



IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
Plaintiff – Below,)
Appellant,)
)
v.) No. 360, 2014
)
DANIEL DIAZ,)
)
Defendant – Below,)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE’S AMENDED OPENING BRIEF

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DATE: September 18, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

On July 24, 2006, a New Castle County Grand Jury returned an indictment against Daniel Diaz (“Diaz”) alleging three counts of Robbery First Degree, one count of Robbery Second Degree and one count of Resisting Arrest. A-1. Diaz pleaded guilty of two counts of Robbery First Degree and one count of Robbery Second Degree on December 11, 2006. A-2. On February 9, 2007, Diaz was sentenced to an aggregate of six years incarceration followed by descending levels of supervision.¹

After being released from prison, Diaz was arrested on April 8, 2013 on drug charges (Drug Dealing and Aggravated Possession of Heroin Tier 5). A-16. At the time, he was on probation and a violation report was filed with the Superior Court. A-4. On July 24, 2013, after a hearing, the Superior Court found Diaz in violation of his probation and sentenced him to 6 years incarceration followed by 6 months of Level 2 probation.² A-4. The violation was based, in large part, on his new arrest. Diaz appealed the Superior Court’s decision and this Court affirmed Diaz’s conviction for violation of probation in March 13, 2014.³ A-5.

¹ *State v. Diaz*, Del. Super. ID No. 0606013407, Brady, J. (February 9, 2007) (Sentence Order) (attached as *Exhibit A* to the State’s Opening Brief).

² *State v. Diaz*, Del. Super. ID No. 0606013407, Babiarez, J. (July 24, 2013) (Sentence Order) (attached as *Exhibit B* to the State’s Opening Brief).

³ *Diaz v. State*, 2014 WL 1017480 (Del. Mar. 13, 2014).

Diaz was tried on his new charges and acquitted of all charges on January 29, 2014. A-23. Diaz filed a motion for modification of his violation of probation sentence on May 28, 2014. A-5. On June 2, 2014, without affording the State an opportunity to respond to Diaz's motion, the Superior Court granted the sentence modification, suspending all of the Level 5 time previously imposed (6 years) for Level 4 Home Confinement followed by Level 3 probation.⁴

On June 27, 2014, the State filed a Motion to Vacate the Superior Court's order modifying Diaz's violation of probation sentence. A-6. The Superior Court did not rule on the State's Motion to Vacate and on July 1, 2014 scheduled a hearing on the matter. A-6. The time to file a notice of appeal of the Superior Court's order modifying Diaz's violation of probation expired on July 1, 2014. Because the Superior Court did not rule on the State's Motion to Vacate prior to the deadline, the State filed its notice of appeal on July 1, 2014. This is the State's Opening Brief.

⁴ *State v. Diaz*, Del. Super. ID No. 0606013407, Streett, J. (June 2, 2014) (Sentence Order) (attached as *Exhibit C* to the State's Opening Brief).

SUMMARY OF THE ARGUMENT

I. The Superior Court failed to follow the plain language of Superior Court Criminal Rule 35(b) and the case law interpreting that rule when it granted Diaz's motion for sentence modification. Rule 35(b) provides that the Superior Court will not consider motions for sentence modification made after 90 days from the date of the imposition of the sentence except under "extraordinary circumstances." In this case, Diaz filed his motion for sentence modification well after the 90-day period had run and his acquittal on newly accrued drug charges did not amount to "extraordinary circumstances" as that term has been interpreted by Delaware courts. Moreover, the Superior Court failed to make any finding that extraordinary circumstances existed in Diaz's case which would warrant the court's consideration of his motion for sentence modification in accordance with Rule 35(b).

STATEMENT OF FACTS

Because Diaz was found in violation of his probation and appealed the Superior Court's order, the following facts are taken directly from this Court's order affirming the Superior Court's decision.⁵

The State's evidence [presented at the violation of probation hearing] reflected that the Delaware State Police had received information from a confidential informant (CI) that Diaz was selling heroin in the Newark and New Castle areas. The CI told police that Diaz would re-supply his drugs by driving to Philadelphia in a silver Ford Taurus with Pennsylvania tags. The silver Ford previously had been observed by his probation officer parked outside Diaz's home. As a result of the CI's information, police made an undercover, controlled drug purchase from Diaz. They also obtained a warrant to place a GPS tracking device on the silver Ford. The monitoring device reflected Diaz leaving Delaware on three occasions. On the third occasion, police stopped his vehicle. After obtaining a warrant, they searched the car and found over 10,000 bags of heroin hidden in a secret compartment. At the conclusion of the State's evidence, the defendant did not contest that the State had established a basis for the VOP.⁶

⁵ *Diaz*, 2014 WL 1017480.

⁶ *Id* at *1.

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT GRANTED DIAZ'S OUT OF TIME MOTION FOR SENTENCE MODIFICATION. DIAZ FAILED TO ALLEGE OR DEMONSTRATE THE EXISTENCE EXTRAORDINARY CIRCUMSTANCES WHICH WOULD WARRANT THE COURT'S CONSIDERATION OF THE MOTION UNDER SUPERIOR COURT CRIMINAL RULE 35(b).

Question Presented

Whether the Superior Court abused its discretion by failing to find extraordinary circumstances when considering a defendant's motion for sentence modification filed out of time under Superior Court Criminal Rule 35(b).

The State attempted to preserve this question below when it filed its Motion to Vacate the Superior Court's May 28, 2014 order granting Diaz's motion for sentence modification.⁷ The Superior Court however, did not rule on the State's motion prior to the deadline for the State to file its notice of appeal in this Court. The issue was, therefore, not addressed below but should be considered by this Court under Supreme Court Rule 8 in the interests of justice as the State did not have an opportunity to be heard on the matter prior to (or after) the Superior Court issuing its order.⁸

⁷ *State v. Diaz*, Del. Super. ID No. 0606013407, State's Motion to Vacate (June 27, 2014) (attached as *Exhibit D* to the State's Opening Brief).

⁸ Delaware Supreme Court Rule 8 provides:

Standard and Scope of Review

This Court reviews sentencing of a defendant in a criminal case under an abuse of discretion standard.⁹ “To disturb a sentence on appeal, there must be a showing either of the imposition of an illegal sentence or of abuse of the trial judge’s broad discretion.”¹⁰

Merits of the Argument

Superior Court Criminal Rule 35(b) provides that the Superior Court “may consider a motion to reduce a sentence only if such motion is made within ninety days after the sentence is imposed or upon a showing of extraordinary circumstances. The Superior Court may not consider repetitive requests for reduction of sentence.”¹¹ An inmate seeking to reduce a sentence of imprisonment

Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

⁹ *Wescott v. State*, 2009 WL 3282707 at *5 (Del. Oct. 13, 2009); *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).

¹⁰ *Weber v. State*, 655 A.2d 1219, 1221 (Del. 1995).

¹¹ *Jones v. State*, 2003 WL 356788, * 1 (Del. Feb. 14, 2003). Rule 35 states, in part:

(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

on his own motion must demonstrate “extraordinary circumstances” for the granting of relief under the rule.¹² That is because Rule 35(b) provides that the Court may reduce a sentence upon application outside of 90 days of the imposition of the sentence *only* in extraordinary circumstances or pursuant to 11 *Del. C.* § 4217.¹³

In this case, Diaz filed his motion for sentence reduction pursuant to Rule 35(b) on May, 28, 2014. Diaz was found to have violated the terms of his probation and was sentenced on July 24, 2013. His motion for sentence reduction came more than 10 months after he had been sentenced. In the interim, Diaz appealed his conviction for violation of probation to this Court. On March 13, 2014, this Court affirmed the Superior Court’s order and sentence.¹⁴ With regard to Diaz’s sentence for violation of probation, this Court stated:

The Superior Court noted the seriousness of the underlying offenses (i.e., robbery) for which Diaz was originally convicted and the seriousness of the subsequent crime for which Diaz was charged in

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.

¹² *Sample v. State*, 2012 WL 193761, at *1 (Del. Jan. 23, 2012) (“Under Rule 35(b), the Superior Court only has discretion to reduce a sentence upon motion made within 90 days of the imposition of sentence, unless ‘extraordinary circumstances’ are shown.”).

¹³ 11 *Del. C.* § 4217 permits the Department of Correction to apply for an offender’s sentence modification); *Woods v. State*, 2003 WL 1857616, at *1 (Del. Apr. 8, 2003) (Department of Correction has sole discretion to file such a petition).

¹⁴ *Diaz*, 2014 WL 1017480. Prior to this Court’s decision, Diaz went to trial and was acquitted of the drug charges underlying the violation of probation in this case. A-23.

2013 as a basis for reimposing the entire balance of the Level V time remaining on Diaz's original sentences. Under the circumstances, the sentence was authorized by law, was neither arbitrary nor excessive, and does not reflect any evidence of a closed mind by the sentencing judge.¹⁵

It was only after this Court affirmed the Superior Court's order and sentence that Diaz filed a motion for reduction of sentence under Rule 35(b).

Because Diaz's motion under Rule 35(b) was filed well beyond the 90-day limit, he was required to demonstrate "extraordinary circumstances." In his motion, Diaz did not allege or demonstrate any "extraordinary circumstances."¹⁶ The basis for Diaz's motion was his acquittal on the underlying charges and his argument that his sentence for the violation of probation was excessive.¹⁷ When Diaz appealed the Superior Court's order finding him in violation, this Court noted that the State was not "obligated to pursue the new criminal charge before it proceeded with the VOP charge." Indeed, the ultimate disposition of the

¹⁵ *Id* at *2.

¹⁶ As the dissent in *Lewis v. State* noted "[t]his Court has held on several occasions that a Motion for Reduction of Sentence pursuant to Rule 35(b) is time-barred after 90 days unless the petitioner is able to demonstrate extraordinary circumstances that *specifically justify the delay*." 797 A.2d 1198, 1203 (Del. 2002) (citing *Black v. State*, 1999 WL 1098171 (Del. Nov. 2, 1999); *Winn v. State*, 1998 WL 515166 (Del. July 6, 1998); *Abdul-Akbar v. State*, 1997 WL 776208 (Del. Dec. 4, 1997)) (emphasis in original).

¹⁷ A-27. As noted above, this Court found that the sentence was not excessive. In addition, Diaz claimed that his child was born during the pendency of the underlying drug charges. This claim however does not amount to "extraordinary circumstances" under Rule 35(b). See *Iverson v. State*, 2010 WL 376899, *1 (Del. Jan 12, 2010) (stating "[f]amilial hardship and financial difficulties are not appropriate factors for the trial court to consider in the context of a sentence modification motion." (citing *State v. Liket*, 2002 WL 31133101 (Del. Sept. 25, 2002)).

underlying charges was of no consequence to the Superior Court's finding that Diaz violated the terms of his probation, nor was it a consideration when he was sentenced for the violation of probation. Stated differently, the disposition of Diaz's pending criminal charges played no part in the Superior Court's finding of a violation of probation or the sentence imposed for the violation.

Here, Diaz's mere allegation that he was acquitted of the underlying drug charges does not amount to a demonstration of extraordinary circumstances. This Court has affirmed a finding of violation of probation in a case where some of the charges underlying the VOP were *nolle prossed* by the State.¹⁸ In *Lopez v. State*, the defendant, an absconded probationer, was arrested for Driving Under the Influence ("DUI") and an administrative warrant for violation of probation was issued.¹⁹ One month after his DUI arrest, police discovered more than fifty grams of heroin in a backpack possessed by Lopez and arrested him.²⁰ Lopez was convicted of the DUI charge and the State entered a *nolle prosequi* on the drug charges citing prosecutive merit.²¹ Lopez was found in violation of his probation and appealed.²² Lopez argued that while he admitted to violating certain terms of

¹⁸ *Lopez v. State*, 2014 WL 2927347 (Del. June 25, 2014).

¹⁹ *Id.* at *1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *2.

his probation, there was insufficient evidence presented about his drug arrest which would have supported a finding that he violated his probation.²³ This Court rejected Lopez’s argument stating that:

“probation is an ‘act of grace,’ “and “revocation of probation is an exercise of broad discretionary power.” “All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.” “[A] probation revocation may not stand unless there be some competent evidence to prove the violation asserted.”²⁴

Here, Diaz conceded that there was a basis for the Superior Court to find him in violation of his probation but later argued that a reduction of his VOP sentence was warranted because of his acquittal on the new drug charges.²⁵ And, it appears that the Superior Court found that the fact that Diaz was acquitted of the underlying drug charges was dispositive on the issue of his VOP sentence. However, the burden of proof at trial and the burden of proof at VOP hearing are completely different standards. At trial, the State was required to prove each element of the underlying drug offenses beyond a reasonable doubt. At the VOP hearing, the State needed only to demonstrate that Diaz’s behavior on probation was not as

²³ *Id* at *5.

²⁴ *Id.* (quoting *Brown v. State*, 249 A.2d 269, 271–72 (Del. 1968)).

²⁵ At the VOP hearing Diaz’s counsel stated “[w]e’re not going to contest that there was a basis for the violation.” A-13. In his Motion for Sentence Modification, Diaz asked the Superior Court reduce his VOP sentence “in light of his acquittal [on the underlying drug charges].” A-27.

good as required by the terms of his probation. The State's burden at that proceeding was to show some competent evidence that Diaz violated the terms of his probation. At the VOP hearing, the State presented evidence that Diaz violated the terms of his probation by leaving the state without his probation officer's permission as well as his arrest on drug charges.²⁶ In addition to Diaz's arrest for drug charges, the fact that Diaz left the state without first seeking his probation officer's permission provided a separate basis for the Superior Court to find him in violation of his probation. Diaz's subsequent acquittal on the underlying drug charges, therefore, were not dispositive of the Superior Court finding him in violation of probation and sentencing him.

The Superior Court likewise failed to find that Diaz demonstrated "exceptional circumstances" which would have warranted consideration of his late-filed motion.²⁷ The order granting Diaz's motion simply states "[t]he sentence was modified because it was a violation of probation sentence that was primarily based on a new arrest. The new arrest case was tried on January 28, 2014 and a jury found Defendant not guilty on all charges."²⁸ While the Superior Court provided

²⁶ A-12. Diaz did not contest that there was a basis for the violation of probation. A-13.

²⁷ *Cf. Henry v. State*, 2009 WL 3286068, *1 (Del. July 16, 2009) (rejecting defendant's argument that the Superior Court was under an obligation to supply written findings regarding whether he met the burden of demonstrating extraordinary circumstances in a late-filed Rule 35 motion where the Superior Court used a pre-printed order).

²⁸ *Exhibit C*.

the reason for granting Diaz's motion, there is no explanation of the rationale behind the court's decision to consider his acquittal or how the acquittal amounted to extraordinary circumstances. Additionally, when the Superior Court decided Diaz's Rule 35(b) motion, the judge who granted the modification did not provide the State with an opportunity to respond to the motion. The motion was filed on Wednesday, May 28, 2014. It was received in chambers on Friday, May 30, 2014. On Monday, June 2, 2014, the Superior Court ruled on the motion and issued its order. There was no communication from the Superior Court to the State which would have afforded the State an opportunity to respond to the motion.²⁹

Because the disposition of Diaz's underlying drug charges was not a consideration during his violation of probation hearing or on appeal to this Court, it should not have played a part in the Superior Court's consideration of Diaz's late-filed sentence modification motion. The Superior Court abused its discretion when it granted Diaz's late-filed motion without addressing the requirement that Diaz demonstrate exceptional circumstances which would consideration of his motion under Rule 35(b).

²⁹ As noted in the procedural history section of its Opening Brief, the State filed a Motion to Vacate the Superior Court's June 2, 2014 order on June 27, 2014. The Superior Court did not take action on the State's motion until July 1, 2014 – the deadline date for the State to file its notice of appeal of the June 2, 2014 order.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be vacated and the matter be remanded for an opportunity for the State to respond to Diaz's Motion for Reduction of Sentence.

/s/ Andrew J. Vella
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Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: September 18, 2014

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

STATE OF DELAWARE

VS.

DANIEL DIAZ

Alias: No Aliases

DOB: [REDACTED] 1980
SBI: 00394028

CASE NUMBER:
0606013407

CRIMINAL ACTION NUMBER:
IN06-06-2008
ROBBERY 1ST(F)
IN06-06-2225
ROBBERY 1ST(F)
PN06-06-2226
ROBBERY 2ND(F)
LIO:ROBBERY 1ST

COMMITMENT

SENTENCE ORDER

NOW THIS 9TH DAY OF FEBRUARY, 2007, IT IS THE ORDER OF
THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged.
Costs are hereby suspended. Defendant is to pay all
statutory surcharges.

AS TO IN06-06-2008- : TIS
ROBBERY 1ST

The defendant shall pay his/her restitution as follows:
\$40.00 TO CITIZENS BANK

Effective June 17, 2006 the defendant is sentenced
as follows:

- The defendant is placed in the custody of the Department
of Correction for 5 year(s) at supervision level 5 KEY
- Suspended after serving 3 year(s) at supervision level 5
- For balance to be served at supervision level 4 CREST

APPROVED ORDER 1 September 10, 2014 14:09

Ex. A

STATE OF DELAWARE
VS.
DANIEL DIAZ
DOB: [REDACTED] 1980
SBI: 00394028

- This sentence is suspended after successful completion of supervision level 4 CREST
- For balance to be served at supervision level 3 CREST
AFTERCARE
- Hold at supervision level 5
- Until space is available at supervision level 4 CREST

The first 2 years of this sentence is a mandatory term of incarceration pursuant to DE11083200A1FB .

AS TO IN06-06-2225- : TIS
ROBBERY 1ST

The defendant shall pay his/her restitution as follows:
\$5616.00 TO DE NATIONAL BANK

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5
- Suspended after serving 3 year(s) at supervision level 5
- For 2 year(s) supervision level 3

The first 2 years of this sentence is a mandatory term of incarceration pursuant to DE11083200A1FB .

The level 3 probation is concurrent to any level 3 under criminal action number IN06-06-2008

AS TO PN06-06-2226- : TIS
ROBBERY 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5
- Suspended immediately
- For 2 year(s) 6 month(s) supervision level 3

STATE OF DELAWARE

VS.

DANIEL DIAZ

DOB: [REDACTED] 1980

SBI: 00394028

The level 3 probation is concurrent to any level 3 under
criminal action number IN06-06-2225

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
DANIEL DIAZ
DOB: [REDACTED] 1980
SBI: 00394028

CASE NUMBER:
0606013407

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Have no contact with De National Bank

Have no contact with Citizens Bank

Obtain and remain gainfully employed.

Obtain a diploma or GED during the probationary period.

Have no drugs/alcohol during period of sentence unless medically prescribed.

Submit to random urinalysis or such other drug testing as deemed appropriate.

Defendant shall be evaluated for substance abuse and follow recommendation for treatment, counseling and screening.

JUDGE M. JANE BRADY

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
DANIEL DIAZ
DOB: [REDACTED] 1980
SBI: 00394028

CASE NUMBER:
0606013407

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	5656.00
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	3.00
<hr/>	
TOTAL	5,659.00

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

STATE OF DELAWARE

VS.

DANIEL DIAZ

Alias: No Aliases

DOB: [REDACTED] 1980

SBI: 00394028

CASE NUMBER:
0606013407

CRIMINAL ACTION NUMBER:
VN06-06-2008-01
VIOL O/PROBATN
ORIG. CHARGE:
ROBBERY 1ST(F)
VN06-06-2225-01
VIOL O/PROBATN
ORIG. CHARGE:
ROBBERY 1ST(F)
VN06-06-2226-01
VIOL O/PROBATN
ORIG. CHARGE:
ROBBERY 2ND(F)

COMMITMENT
FASTRACK

VIOLATION OF PROBATION SENTENCE ORDER

NOW THIS 24TH DAY OF JULY, 2013, IT IS THE ORDER OF THE
COURT THAT: The defendant is found in violation.
Defendant is sentenced as follows:

AS TO VN06-06-2008-01 : TIS 11 Del.C.083200A3FB
VIOL O/PROBATN - FOUND IN VIOLATION

Effective April 8, 2013 the defendant is sentenced
as follows:

- The defendant is placed in the custody of the Department
of Correction for 2 year(s) at supervision level 5

AS TO VN06-06-2225-01 : TIS 11 Del.C.083200A3FB
VIOL O/PROBATN - FOUND IN VIOLATION

- The defendant is placed in the custody of the Department
of Correction for 2 year(s) at supervision level 5

Probation is consecutive to criminal action number
APPROVED ORDER 1 September 10, 2014 14:09

Ex. B

STATE OF DELAWARE

VS.

DANIEL DIAZ

DOB: [REDACTED] 1980

SBI: 00294028

VN06-06-2008-01

AS TO VN06-06-2226-01 : TIS 11 Del.C.083100A1FE
VIOL O/PROBATN - FOUND IN VIOLATION

- The defendant is placed in the custody of the Department
of Correction for 2 year(s) at supervision level 5

- Followed by 6 month(s) at supervision level 2

- Pursuant to 11 Del.C.4204(L)

Probation is consecutive to criminal action number
VN06-06-2225-01

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
DANIEL DIAZ
DOB: [REDACTED] 1980
SBI: 00394028

CASE NUMBER:
0606013407

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

All previous terms and conditions are reimposed.

JUDGE JOHN E BABIARZ JR.

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

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Case No. 0606013407
)	
DANIEL DIAZ,)	
)	
Defendant.)	

ORDER

This 2nd day of June, 2014, Defendant's Motion for Sentence Modification is **GRANTED** in the following respects:

Effective May 30, 2014,

IN06-06-2008 – 2 years Level 5, suspended immediately for 1 year Level 3;

IN06-06-2225 – 2 years Level 5, suspended immediately for 1 year Level 3; and

IN06-06-2226 – 2 years Level 5, suspended immediately for 6 months Level 4 (Home Confinement).

Level 3 probations are concurrent. Hold at Level 3 until space available at Level 4 Home Confinement.

This sentence is modified because it was a violation of probation

sentence that was primarily based on a new arrest. The new arrest case was
tried on January 28, 2014 and a jury found Defendant not guilty on all
charges.

IT IS SO ORDERED.



Judge Diane Clarke Streett

Original: Prothonotary
Dep. Atty. Gen. Caterina Gatto
Michael W. Modica, Esquire
Daniel Diaz, Defendant

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

STATE OF DELAWARE,)
)
 v.)
) Case No. 0606013407
 DANIEL DIAZ,)
)
 Defendant.)

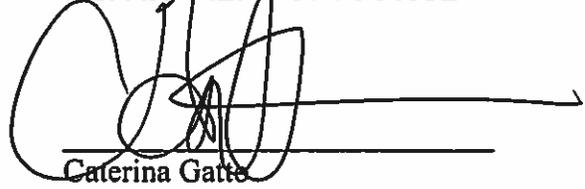
**NOTICE OF STATE'S RESPONSE TO DEFENDANT'S
SECOND AMENDED MOTION TO SUPPRESS**

TO:

PLEASE TAKE NOTICE that the attached *State's Motion to Vacate Order* will
be presented to the Honorable Diane Clarke Streett at the Court's earliest convenience

FILED
PROTHONOTARY
2014 JUN 27 PM 12:40

STATE OF DELAWARE
DEPARTMENT OF JUSTICE



Caterina Gatto
Deputy Attorney General
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, Delaware 19801
(302) 577-8808

Date: June 27, 2014

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

STATE OF DELAWARE,)	
)	
v.)	Case No. 0606013407
)	
DANIEL DIAZ,)	
)	
Defendant.)	

MOTION TO VACATE ORDER

COMES NOW, the State of Delaware, by and through the undersigned Deputy Attorney General, Caterina Gatto, and moves this Honorable Court to vacate the June 2, 2014 Order Granting Defendant's Motion for Sentence Modification.

FACTS

1. A drug investigation targeting Defendant Daniel Diaz was commenced by the Delaware State Police in February, 2013. As a result of the investigation, a search warrant for a GPS tracking device was obtained and placed on Defendant's vehicle. After a few weeks of surveillance, Defendant's vehicle was stopped by the Delaware State Police on April 8, 2013. On that day, Defendant had been tracked going to Philadelphia, remaining in the area briefly and was subsequently stopped on his return to Delaware. During the vehicle stop, Defendant was taken into custody for violating certain terms of his probation. A search of the vehicle revealed an after-market hidden compartment that contained 10,026 individual bags of heroin that was stamped for sale.

2. A probation administrative search was conducted at Diaz' residence at 1 Defoe Circle, Newark, Delaware. Probation officers located a safe on the floor of the

master bedroom closet. Diaz provided the combination to the safe. The safe contained \$1,836. In that same bedroom, officers found a brown accordion file containing documents and receipts showing thousands of dollars worth of purchases made using cash. The only residents of 1 Defoe Circle were Defendant, his unemployed girlfriend, and their young child.

3. On July 8, 2013, Defendant was indicted on Possession of Heroin in a Tier 5 weight and Drug Dealing in Heroin. These offenses are related to the vehicle stop that occurred on April 8, 2013. Case No. 1304006496.

4. On July 24, 2013, a Contested Violation of Probation Hearing was held and was presided over by the Honorable John E. Babiarz. Defendant was found to be in violation of his probation for 2 counts of Robbery First Degree and 1 count of Robbery Second Degree. Defendant was sentenced to total of 6 years Level 5 followed by Level 4 Crest suspended after successful completion for 2 years 6 months Level 3 on all three violations.

5. Defendant filed a Motion to Suppress in Case No. 1304006496. After briefing by both sides and a hearing, an opinion was issued on November 27, 2013 and denied the motion in part and granted the motion in part.

6. A jury trial was held on January 28, 2014. Much of the facts surrounding this investigation were not admissible at trial -- either based upon the prejudicial effect it would have on the Defendant or relating to the suppression ruling.

7. Defendant was found not guilty of both offenses on July 29, 2014.

8. On May 28, 2014, Defendant filed a Motion for Sentence Modification on Case No. 0606013407.

9. On June 2, 2014, the Honorable Diane Clarke Streett granted Defendant's Motion without providing the State with an opportunity to respond. The Order eliminated all Level 5 time and Defendant was resentenced to only Level 4 and Level 3. The Order stated that the basis for the sentence was because the violation of probation sentence was primarily based upon a new arrest and the jury found Defendant not guilty of those offenses.

LEGAL ARGUMENT

10. A violation of probation hearing is not a trial and a probationer is not afforded all of the Constitutional rights that a defendant is entitled to in a criminal trial. The rights that a probationer is entitled to during a violation of probation hearing are set forth in the Superior Court Criminal Rules. Rule 32.1(a) Revocation of Partial Confinement or Probation states that:

Whenever a person is taken into or held in custody on the grounds that the person has violated a condition of partial confinement or probation, the person shall be brought without unreasonable delay before a committing magistrate or a judge of Superior Court for the purpose of fixing bail and, if not released on bail, shall be afforded a prompt hearing before a judge of Superior Court on the charge of violation. The person shall be given:

- (A) Written notice of the alleged violation;
- (B) Disclosure of the evidence against the person;
- (C) An opportunity to appear and to present evidence in the person's own behalf;
- (D) The opportunity to question adverse witnesses; and

- (E) Notice of the person's right to retain counsel and, in cases in which fundamental fairness requires, to the assignment of counsel if the person is unable to obtain counsel.

Super.Ct.Crim.R. 32.1.

11. The standard of proof required in a violation of probation proceeding is also lower than that required in a criminal trial. A violation must be proven only by a preponderance of the evidence. The burden is on the State to provide “‘some competent evidence to prove the violation asserted.’ This evidence must ‘reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.’” *Collins v. State*, 897 A.2d 159, 160 (Del.2006), quoting *Melody v. State*, 808 A.2d 1204 (Del.2002). Furthermore, the rules of evidence do not apply in a violation of probation hearing. *D.R.E.* 1101(b)(3).

12. The Superior Court has the authority to revoke probation when a probationer has been charged with new criminal offenses. *Gabbert v. State*, 1995 WL 420798 (Del.Supr.). Even if these charges are subsequently dismissed or result in an acquittal, this should not affect a sentence imposed as a result of the violation of probation hearing. See *Cruz v. State*, 990 A.2d 990 (Del.Supr.2010) (a violation of probation based on new charges *after* a probationer was acquitted of the new charges was upheld); *Hawkins v. State*, A.3d 1097 (Del.2010)(Superior Court can violate a probationer that has been charged with new criminal offenses even if those criminal offenses are later dismissed.)

13. In the case at hand, Defendant’s probation was revoked and he was sentenced on the violation of probation after a full hearing was held and the state met its burden of proof. All of the rights set forth in Superior Court Criminal Rule 32.1 were

afforded to the Defendant. Therefore, the Defendant's sentence should not have been modified based upon the case law as cited above.

CONCLUSION

WHEREFORE, for all of the reasons stated herein the *State's Motion to Vacate Order* should be **GRANTED** without any further proceedings.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'C. Gatto', written over a horizontal line.

Caterina Gatto
Deputy Attorney General
820 North French Street, 7th Floor
Carvel State Building
Wilmington, DE 19801
(302) 577-5173

Dated: June 27, 2014

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

STATE OF DELAWARE,)
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 v.) Case No. 0606013407
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 DANIEL DIAZ,)
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 Defendant.)

ORDER

AND NOW, TO WIT, this day of , 2014, upon
consideration of the *State's Motion to Vacate Order*, it is hereby ORDERED:

The STATE's MOTION TO VACATE ORDER is hereby GRANTED.

Judge

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

STATE OF DELAWARE,)	
)	
v.)	Case No. 0606013407
)	
DANIEL DIAZ,)	
)	
Defendant.)	

CERTIFICATION OF MAILING AND /OR DELIVERY

The undersigned certifies that on October 4, 2013, he caused the attached *State's Motion to Vacate Order* to be delivered to the following persons in the form and manner indicated:

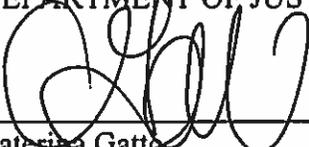
NAME AND ADDRESS OF RECIPIENT(S):

Michael W. Modica, Esquire
715 King Street, Suite 300
Wilmington, DE 19899

MANNER OF DELIVERY

 X Two true copies via hand delivery.
 X Via email.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE



Caterina Gatto
Deputy Attorney General
Carvel State Building
820 North French Street, 7th Floor
Wilmington, DE 19801

Dated: June 27, 2014

CERTIFICATION OF SERVICE

The undersigned certifies that on September 18, 2014, he caused the attached *State's Amended Opening Brief* to be delivered electronically via Lexis/Nexis File and Serve to the following person:

Michael W. Modica, Esq.
715 King Street
P.O. Box 437
Wilmington, DE 19899
Attorney for the Appellant

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
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