

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES J. GILMORE,	§	
	§	
Defendant Below-	§	No. 378, 1999
Appellant,	§	
	§	
v.	§	Court Below— Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr.A. Nos. IN97-07-0377
Plaintiff Below-	§	VN95-02-0991-01
Appellee.	§	VN95-02-0993-01
	§	VN95-08-1557-01

Submitted: December 8, 1999

Decided: February 8, 2000

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

ORDER

This 8th 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 J. Gilmore (“Gilmore”), filed this appeal from an order of the Superior Court denying his motion for correction of sentence pursuant to Superior Court Criminal Rule 35(a) (“Rule 35(a”).

We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In this appeal, Gilmore claims his sentence for drug trafficking was illegal because it violated the terms of his plea agreement with the State.

He contends the Superior Court illegally sentenced him to a 6-year, rather than a 3-year, prison term in violation of his plea agreement. He further contends the Superior Court illegally ordered, contrary to his plea agreement and in violation of his constitutional rights, that he be held at Level V until space becomes available at Level IV to serve the probationary portion of his sentence. Gilmore asks that the Superior Court correct his illegal sentence to conform to his agreement with the State.

(3) In September 1997 Gilmore pleaded guilty to 1 count of trafficking in phencyclidine.¹ He was sentenced to 6 years imprisonment at Level V, to be suspended after 3 years for 3 years at Level IV, to be further suspended after 6 months for 30 months at Level III. Gilmore did not file a direct appeal of his conviction or sentence. Later in 1997 he filed a motion for correction of sentence, which was denied by the Superior Court. In 1998 the Department of Corrections requested that Gilmore's sentence be modified so he could participate in the boot camp training program. The Superior Court denied the request. In 1999 Gilmore filed another motion for correction of sentence, which was also denied by the Superior Court.

¹Gilmore also pleaded guilty to 3 counts of violating probation, but does not challenge those convictions or sentences here.

(4) 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.’”² “Relief under Rule 35(a) is available ‘when the sentence imposed exceeds the statutorily-imposed limits, [or] violates the Double Jeopardy Clause’”³ “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.’”⁴

(5) Gilmore’s claim that his sentence was illegal pursuant to Rule 35(a) because it violated his plea agreement is without merit. The Superior Court is authorized by statute to impose a sentence of up to 20 years at Level V for a Class B felony such as trafficking in phencyclidine.⁵ Gilmore received a sentence of 6 years at Level V, to be suspended for decreasing

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

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

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

⁵16 Del. C. §4753A(a) (6); 11 Del. C. §4205(b) (2).

levels of probation after serving 3 years, which was well within the statutory limit. The plea agreement does not provide support for Gilmore's claim as it indicates only that the State will "recommend" the minimum mandatory 3-year period of incarceration.⁶ A recommendation by the State for a particular sentence is not binding on the Superior Court.⁷ Moreover, on the signed guilty plea form Gilmore acknowledged no one had promised him what his sentence would be. The Superior Court was likewise within its discretion in imposing the condition that Gilmore remain at Level V until space becomes available at Level IV since this condition did not exceed any penalty the Superior Court was authorized to impose.⁸ Furthermore, the imposition of the condition was not violative of Gilmore's constitutional rights.⁹

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

⁶16 Del. C. §4753(a) (6) a.

⁷Super. Ct. Crim. R. 11(e) (1) (B).

⁸*Collick v. State*, Del. Supr., No. 212, 1998, Holland, J., 1998 WL 700170 (Aug. 10, 1998) (ORDER).

⁹*Id.*

BY THE COURT:

/s/ Carolyn Berger
Justice