

SUPREME COURT OF THE STATE OF DELAWARE

Zera v. State

Zera v. State · No. No. 293, 2018 · Decided September 25, 2018

SUMMARY

The Delaware Supreme Court affirmed the Superior Court’s sentence imposed after Kenneth Zera violated probation conditions concerning internet access, possession of an internet-enabled cell phone, and related conduct. The Court held that the sentence did not exceed the previously suspended Level V incarceration and was within statutory limits.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	Per Curiam; Strine, Chief Justice; Valihura, Justice; Seitz, Justice
JURISDICTION	Delaware
DECIDED	September 25, 2018
DOCKET	No. 293, 2018
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the Superior Court's order sentencing Zera for a violation of probation; the State moved to affirm under Delaware's summary affirmance procedure.
STANDARD OF REVIEW	The appeal was subject to summary affirmance because it was manifest on the face of the appellant's opening brief that the appeal was without merit.
PRECEDENTIAL VALUE	published
PARTIES	Kenneth Zera v. State of Delaware

TOPICS

- probation
- sentencing
- appellate procedure
- criminal procedure

PRACTICE AREAS

- Criminal law
- Probation and sentencing
- Delaware appellate procedure

QUESTIONS PRESENTED

1. Whether the Superior Court imposed an excessive sentence after finding that Zera violated probation because he could not begin the required Life Skills Program until June 2019.
2. Whether the Superior Court's post-violation-of-probation Level V sentence exceeded the previously suspended Level V time or statutory limits.

HOLDINGS

1. After a defendant commits a violation of probation, the Superior Court may impose any period of incarceration up to and including the balance of the Level V time remaining on the sentence.
2. Zera's post-violation Level V sentence was not excessive on the grounds asserted because it did not exceed the previously suspended Level V time and was within statutory limits.

KEY QUOTATIONS

“Once Zera committed a VOP, the Superior Court could impose any period of incarceration up to and including the balance of the Level V time remaining on his sentence.” (3)

“The Level V sentence imposed by the Superior Court after Zera’s VOP did not exceed the Level V time previously suspended and was within statutory limits.” (3)

FACTUAL BACKGROUND

Zera pleaded guilty to sexual exploitation of a child, and his sentence included conditions requiring sex-offender treatment and prohibiting internet access and possession of an internet-enabled computer. He violated probation on multiple occasions, including by possessing an internet-enabled cell phone, continuing to possess one after being directed to replace it, and admitting to online gaming. Following the latest violation, the Superior Court imposed ten years and six months of Level V incarceration, suspended after completion of the Life Skills Program for two years of Level III probation and sex-offender programming.

PROCEDURAL HISTORY

Zera pleaded guilty to sexual exploitation of a child and received a Level V sentence suspended after two years for decreasing levels of supervision. After several probation violations, the Superior Court imposed a sentence of ten years and six months of Level V incarceration, suspended after completion of the Life Skills Program for probation and sex-offender programming. Zera appealed, arguing that the sentence was excessive because he could not begin the Life Skills Program until June 2019. The Supreme Court granted the State's motion to affirm and affirmed the Superior Court's judgment.

DISPOSITION

affirmed

CASES CITED

- Pavulak v. State, 880 A.2d 1044, 1046 (Del. 2005)

OPINION

Zera v. State

PER CURIAM.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH ZERA, §

§ Defendant Below, § No. 293, 2018 Appellant, § § Court Below—Superior Court v. § of the State of Delaware §

STATE OF DELAWARE, § Cr. ID No. 1106028037 (K)

§ Plaintiff Below, § Appellee. § Submitted: August 22, 2018 Decided: September 25, 2018 Before STRINE, Chief Justice; VALIHURA and SEITZ, Justices.

ORDER

After consideration of the appellant’s opening brief, the appellee’s motion to affirm, and the record below, the Court concludes that:

(1) The appellant, Kenneth Zera, filed this appeal from the Superior Court’s May 11, 2018 order sentencing him for a violation of probation (“VOP”). The State of Delaware has moved to affirm the Superior Court’s judgment on the ground that it is manifest on the face of Zera’s opening brief that the appeal is without merit. We agree and affirm.

(2) The record reflects that, on August 23, 2011, Zera pled guilty to Sexual Exploitation of a Child in exchange for the State dismissing multiple counts of Dealing in Child Pornography. The Superior Court sentenced Zera, effective June 30, 2011, to fifteen years of Level V incarceration suspended after two years for decreasing levels of supervision. The sentencing order required Zera to engage in sexual offender treatment and prohibited him from accessing the internet or possessing a computer with internet service.

(3) On May 23, 2014, an administrative warrant was filed for Zera’s VOP.

After a VOP hearing on June 13, 2014, the Superior Court found that Zera had violated his probation and sentenced him, effective June 2, 2014, to thirteen years of Level V incarceration, suspended after successful completion of the Level V Transitions Sex Offender Program for decreasing levels of supervision. On February 28, 2017, another administrative warrant was filed for Zera’s VOP. After a VOP hearing on March 13, 2017, the Superior Court found that Zera had violated his probation and sentenced him, effective February 23, 2017, to ten years and seven months of Level V incarceration suspended for six months of Level IV work release, followed by one year of Level III probation.

(4) On April 23, 2018, another administrative warrant was filed for Zera’s

VOP. The VOP report alleged that Zera had failed a polygraph examination regarding his internet use and sexual contact with a minor, possessed a cell phone with internet access, continued to possess a cell phone with internet access even after his probation officer directed him to get a new cell phone without internet access, and admitted to online gaming at least once a month. After a VOP hearing on May 21, 2018, the Superior Court found that Zera had violated his probation.

The Superior Court sentenced Zera, effective April 19, 2018, to ten years and six months of Level V incarceration, suspended after successful completion of the Life Skills Program for two years of Level III probation and participation in the Level III Transitions Sex Offender Program. This appeal followed.

(5) In his opening brief, Zera does not dispute that he violated his probation, but argues that his sentence is excessive because he will not be able to start the Life Skills Program until June 2019. Once Zera committed a VOP, the Superior Court could impose any period of incarceration up to and including the balance of the Level V time remaining on his sentence.¹ The Level V sentence imposed by the Superior Court after Zera's VOP did not exceed the Level V time previously suspended and was within statutory limits. NOW, THEREFORE, IT IS ORDERED that the motion to affirm is GRANTED and the judgment of the Superior Court is AFFIRMED. BY THE COURT: /s/ Karen L. Valihura Justice 1 11 Del. C. § 4334(c); Pavulak v. State, 880 A.2d 1044, 1046 (Del. 2005). 3