

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY ROSE,	§
	§
Defendant Below-	§ No. 358, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN98-12-0014
Plaintiff Below-	§ IN98-12-0015
Appellee.	§ VN98-12-0014-01
	§ VN98-12-0015-01

Submitted: November 30, 2001

Decided: February 4, 2002

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

ORDER

This 4th day of February 2002, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Jeffrey Rose, filed an appeal from the July 23, 2001 order of the Superior Court denying his motion for modification/reduction of his sentence pursuant to Superior Court Criminal Rule 35. We find no merit to the appeal. Accordingly, we **AFFIRM**. However, we **REMAND** this matter to the Superior Court so that it may rule on Rose's postconviction motion pursuant to Superior Court Criminal Rule 61.

(2) In this appeal, Rose claims that the Superior Court abused its discretion by denying his Rule 35 motion as time-barred. He contends that his sentence should be reduced due to his demonstrated work ethic and rehabilitation.

(3) In January 1999, Rose pleaded guilty to Possession of a Deadly Weapon by a Person Prohibited and Maintaining a Dwelling for Keeping Controlled Substances. Among other things, Rose was sentenced to a 4-year Level V prison term for the weapon conviction. At a violation of probation hearing in July 2000,¹ the Superior Court re-imposed Rose's four-year Level V sentence for the weapon conviction. In February 2001, Rose filed a motion for postconviction relief pursuant to Superior Court Criminal Rule 61 claiming that his counsel had been ineffective and he had been sentenced for a crime to which he did not plead guilty. In its order dated June 7, 2001, the Superior Court agreed that Rose's four-year Level V sentence was improper and reduced it to two years.² In June and July of 2001, Rose

¹Rose had absconded prior to beginning his prison term.

²The Superior Court determined that, while Rose had pleaded guilty to Possession of a Deadly Weapon By a Person Prohibited, he was actually sentenced for Possession of a Firearm By a Person Prohibited, which carried a higher maximum prison term. Although Rose filed his postconviction motion pursuant to Superior Court Criminal Rule 61, the Superior Court relied on Rule 35(a) to reduce his unauthorized four-year Level V sentence. The record reflects that the Superior Court never explicitly ruled on Rose's Rule 61 claim of ineffective assistance of counsel.

moved to further modify his sentence based on his alleged work ethic and rehabilitation. The Superior Court denied the motions, finding them to be time-barred.³

(4) Rose's claim that the Superior Court abused its discretion by not further reducing his sentence is without merit. The Superior Court correctly determined that Rose's motions were filed beyond the 90-day period prescribed in Rule 35(b) and, therefore, were time-barred. Even if the motions had been filed within the prescribed time period, they are meritless in any case. A reviewing court will not interfere with a sentencing court's refusal to modify a sentence, unless it can be demonstrated that the sentence was beyond the maximum authorized by law or resulted from an abuse of discretion on the part of the sentencing judge.⁴ Following the Superior Court's modification of Rose's sentence on his weapon conviction, there is no such evidence in this case.

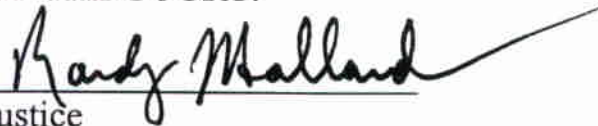
NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. However, because it appears that the Superior Court never ruled on the ineffective assistance of counsel claim in Rose's February 2001 motion for postconviction relief, this matter is hereby

³SUPER. CT. CRIM. R. 35(b).

⁴*Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

REMANDED to permit the Superior Court to consider and rule on that claim. Jurisdiction is not retained.⁵

BY THE COURT:


Justice

⁵Rose filed a “Motion for Preventive Injunction” in this Court on January 14, 2002, requesting that the Superior Court be directed to rule on his ineffective assistance of counsel claim after the instant appeal is decided. Because this Order in essence grants Rose the relief he requests, his motion is denied as moot.