

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK A. SELLERS,	§	
	§	No. 248, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0908024221
Appellee.	§	

Submitted: October 21, 2011

Decided: December 30, 2011

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

**O R D E R**

This 30<sup>th</sup> day of December 2011, upon consideration of the appellant's opening brief and the appellee's motion to affirm, it appears to the Court that:

(1) On December 2, 2009, the appellant, Mark A. Sellers, pled guilty to Possession with Intent to Deliver Heroin ("PID Heroin") in the above matter and to violation of probation in another matter unrelated to this appeal.<sup>1</sup> For PID Heroin, the Superior Court sentenced Sellers to ten years at Level V incarceration suspended after six months for one year at Level II

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<sup>1</sup> *State v. Sellers*, Del. Super., Cr. ID No. 0604008728.

probation. For violation of probation, the Superior Court sentenced Sellers to one year at Level V.<sup>2</sup>

(2) The record reflects that Sellers was discharged from prison on January 13, 2011. Following his release from prison, Sellers did not contact his probation officer and did not report for probation supervision. As a result, on March 1, 2011, Sellers was charged with violation of probation (VOP).

(3) Through his defense counsel, Sellers admitted the violation at the April 20, 2011 VOP hearing. Also through defense counsel, however, and in response to the court's questions, Sellers explained that he had "no family in Delaware, in support system in Delaware."

(4) At the conclusion of the April 20, 2011 VOP hearing, the Superior Court revoked Sellers' probation for PID Heroin and sentenced him to nine years and six months at Level V suspended after one year for eighteen months at Level IV work release followed by one year at Level III probation. This appeal followed.

(5) In his opening brief on appeal, Sellers challenges the VOP sentence, claiming that the Superior Court violated due process when imposing Level V incarceration on a Level II VOP. Sellers also makes the

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<sup>2</sup> *Id.* See docket at 20 (Dec. 2, 2009) (sentencing).

conclusory claim that the Superior Court did not consider his explanation that he has trouble complying with the conditions of probation because he has neither family nor a “support system” in Delaware.

(6) Appellate review of a VOP sentence is limited to whether a sentence has exceeded statutory limits.<sup>3</sup> “[O]nce a defendant violates the terms of his probation, the Superior Court has the authority to require a defendant to serve the sentence imposed, or any lesser sentence.”<sup>4</sup> Moreover, under sentencing guidelines, a VOP offender may have his level of supervision raised more than one level when “aggravating circumstances” warrant such action.<sup>5</sup>

(7) The VOP sentence imposed on April 20, 2011 is within statutory limits and does not exceed the sentence originally imposed on December 2, 2009 for PID Heroin.<sup>6</sup> Sellers was serving Level II probation when he was charged with VOP; however, the record reflects the existence

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<sup>3</sup> *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

<sup>4</sup> *State v. Sloman*, 886 A.2d 1257, 1260 (Del. 2005) (citing 11 Del. C. § 4334(c)).

<sup>5</sup> See Delaware Sentencing Accountability Commission (SENTAC) Benchbook Violation of Probation Sentencing Policy at 121 (2011) (listing “aggravating circumstances”).

<sup>6</sup> See Del. Code Ann. tit. 16, § 4751 (a) (2003 & 2010 Supp.) (providing that PID Heroin is a class C felony); Del. Code Ann. tit. 11, § 4205(b)(3) (providing for up to fifteen years of incarceration for a class C felony).

of aggravating circumstances warranting the imposition of supervision at Level V.<sup>7</sup>

NOW, THEREFORE IT IS HEREBY ORDERED that the motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>7</sup> Under the heading “aggravating factors,” the probation violation report filed on March 1, 2011 states that Sellers’ behavior “is repetitive and flagrantly defies the authority of the court.” *See* SENTAC Benchbook at 121, section F (listing repetitive and flagrantly defiant behavior as aggravating circumstance). At the VOP hearing, the probation officer stated that Sellers had “at least three prior adult violations . . . for failing to report and absconding from probation.” Hr’g Tr. at 2 (April 20, 2011).