

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID R. WHITEHAIR,	§	
	§	No. 538, 2005
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court of
	§	the State of Delaware, in and
v.	§	for Kent County in Cr. A.
	§	No. VK03-05-0370-02.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Def. ID No. 0305001312
Appellee.	§	

Submitted: November 30, 2005
Decided: February 6, 2006

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 6th day of February 2006, upon consideration of the appellant's opening brief, the appellee's motion to affirm, and the appellant's motion to respond to the motion to affirm, it appears to the Court that:

(1) In 2003, the appellant, David R. Whitehair, pleaded guilty to one count of Unlawful Sexual Contact in the Second Degree and was sentenced to two years at Level V suspended for one year at Level IV followed by one year of probation. In 2004, Whitehair was found guilty of having violated probation (VOP) and was resentenced to two years at Level V suspended after six months for one year of probation. In 2005, Whitehair was found guilty for the second

time of VOP and was resentenced to eighteen months at Level V suspended for Level IV upon his successful completion of the Key Program.

(2) On June 3, 2005, Whitehair filed a motion for correction of illegal sentence pursuant to Superior Court Criminal Rule 35(a). By order dated June 27, 2005, the Superior Court denied Whitehair's motion. Whitehair did not file an appeal.

(3) On September 6, 2005, Whitehair filed a motion for modification of sentence pursuant to Superior Court Criminal Rule 35(b). Whitehair sought to change his placement from Level V incarceration to Level III probation based upon (i) his removal from the Key Program,¹ and (ii) his desire to return to his job and children and to participate in drug and alcohol recovery programs available in the community. By order dated October 17, 2005, the Superior Court denied the motion for modification of sentence as time-barred and on the basis that Whitehair had not demonstrated "extraordinary circumstances."² Moreover, the Superior Court found that Whitehair "was not amenable to probation at this time."

¹Whitehair stated that the Department of Correction removed him from the Key Program upon learning that he had an "open charge."

²See Super. Ct. Crim. R. 35(b) (providing that a motion for modification of sentence must be filed within ninety days of sentence, absent extraordinary circumstances).

(4) On October 31, 2005, Whitehair filed a notice of appeal from (i) the June 27, 2005 order denying his motion to correct an illegal sentence and (ii) the October 17, 2005 order denying his motion for modification of sentence. It appears manifest to the Court that Whitehair's appeal from the June 27, 2005 order is untimely.³ Moreover, Whitehair's claim in that untimely-filed appeal, *i.e.*, that the Superior Court illegally sentenced him to eighteen months at Level V on the second VOP, is without merit.⁴

(5) In his opening brief on appeal from the October 17, 2005 order denying his motion for modification of sentence, Whitehair disputes the Superior Court's finding that the motion was untimely.⁵ Whitehair's argument is well taken.⁶ Nonetheless, assuming that the motion for modification of sentence was timely filed, the record does not reflect that the Superior Court

³See Del. Supr. Ct. R. 6(a)(iii) (providing that a notice of appeal must be filed within thirty days of the entry upon the docket of the order on appeal); *see also Carr v. State*, 554 A.2d 778, 779 (Del. 1989) (untimely appeal creates jurisdictional defect).

⁴See *Pavulak v. State*, 880 A.2d 1044, 1046 (Del. 2005) (holding that upon a subsequent VOP probationer could be sentenced to serve remaining portion of suspended sentence from prior VOP).

⁵Whitehair argues that the motion for modification of sentence filed on September 6, 2005 was timely because it related back to his timely-filed modification request that the Prothonotary had rejected and returned to him.

⁶See *Wilmington Sav. Fund Soc'y v. ChiliBilly's Inc.*, 2005 WL 1654028 (Del. Super.) (determining that technical defect in motion rejected by Prothonotary did not bar motion as untimely when defect was promptly corrected), *aff'd*, 2005 WL 3078824 (Del. Supr.).

abused its discretion when denying the motion.⁷ Whitehair did not demonstrate that the VOP sentence was illegal or inappropriate⁸ or that his removal from the Key Program entitled him to a modification of sentence.⁹ Moreover, in view of the apparent reason for Whitehair's removal from the Key Program, *i.e.*, that he was indicted on August 1, 2005 on one count of Unlawful Sexual Contact,¹⁰ the Superior Court did not abuse its discretion when determining that Whitehair "was not amenable to probation at this time."

NOW, THEREFORE, IT IS ORDERED that Whitehair's motion to respond to the motion to affirm is DENIED. The State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁷*See Shy v. State*, 246 A.2d 926, 927 (Del. 1968) (reviewing denial of motion for sentence modification for abuse of discretion).

⁸*See Henry v. State*, 2002 WL 1362233 (Del. Supr.) (citing *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992).

⁹The Key Program provided Whitehair only with an opportunity to qualify for a reduced level of incarceration. *See, e.g., Phillips v. Kearney*, 2003 WL 2004392 (D. Del) (determining that the Key Program was not a mandatory part of the defendant's sentence but rather was "a pre-requisite for the *possibility* of reduced levels of incarceration") (citation omitted).

¹⁰The Court takes judicial notice of Whitehair's indictment. *See State v. Whitehair*, Cr. ID No. 0506012823 (Del. Super. filed Aug 1, 2005).