

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES FISHER,	§
	§
Defendant Below-	§ No. 414, 1999
Appellant,	§
	§
v.	§ Court Below— Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr.A. No. S97-01-0457
Plaintiff Below-	§
Appellee.	§

Submitted: December 30, 1999

Decided: February 28, 2000

Before **VEASEY**, Chief Justice, **HARTNETT** and **BERGER**, Justices

**ORDER**

This 28th day of February 2000, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, James Fisher (“Fisher”), appeals from an order of the Superior Court denying his motion to correct sentence pursuant to Superior Court Criminal Rule 35(a) (“Rule 35(a”). We find that the Superior Court had authority to sentence Fisher to a 5-year term at Level V, but committed error in sentencing Fisher to successive probationary periods that could cause the sentence to exceed the 5-year maximum statutory penalty.

Accordingly, we **AFFIRM IN PART** and **REVERSE IN PART**.

(2) In this appeal, Fisher claims his sentence exceeded the statutory authorization and violated the terms of his plea agreement with the State. He asks that his sentence be corrected accordingly. Fisher contends that “[p]ursuant to the Laws governing D.U.I.” he is guaranteed a good-time credit of 18 months on a 5-year prison term. Thus, he contends, the Superior Court had the authority to sentence him to a prison term of no more than 3 years and 6 months.<sup>1</sup> Fisher also contends his plea agreement guaranteed a prison term of no more than 3 years and 6 months. Finally, Fisher contends that his sentence exceeded the maximum penalty permitted under law since, upon completion of the Key Program and his Level IV, Level III and Level II probation, he conceivably could serve as much as a 6½-year sentence.

(3) Fisher pleaded guilty to 1 count of driving under the influence of alcohol (“DUI”). He was sentenced as a repeat offender to 5 years in prison at Level V, with credit for time served. After serving 3 years and 6 months at Level V, Fisher was to enter and successfully complete the Key Program at which time the balance of the Level V sentence would be suspended for 1 year in the Level IV Aftercare Program, after which the remainder of the

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<sup>1</sup>Fisher does not cite to a specific statute in support of this contention.

sentence would be suspended for 1 year of probation at Level III, to be followed by an additional year of probation at Level II. Fisher did not file a direct appeal of his sentence or conviction.

(5) Rule 35(a) permits the Superior Court to correct an illegal sentence “at any time.” “The ‘narrow function of Rule 35 is to permit correction of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence.’”<sup>2</sup> “Relief under Rule 35(a) is available ‘when the sentence imposed exceeds the statutorily-authorized limits, [or] violates the Double Jeopardy Clause . . . .’”<sup>3</sup> “A sentence is also illegal if it ‘is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.’”<sup>4</sup>

(6) Fisher’s contention that the Superior Court had authority to sentence him to a prison term of no more than 3 years and 6 months is without

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<sup>2</sup>*Brittingham v. State*, Del. Supr., 705 A.2d 577, 578 (1998) (quoting *Hill v. United States*, 368 U.S. 424, 430 (1962)).

<sup>3</sup>*Id.* (quoting *United States v. Pavlico*, 961 F.2d 440, 443 (4th Cir. 1992)).

<sup>4</sup>*Id.* (quoting *United States v. Dougherty*, 106 F.3d 1514, 1515 (10th Cir. 1997)).

merit.<sup>5</sup> The statute governing penalties for DUI<sup>6</sup> authorizes a prison term of “not less than 2 years nor more than 5 years” for a fourth offense.<sup>7</sup> There is no provision in the DUI statute that mandates 18 months of good-time credit for a 5-year prison sentence. Fisher’s contention that his plea agreement mandates a prison term of 3 years and 6 months is also without merit. The plea agreement indicates only that the State recommended Fisher’s 5-year Level V prison term be suspended for the Key Program and probation after 3 years and 6 months. A recommendation by the State for a particular sentence is not binding on the Superior Court.<sup>8</sup>

(7) Fisher is correct, however, in his final contention that the Superior Court erred in imposing a sentence that exceeded the maximum penalty authorized by law.<sup>9</sup> The maximum statutory penalty for a fourth DUI

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<sup>5</sup>Indeed, Fisher appears to concede this point in his “Motion to Expedite,” which we have deemed to be his reply brief.

<sup>6</sup>21 Del. C. § 4177(d) (4).

<sup>7</sup>Fisher concedes this was his fourth DUI conviction.

<sup>8</sup>Super. Ct. Crim. R. 11(e) (1) (B). In this case, the Superior Court accepted the sentencing recommendation of the State.

<sup>9</sup>The State laudably concedes the error.

conviction is 5 years imprisonment at Level V.<sup>10</sup> The Superior Court exceeded its authority in sentencing Fisher to a prison term, the Key Program and successive probationary terms that could add up to as much as 6-1/2 years.<sup>11</sup>

(8) Delaware law requires a probationary period of “not less than 6 months to facilitate the transition of the individual back to society” whenever a court “imposes a period of incarceration at Level V custody for 1 or more offenses that totals 1 year or more.”<sup>12</sup> This 6-month period may, in the discretion of the court, be in addition to the maximum sentence of imprisonment established by statute.<sup>13</sup> Thus, the maximum permissible sentence was 5 years plus a 6 month transitional period and the final year of probation at Level III must be vacated.<sup>14</sup>

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<sup>10</sup>21 Del. C. § 4177(d) (4).

<sup>11</sup>This period is impossible to calculate with precision at this time since it is not known when Fisher will enter the Key Program or whether he will successfully complete it. It is also not known how long the program will last, assuming normal progress towards completion, although in his brief Fisher indicates 9-12 months. Because the State has not disputed that representation, we accept it for the purpose of deciding this case.

<sup>12</sup>11 Del. C. § 4204(l).

<sup>13</sup>Id.

<sup>14</sup>*Andrews v. State*, Del. Supr., No. 95, 1995, Holland, J., 1995 WL 439189 (July 17, 1995) (ORDER) (citing *Larson v. State*, Del. Supr., No. 366, 1994, Walsh, J., 1995 (continued...))

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED IN PART and REVERSED IN PART. This matter is hereby REMANDED to the Superior Court for proceedings in accordance with this Order.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>14</sup>(...continued)  
WL 236640 (Apr. 13, 1995 (ORDER)).