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Case Number 249,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
Plaintiff Below,	)	
Appellant,	)	
	)	
v.	)	No. 249, 2016
	)	
CATHERINE CULP,	)	
	)	
Defendant Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

APPELLEE'S ANSWERING BRIEF

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Dated: August 1, 2016

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NATURE AND STAGE OF PROCEEDINGS

The Defendant generally adopts the Nature and Stage of Proceedings as recited in the State's Opening Brief on appeal. This is the Defendant's Answering Brief on appeal.

SUMMARY OF ARGUMENT

1. The State's argument is DENIED. The Superior Court did not abuse its discretion by modifying the Defendant's sentence but instead exercised its discretion to modify the Defendant's sentence because she met the "heavy burden" of showing "extraordinary circumstances" by virtue of her compelling record of rehabilitation.[1] Proof of extraordinary circumstances in itself, may excuse the ordinary bar under Superior Court Criminal Rule 35(b) against repetitive requests for sentence modification. Unusual and extraordinary circumstances of rehabilitation may also be considered by the Superior Court in its discretion to grant a sentence modification request outside of the ninety day limit for making such requests even if ordinarily the Superior Court may and will exercise its discretion to decline such untimely requests. Even if its consideration may be unusual, there is no absolute bar to the Superior Court's consideration of a sentence reduction request filed beyond the ordinary ninety day limit on the ground that it is either repetitive because there was a previous request or because it relies on extraordinary circumstances of rehabilitation.

[1] *State v. Diaz*, 2015 Del.LEXIS 189, *5.

STATEMENT OF FACTS

On July 30, 2001, the Defendant was convicted of the offenses of murder second degree, a lesser included offense of the charged offense of murder first degree, and possession of a firearm during the commission of a felony. A12. [D.I. 125]. She had recklessly caused the death of her boyfriend, Lee B. Hicks, in 1999.[2] *Culp v. State*, 2003 Del. LEXIS 59. On August 1, 2001, the Defendant was sentenced to twenty years imprisonment at Level V for the murder second degree offense and five years imprisonment at Level V for the firearm offense followed by probation. [D.I. 126]. At that time, the minimum imprisonment sentence for murder second degree, a Class B felony, was ten years imprisonment and the maximum was twenty years imprisonment, which was imposed on the Defendant for the murder second degree offense, and three years imprisonment for the firearm offense.[3]

On April 22, 2003, approximately two months after her convictions were affirmed on appeal, the Defendant filed a request *pro se* for a sentence modification. [D.I. 141]. The request was denied on May 29, 2003. [D.I. 144].

On October 5, 2015, seventeen years after her imprisonment had

[2] 11 *Del. C.* §635(1).
[3] 11 *Del. C.* §§ 635, 4205.

commenced, the Defendant filed a second sentence modification request referencing the extensive efforts towards rehabilitation that she had accomplished during her imprisonment. [D.I. 161]. Instead of exercising its discretion to deny the request outright on the ground that it was untimely under Rule 35(b), the Superior Court scheduled a hearing to consider the application and review the Defendant's prior sentence imposed in 2001. [D.I. 163]. After the hearing, the Superior Court modified the Defendant's sentence by reducing the original maximum twenty year imprisonment sentence at Level 5 imposed on the murder second degree offense by suspending it after twelve years.[4] The Superior Court also made the following findings:

> Culp's progress during the about-to-be 18 years since her initial incarceration, most of which are documented, and are enclosed with her motion, is extensive. The areas of progress include mental health, work skills and educational. The documentation demonstrating much of it is attached to this Order, and incorporated by reference.
>
> The ultimate effect of Culp's tremendously ambitious efforts is that she has not only exposed herself to, but excelled in the acquisition of, skills that will make her a particular benefit to the community upon her reintegration. These manifest endeavors far exceed an inmate's "doing what was required" or "filling up the time."

[4] This was still more than the ten year minimum sentence statutorily required. 11 *Del. C*. §§ 635, 4205.

She has achieved an Associates of Applied Science Degree in Marketing from Ashworth College in Atlanta, Georgia, graduating with Honors and a 3.15 GPA. That is just the culmination of her academic pursuits. Through many courses — several of 400 hour duration — she has qualified herself to teach (and has taught) a variety of courses to other inmates. These have included G.E.D. classes, Thresholds, many Drug education classes, and much more, as the attachments demonstrate. For 11 years she has been an Educational Tutor at Baylor, whose performance has been described as "exemplary." Indeed, she has trained other tutors. Letters of high praise from a variety of sources are replete through the materials.

In an outside world of rapidly changing technologically, Culp has prepared herself for reasonably smooth transition by completing a great many computer courses, even achieving a State of Delaware Computer Operator certificate.

On a less specific, but significant, level of transition into a "normal living" and community beneficial capacity, she has attained abilities in Spanish, culinary arts, diverse aspects of Women's Health, public speaking, dancing and floral design. These pursuits will help normalize Culp's transition into the community, and heighten her benefit to that community.

She has expressed, in a variety of forms, great remorse for the actions causing her conviction. Not only do those expressions project with sincerity, they are founded upon significant religious courses, activities and projects which Culp has pursued throughout her incarceration. Unsolicited letters from religious leaders endorse that.

Critical to order in a penal institution is the presence of hope for inmates to perceive through their periods of imprisonment. It is difficult to imagine a better beacon for others than the example that Culp has provided through her extensive time, and consequently the justice system's

acknowledgement of that.

> This Court finds, as a matter of fact, that Culp has demonstrated beyond cavil extraordinary circumstances, in the clearest manner that Rule 35(b) could conceive, for a reduction of her sentence.

State v. Culp, 2016 Del. Super. LEXIS 146, at *4-7 (Super. Ct. Apr. 18, 2016) (State's Opening Brief, Exhibit A).

I. THE SUPERIOR COURT MAY EXERCISE DISCRETION TO MODIFY A DEFENDANT'S SENTENCE UNDER EXCEPTIONAL CIRCUMSTANCES OF REHABILITION IN EXTRAORDINARY AND UNUSUAL CASES EVEN IF THE REQUEST IS ORDINARILY UNTIMELY BECAUSE THERE IS NO ABSOLUTE BAR TO THE SUPERIOR COURT'S EXERCISE OF DISCRETION ON THE GROUND THAT THE REQUEST FOR A SENTENCE MODIFICATION IS NOT A FIRST REQUEST OR BECAUSE IT RELIES ON THE GROUND OF EXTRAORDINARY REHABILITATION.

Question Presented

The question presented is whether the Superior Court abused its discretion in granting the Defendant's sentence modification request. The question was preserved by the State's opposition to it. [D.I. 168, 172].

Standard and Scope of Review

The standard and scope of review is abuse of discretion. *State v. Lewis*, 797 A.2d 1198, 1202 (Del. 2002) ("If we conclude, as we must, that Rule 35(b) confers authority to modify a sentence, the exercise of that authority is viewed under an abuse of discretion standard. Under this highly deferential standard, a reviewing court should resist a tendency to substitute its views for those of the judge exercising the initial power. The test is not whether the reviewing court would have ruled otherwise but whether the trial court acted within a zone of

reasonableness or stayed within a range of choice") (internal quotations omitted).

Merits of Argument

In its Opening Brief, the State does not contest that the Defendant's record of rehabilitation was exceptional or that the Superior Court abused its discretion in its factual findings concerning the Defendant's rehabilitation. Instead, the State argues that the Superior Court may never, as a matter of law, grant a sentence modification request if it is not the first sentence modification request or if it is filed more than ninety days after the original sentencing and relies to any degree on the exceptional rehabilitation of the offender.

A. A prior sentence modification request does not absolutely bar any subsequent modification request based on extraordinary circumstances.

Superior Court Rule of Criminal Rule Procedure 35(b) provides that:

> 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.
>
> Del. Super. Ct. Crim. R. 35

It its Opening Brief, focusing only on the language of Rule 35(b) that "[t]he court will not consider repetitive requests for reduction of sentence," the State contends that "this absolute bar prohibits the Superior Court from considering a second motion for sentence modification" Ans. Br. at 11 (quoting *State v. Redden*, 111 A.3d 602, 609 (Del. Super. 2015). The meaning of "repetitive," however, is not synonymous to any event occurring more than once. "Repetitive" is defined as "happening again and again : repeated many times : having parts, actions, etc., that are repeated many times in a way that is boring or unpleasant"[5] Thus, while numerous sentencing modification requests, including second modification requests, may be repetitive in the sense that they repeat what has been said before, possibly many times before, not all second sentence modification requests are repetitive in the sense that they consistently repeat the content of what has been said before and are annoying and unduly burdensome for that reason. If a Superior Court judge doesn't consider in the exercise of his or her discretion that, due to its

[5] Merriam-Webster.com, http://www.merriam-webster.com/**dictionary** (last visited Aug. 1, 2016).

unusual merits, a particular sentence modification request repeats what has been said before it repetitive and "annoying" on its face, then the judge is not barred from considering it regardless of its content because it a "second" request, and therefore a "repetitive" request, and therefore absolutely barred. The State argues that the "plain language" of Rule 35 bars the request, Ans. Br. at 11, 13, but the plain meaning definition of "repetitive" is not mechanical or numerically exact and does not mean it is always and must be any event occurring more than once. On the other hand, if Rule 35(b) stated that the Superior Court will never consider a second or subsequent request for modification of sentence, the State might have a point, but it doesn't.

An absolute bar to the Superior Court's consideration of any second or subsequent request for a sentence modification would also conflict with the Superior Court's reservation of authority to consider untimely sentence reductions where extraordinary circumstances otherwise exist. For example, the Superior Court does not abuse its discretion by considering the consequence of a defendant's deportation as an extraordinary circumstance excusing an otherwise untimely sentence modification request. *State v. Lewis*, 797 A.2d at 1198. If however, the defendant in *Lewis* or any other case where an untimely sentence reduction had been granted on grounds of extraordinary circumstances happened to

have filed a previous sentence reduction on different grounds, either timely or untimely, then the subsequent sentence reduction motion where extraordinary circumstances were shown and manifest would be barred notwithstanding because Rule 35(b) "absolutely" bars a second or subsequent sentence reduction motion. [6]

B. A record of extraordinary rehabilitation may constitute exceptional circumstances excusing default for an otherwise untimely sentence reduction request.

In its Answering Brief, the State also maintains that the Superior Court may never grant an untimely sentence reduction request if the ground is exceptional rehabilitation regardless of its merit. Ans. Br. at 14-18. Superior Court's Rule 35(b) does not say that. It clearly could, but it doesn't. It could say "rehabilitation shall not be considered an extraordinary circumstance for sentence modification if an application is untimely," but it doesn't. Although the State contends otherwise, this Court has also not stated that an untimely sentence modification request on the ground of exceptional rehabilitation can never be considered by the Superior Court regardless of its merit. The State maintains that permitting an untimely sentence modification request on the ground of exceptional rehabilitation "is inconsistent with Delaware Supreme Court precedent." Ans. Br. at 14. That is not as clear as

[6] See, e.g., *State v. Patel*, 2015 Del. Super. LEXIS 521 (State did not oppose sentence untimely modification motion in order to avoid deportation); *State v. Rodriguez*, 2010 Del. Super. LEXIS 565 (same); *State v. DeRoche*, 2003 Del. Super. LEXIS 489 (prisoner's medical condition constituted extraordinary circumstances excusing an untimely sentence reduction).

the State maintains. Undoubtedly, the Court has affirmed the Superior Court's numerous denials of untimely sentence reduction requests on the ground of rehabilitation over a number of years, but the ground for affirmance is not synonymous with the principal that, as a matter of law, the Superior Court can never grant an untimely sentence modification request if the ground is extraordinary rehabilitation. The Superior Court recognized this below. In Superior Court, the State relied on *Allen v. State*[7] in support of its contention that the Superior Court was legally barred from considering an untimely sentence modification request if the ground relied on the defendant's rehabilitation. The Superior Court recognized that the basis for this Court's affirmance in *Allen* was the Superior Court had not abused its discretion in finding that "Allen's prison record is not sufficient to establish "extraordinary circumstances" under Rule 35(b)."[8] The Superior Court below likewise recognized that to the extent that extraordinary circumstances may excuse an untimely sentence reduction motion, "[c]ases … have made clear that few applications claiming extraordinary circumstances will be considered, upon analysis, to be extraordinary for purposes of sentence modification after 90 days have elapsed."[9] But the Superior Court also

[7] 2002 Del. LEXIS 751.
[8] *Allen v. State*, 2002 Del. LEXIS 751, at *3.
[9] *State v. Culp*, 2016 Del. Super. LEXIS 146, at *1-2.

recognized that although cases in which untimely sentence modification requests are granted by the Superior Court if extraordinary circumstances exist are rare is not the same as saying that they are legally barred: "The [*Allen*] Court certainly did not preclude a prison record's establishing extraordinary circumstances. The fair reading is quite to the contrary. Allen's record was (probably woefully) not enough, but the process and the possibility exist."[10] The Superior Court's reliance on Allen was not "inconsistent with Delaware Supreme Court precedent" as the State maintains. In numerous cases affirmed on appeal where the Superior Court has exercised its discretion not to consider untimely sentence modification requests on the ground of exceptional rehabilitation, the Court has affirmed the Superior Court's exercise of discretion on the record before it.[11]

The State also maintains that any justification for delay must be "entirely beyond a petitioner's control [,] "have prevented the applicant from seeking the remedy on a timely basis" and that therefore rehabilitation fails to meet the definition of "exceptional circumstances" because it is "entirely within a

[10] *State v. Culp*, 2016 Del. Super. LEXIS 146, at *2-3.
[11] *State v. Diaz*, 2015 Del. LEXIS 189; *Hewett v. State*, 2014 Del. LEXIS 45; *Torres v. State*, 2012 Del. LEXIS 530; *Shockley v. State*, 2007 Del. LEXIS 341; *Upshur v. State*, 2006 Del. LEXIS 43; *Morrison v. State*, 2004 Del. LEXIS 143; *Ketchum v. State*, 2002 Del. LEXIS 373; *Allen v. State*, 2002 Del. LEXIS 751; *State v. Lewis*, 797 A.2d 1198 (Del. 2002) ("zone of reasonableness").

petitioner's control." Ans. Br. at 14-15.[12] The State fails to recognize that rehabilitation within 90 days of sentencing for an offense of murder second degree requiring a minimum sentence of at least thirteen years imprisonment is an unrealistic condition, however.

Finally, the State contends that a sentence modification initiated by the Department of Correction under 11 *Del. C.* § 4217 is the only means by which the Superior Court may modify a defendant's sentence due to exceptional rehabilitation. Again, Rule 35(b) could state that clearly but does not. It provides that untimely sentence modification request may be made "only in extraordinary circumstances *or* pursuant to 11 *Del. C.* § 4217" (emphasis added). These are alternative remedies. The State also has not shown that § 4217 is utilized by the Department of Correction for exceptional rehabilitation with any frequency. It may be too cumbersome or impractical to have any significant effect and therefore an illusory available remedy – a proverbial unicorn in that environment.

Although the exercise of the Superior Court's discretion to modify an untimely sentence modification request on the ground of exceptional rehabilitation is rare, it is not thereby an abuse of discretion and not legally forbidden.

[12] Quoting *State v. Diaz*, 797 A.2d 1198, 1205 (Del. 2002) (Steele, J., dissenting).

CONCLUSION

The Superior Court's modification of the Defendant's sentence should be affirmed because even if unusual, it was within the Superior Court's discretion and the exceptional circumstances the Superior Court relied on supported it.

Respectfully submitted,

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