

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	ID No. 9412009781
)	
v.)	
)	
WAYNE R. AVERILL,)	
)	
Defendant.)	

Submitted: March 13, 2008
Decided: June 25, 2008

On Defendant's Motion for Sentence Modification. **GRANTED** in part.

ORDER

Donald J. Roberts, Deputy Attorney General, Wilmington, Delaware.

Wayne R. Averill, *Pro Se*.

BRADY, J.

Before the Court is a Motion for Sentence Modification filed by Wayne R. Averill (“Averill”) pursuant to Superior Court Criminal Rule 35(b).¹

On October 7, 1998 Averill was sentenced on a violation of probation. The sentence reinstated a previously suspended term of incarceration for Possession with Intent to Deliver Marijuana and Conspiracy, Third Degree. On the Possession charge, the Court sentenced Averill to ten months at Level V. On the Conspiracy charge, the Court sentenced him to one year at Level V, suspended for one year at Level IV Work Release, suspended after six months, followed by three months at Level III probation.

Prior to completing his time on the above sentence, Averill pled guilty to three counts of Indecent Exposure, First Degree and three counts of

¹ Super. Ct. Crim. R. 35 provides as follows: **(b) Reduction of sentence.** The court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed. This period shall not be interrupted or extended by an appeal, except that a motion may be made within 90 days of the imposition of sentence after remand for a new trial or for resentencing. The court may decide the motion or defer decision while an appeal is pending. The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances or pursuant to 11 Del.C. § 4217. The court will not consider repetitive requests for reduction of sentence. The court may suspend the costs or fine, or reduce the fine or term or conditions of partial confinement or probation, at any time. A motion for reduction of sentence will be considered without presentation, hearing or argument unless otherwise ordered by the court.

Unlawful Sexual Intercourse, Third Degree. His sentence – as modified on January 16, 2008 – is as follows:

Indecent Exposure, Count 1: One year at Level V, suspended after time served, no probation to follow.

Indecent Exposure, Count 2: One year at Level V, suspended after time served, no probation to follow.

Indecent Exposure, Count 3: One year at Level V, suspended after time served, no probation to follow.

Unlawful Sexual Intercourse, Count 1: Ten years at Level V, suspended after time served for six months Level IV work release followed by two years of Level III probation.

Unlawful Sexual Intercourse, Count 2: Ten years at Level V, suspended for two years of Level III probation.

Unlawful Sexual Intercourse, Count 3: Ten years at Level V, suspended for two years of Level III probation.

Currently, Averill has served all of his non-suspended Level V time under the above sentences. He has also completed his six-month Level IV Work Release sentence under the January 16, 2008 Modified Sentencing Order. He is now serving his six-month Level IV Work Release sentence under the October 7, 1998 Sentencing Order.

Averill requests the Court to modify his sentence to make his two Level IV Work Release sentences run concurrently, rather than consecutively. The effect of this request, if granted, would terminate his

remaining Level IV time and place him on Level III probation pursuant to the above-mentioned Sentencing Orders.

For the following reasons, Averill's Motion is **GRANTED** in part.

DISCUSSION

Averill bases his Motion on eight separate grounds. All eight grounds are best summarized as follows: (1) Averill received two separate sentences for Conspiracy and Possession With Intent to Deliver. Averill contends both charges are related to the same criminal enterprise, and he has already served 10 months at Level V due to the act that resulted in both convictions. (2) Averill has already successfully completed a Level IV Work Release program under his January 16, 2008 Modified Sentencing Order. He has achieved all of his goals including obtaining full-time employment, making payments on his fines, and saving money for a car and for housing, and (3) Averill's father is ill, and Averill wants to begin his Level III probation time as soon as possible so he has may care for his ailing father.

Averill requests the Court to give him concurrent, rather than consecutive, Level IV Work Release sentences. However, this specific request is statutorily prohibited. "No sentence of confinement of any

criminal defendant... shall be made to run concurrently with any other sentence of confinement imposed on such criminal defendant.”² Although work release is a sentence of partial confinement, it is, nonetheless, still a sentence of confinement,³ which may not run concurrently with any other sentence of confinement.⁴

However, pursuant to Superior Court Criminal Rule 35(b), the Court may “reduce the... term or conditions of partial confinement or probation, at any time.”⁵ Therefore, the Court will consider Averill’s Motion as a request to suspend his remaining Level IV time for Level III probation.

Relief under Rule 35(b) is a discretionary function of this Court. The Rule does not set forth specific criteria which must be met before the Court may grant a Rule 35(b) motion. However, common sense (as well as the few published decisions that have addressed the Rule) dictates that the Court may modify a sentence if present circumstances indicate that the previously imposed sentence is no longer appropriate, or if the sentencing Court “would have sentenced the defendant any differently... had it been aware of the

² 11 Del. C. § 3901(d).

³ 11 Del. C. § 4204 (c)(4); *Anderson v. State*, 913 A.2d 562 (Del. 2006) (Noting the general policy of giving inmates Level V credit for time served at a Level IV facility); *Walt v. State*, 727 A.2d 836, 839 (Del. 1999) (Holding that commitment to a Level IV halfway house constitutes a sentence of imprisonment.)

⁴ 11 Del. C. § 3901(d).

⁵ Super. Ct. Crim. R. 35(b).

factual bases that defendant has proffered in support of his motion to modify.”⁶

The Court is not persuaded by Averill’s argument that he should not have to serve two sentences for one criminal act. He was convicted of two charges, and properly sentenced on each. Similarly, Averill’s family considerations are also not an appropriate basis to grant relief under Rule 35(b). “The considerations of familial hardship... were important factors that Defendant should have considered before undertaking the criminal acts for which he was convicted.”⁷

However, the Court finds that Averill’s consecutive six-month Level IV Work Release sentences contradict the intent of the October 7, 1998 Sentencing Order.

Averill was sentenced to Level IV Work Release by two different judges of this Court. Obviously, when he was sentenced to Level IV Work Release on October 7, 1998, the sentencing Judge did not anticipate that his Order would be superseded by a subsequent sentence of Level IV Work Release, thus resulting in back-to-back sentences that are essentially identical.

⁶ *State v. Johnson*, 2006 WL 3872849 at *3 (Del. Super. Dec. 7, 2006).

⁷ *State v. Liket*, 2002 WL 31133101 at *3 (Del. Super. Sept. 25, 2002).

The purpose in sentencing criminal defendants to decreasing levels of supervision, after a term of Level V incarceration, is to assist them in their transition back into society while assessing their ability and desire to make better choices as they are gradually given more freedom and responsibility.⁸ The manner in which Level IV Work Release accomplishes this purpose is self explanatory, and if a criminal defendant successfully completes a six-month sentence of Level IV Work Release, the Court finds that it is reasonable and prudent to place the defendant on a lower level of supervision.

The Court is satisfied that the sentencing Judge would not have sentenced Averill to Level IV Work Release if he had known that the sentence would have resulted in the current situation, in which Averill is repeating the Level IV program after already successfully completing it. Indeed, the sentencing Judge sentenced Averill to one year at Level IV Work Release, but suspended six months of the sentence pending the successful completion of the first six months. Therefore, the sentencing Judge apparently felt that six months of Level IV Work Release would provide an adequate opportunity to measure Averill's readiness to enter Level III

⁸ 11 Del. C. § 4204(l).

probation. Accordingly, the Court finds that it is appropriate to suspend Averill's remaining Level IV time for Level III probation.

CONCLUSION

For the forgoing reasons, Averill's Rule 35(b) Motion is hereby **GRANTED** in part. His remaining Level IV sentence shall be suspended for Level III probation. All other terms and conditions of his October 7, 1998 Sentencing Order shall remain in full effect.

IT IS SO ORDERED.

M. Jane Brady
Superior Court Judge

Original to Prothonotary