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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVON GORDON,	)	
	)	
Defendant Below-Appellant,	)	
	)	
v.	)	Nos. 225 & 312, 2024C
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Davon Gordon's December 18, 2024 Opening Brief.

The appeal in No. 312, 2024C was untimely filed, and this Court issued a Notice to Show Cause on August 19, 2024. (A-233). On September 4, 2024, the State filed a Response not opposing the untimely appeal.[1] (A-237-61). This Court on September 16, 2024 issued an Order agreeing with the State that in the interest of justice the untimely appeal in No. 312 should not be dismissed for lack of jurisdiction and consolidated appeal No. 312 with the timely filed violation of probation (VOP) appeal in No. 225, 2024.

[1] *But see Preform Building Components, Inc. v. Edwards*, 280 A.2d 697, 698 (Del. 1971) ("…it is elementary that counsel could not confer the power and jurisdiction upon the Court by consent or otherwise."); *Mixon v. Delaware Olds, Inc.*, 396 A.2d 963, 966 (Del. 1978) ("Neither counsel nor this Court can waive a jurisdictional defect so as to confer jurisdiction which does not otherwise exist.").

SUMMARY OF THE ARGUMENT

I. DENIED. The direct appeal of the intimidation conviction (No. 312, 2024C) is not the proper forum to collaterally attack Davon Gordon's guilty plea. An attempt to cancel or withdraw that guilty plea must first be filed in a Superior Court postconviction relief motion, not a direct appeal.

The possibility that the intimidation felony conviction could result in a violation of probation (VOP) in Gordon's earlier cases (225, 2024C) is a collateral consequence of the intimidation conviction. The judge at Gordon's intimidation guilty plea colloquy was not required to inform the defendant of that potential VOP. It was not a due process violation for the guilty plea judge not to warn Gordon of the possibility of a VOP if he pled guilty in a different case.

The Truth-In-Sentencing (TIS) Guilty Plea Form signed by Gordon and his counsel specifically asked if Gordon was on probation at the time of this offense and warned: "A guilty plea may constitute a violation." (A-131). At his guilty plea colloquy Gordon said he read, understood, and signed the written plea documents. (A-152-53, 159). A defendant is bound by his statements in open court and in the plea documents. Gordon had actual notice of the possibility of a VOP before the intimidation guilty plea, and a belated collateral attack upon the voluntariness of the intimidation plea is meritless.

Gordon also waived any objection to the lack of a VOP hearing by not objecting when a different Superior Court Judge at sentencing initially announced that "…the Court is going to sentence for both the new offense and the Violation of Probation." (A-192). Gordon's belated attack on his intimidation conviction that was the basis for a VOP finding appears to be only dissatisfaction with the 3-year Level V VOP sentences.

Gordon has failed to establish any plain error in his intimidation guilty plea colloquy, and this appeal is meritless.

STATEMENT OF FACTS

On September 25, 2023 (A-1), the New Castle County Grand Jury indicted Davon M. Gordon in ID #2308008915 for three offenses involving the same complaining witness, Ajeenah Hopes. (A-127-28). The three charges resulted from an August 1, 2023 telephone call by Gordon while incarcerated at the Howard R. Young Correctional Institution to Hopes. (A-122-25).

Gordon, with the assistance of legal counsel, resolved the three charges on January 29, 2024, by a plea agreement where Gordon pled guilty to the lead charge of Intimidation, Cr. A. No. IN23-09-1211, in exchange for the State's agreement to enter a *nolle prosequi* as to the two other charges. (A-129-31). In the Truth-In-Sentencing (TIS) Guilty Plea Form, Gordon checked the "Yes" block for the question: "Were you on probation or parole at the time of this offense? (A guilty plea may constitute a violation)." (A-131).

The New Castle County Superior Court on January 29, 2024 conducted a guilty plea colloquy with Gordon and counsel. (A-132-68). Initially, during the plea colloquy the prosecutor informed the trial court that two plea offers were extended to Gordon—one that resolved only the three pending charges and a second offer that encompassed the three charges and the other pending violation of probation (VOP) cases. (A-139-40). Gordon only agreed to resolve the three pending charges in his

plea, and not the VOP matters. (A-139-40). Defense Counsel for Gordon acknowledged the two plea offers and represented that the defendant understood that "he will be brought back to court at a later date to have to deal with the VOP." (A-142).

Gordon said he was 42 years old (A-145), and that he had read, understood, and signed the written plea documents, including the TIS form. (A-153-54). Gordon agreed that he was guilty of the intimidation charge (A-153-54), and that there were no other promises not stated in the written plea. (A-155, 157). The plea was voluntary according to Gordon (A-156-57), and the defendant agreed that he had a Master's degree from Rutgers University. (A-156). When asked a second time if he read, understood, and truthfully answered all the questions on the TIS form, Gordon again answered in the affirmative. (A-159).

Responding to the trial court's inquiry about any questions, Gordon said: "Oh, as far as the VOP hearing, will I have that soon so I can kind of get that done, too?" (A-161). In response to Gordon's question, the trial judge said, "…the VOPs will not be resolved until this is sentenced." (A-162). In conclusion, the Superior Court Judge ruled: "So, I find this plea knowingly, intelligently and voluntarily given, and I will accept it." (A-166). The trial court declined the request for immediate

sentencing (A-130), and ordered a presentence investigation on January 29, 2024. (A-166).

A different Superior Court Judge conducted Gordon's subsequent sentencing on May 17, 2024. (A-169-232). At the outset of the May 17 sentencing, the prosecutor noted, "The Defendant did not wish to have his violations heard at the time of the plea, so that was not included on the Plea Agreement." (A-174). After the prosecutor recited the factual basis for the intimidation offense (A-175-79), the female complaining witness addressed the sentencing judge. (A-179-92). She stated: "Davon is a monster. Davon is pure evil." (A-181).

Next, the sentencing judge announced: "…the Court is going to sentence for both the new offense and the Violation of Probation." (A-192). The judge understood the complaining witness to be "speaking to both, …the violations of probation and the new charge…[since] the charges for which Mr. Gordon was on probation, involved her as a victim." (A-193). The prosecutor had no additional comments about the VOP (A-194) beyond the earlier VOP sentence recommendation of 1 year Level V time followed by 1 year Level III probation with GPS monitoring. (A-175).

Gordon's defense counsel offered more extensive sentencing comments (A-194-201), including the acknowledgment that "…Mr. Gordon is here for two things:

To be sentenced on the Act of Intimidation charge, as well as the Violation of Probation." (A-197). Thus, the trial court and both counsel clearly understood that Gordon was going to be sentenced for both the intimidation conviction and his VOP cases on May 17. Neither the attorneys nor Gordon voiced any objection to a unified sentencing of the new intimidation conviction and the VOP cases all involving the same victim.

Gordon also addressed the trial court at length during his joint sentencing and did not protest his VOP sentencing. (A-201-21). Following Gordon's remarks, the Superior Court Judge made extensive comments, including announcing, "I am going to separately sentence, however, for the violation of probation." (A-225). Again no one objected to the VOP sentencing, and Gordon was sentenced for five VOPs. (A-92-98, 228-31).

Gordon filed a *pro se* letter with this Court on June 7, 2024, deemed to be an appeal of the five May 17 VOP sentences (No. 225, 2024). (A-234). A second *pro se* letter from Gordon was sent to this Court on August 5, 2024, and that was deemed an appeal from the intimidation conviction and sentence in Case ID No. 2308008915 (No. 312, 2024). (A-234). Both *pro se* appeals on June 7 and August 5, 2024 were consolidated by this Court on September 16, 2024. (A-262-65).

ARGUMENT

I. AT THE PLEA COLLOQUY THE TRIAL COURT WAS NOT REQUIRED TO ADVISE THE DEFENDANT OF THE POSSIBILITY OF A VIOLATION OF PROBATION COLLATERAL CONSEQUENCE OF A GUILTY PLEA.

QUESTION PRESENTED

Whether the trial judge during the guilty plea colloquy (A-132-68) was required to orally advise the defendant that a guilty plea to a new charge could trigger the possibility of a violation of probation (VOP) for earlier convictions for which the defendant was on probation at the time of the instant offense.

STANDARD AND SCOPE OF REVIEW

Because Davon Gordon did not raise any objection to the sufficiency of his guilty plea colloquy prior to sentencing and has not filed any postconviction relief motion under Del. Super. Ct. R. 61 in this regard, any belated complaint that his plea was not knowing and voluntary is waived and may now only be reviewed on appeal for plain error.[2] " [P]lain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character; and which clearly deprive an accused of a substantial right, or which clearly show

[2] Del. Supr. Ct. R. 8; *Gregory v. State*, 293 A.3d 994, 998 (Del. 2023); *Stevenson v. State*, 2018 WL 1136524, at *2-3 (Del. Mar. 1, 2018).

manifest injustice."[3] To reverse for plain error, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[4] "Plain error should be, by definition, blatant, and such as to require a trial judge to intervene spontaneously even in the absence of objection."[5] To affect substantial rights, the error must have affected the outcome of the trial.[6] In demonstrating that a forfeited error is prejudicial, the burden of persuasion is on the defendant.[7]

MERITS OF THE ARGUMENT

At Gordon's May 17, 2024 sentencing (A-169-232), the Superior Court sentenced the defendant for both his January 29, 2024 guilty plea conviction for intimidation (A-132-68), and four earlier violation of probation (VOP) cases. For the intimidation conviction, Gordon received a Level V sentence of 8 years, suspended in its entirety for 6 months Level IV, followed by 18 months Level III probation. (A-225-27). As to the probation violation in Cr. A. No. VN22-08-1479-

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[3] *Pollard v. State*, 284 A.3d 41, 44 (Del. 2022). *See also Hastings v. State*, 289 A.3d 1264, 1270 (Del. 2023).
[4] *Hastings*, 289 A.3d at 1270 (quoting *Lowther v. State*, 104 A.3d 840, 845 (Del. 2014)).
[5] *Morales v. State*, 104 A.3d 527, 533 (Del. 2016) (Strine, C.J., concurring).
[6] *Wainright v. State*, 504 A.2d 1096, 1100 (Del.), *cert denied*, 479 U.S. 869 (1986); *Williams v. Taylor*, 529 U.S. 263, 390-91 (2000) (trial result unreliable).
[7] *United States v. Olano*, 507 U.S. 725, 734 (1993); *Brown v. State*, 897 A.2d 748, 753 (Del. 2006); *Sullivan v. State*, 636 A.2d 931, 942 (Del. 1994).

01, Gordon was sentenced to 5 years Level V, suspended after 3 years. (A-229). On the other four VOP convictions Gordon received concurrent suspended sentences of 1 year Level III probation. (A-228-30).

Gordon filed a *pro se* timely appeal of the VOP convictions and sentences on June 7, 2024 (No. 225, 2024). (A-234). Thereafter, Gordon on August 5, 2024 filed a second *pro se* untimely appeal of the intimidation conviction and sentence. (No. 312, 2024). (A-234). The two direct appeals on June 7 and August 5 were consolidated by this Court on September 16, 2024. (A-262-65).

In these consolidated appeals, Gordon argues: "The Superior Court's failure to *sua sponte* inform Mr. Gordon that his guilty plea to Act of Intimidation would constitute a violation of his probation was plain error. Mr. Gordon's due process rights were violated because his plea was not knowing, intelligent, and voluntary."[8] Gordon is mistaken.

"Prior to accepting a guilty plea, the trial judge must address the defendant in open court."[9] This was done at length during Gordon's January 29, 2024 guilty plea colloquy for the intimidation charge. (A-132-68). Del. Super. Ct. Crim. R. 11(c)(1-5) specifies what advice the trial judge must give a defendant in determining that

[8] Opening Brief at 25.
[9] *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citing *Sullivan v. State*, 636 A.2d 931, 937 (Del. 1994)).

a defendant understands the nature of a felony guilty plea. Rule 11(c) does not require that a defendant be informed that a guilty plea may result in a violation of probation in a different case.

The Truth-In-Sentencing (TIS) Guilty Plea Form signed by Gordon and his defense counsel as part of the intimidation charge plea specifically asks: "Were you on probation or parole at the time of this offense?" (A-131). Gordon checked the "Yes" block in response to the probation question. (A-131). In addition, the written TIS form stated: "A guilty plea may constitute a violation." (A-131). Thus, Gordon had written notice that his intimidation charge guilty plea might be a violation of the defendant's probation.[10] At his guilty plea colloquy, Gordon twice told the Superior Court Judge that he read, understood and signed the written plea agreement documents, including the TIS Form. (A-153-54, 159). "In the absence of clear and convincing evidence to the contrary, [a defendant] is bound by his answers on the Truth-In-Sentencing Guilty Plea Form and by his sworn testimony prior to the acceptance of the guilty plea."[11] Thus, Gordon is bound by his TIS admission and his in-court statements at the plea colloquy.

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[10] *See Hicks v. State*, 2008 WL 3166329, at *3-4 (Del. Aug. 7, 2008) (defendant informed of a VOP possibility in written TIS form).

[11] *Somerville*, 703 A.2d at 632. *See also Jackson v. State*, 2024 WL 1716517, at *3 n. 21 (Del. Apr. 22, 2024) (plain error review of coerced plea claim); *Hopkins v. State*, 2023 WL 8296427, at *2 (Del. Dec. 1, 2023); *Benson v. State*, 2022 WL 18005694, at *3 (Del. Dec. 29, 2022).

In this intimidation plea direct appeal, Gordon is really seeking to withdraw his guilty plea to the intimidation charge because that felony guilty plea is the factual and legal basis for the five VOP sentences where Gordon received a three-year Level V unsuspended sentence. It is a belated action occurring only after the VOP sentences were imposed. (A-228-30)

Superior Court Criminal Rule 32(d) provides that if a motion to withdraw a plea of guilty 'is made before imposition…of sentence…the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only by motion under Rule 61."[12] Gordon did not move to withdraw his intimidation guilty plea prior to sentencing, nor has he filed any motion for postconviction relief in the Superior Court.

"When a motion to withdraw a guilty plea is made prior to sentencing, there is 'a lower threshold of cause sufficient to permit withdrawal.'"[13] "Superior Court Criminal Rule 32(d) provides that the Superior Court may permit a defendant to withdraw his guilty plea after sentencing only to correct manifest injustice."[14] Here,

[12] *Blackwell v. State*, 736 A.2d 971, 972 (Del. 1999) (quoting *Del. Super. Ct. Crim. R.* 32(d)).
[13] *Shorts v. State*, 2018 WL 2437229, at *2 (Del. May 30, 2018) (quoting *McNeill v. State*, 2002 WL 31477132, at *1 (Del. Nov. 4, 2002)).
[14] *Allen v. State*, 509 A.2d 87, 88 (Del. 1986).

since Gordon is attempting to attack his intimidation guilty plea on direct appeal, the plain error standard of proof is required.

Where the motion to withdraw a guilty plea after sentencing is more properly filed in the Superior Court, "To grant an application to withdraw a guilty plea, the Trial Court must find: (a) the guilty plea was not voluntarily entered or (b) the guilty plea was entered because of mistake or misapprehension of the defendant as to his legal rights."[15] "The standard is reviewing the Trial Judge's decision on the request to withdraw a plea is whether or not the judge below abused his discretion after applying the manifest injustice standard in refusing to allow defendant to withdraw his plea of guilty."[16]

Because Gordon is attempting to void his intimidation plea on direct appeal, there is no trial court decision to review for manifest injustice. Gordon's appellate attack is more akin to what occurred in *Vincent v. State*,[17] where a VOP direct appeal was found not to be the proper remedy to attack the original DUI guilty plea.

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[15] *Smith v. State*, 451 A.2d 837, 839 (Del. 1982) (citing *State v. Insley*, 141 A.2d 619, 622 (Del. 1958)).
[16] *Smith*, 451 A.2d at 839.
[17] 2004 WL 2743512, at *2 (Del. Nov. 17, 2004) ("In this appeal, Vincent may challenge the VOP proceedings and sentence. He may not, however, use the appeal to collaterally attack the voluntariness of his prior guilty plea.") (citing *Weaver v. State*, 779 A.2d 254, 258 n.17 (Del. 2001)).

Even if the manifest injustice standard somehow applied in this direct appeal, Gordon cannot meet that standard. He had actual knowledge of the VOP possibility by virtue of the TIS Form. (A-131). Belatedly claiming unfair surprise is not supported by this record.

A motion to withdraw a guilty plea after sentencing is only granted to correct manifest injustice.[18] Manifest injustice is "a prerequisite for setting aside a judgment after sentence."[19] "Where a guilty plea is sought to be withdrawn long after sentence, defendant has the burden of showing prejudice amounting to manifest injustice."[20] Gordon has not demonstrated manifest injustice or plain error in his attempt to conceal the intimidation guilty plea prior to the VOP sentencings. Interestingly, Del. Super. Ct. Crim. R. 32(d), "contemplates a lower threshold of cause sufficient to permit withdrawal of a guilty plea" than Rule 61, applicable to postconviction relief proceedings.[21]

Procedurally, Gordon's direct appeal attack upon his intimidation guilty plea is similar to what occurred in *Vincent v. State*,[22] where the defendant was also attempting to attack the voluntariness of prior guilty pleas in 2002, 1998 and 1997

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[18] *Raison v. State,* 469 A.2d 424, 425 (Del. 1983).
[19] *Raison*, 469 A.2d at 426.
[20] *Smith*, 451 A.2d at 839 (quoted in *Allen v. State*, 509 A.2d 87, 88 (Del. 1986)). *Accord Insley,* 141 A.2d at 622.
[21] *Smith,* 451 A.2d at 839.
[22] 2004 WL 2743512, at *1-2.

in an appeal from a 2004 VOP. Rejecting Vincent's procedural tactic, this Court found: "In this appeal, Vincent may challenge the VOP proceedings and sentence. He may not, however, use the appeal to collaterally attack the voluntariness of his prior guilty pleas."[23] Similarly, Gordon may attack his VOP convictions and sentence in this consolidated appeal, but the appeal may not properly be utilized to undo collaterally the intimidation guilty plea.[24]

While Gordon only attacks the professional performance of the trial judge who conducted his intimidation guilty plea colloquy, he could not on direct appeal allege ineffective assistance of his former defense counsel at the January 2024 guilty plea hearing.[25] On the basis of the current record and in the absence of any Superior Court postconviction motion to withdraw the intimidation guilty plea, it is unknown what, if anything, former defense counsel told Gordon about the effect of an intimidation guilty plea on the defendant's pending VOP cases.

All the guilty plea colloquy record reveals is that the prosecutor disclosed that two plea offers were extended - one that resolved only the three charges in the intimidation case and a second offer that also encompassed the VOP cases. (A-139-

[23] *Id.*, at *2.
[24] *See Weaver*, 779 A.2d at 258 n. 17.
[25] *See Watson v. State*, 2013 WL 5969065, at *2 (Del. Nov. 6, 2013) (Citing *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994)).

40). Gordon rejected the second plea which would have included a resolution of his VOP matters. (A-139-42).

At a Rule 61 postconviction proceeding former defense counsel for Gordon will have an opportunity to defend his professional performance at the intimidation plea proceeding.[26] In a Rule 61 postconviction proceeding counsel was not found ineffective for failing to inform the defendant who pled *nolo contender* to the theft by false pretense charge that a collateral consequence of the plea could be a suspension of the defendant's mortgage loan broker's license.[27]

Gordon's challenge to his VOP sentence of three years imprisonment is indirect given he asserts only a deficiency by the plea colloquy judge in the separate intimidation prosecution. Like a motion to withdraw a guilty plea, this amounts to a collateral attack which "is subject to the requirements of Rule 61, including its bars of procedural default."[28]

A "collateral consequence is one that is not related to the length or nature of the sentence imposed on the basis of the plea."[29] For example, "A defendant's loss

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[26] *Preston v. State*, 306 A.2d 712, 716 (Del. 1973).
[27] *Henry v. State* 2003 WL 22321039, at *1 (Del. Oct. 7, 2003).
[28] *Blackwell*, 736 A.2d at 972-73 (citing *Patterson v. State*, 684 A.2d 1234, 1237 (Del. 1996)).
[29] *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1998). *See also Henry*, 2003 WL 22321039, at *1.

of the future right to possess deadly weapons upon the entry of certain guilty pleas is merely a collateral consequence of such a plea."[30]

In contrast, "A direct consequence is one that has a 'definite, immediate and largely automatic effect' on the range of the defendant's punishment."[31] "An example of a direct consequence is a mandatory minimum term of imprisonment or a mandatory parole term imposed by statute."[32] "A defendant need not be informed of all the collateral consequences of a guilty plea; the distinction between a direct consequence and a collateral consequence turns on whether the consequence represents a definite, immediate, and largely automatic effect on the range of a defendant's punishment."[33]

This Court's decision in *Weaver v. State* is analogous to the procedural posture of Gordon's consolidated appeals. There, this Court observed: "The right to appeal from a sentence for a VOP is limited. The defendant may challenge the VOP proceedings and sentence, but there is no right to challenge the underlying

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[30] *Kipp v. State*, 704 A.2d 839, 841-42 (Del. 1998).
[31] *Parry v. Rosemeyer*, 64 F.3d 110, 114 (3d Cir. 1995), *cert. denied*, 516 U.S. 1058 (1996) (quoting *Cuthrell v. Director, Patuxent Inst.,* 475 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 414 U.S. 1005 (1973)). *See Barkley v. State*, 724 A.2d 558, 560 (Del. 1999); *Harris v. State*, 2000 WL 990921, at *3 (Del. June 21, 2000).
[32] *Barkley*, 724 A.2d at 560 (automatic revocation of driver's license).
[33] ANNOT., "Court's duty to advise or admonish accused as to consequences of a plea of guilty, or to determine that he is advised thereof," 97 A.L.R.2d 549, at *3 (1964).

conviction and proceedings leading to that conviction."[34] The only difference between Gordon's case and *Weaver* is the fact that Gordon's untimely appeal of his intimidation conviction has been consolidated with his timely earlier VOP appeal. (A-262-65).

In *Chapman v. State*,[35] the defendant attempted to use his appeal from a VOP to resurrect claims of error that could have been, but were not raised in a timely appeal. This Court pointed out that "Chapman did not appeal his 2013 guilty plea or sentence and may not collaterally attack his 2013 sentence in this appeal from a VOP."[36]

Of course, a criminal defendant must be made aware of all direct consequences of a guilty plea, but he need not be advised of every possible collateral consequence.[37] Gordon was told on his TIS form (A-131) that if he was on probation, "A guilty plea may constitute a violation." This written warning was plain and explicit.

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[34] *Weaver*, 779 A.2d at 258 n.17.
[35] 2015 WL 357955, at *1 (Del. Jan. 26, 2015).
[36] *Id.*, at *1 + n. 2 (citing *Taylor v. State*, 2013 WL 1489392, at *1 (Del. Apr. 10, 2013); *Eley v. State*, 2006 WL 453392, at *1 (Del. Feb. 21, 2006), (appellant could not attack sentences on convictions underlying VOP in appeal from VOP).
[37] *Johnson v. Commissioner of Correction*, 652 A.2d 1050, 1057 (Conn. App. 1995).

Gordon's factual circumstance is similar to what occurred in *Hicks v. State*,[38] where the defendant answered Yes on the TIS form "confirming that he understood that a guilty plea may constitute a violation of his probation.[39] Hicks first entered into a plea agreement on June 20, 2005, and in a July 8, 2005 VOP proceeding the new June drug conviction was cited as a violation of probation.[40] In a postconviction petition Hicks sought to withdraw the June guilty plea claiming ineffective assistance of counsel.

On appeal, this Court in *Hicks* affirmed the denial of postconviction relief and noted that the TIS Form "asked whether the defendant was on probation at the time of the offense. It also advised that '[a] guilty plea may constitute a violation.' Hicks checked the 'yes' box on the form in his own handwriting. Thus, Hicks was informed that his guilty pela may result in a VOP."[41] Gordon was similarly informed of the possibility of a VOP when he pled guilty to intimidation. Gordon is similar to the defendant in *Patterson v. State*,[42] who also turned down a plea offer that included the VOP. (A-139-42).

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[38] 2008 WL 3166329, at *2-4 (Del. Aug. 7, 2008).
[39] *Id.* at *3.
[40] *Id.* at *2.
[41] *Id.* at *4.
[42] 2004 WL 65333, at *1 (Del. Jan. 12, 2004).

Some competent evidence of a VOP is required, and the trial court's decision is reviewed on appeal for an abuse of discretion.[43] Normally, a first condition of probation is that the probationer not commit a new criminal offense. (A-100, 114). The August 1, 2023 telephone intimidation charge (A-122-25) was a new criminal offense that violated Gordon's existing terms of probation. Probation is an "act of grace," and the State need only prove by a preponderance of the evidence that a violation has occurred because the probationer's conduct has not been as good as required by the conditions of probation.[44]

By admitting that he was guilty of the intimidation charge (A-153-54), Gordon conceded the legal basis to violate his existing terms of probation. It is for this reason that Gordon is only collaterally attacking the intimidation conviction, not the VOP adjudications, in this consolidated appeal. A separate VOP hearing will not change that result. A seminal issue in this appeal is whether the possibility that a guilty plea to a new charge might trigger a VOP in an earlier case. Gordon does not argue that the VOP possibility is a direct consequence of his intimidation plea. Courts in other jurisdictions have found that the possibility of a probation or parole violation based on a new conviction is only a collateral consequence, and that

[43] *Thompson v. State*, 192 A.3d 554, 549 (Del. 2018); *Cruz v. State*, 990 A.2d 409, 412 (Del. 2010).
[44] *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006); *State v. Diaz*, 2015 WL 1741768, at *3 (Del. Apr. 15, 2015).

procedural due process does not require that a defendant by advised by the court or counsel of this collateral consequence.[45]

Rather, Gordon's appellate argument focuses on the defendant's expectation that he would be able to litigate his VOP cases even if he pled guilty to a new felony offense that in itself would constitute a violation of his probation conditions.[46] If this was the case, Gordon does not explain why neither he nor his defense counsel did not voice any objection at the unified Superior Court sentencing on May 17, 2024. (A-169-232).

Before that sentencing the trial judge stated: "the Court is going to sentence for both the new offenses and the Violation of Probation." (A-192). By voicing no objection to this announced court procedure, Gordon and his counsel waived any objection. Gordon is belatedly complaining now about the unobjected to dual sentencing because he is apparently dissatisfied with the 3-year Level V VOP sentence.

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[45] *See Parry v. Rosemeyer*, 64 F.3d 110, 115 (3rd Cir. 1995) ("…we hold that Parry's re-sentencing following his probation violation was a collateral consequence of his guilty plea."); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977) (parole violation collateral consequence of guilty plea); *Yorks v. Barrett*, 2016 WL 4537816, at *3 (E.D. Mich. Aug. 31, 2016) (probation violation collateral consequence); *Sell v. Steele*, 2014 WL 707248, at *12 (E.D. Mo. Feb. 24, 2014) (parole violation); *Barmore v. State*, 117 S.W. 3d 113, 115 (Mo. App. 2002) (probation violation a collateral, not direct consequence of guilty plea); *Jakoski v. State*, 32 P.3d 672, 677 (Ind. App. 2001).

[46] Opening Brief at 23-25.

A separate VOP hearing would be of no assistance to Gordon. His new intimidation conviction was a sufficient basis to violate the existing probations. In the absence of any genuine prejudice, Gordon cannot demonstrate any plain error in how his intimidation guilty plea colloquy was conducted or in the subsequent combined sentencing by a different judge.

The VOP convictions and sentences should all be affirmed.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: February 19, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVON GORDON,	)	
	)	
Defendant Below-Appellant,	)	
	)	
v.	)	No. 225 & 312, 2024C
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

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