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Case Number 269,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMMEYIN JOHNSON,	)	
	)	
Defendant Below-Appellant,	)	No. 269, 2021
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 1609014541
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

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

REPLY BRIEF

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Dated: March 29, 2022

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Appellant Dammeyin Johnson, through the undersigned attorney, replies to the State's Answering Brief as follows:

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THAT THE GPS TRACKING REQUIREMENT IN 11 *DEL C.* § 4121(u) APPLIES TO A SUBSEQUENT SENTENCE AFTER THE OFFENDER HAS COMPLETED THE PROBATION FOR THE UNDERLYING SEX OFFENSE.

***This is a statutory interpretation question that should be reviewed* de novo.**

The State lists three possible standards of review in its Answering Brief but does not specifically state in its "Standard and Scope of Review" section which one applies.[1] In the "Merits" section, the State argues that Mr. Johnson raised double jeopardy and *ex post facto* claims below, and now asserts that the GPS requirement is illegal because 11 *Del. C.* §4121(u) does not apply to subsequent probations after the completion of the probation for the Tier III sex offense. This, according to the State, is a new claim that is barred by Rule 8 of this Court.[2] Throughout most of the rest of the brief, the State argues the Superior Court did not abuse its discretion in denying Mr. Johnson's motion.

It is true that Mr. Johnson, *pro se*, argued that Probation and Parole's imposition of GPS monitoring violated the double jeopardy and *ex post facto*

[1] Ans. Br. at 6.
[2] Ans. Br. at 9-10.

clauses.[3] The Court requested a response from the prosecutor, who cited §4141(u), and argued "a plain reading of the statute does not limit GPS monitoring to a Level IV, III, II, or I sentence that is part of the underlying conviction that triggered the registration."[4] In its Letter Order denying Mr. Johnson's motion, the Superior Court also cited the subsection and adopted the State's reasoning.[5] As such, statutory interpretation of § 4141(u) was clearly at issue below and is not being raised for the first time on appeal. Rule 8 is not implicated.

When denying the State's Motion to Affirm, this Court appointed counsel *sua sponte* and in the interest of justice.[6] Now aided by counsel, Mr. Johnson's argument is that the Superior Court erred below in its interpretation of § 4121(u). This is a legal question of statutory interpretation, which this Court reviews *de novo*.

Rule 35(a) is not implicated; Rule 35(b) applies.

The State argues that the Superior Court did not abuse its discretion in denying Mr. Johnson's motion under Superior Court Criminal Rule 35(a).[7] However, it was never argued below nor here that Mr. Johnson's sentence was illegal. The Superior Court did not impose GPS monitoring – Probation and Parole

[3] A289-290.
[4] A296.
[5] Exhibit A.
[6] A340.
[7] Ans. Br. at 10-28.

did that. Mr. Johnson's motion sought relief from a condition of his probation that the Court never ordered.

Moreover, the Superior Court specifically cited to Superior Court Criminal Rule 35(b) when denying the motion.[8] The Court never mentioned Rule 35(a). The Order acknowledges that under Rule 35(b), "the Court may…reduce…the terms and conditions of partial confinement or probation, at any time."[9]

In the "Rule 35(b)" section of the Answering Brief,[10] the State argues that Mr. Johnson was barred from filing the motion as it is repetitive. The State asserts that the bar on repetitive motions is "absolute and flatly prohibits repetitive requests for reduction of sentence."[11] The State's argument is incorrect, because Mr. Johnson's motion did not ask for a reduction of his prison sentence, which had already been served.[12]

Rule 35(b)'s heading, "Reduction of Sentence" is somewhat incomplete because the Rule addresses both reduction of prison sentences *and* modification of probationary sentences. The Rule states, in its entirety:

[8] Exhibit A at 1-2.
[9] *Id.*, *citing,* Super. Ct. Crim. R. 35(b).
[10] Ans. Br. at 28-30.
[11] Ans. Br. at 30.
[12]

> **(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.[13]

The Court may reduce a sentence *of imprisonment* if a motion is filed within 90 days or if extraordinary circumstances pertain. The Court will not consider repetitive requests for *reduction of sentence*. But the rule also provides that a term of probation may be modified at any time. And the bar on repetitive requests applies to sentence reductions, not modifications of probation conditions.

The case cited by the State, *Barrall v. State*,[14] underscores this point. The defendant filed multiple motions for sentence modification in his child pornography case. The Superior Court denied a subsequent motion for sentence review, while Barrall was still incarcerated, on the grounds that more than 90 days had passed since sentencing. The State conceded that this was error in that Rule 35(b)'s 90-day limitation does not apply to motions to modify the length or

[13] Super. Ct. Crim. R. 35(b).
[14] 2019 WL 1787310 (Del. Apr. 23, 2019).

conditions of probation.[15] This Court affirmed, on the alternate ground that the third motion was repetitive.[16] However, in doing so, this Court noted that once Barrall began serving probation, he could work with Probation and Parole to tailor a reasonable set of protective provisions in a way that provided for the safety of children and the public. This Court went on to note that Barrall could petition the Superior Court for modification of his probation conditions.[17]

Similarly, in *Wilkerson v. State*,[18] a child pornography defendant filed a motion to modify the restrictions on his internet use and contact with children for the probationary portion of his sentence. Like in *Barrall*, the Court erroneously applied the 90-day limitation. This Court noted, "Wilkerson was on probation, and not seeking to reduce a term of imprisonment." This Court affirmed, however, because the Superior Court had considered the issues presented to it.[19] However, this Court took note of the "burdens imposed on Wilkerson" arising from the probation conditions.[20] This Court recommended that Wilkerson seek accommodation from Probation and Parole and if necessary, petition the Superior Court for a modification of his conditions.[21]

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[15] *Id.* at *1.
[16] *Id.*
[17] *Id.*, n. 5.
[18] 2017 WL 5450747 (Del. Nov. 13, 2017).
[19] *Id.* at *2.
[20] *Id.*, n. 10.
[21] *Id.*

As these cases demonstrate, the State is incorrect in arguing that Mr. Johnson is precluded by Rule 35(b) by moving to modify the GPS condition that Probation and Parole imposed.

Finally, the State asserts that Probation and Parole's imposition of the non-sentenced GPS requirement is "not unlawful under 11 *Del. C.* § 6502."[22] It is not clear how the section applies, except that it generally says that the Department of Correction shall provide "effectively and efficiently" for the "maximum study, care, training, and supervision" of inmates and probationers.[23] The Opening Brief did not argue that Probation and Parole's imposition of GPS monitoring was illegal. The argument is that its interpretation of § 4121(u) was incorrect and that the Superior Court erred in not modifying the condition of probation.

The phrase "their probation" refers unambiguously to the qualifying sex offense.

The meaning of a statute must, in the first instance, be sought in the language in which the act is framed.[24] When considered in the context of the rest of 11 *Del. C.* § 4121, it is clear that the GPS requirement for "their probation" refers to the probation for the underlying sex offense.[25] The other subsections of

[22] Ans. Br. at 30.
[23] 11 *Del. C.* § 6502(a).
[24] *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011).
[25] 11 *Del. C.* § 4121(u).

the statute clearly refer to requirements for the underlying sex offense. Particularly, § 4121(c) imposes a tier designation for the original sex offense if the probationer previously pled guilty to a lesser offense and subsequently violates probation.[26] Moreover, the statute specifically addresses what happens when a sex offender is convicted of any subsequent offense: it restarts the clock on when a Tier III offender can apply for redesignation to a lower tier.[27] At no point does the statute require these subsequent offenders to resume GPS monitoring as a result of a new offense.

The State asserts these "claims are unavailing,"[28] because they "provide no basis for the Court to re-write the statute in a way that disregards the General Assembly's intent."[29] But the General Assembly's intent is found in the full statute, which provides one specific additional sanction for Tier III sex offenders who commit subsequent offenses – a delay in when they can apply for redesignation to a lower tier.[30] As such, interpretation of "their probation" as probation for the underlying sex offense is not a "re-write" of the statute. It is simply reading the statute in the context of the language in which the act is framed.

[26] 11 *Del. C.* § 4121(c).
[27] 11 *Del. C.* § 4121(e)(2)(a).
[28] Ans. Br. at 16.
[29] Ans. Br. at 19.
[30] 11 *Del. C.* § 4121(e)(2)(a).

The Florida cases cited by the State do not answer the question as to the Delaware General Assembly's intent when enacting 11 *Del. C.* § 4121(u). While it is true that Delaware's statute follows the so-called Florida Model, it does not do so in the way the State suggests. The Florida model imposes mandatory GPS tracking on defendants for an enumerated list of sex crimes as a condition of probation, without any individualized risk assessment.[31] In this way, Delaware's statute resembles Florida's. A model first enacted in California imposes mandatory lifetime GPS tracking.[32] A third model first enacted in Massachusetts allows judicial discretion in determining whether and for how long to impose GPS tracking.[33]

> The Florida statute requires the Court to order GPS monitoring:
>
> > Effective for a probationer or community controllee whose crime was committed on or after September 1, 2005, and who ... (b) Is designated a sexual predator pursuant to s. 775.21 ... the court must order, in addition to any other provision of this section, mandatory electronic monitoring as a condition of the probation or community control supervision.[34]

The Florida statute explicitly requires the court to impose GPS monitoring for probationers who commit crimes – any crimes – after September 1, 2005.[35] The

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[31] Eric M. Dante, *Tracking the Constitution-the Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 Seton Hall L. Rev. 1169, 1176 (2012).
[32] *Id.* at 1177-1178.
[33] *Id.* at 1180-1181.
[34] Fla. Stat. § 948.30(3)(b).
[35] *State v. Lacayo*, 8 So.3d 385, 387 (Fla. Dist. Ct. App. 2009).

Delaware statute does not specify that subsequent crimes committed by Tier III sex offenders require GPS tracking while on probation for those crimes.

More to the point, the Florida statute was never mentioned or discussed during the legislative session for 11 *Del. C.* § 4121(u). In fact, one of the few comments made suggests that the legislators thought that Tier III sex offenders rarely got out of prison.[36] It is also notable that the Superior Court did not impose GPS monitoring for Mr. Johnson's subsequent offense. The fact that the Court did not do so undermines the State's argument that the statute unambiguously requires the Court to order GPS monitoring.

The State asserts that even if the statute is ambiguous, the ambiguity should be resolved by imposing a GPS requirement for all subsequent offenses committed by Tier III sex offenders.[37] The State points to an absence of discussion of a limitation on monitoring in the synopsis of the bill. But the legislative sessions make clear that the General Assembly never considered or discussed whether Tier III sex offenders should be monitored after any crime for the rest of their lives – at their own expense. The absence of debate does not militate in favor of a finding of legislative intent. As noted, the understanding in the House of Representatives was that Tier III sex offenders rarely get out of jail.

[36] A382.
[37] Ans. Br. at 25-27.

GPS monitoring for Mr. Johnson is permissible but not required.

The State argues that Probation and Parole has broad discretion to impose requirements on probationers.[38] That point is not controversial, but it is also not relevant to the claim on appeal. In Mr. Johnson's case, Probation and Parole unilaterally imposed GPS monitoring. He moved to remove the requirement because it was difficult for him to obtain employment with the anklet visible.[39] The Court denied the motion, holding that 11 *Del. C.* § 4121(u) required GPS monitoring. As such, the Court denied the motion due to its interpretation of the statute, not as an endorsement of Probation and Parole's decision to put Mr. Johnson on the GPS monitor.

Under these circumstances, the fact that Probation and Parole has discretion to effectively supervise probationers is not relevant to this appeal.

[38] Ans. Br. at 27-28.
[39] A291.

CONCLUSION

For the foregoing reasons and those stated in the Opening Brief, Appellant Dammeyin Johnson respectfully requests that this Court reverse the judgment of the Superior Court.

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