



IN THE SUPREME COURT OF THE STATE OF DELAWARE

WARREN J. WYANT,)	
)	
Defendant-Below,)	
Appellant.)	
)	No. 412, 2014
v.)	
)	On Appeal from the
STATE OF DELAWARE,)	Superior Court of the
)	State of Delaware in and
Plaintiff-Below,)	for New Castle County
Appellee.)	

STATE'S ANSWERING BRIEF

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

Gregory E. Smith
Bar ID No. 3869
Deputy Attorney General
820 North French Street
7th Floor
Carvel State Building
Wilmington, DE 19801
(302) 577-8398

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	ii
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	5
STATEMENT OF FACTS.....	6
ARGUMENT	
1. SUPERIOR COURT COMMITTED NO ERROR IN ANNOUNCING, IN WYANT’S PRESENECE, ITS INTENTION TO RELEASE HIM FROM CUSTODY IN 2020, AND LATER CRAFTING A SENTNECE ORDER THAT ACHIEVED THAT RESULT.....	8
2. SUPERIOR COURT STRUCTURED A MODIFIED SENTENCE ORDER USING THE EFFECTIVE DATE FROM THE ORIGINAL 1984 SENTENCING ORDER, WHICH WYANT UNDERSTOOD WAS DESIGNED TO PRODUCE A RELEASE DATE IN 2020.....	12
CONCLUSION.....	16
<i>Wyant v. Redman</i> , C.A. No. 89-456, Report & Rec’n, Robinson, M. (D. Del. Nov. 15, 1990).....	Ex. A
<i>Wyant v. Redman</i> , C.A. No. 89-456, Mem. Op., Schwartz, J. (D. Del. Feb. 20, 1991).....	Ex. B
<i>Wyant v. Redman</i> , No. 91-3115, Order, Alito, J. (3d Cir. Dec. 24, 1991).....	Ex. C
pet’n for re-hearing denied (3d Cir. Jan. 17, 1992).....	Ex. D

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Defoe v. State</i> , 750 A.2d 1200 (Del. 2000).....	14
<i>DeVita v. State</i> , 2006 WL 2535105 (Del. Aug. 29, 2006).....	9
<i>Hooks v. State</i> , 429 A.2d 1312 (Del. 1981).....	10
<i>Miller v. Alabama</i> , 132 S. Ct. 2455 (2012).....	3
<i>Oakley v. State</i> , 2008 WL 836598 (Del. Mar. 31, 2008).....	14
<i>Williams v. State</i> , 98 A.3d 917 (Del. 2014).....	8
<i>Wyant v. Redman</i> , C.A. No. 89-456, Mem. Op., Schwartz, J. (D. Del. Feb. 20, 1991).....	2
<i>Wyant v. Redman</i> , C.A. No. 89-456, Report & Rec'n, Robinson, M. (D. Del. Nov. 15, 1990).....	2
<i>Wyant v. Redman</i> , No. 91-3115, Order, Alito, J. (3d Cir. Dec. 24, 1991).....	2
<i>Wyant v. State</i> , 519 A.2d 649 (Del. 1986).....	2, 6
<i>Wyant v. State</i> , 2007 WL 2983635 (Del. Oct. 12, 2007).....	2
<u>Statutes</u>	
11 <i>Del. C.</i> § 531.....	1
11 <i>Del. C.</i> § 764.....	1
11 <i>Del. C.</i> § 783A.....	1
11 <i>Del. C.</i> § 826.....	1
11 <i>Del. C.</i> § 832.....	1

Statutes cont'd Page

11 *Del. C.* § 3901(a).....14

11 *Del. C.* § 4204A.....9

Rules

DEL. SUPR. CT. R. 8.....8, 12

DEL. SUPER. CT. CRIM. R. 35A.....9

DEL. SUPER. CT. CRIM. R. 43.....8

NATURE AND STAGE OF PROCEEDINGS¹

On February 1, 1983, a New Castle County grand jury indicted Warren Wyant on: burglary in the first degree (11 *Del. C.* § 826); attempted rape in the first degree (11 *Del. C.* §§ 531 and 764); two counts of rape in the first degree (11 *Del. C.* § 764); kidnapping in the first degree (11 *Del. C.* § 783A); and robbery in the first degree (11 *Del. C.* § 832). (D.I. 1). Beginning on November 3, 1983, Superior Court held a five-day jury trial. (D.I. 7). The jury found Wyant guilty of all charges except burglary. On November 21, 1983, Wyant filed a motion for new trial. (D.I. 9). Superior Court denied that motion on December 29, 1983. (D.I. 11). On March 16, 1984, Superior Court sentenced Wyant as follows: rape in the first degree (IN 83-02-1502)—life in prison with no possibility of parole for the first 20 years; rape in the first degree (IN 83-02-1503)—life in prison with no possibility of parole for the first 20 years; kidnapping in the first degree (IN 83-02-1504)—life in prison with no possibility of parole for the first 20 years; attempted rape in the first degree (IN 83-02-1501)—life in prison; and robbery in the first degree (IN 83-02-1505)—15 years in prison with no possibility of parole for the first 3 years of that sentence. (D.I. 18). On

¹ “(D.I. __)” refers to Superior Court docket items from *State v. Warren J. Wyant*, case ID No. 83000839DI.

December 16, 1986, this Court affirmed Wyant's convictions and sentence. *Wyant v. State*, 519 A.2d 649 (Del. 1986).

On August 22, 1989, Wyant filed a petition for a writ of habeas corpus in the United States District Court. On November 15, 1990, a Magistrate recommended that his petition be denied. *Wyant v. Redman*, C.A. No. 89-456, Report & Recommendation, Robinson, M. (D. Del. Nov. 15, 1990) (Ex. A). For different reasons, the District Court denied Wyant's habeas petition on February 20, 1991. *Wyant v. Redman*, C.A. No. 89-456, Mem. Op., Schwartz, J. (Feb. 20, 1991) (Ex. B). The Third Circuit affirmed. *Wyant v. Redman*, No. 91-3115, Order, Alito, J. (3d Cir. Dec. 24, 1991) (Ex. C), pet'n for re-hearing denied (3d Cir. Jan. 17, 1992) (Ex. D).

On July 30, 2007, Wyant moved for production of the trial transcripts. (D.I. 33). Superior Court denied the motion on August 21, 2007. (D.I. 34). This Court dismissed Wyant's appeal from that August 2007 order as interlocutory. *Wyant v. State*, 2007 WL 2983635 (Del. Oct. 12, 2007).

On March 8, 2011, Wyant, *pro se*, filed a motion for post-conviction relief. (D.I. 37). On June 9, 2011, Superior Court appointed counsel to represent Wyant. (D.I. 42). On September 19, 2011, Wyant, through counsel, filed an amended motion for post-conviction relief. (D.I. 46). After both parties submitted pleadings, Superior Court stayed consideration of

Wyant's motion pending a decision by the United States Supreme Court. The Supreme Court rendered that decision on June 25, 2012. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012). Superior Court established a briefing schedule, and Wyant filed two pleadings subsequent to *Miller*, the first on August 3, 2012, and the second on August 22, 2012. (D.I. 54 & 55).

While matters were pending in Superior Court, the Legislature passed, and the Governor signed, Senate Bill 9, as amended by Senate Amendment 2 and House Amendment 2, on June 4, 2013. *See* D.I. 64. On June 26, 2013, pursuant to the newly enacted legislation, Wyant filed a motion for sentence modification. (D.I. 67). On January 16, 2014, the State filed additional opposition to modification of Wyant's sentence. (D.I. 72). On February 14, 2014, Superior Court held a hearing on Wyant's motion, at which both the victim and Wyant spoke, and counsel for the parties offered argument. (D.I. 77). At that hearing, Superior Court announced its decision to grant, in part, Wyant's motion for sentence modification and intention to craft a sentence order that would result in Wyant's release in 2020. (D.I. 77). Superior Court circulated draft sentence orders with the parties and provided opportunity to object, to ensure that the final sentence order would actually result in Wyant's release in 2020 after the accrual of good time credits. (D.I.

85, 88). On July 22, 2014, Superior Court issued a modified sentence order.
(D.I. 90).

It is from this July 2014 order that Wyant has appealed.

SUMMARY OF ARGUMENT

1. Appellant's first argument is DENIED. A defendant's presence is not required at a reduction of sentence under Rule 35. Wyant nonetheless was present at the February 14, 2014 hearing Superior Court held, where both Wyant and the victim spoke. At that hearing, in Wyant's presence, Superior Court announced its decision to reduce Wyant's sentence to result in his release in 2020. Wyant had no right to be present for the discussion of legal issues Superior Court subsequently had with counsel related to crafting the language of the sentence order to effectuate Wyant's release in 2020. Wyant did not present this claim to Superior Court, and has waived it.

2. Appellant's second argument is DENIED. Wyant waived this argument challenging the effective date of his modified sentence order by failing to raise it when Superior Court circulated a draft order and solicited responses from the parties. Superior Court consciously selected the same date contained in the original sentence order, using the date Wyant moved from juvenile to adult custody as an effective date. Superior Court crafted a modified sentence order designed to release Wyant from prison in 2020, instead of making him wait until 2046 for the possibility of parole under the original sentence order. Wyant has obtained a windfall sentence reduction.

STATEMENT OF FACTS²

On the night of October 18, 1982, victim, a twenty-five-year-old pregnant housewife, was at home watching television in a downstairs family room in New Castle County, Delaware. Her husband was at work and her two young children were asleep in the house. About ten o'clock, victim heard suspicious noises on the floor above, the sound of a sliding glass outer door opening and someone entering the house. She grabbed a shotgun from a wall case and started to proceed upstairs when she was confronted by a man pointing a small handgun at her. She then realized that her gun was not loaded; and defendant disarmed her and placed his gun to her head. Defendant told her that if she made any noise or failed to do as he said, he would kill her and her children. Defendant then ordered victim to remove her clothing and forced her into an adjacent downstairs bedroom, where he attempted anal intercourse upon her. Failing in that attempt, defendant raped victim vaginally. Thereafter defendant forced victim at gunpoint to go upstairs to another bedroom, where he again raped and sexually assaulted victim. During this time defendant continued to threaten victim and her children. Defendant then forced victim back downstairs, where he again raped as well as sexually assaulted her. Defendant also searched the house

² These facts are quoted from this Court's decision on direct appeal. *Wyant v. State*, 519 A.2d 649, 652-53 (Del. 1986).

and removed from victim's pocketbook a dollar bill. He also attempted to wipe his fingerprints off various objects in the house that he had touched. After putting his clothes on, the assailant forced victim, still naked, to leave the house, and demanded from her directions to the nearest interstate highway. Vowing that he would hurt her family if she reported the attacks, defendant fled into the night. From the time of defendant's entry into the house until his departure, more than one hour had elapsed.

The following day, defendant was arrested after victim had identified defendant in a photographic display. After being taken into police custody and given his *Miranda* rights, defendant on October 19, 1982 admitted having been the intruder in victim's home near Newark the previous evening. In a recorded statement received in evidence over defendant's objection, defendant admitted having been present in victim's home and to have been the perpetrator of the offenses charged.

1. **SUPERIOR COURT COMMITTED NO ERROR IN ANNOUNCING, IN WYANT’S PRESENECE, ITS INTENTION TO RELEASE HIM FROM CUSTODY IN 2020, AND LATER CRAFTING A SENTNECE ORDER THAT ACHIEVED THAT RESULT.**

Question Presented

Whether a defendant has a right to be personally present when the court issues a modified sentence order that reduces the defendant’s sentence.

Scope of Review

This Court reviews a claim of error to which no objection was made for plain error. *See* DEL. SUPR. CT. R. 8. Where “the record reflects that the decision not to object at trial was a ‘deliberate tactical maneuver by’ defense counsel and did not result from oversight, then that action constitutes a true waiver.” *Williams v. State*, 98 A.3d 917, 921 (Del. 2014) (internal citations omitted).

Merits of the Argument

Wyant cites Superior Court Criminal Rule 43(a) for the proposition that a defendant’s presence is required at the time Superior Court imposes a sentence. Op. Brf. at 9. But Superior Court’s July 22, 2014 sentence order was the modification of a sentence originally imposed in 1984. Wyant fails to cite Superior Court Criminal Rule 43(c)(3), which provides: “A defendant need not be present in the following situations: At a reduction of sentence

under Rule 35.” After the enactment of 11 *Del. C.* § 4204A, Superior Court promulgated Criminal Rule 35A to govern the modification of sentences for offenses committed as a juvenile. There is no dispute that “On June 26, 2013, Wyant filed a new Motion for Sentence Modification under Superior Court Criminal Rule 35A seeking his release under Section 4204A.” Op. Brf. at 2. This Court has found that when the Superior Court reduces an offender’s sentence, the offender has no right to be present. *DeVita v. State*, 2006 WL 2535105, at *1 (Del. Aug. 29, 2006).

When Superior Court held a hearing on the modification of Wyant’s sentence on February 14, 2014, Wyant was present and personally addressed the Superior Court. [A-24-25]. Wyant was present when the Superior Court announced:

The bottom line is that I think the defendant should be deemed eligible for release in another eight years, which is the year 2020. So that’s my decision, and now I need to structure the sentence to have that come about. And I think I do that as follows: In order to make the defendant eligible for release in eight years, or 2020, I’m going to issue a draft order for counsel to comment on before it’s final. I would suspend all mandatory sentences after 38 years. So effectively a 38-year term. And then that would be followed by 15 years of probation.

. . . .

I will issue a sentence order and ask counsel for comment before I make it final.

[A-27]. After Wyant left the courtroom, the Superior Court judge observed that he should have said six years, instead of eight years, to be consistent with a release date in 2020. [A-27].

Superior Court Criminal Rule 43 did not require Wyant's presence at the February 14, 2014 hearing. Nonetheless, Wyant was present, heard the reduced sentence the Superior Court planned to enter, and the court's intention to seek additional input from counsel in crafting a sentence order that would produce a release date in 2020. Superior Court issued two draft sentence orders and invited additional comment from the parties. Neither in a written response, nor at the office conference Superior Court held before issuing its July 2014 modified sentence order, did Wyant suggest that Superior Court needed to bring him back into court and issue the signed order in his presence. Even if Wyant were correct, which the State in no way concedes, the remedy would be no more than to have Wyant appear again before Superior Court to have the modified sentence order re-issued in his presence. Transporting Wyant from prison so that he could personally hear, not just his anticipated release date, but the components of the overall sentence, is a poor expenditure of resources that would not result in any substantive change. *See Hooks v. State*, 429 A.2d 1312, 1314 (Del. 1981)

(no constitutional defect in reducing a defendant's sentence from death to life imprisonment by written order).

2. **SUPERIOR COURT STRUCTURED A MODIFIED SENTENCE ORDER USING THE EFFECTIVE DATE FROM THE ORIGINAL 1984 SENTENCING ORDER, WHICH WYANT UNDERSTOOD WAS DESIGNED TO PRODUCE A RELEASE DATE IN 2020.**

Question Presented

Whether Superior Court committed any prejudicial error in reducing Wyant's sentence from one that made him eligible for parole in 2046 to one designed to result in his release in 2020.

Scope of Review

“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.” DEL. SUPR. CT. R. 8.

Merits of the Argument

Wyant contends that he preserved this claim at the February 2014 re-sentencing hearing by suggesting that the effective date of the modified sentence order should run from the date he was taken into custody as a juvenile on October 18, 1982. [A-27]. Superior Court first circulated a draft modified sentence order to the parties in March 2014. (D.I. 83). Superior Court next held an office conference on April 14, 2014, at which the parties had the opportunity to lodge objections to the draft modified sentence order.

(D.I. 82). In June 2014, Superior Court sent the parties a second draft modified sentence order. (D.I. 85). Both draft modified sentence orders used November 8, 1983 as the effective date, just as the original March 1984 sentence order did.³ When Superior Court offered that same date in the draft modified sentence orders, Wyant did not object to that date. As the notes to the modified sentence order expressly state:

The effective date of 11/8/83 is correct and reflects the date the defendant went into adult correctional custody (he had previously been in juvenile correctional custody). The Court has conferred with the Department of Correction for advice about structuring the modified sentence order so that a January 16, 2020 STRD is created, which was the Court's stated intention at the time of sentencing, with 15 years of probation to follow. Per DOC's calculation, pursuant to the modified sentence order, defendant's STRD is now 1/16/20.

The Court's intent is that the defendant be released from Level 5 custody on or about January 16, 2020.

[A-52]. Wyant's objections to the modified sentence order only addressed the Superior Court's stated goal of crafting a sentence that, through the reduction of good time, would result in a release date for Wyant in 2020.

[A-57]. Without any objection from Wyant to the effective date, Superior Court issued a modified sentence order on July 22, 2014, repeating the above-quoted language in the notes section, and adding another note: "The

³ Wyant did not object to November 8, 1983 as the effective date of his original sentence order in 1984 or on direct appeal from that order.

intended end date of the term of imprisonment is identified pursuant to this court's discretion to specify such date under 11 *Del. C.* [§] 3901(a). The court seeks to insure that each component of this sentence be carried out as intended as each is integrated into the court's overall sentencing plan in this unusual set of circumstances. *See Defoe v. State*, 750 A.2d 1200, 1202 (Del. 2000)." Ex. A at 5 to Op. Brf.

Wyant argues this Court's decision in *Oakley v. State*, 2008 WL 836598 (Del. Mar. 31, 2008), requires that he be given credit against his adult sentence for time served in juvenile custody. Prior to his arrest in October 1982 for the instant offense, Family Court had adjudicated Wyant delinquent for several burglary and theft crimes. At the time of the instant offense, Wyant was on Aftercare from Family Court. Whether it is appropriate to apply *Oakley* retroactively is an academic question this Court need not answer here. Wyant clearly understood the Superior Court's intent from the draft modified sentence order and lodged no objection to the effective date. If Superior Court had matched the effective date of the sentence with Wyant's date of juvenile custody, it obviously would have made the period of non-suspended incarceration longer in order to produce a prison release date in 2020. The Superior Court and the parties have expended significant time and resources to this sentence modification. The

State does not concede the relief Wyant has requested is required, but in any case his sought-after relief would not change the Superior Court's ability to craft a sentence that would result in Wyant's release in 2020.

CONCLUSION

The judgment of the Superior Court should be affirmed.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/Gregory E. Smith
Bar ID No. 3869
Deputy Attorney General
820 North French Street
7th Floor
Carvel State Building
Wilmington, DE 19801
(302) 577-8398

Dated: November 26, 2014

CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on November 26, 2014, he caused the attached *Answering Brief* to be delivered to the following persons in the form and manner indicated:

Robert J. Goff, Esq.
Assistant Public Defender
820 North French Street, 3rd floor
Carvel State Building
Wilmington, DE 19801

one true copy by electronic filing through File & Serve Xpress

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/Gregory E. Smith
ID No. 3869
Deputy Attorney General
820 North French Street
Carvel State Building, 7th Floor
Wilmington, DE 19801
(302) 577-8398