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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVON GORDON,	)	
	)	No. 225, 2024C
Defendant Below-Appellant,	)	No. 312, 2024C
	)	
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID Nos. 2108015289, 2201000032
STATE OF DELAWARE,	)	2201007423, 2107009883
	)	2202001715, 2308008915
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: February 27, 2025

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The undersigned attorney replies to the State's Answering Brief as follows:

ARGUMENT

I. MR. GORDON'S PLEA WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY BECAUSE HE WAS NOT INFORMED THAT THE GUILTY PLEA WOULD RESULT IN VIOLATIONS OF HIS PROBATION; IN FACT, HE WAS LED TO BELIEVE THAT HE COULD STILL LITIGATE HIS VOP MATTERS.

Davon Gordon pled guilty to Act of Intimidation. The record clearly demonstrates his belief that there would be VOP hearings in the future to contest his several violations of probation. In fact, he rejected a plea that would have resolved the charge and the VOPs for that very reason.

No one – not the attorneys nor the Court, advised Mr. Gordon that by pleading guilty to Act of Intimidation he was admitting that he violated his probation. In fact, the opposite is true. Both the State and defense counsel told the Court that he would be able to fight his VOPs in the future.

Mr. Gordon went on at great length about perceived infirmities with his VOP allegations and the great lengths he had gone to in an attempt to have VOP hearings.[1] He claimed that every time his VOP hearings were continued, the various judges told him that he would have VOP hearings in the future. When Mr. Gordon asked the Court about the scheduling of his VOP hearings, the judge responded:

[1] *See*, Op. Br. at 12-13.

> The prosecution mentioned they offered you a plea that would have resolved the VOPs. So we're not here on that plea. We have a different plea here. So if that's what you were told by the judges, then the VOPs will not be resolved until this is sentenced.[2]

With that understanding, Mr. Gordon accepted the plea. He was sentenced later by a different judge on the Act of Intimidation charge and five VOPs. Substantive VOP hearings never occurred.

The State is incorrect that Mr. Gordon seeks to collaterally attack his convictions and sentence and have them set aside; Mr. Gordon has standing to directly challenge the plea procedure leading to his conviction.

The State asserts that Mr. Gordon is making an improper collateral attack on his plea proceedings. According to the State, the appropriate vehicle for that after sentencing is a motion for postconviction relief.[3] According to the State, once the defendant has been sentenced, he or she has two options: move in the Superior Court to withdraw the plea on grounds of manifest injustice, or to file a motion for postconviction relief in this Court.[4]

This Court, however, does consider plea-related claims on direct appeal. In *Dunne v. State*,[5] the appellant claimed that his appeal was not voluntary because he was led to believe by his lawyer that he would receive only a six-month sentence.

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[2] A162.
[3] Ans. Br. at 12-16.
[4] Ans. Br. at 12-14.
[5] 865 A.2d 521 (Del. 2005).

This Court found that the plea was knowing, intelligent, and voluntary.[6] Notably, this Court did not find that the claimant's issue was not properly on appeal, nor did this Court remand for plea withdrawal or postconviction proceedings.

In *Benge v. State*,[7] a postconviction petitioner argued that errors in his plea proceeding rendered his plea invalid. The Superior Court found that the claim was procedurally defaulted because it was not raised on direct appeal to this Court. This Court held that Benge failed to overcome the procedural default.[8] As such, by waiting until postconviction proceedings, as the State suggests Mr. Gordon should do, Benge lost the opportunity to litigate his procedurally defaulted claim.

In *Palmateer v. State*,[9] the petitioner moved for postconviction relief, claiming his plea was invalid because he was under the influence of drugs during the plea hearing. On appeal after denial of his postconviction motion, this Court held, "because Palmateer failed to assert his claim of an involuntary guilty plea on direct appeal, he is barred from asserting it in this proceeding."[10]

As these cases demonstrate, Mr. Gordon must raise his claim on direct appeal; if he asserts the claim in a postconviction motion, he will be procedurally defaulted.

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[6] *Id.* at *1.
[7] 945 A.2d 1099 (Del. 2008).
[8] *Id.* at 1011.
[9] 2007 WL 37772 (Del. Jan. 5, 2007).
[10] *Id.* at *1.

The State asserts that, "procedurally, Gordon's direct appeal attack on his intimidation guilty plea is similar to what occurred in *Vincent v. State*…"[11] It is not. In *Vincent v. State*,[12] this Court considered a direct appeal of a VOP sentence. After a fourth DUI, the Superior Court found him in violation of probation. On direct appeal of that violation, Vincent claimed, among other things, that his earlier DUI pleas were coerced.[13] This Court held, "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."[14]

Not only is Mr. Gordon's case not like *Vincent*, it is the opposite of *Vincent*. Mr. Gordon is directly appealing his conviction for Act of Intimidation because his plea was not knowing, intelligent, and voluntary. That is the sole focus of this appeal. Mr. Gordon filed *pro se* appeals on his VOP cases. This Court consolidated the appeals with the Act of Intimidation case. And, the VOP findings and sentences are implicated, but only because the sole basis for the violations is the Act of Intimidation conviction.

[11] Ans. Br. at 14.
[12] 2004 WL 2743512 (Del. Nov. 17, 2004).
[13] *Id.* at *2.
[14] *Id.*

Mr. Gordon is not appealing based on collateral consequences; he is simply asserting that his plea was not knowing, intelligent, and voluntary.

The State next asserts that Mr. Gordon is appealing his VOP sentence as a collateral consequence of his guilty plea. According to the State, a defendant need not be informed of collateral consequences. Moreover, the State asserts, Mr. Gordon conceded the legal and factual basis for his violations by pleading guilty.[15]

The State's reference to *Chapman v. State*[16] is unavailing. It is true that a defendant cannot use a VOP appeal to attack his prior guilty plea. But Mr. Gordon's appeal is not a VOP appeal. It is a direct appeal of his Act of Intimidation conviction.

The State next contends that Mr. Gordon's appeal "is similar to what occurred in *Hicks v. State*.[17] *Hicks*, however, had a unique fact pattern much unlike Mr. Gordon's case.

In *Hicks*, the defendant was first offered a "fast track" plea combining his case and his VOP. He rejected that plea, and the VOP was deferred. Then Hicks incurred more charges.[18] A private lawyer had the first case, and a succession of appointed lawyers had the newer case. When the State offered Hicks a plea that resolved both sets of charges, his attorney informed the Court that the plea would

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[15] Ans. Br. at 16-20.
[16] 2015 WL 357995 (Del. Jan. 26, 2015).
[17] Ans. Br. at 19; *Hicks v. State*, 2008 WL 3166329 (Del. Aug. 7, 2008).
[18] *Id.* at *1.

resolve "all pending matters" in Superior Court.[19] But it did not. Represented by a third attorney, Hicks then faced the VOP charges. At the hearing, the prosecutor and defense attorney disagreed as to whether the global plea included the violations.[20]

One of Hicks' former attorneys wrote to the judge that he was "almost 100 percent sure" that Hicks' plea included the VOPs. The prosecutor, however, informed the Court that once a fast track offer is rejected, his practice was not to include a VOP in a subsequent plea offer.[21]

Over the objection of both Hicks and his fourth attorney, the judge sentenced Hicks on the violations to additional prison time.[22]

Hicks' case was before this Court in a postconviction posture, unlike Mr. Gordon's direct appeal. This Court declined to reverse the Superior Court's holding that prior counsel were ineffective.[23] Part of this Court's reasoning was that Hicks signed a TIS form acknowledging that a guilty plea may constitute a violation of probation.[24]

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[19] *Id.*
[20] *Id.* at *2.
[21] *Id.*
[22] *Id.* at *3.
[23] *Id.* at *4.
[24] *Id.*

The *Hicks* Court was "deeply concerned" with the "woeful lack of communication between the array of attorneys serially appointed to represent Hicks."[25] This Court directed the Clerk to send copies of the Order to the Office of the Attorney General, the Office of the Public Defender, and the President Judge of the Superior Court.[26]

Mr. Gordon's case could not be more different than *Hicks*. Mr. Gordon deliberately selected a plea deal that did *not* resolve the VOP matters. He spoke at great length about his issues with the alleged violations and attempts to schedule hearings. He was affirmatively told by the attorneys and the Court that those hearings would indeed occur later. It is true that Mr. Gordon answered "yes" on the TIS form that the guilty plea may constitute a violation. But in light of the record developed at the plea hearing, Mr. Gordon clearly thought he would have a chance to litigate the VOP matters – and no one advised otherwise. In fact, the attorneys and the Court all remarked that the hearings would be in the future.

Mr. Gordon's lack of objection to the consolidated sentencing is irrelevant to this appeal.

Finally, the State criticizes Mr. Gordon and his attorney for not speaking up at the sentencing hearing in objection to the combined sentencing. Mr. Gordon was represented by counsel at all times. Counsel may have advised Mr. Gordon not to

[25] *Id.* at *5.
[26] *Id.*

bring up the issue before the judge that was about to impose sentence and had great discretion over what sentence to impose. Mr. Gordon appropriately focused his remarks on expressions of remorse for his conduct. Sentencing hearings are never the best time to raise legal and procedural arguments.

CONCLUSION

Mr. Gordon's plea to Act of Intimidation was not knowingly, voluntarily, and intelligently made. As such, his convictions, violations, and sentences should be vacated. This Court should remand for further proceedings in the Superior Court. For the reasons stated in this Reply Brief and the Opening Brief, Davon Gordon respectfully seeks reversal.

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