(4).

¹⁸ *See generally* 11 *Del. C.* § 1448.

¹⁹ *Oliver*, 2012 WL 1187742 at *1.

The language of Section 1447A(d) is identical to Subsection (e) of Section 1448.²⁰ The State’s rationale that it “applies to all PFDCF convictions” is unpersuasive, as Subsection (e)(4) of Section 1448 similarly applies to all Person Prohibited convictions where the defendant has a prior violent felony conviction and faces a mandatory prison sentence.²¹

Moreover, this Court has previously upheld sentences under Section 1447A that imposed and ultimately suspended a period of incarceration greater than the minimum-mandatory sentence. In *Vessels v. State*, the trial court sentenced the defendant to ten years at Level V incarceration, suspended after serving five years, for a violation of the PFDCF statute.²² Another defendant convicted for PFDCF was sentenced to seven years in prison, suspended after serving six years for one year at Level IV supervision.²³ This Court similarly affirmed a conviction and sentence for a violation of Section 1447A in which the trial court imposed a sentence of ten years at Level V, suspended after serving five years for five years

²⁰ Compare 11 Del. C. § 1447A(d) with 11 Del. C. 1448(e)(4).

²¹ 11 Del. C. § 1448(e).

²² 2009 WL 4847619 at *1 (Del. Supr. Dec. 16, 2009).

²³ *State v. Fletcher*, 2007 WL 2792245 at *1 (Del. Super. Ct. Sep. 26, 2007). See also *Fletcher v. State*, 2004 WL 1535728 (Del. Supr. July 2, 2004) (affirming the *Fletcher* defendant’s conviction and sentence).

at Level II probation.²⁴ The State’s reading of Section 1447A would render those sentences—and all similar sentences—illegal.

The analysis by the *Oliver* Court of Subsection (e) of the Person Prohibited statute conducted equally applies to the identically-worded PFDCF statute. Mr. Longford-Myers’s original sentence, in which Level V time greater than the statutorily required minimum-mandatory sentence was imposed and ultimately suspended, was legal. Consequently, the trial court lacked the ability to modify its sentence as to the Drug and Firearm Case. Doing so constituted plain and reversible error.

The Trial Court Lacked Authority to Modify the Drug and Firearm Case Sentence.

The State contends that “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.”²⁵ The State relies upon Superior Court Criminal Rule 35(c) to support its argument.²⁶ A plain reading of the Rule rebuts the State’s contention.

Rule 35(a) allows the Superior Court to “correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time

²⁴ *State v. Mays*, 2006 WL 2560184 at *1 (Del. Super. Ct. Aug. 28, 2006) (citing *Mays v. State*, 2003 WL 231615 (Del. Supr. Jan. 31, 2003)).

²⁵ Ans. Br. at 19.

²⁶ Ans. Br. at 19 n.37.

provided herein for the reduction of sentence.”²⁷ The trial court’s ability to correct a *legal* sentence is governed, in pertinent part, by Rule 35(c), which allows the court to “correct a sentence that was imposed as a result of arithmetical, technical, or other clear error,” so long as such correction is made within seven days after the imposition of sentence.²⁸ The sentence imposed in the Drug and Firearm Case was legal and not subject to modification pursuant to Rule 35(a). Moreover, the sentence was not in need of correcting, as it was not imposed as the result of an arithmetical, technical, or other clear error. Even if such error had occurred when the sentence was imposed, however, the trial court lacked the authority to modify it nearly six years later, as the Rule only allows such modification within seven days of the imposition of sentence.

The State’s argument that Rule 35(c) gave the Superior Court authority to modify a legal sentence is meritless. The trial court lacked any legal authority to modify the Drug and Firearm sentence, and the modification constituted plain and reversible error.

²⁷ *Sup. Ct. Crim. R. 35(a)*.

²⁸ *Sup. Ct. Crim. R. 35(c)*.

The Illegality of the Sentence Imposed in the Maintaining a Dwelling Case Did Not Allow the Trial Court to Modify Any Other Lawful Portion of its Sentence.

The State contends that the Fifth Circuit’s decision in *United States v. Henry*²⁹ is distinguishable from the instant case “and is in conflict with other circuit court decisions.”³⁰ To support the latter argument, the State cites *United States v. Pimienta-Redondo*, a case out of the First Circuit.³¹ The procedural differences between *Henry* and *Pimienta-Redondo*, however, undermine the State’s contention.

The *Henry* Court was confronted with the legality of a trial court’s modification of a sentence pursuant to Federal Criminal Rule of Procedure 35.³² The *Henry* Court engaged in a lengthy analysis of the text and history of Rule 35, concluding that a court’s power to correct an illegal sentence “was not a real power in anything like the normal sense; rather, it was more in the nature of a duty to confess error and acknowledge that the imposition of the initial sentence exceeded the court’s statutory authority and was therefore a legal nullity.”³³

²⁹ 709 F.2d 298 (5th Cir. 1983).

³⁰ Ans. Br. at 19.

³¹ Ans. Br. at 19 n.36 (citing *United States v. Pimienta-Redondo*, 874 F.2d 9 (1st Cir. 1994)).

³² 709 F.2d at 300.

³³ *Id.* at 308.

Pimienta-Redondo did not implicate Rule 35 in any way.³⁴ Instead, the First Circuit was confronted with a constitutional challenge to a resentencing after successful appeal on due process and double jeopardy grounds.³⁵ Given that Mr. Longford-Myers’s argument is premised squarely upon the trial court’s authority to modify a legal sentence pursuant to Rule 35, the supposed distinction between *Henry* and *Pimienta-Redondo* is not relevant to this Court’s analysis.

The State contends that this case differs from *Henry* because “Henry’s conviction for violation of 18 U.S.C. § 924 was vacated, while [Mr.] Longford-Myers had already served the maximum sentence” in the *Maintaining a Dwelling Case*.³⁶ The State offers no support for its conclusory statement, nor does it address the analysis of Rule 35 advanced by the First Circuit. Instead, the State offers a separate rationale—that “the Superior Court’s intent was to impose a three-year term of imprisonment”³⁷—the likes of which was rejected by the Third Circuit in *United States v. Welty* over forty years ago.³⁸

³⁴ See generally *Pimienta-Redondo*, 874 F.2d 9.

³⁵ *Id.* at 10-12.

³⁶ Ans. Br. at 19.

³⁷ Ans. Br. at 19.

³⁸ 426 F.2d 615 (3d Cir. 1970).

The *Welty* Court rejected an argument nearly identical to the one advanced by the State here, noting that “[a]dded punishment under a valid sentence simply because the defendant has successfully show the invalidity of the sentence under another count is a plain violation of the constitutional protection. It may not be justified because the sentencing judge would have imposed the higher penalty if he had been aware of the invalidity of the sentence imposed on the other counts.”³⁹ Recognizing Rule 35 as a check against the Government designed to protect criminal defendants, the *Welty* Court opined that “[t]he possibility of abuses inherent in broad judicial power to increase sentences outweighs the possibility of windfalls to a few prisoners.”⁴⁰

Finally, the State relies upon *Owens v. State*⁴¹ for the contention that a sentencing court, in correcting an illegal sentence, may do more than merely excise the illegal portion of the sentence from its prior Order.⁴² The *Owens* defendant was sentenced for a violation of the Person Prohibited statute.⁴³ The original

³⁹ *Id.* at 619.

⁴⁰ *Id.* at 618 (quoting *United States v. Sacco*, 367 F.2d 368, 370 (2d Cir. 1966)).

⁴¹ 2013 WL 6536758 (Del. Supr. Dec. 9, 2013).

⁴² Ans. Br. at 21.

⁴³ 2013 WL 6536758 at *1.

sentence imposed for that conviction was illegal.⁴⁴ The State conceded the illegality of the sentence and argued to the trial court that it need only modify the sentence to bring it within the bounds of legality.⁴⁵ The trial court granted the State's request, substantively changing the original sentence, but did so without the defendant or his counsel present at a new sentence hearing.⁴⁶ Because the trial court acted without the defendant or his attorney present, this Court vacated the sentence order and remanded the matter for resentencing.⁴⁷ At resentencing, the trial court modified its sentence for the same charge it had originally imposed an illegal sentence.⁴⁸ This Court affirmed, finding that the new sentence was within the bounds of the law.⁴⁹

Here, Mr. Longford-Myers challenged the legality of the trial court's sentence in the Maintaining a Dwelling Case. In finding its initial sentence illegal,

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* See also *Owens v. State*, 2013 WL 85185 at *1 (Del. Supr. Jan. 7, 2013). It is worth noting that the initial reason for the vacation of the *Owens* defendant's sentence order—that the defendant was not afforded to be heard with the assistance of counsel prior to the modification of his sentence—is similarly present in this case, as the trial court did not allow Mr. Longford-Myers or his attorney to be present when it substantially modified its prior sentence order.

⁴⁸ *Id.*

⁴⁹ *Id.* at *2.

the trial court struck that portion of its sentence order. However, unlike in *Owens* where the trial court merely modified the previously-illegal portion of its sentence, the sentencing court here then went on to modify legal portions of Mr. Longford-Myers's sentence—stemming from a wholly separate indictment—to enhance its prior sentence in the Drug and Firearm Case.

The trial court committed reversible error by modifying the legal portions of its February 6, 2018 sentence Order. Rule 35 required the sentencing court to strike the illegal portion of its Order and leave the legal portions in place as they were originally imposed. Failure to do so constituted reversible error.

CONCLUSION

For the reasons stated in his Opening Brief and herein, Mr. Longford-Myers respectfully requests that this Honorable Court reverse his conviction and remand the case for resentencing.

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