

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRENTON L. SMITH,	§
	§
Defendant Below-	§ No. 462, 1999
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. IN89-02-1149
Plaintiff Below-	§
Appellee.	§

Submitted: February 23, 2000

Decided: May 2, 2000

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

**ORDER**

This 2nd day of May 2000, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Brenton L. Smith, filed this appeal from an order of the Superior Court denying his motion to correct sentence pursuant to Superior Court Criminal Rule 35(a). We find no merit to the appeal. Accordingly, we AFFIRM. Smith's motion to amend his opening brief is DENIED.

(2) In this appeal, Smith claims that it was illegal for the Superior Court: i) to file the order declaring him an habitual offender the day after he was sentenced and ii) to fail to conduct a separate hearing on his habitual offender

status.<sup>1</sup> To the extent Smith has not argued other grounds to support his appeal that were previously raised, those grounds are deemed waived and will not be addressed by this Court.<sup>2</sup>

(3) On August 17, 1989, Smith was found guilty by a jury of robbery in the second degree. Six days later, the State filed a motion to have Smith declared an habitual offender. Following a hearing on November 6, 1989, the Superior Court declared Smith an habitual offender and sentenced him to life in prison at Level V. Smith's conviction and sentence were affirmed by this Court on direct appeal.<sup>3</sup> In 1991, Smith filed a motion for postconviction relief, which was denied by the Superior Court. This Court dismissed the appeal.<sup>4</sup> In 1994, the Superior Court denied Smith's second motion for postconviction relief.

(4) At the November 6, 1989 hearing, the Superior Court sentenced Smith for his second degree robbery conviction, disposed of several violations

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<sup>1</sup>In his subsequent motion to amend his opening brief, Smith also claims the State did not present proper proof that he committed the predicate offenses and improperly relied on evidence of a Robinson plea in its motion to have him declared an habitual offender.

<sup>2</sup>*Murphy v. State*, Del. Supr., 632 A.2d 1150, 1152 (1993). Smith also argued in the Superior Court below that he should have received no more than 10 years in prison under the SENTAC Guidelines.

<sup>3</sup>*Smith v. State*, Del. Supr., No. 491, 1989, Holland, J., 1991 WL 12113 (Jan. 9, 1991) (ORDER).

<sup>4</sup>*Smith v. State*, Del. Supr., No. 393, 1991, Horsey, J., 1991 WL 279846 (Dec. 2, 1991) (ORDER).

of probation and decided the State's motion to have Smith declared an habitual offender. The record reflects that Smith was given notice of the State's motion to declare him an habitual offender, that he was present with counsel at the time of the hearing and that both he and his counsel offered argument against the State's motion. The record also reflects that the State offered proof of the requisite predicate offenses under the habitual offender statute<sup>5</sup> and Smith admitted he had been convicted of those offenses.

(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>6</sup> Relief under Rule 35(a) is available 'when the sentence imposed exceeds the statutorily-imposed limits, [or] violates the Double Jeopardy Clause . . . .'<sup>7</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

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<sup>5</sup>11 Del. C. § 4214(a). The State offered proof that in 1983 Smith was convicted of burglary in the second degree, in 1985 he was convicted of 2 counts of felony theft and in 1987 he was again convicted of burglary in the second degree.

<sup>6</sup>*Brittingham v. State*, Del. Supr., 705 A.2d 577, 578 (1998) (quoting *Hill v. United States*, 368 U.S. 424, 430 (1962)).

<sup>7</sup>*Id.* (quoting *United States v. Pavlico*, 961 F.2d 440, 443 (4<sup>th</sup> Cir. 1992)).

uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.’”<sup>8</sup>

(6) Smith does not contend that his sentence exceeded the statutory authorization, constituted double jeopardy, or was ambiguous or contradictory. Because the only claims Smith makes involve alleged procedural errors in connection with the hearing at which he was declared an habitual offender, he is not entitled to relief pursuant to Rule 35(a).<sup>9</sup>

(7) To the extent that Smith’s motion can be viewed as a motion to correct a sentence imposed in an illegal manner,<sup>10</sup> it is time-barred because it was not filed within 90 days after sentence was imposed.<sup>11</sup>

(8) Even if considered on their merits, Smith’s claims are unavailing. Smith’s claim that it was improper for the Superior Court to sentence him on the second degree robbery charge and the violations of probation at the same time it heard the State’s motion to have him declared an habitual offender is without

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<sup>8</sup>*Id.* (quoting *United States v. Dougherty*, 106 F.3d 1514, 1515 (10<sup>th</sup> Cir. 1997)).

<sup>9</sup>*Id.* (citing *Hill v. United States*, 368 U.S. at 430).

<sup>10</sup>Super. Ct. Crim. R. 35(a).

<sup>11</sup>Super. Ct. Crim. R. 35(b).

merit. Because Smith did not object to the combined hearing, we review this issue for plain error that is “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”<sup>12</sup> Although the habitual offender statute contemplates a separate hearing on habitual offender status prior to sentencing, it does not mandate that the two hearings be held on separate days.<sup>13</sup> Thus, Smith must demonstrate actual prejudice resulting from combining the hearings, which he has failed to do.<sup>14</sup> There was likewise no impropriety in docketing the order reflecting the rulings made at the combined hearing following that hearing.

(9) Smith’s motion to amend his opening brief requests this Court to consider two additional claims. Those claims were not raised below and this Court will not consider them for the first time on appeal.<sup>15</sup> The claims are meritless in any case. While Smith asserts that the State did not provide the requisite proof of his predicate convictions, the record reflects that neither Smith nor his counsel objected to the Superior Court’s consideration of certified copies

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<sup>12</sup>*Kirby v. State*, Del. Supr., No. 344, 1997, Walsh, J., 1998 WL 184492 (Apr. 13, 1998) (ORDER) (citing *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100, cert. denied, 479 U.S. 869 (1986)).

<sup>13</sup>*Id.* (citing *Bailey v. State*, Del. Supr., 450 A.2d 400, 404 (1982)).

<sup>14</sup>*Id.*

<sup>15</sup>Supr. Ct. R. 8.

of the docket sheets showing Smith's previous felony convictions. Moreover, Smith admitted the convictions as reflected on the docket sheets. Absent any evidence raising questions concerning the accuracy of the docket sheets or the identity of the perpetrator, the certified docket sheet is sufficient to support the Superior Court's imposition of an enhanced sentence.<sup>16</sup> Equally unavailing is Smith's claim that a judgment of conviction upon a Robinson plea can not serve as a predicate offense for purposes of the habitual offender statute. Superior Court Criminal Rule 11, which governs pleas, specifically states that "... a judgment of conviction upon a plea of guilty or nolo contendere may be admissible in any proceeding ...."<sup>17</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED. The motion to amend is hereby DENIED.

BY THE COURT:

s/Joseph T. Walsh  
Justice

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<sup>16</sup>*Gatewood v. State*, Del. Supr., No. 489, 1997, Berger, J., 1999 WL 591830 (July 14, 1999) (ORDER) (distinguishing *Morales v. State*, Del. Supr., 696 A.2d 390, 394-95 (1997)).

<sup>17</sup>Super. Ct. R. 11(e) (6).

