

SUPREME COURT OF THE STATE OF DELAWARE

Pernot v. State

Pernot · No. No. 377, 2019 · Decided January 10, 2020

SUMMARY

The Delaware Supreme Court affirmed the Superior Court’s denial of Charles Pernot’s motion challenging a violation-of-probation sentence and seeking a transcript at state expense. The Court held that the sentencing challenge was properly treated under Rule 35 rather than Rule 61, was untimely absent extraordinary circumstances, and that the transcript request lacked good cause.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	Collins J. Seitz, Jr., Chief Justice; Seitz, Chief Justice; Vaughn, Justice; Traynor, Justice
JURISDICTION	Delaware
DECIDED	January 10, 2020
DOCKET	No. 377, 2019
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the Superior Court's denial of a motion for postconviction relief and a motion for a transcript of a violation-of-probation hearing at state expense.
STANDARD OF REVIEW	The denial of a motion for modification of sentence is reviewed for abuse of discretion. The denial of a motion for a transcript at state expense is also within the Superior Court's discretion absent good cause.
PRECEDENTIAL VALUE	unpublished
PARTIES	Charles Pernot v. State of Delaware

TOPICS

- post-conviction relief
- sentence modification
- criminal procedure
- appellate procedure
- remedies

PRACTICE AREAS

- criminal procedure
- post-conviction relief
- appellate procedure
- sentencing

QUESTIONS PRESENTED

1. Whether the Superior Court properly treated Pernot's motion for postconviction relief as a motion for sentence modification or reduction under Rule 35.
2. Whether the Superior Court abused its discretion by denying Pernot's untimely sentence-modification motion and his claim that the court acted with preconceived bias or breached the plea agreement.
3. Whether the Superior Court properly denied Pernot's request for a transcript of the violation-of-probation hearing at state expense.

HOLDINGS

1. A motion challenging only the sentence imposed, rather than seeking to set aside the underlying judgment of conviction, must be brought under Superior Court Criminal Rule 35, not Rule 61. The Superior Court therefore did not err by treating Pernot's motion as one for sentence modification or reduction.
2. The Superior Court did not abuse its discretion by denying Pernot's motion for sentence modification or reduction. The motion was filed well beyond Rule 35's ninety-day deadline, and Pernot showed neither extraordinary circumstances justifying the delay nor support for his claim of preconceived judicial bias. The record also showed that the violation-of-probation sentence was consistent with the plea agreement and sentencing order.
3. The Superior Court did not err by denying Pernot's request for a transcript at state expense because he failed to show good cause or identify factual or legal grounds that could support postconviction relief or sentence modification.

KEY QUOTATIONS

"Rule 35, not Rule 61, is the proper vehicle for challenging a sentence," (at 3)

"Absent a showing of good cause, it is within the Superior Court's discretion to deny a motion for transcripts at State expense." (at 4)

FACTUAL BACKGROUND

Pernot pleaded guilty to strangulation in 2014 and received a partially suspended five-year sentence. While on probation, he was arrested on drug-related charges and charged with violating probation in the strangulation case. In 2017, he pleaded guilty to drug dealing under an agreement providing that the State would recommend time served on the pending violation, but the Superior Court later imposed a violation-of-probation sentence of four years and three months, suspended after 187 days for eighteen months of probation. Pernot filed his motion nearly ten months after the Superior Court advised him that his requested relief was properly treated as sentence modification rather than postconviction relief.

PROCEDURAL HISTORY

Pernot pleaded guilty to strangulation in 2014 and later pleaded guilty to drug dealing in 2017 pursuant to an agreement under which the State would recommend time served on the pending violation of probation in the

strangulation case. After the Superior Court imposed a violation-of-probation sentence, Pernot filed a motion styled as a motion for postconviction relief, arguing that the plea agreement required discharge of the violation as unimproved. The Superior Court treated the requested relief as a sentence-modification or reduction motion, denied it as unsupported and untimely, denied his request for a transcript at state expense, and the Delaware Supreme Court affirmed on the State's motion to affirm.

DISPOSITION

affirmed

CASES CITED

- Priest v. State, 2015 WL 7424860 (Del. Nov. 20, 2015)
- Bengé v. State, 101 A.3d 973, 976-77 (Del. 2014)
- State v. Diaz, 2015 WL 1741768, at *2 (Del. Apr. 15, 2015)
- McNeil v. State, 2016 WL 5118302, at *4 (Del. Sept. 20, 2016)
- Stover v. State, 2018 WL 3245175 (Del. July 3, 2018)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF THE STATE OF DELAWARE CHARLES PERNOT, § § No. 377, 2019 Defendant Below, § Appellant, § Court Below—Superior Court § of the State of Delaware v. § § Cr. ID No. 1310018180 (N) STATE OF DELAWARE, § § Plaintiff Below, § Appellee. § Submitted: December 2, 2019 Decided: January 10, 2020 Before SEITZ, Chief Justice; VAUGHN, and TRAYNOR, Justices.

ORDER Upon consideration of the appellant's opening brief, the appellee's motion to affirm, and the record below, it appears to the Court that: (1) The appellant, Charles Pernot, filed this appeal from the Superior Court's denial of his motion for postconviction relief.

The State has moved to affirm the judgment below on the ground that it is manifest on the face of Pernot's opening brief that his appeal is without merit. We agree and affirm. (2) Pernot pleaded guilty to strangulation in 2014.

The Superior Court sentenced him to five years' imprisonment, suspended after nine months for four years and three months at Level IV (Crest), suspended after successful completion of Crest for 18 months of probation. Pernot did not file a direct appeal.

In March 2017, while Pernot was on probation, he was arrested on various drug-related charges. As a result, he was also charged with a violation of probation ("VOP") in the strangulation case. (3) On September 5, 2017, Pernot pleaded guilty to one count of drug dealing.

In exchange for his guilty plea, the State agreed to dismiss the other drug- related charges and to recommend a time-served sentence for the VOP in the strangulation case. The plea agreement and the sentencing order in the drug-dealing case both reflected that agreement.¹ Pernot did not appeal his drug-dealing conviction or sentence.

(4) Following a VOP hearing in the strangulation case on September 20, 2017, the Superior Court found Pernot in violation of his probation and sentenced Pernot to four years and three months in prison, suspended after 187 days for eighteen months of probation. Pernot did not file a direct appeal.

(5) On June 19, 2018, Pernot filed a motion for postconviction relief, in which he challenged the sentence imposed for the VOP in the strangulation case, contending that the agreement in the drug-dealing case was that the VOP in the strangulation case was to be discharged as unimproved.

On June 26, 2018, the ¹ See Exhibit D to Motion to Affirm (plea agreement in drug-dealing case indicating that the “State will ask for time served in pending VOP”); Exhibit J to Opening Brief (sentencing order in drug- dealing case, noting that “State will ask for no greater than time served on pending violations of probation on case #... 1310018180 [the strangulation case] in New Castle County”).

² Superior Court sent Pernot a letter stating that, in light of the relief that Pernot sought, the motion was more appropriately considered as a motion for sentence modification or reduction, and not for postconviction relief.

The court then explained that the VOP sentence imposed was appropriate and consistent with the plea agreement in the drug-dealing case. (6) Nearly ten months later, in April 2019, Pernot sent the court a letter acknowledging the court’s June 2018 letter, requesting a ruling on his motion for postconviction relief, and again asserting that his understanding of the plea agreement in the drug-dealing case was that he would be discharged from probation as unimproved in the strangulation case.

In June 2019, Pernot filed a motion requesting that he be provided with a transcript of the VOP hearing at State expense, and in July 2019, Pernot sent another letter requesting a ruling on his motion for postconviction relief.

On July 29, 2019, the Superior Court issued a letter order denying the motion for postconviction relief and the motion for the VOP transcript. (7) Pernot has appealed to this Court. He argues that the Superior Court (i) deprived him of his due process rights by considering the motion as a motion for sentence modification or reduction, rather than as a motion for postconviction relief; and (ii) acted with preconceived bias and breached the plea agreement by denying the motion.

3 (8) We find no merit to Pernot’s appeal. Rule 61 of the Superior Court Criminal Rules establishes a procedure by which a person may seek “to set aside the judgment of conviction... on the ground that the court lacked jurisdiction or on any other ground that is a sufficient factual and legal basis for a collateral attack upon a criminal conviction.”² Pernot’s motion for postconviction relief did not state any basis for setting aside the judgment of conviction under which he was sentenced.

Instead, it argued that the court should have imposed a different sentence. “Rule 35, not Rule 61, is the proper vehicle for challenging a sentence,” and the Superior Court therefore did not err by considering the motion under Rule 35 instead of Rule 61.³ (9) The Superior Court also did not err in denying the motion.

We review the Superior Court’s denial of a motion for modification of sentence for abuse of discretion.⁴ Although the Superior Court did not deny the motion as untimely, a motion for reduction or modification of sentence must be filed within ninety days of sentencing, absent a showing of “extraordinary circumstances.”⁵ Pernot filed his motion well beyond the ninety-day limit.

He has not demonstrated any extraordinary circumstances, nor has he provided any support for his claim that the Superior Court denied his motion on the basis of a “preconceived bias.” To the contrary, the record 2 SUPER. CT. CRIM. R. 61(a)(1). 3 *Priest v. State*, 2015 WL 7424860 (Del. Nov. 20, 2015). 4 *Benge v. State*, 101 A.3d 973, 976-77 (Del. 2014). 5 SUPER.

CT. CRIM. R. 35(b). 4 reflects that the Superior Court imposed a VOP sentence that is consistent with the plea agreement and sentencing order in the drug-dealing case.⁶ (10) Finally, we conclude that the Superior Court did not err by denying Pernot’s motion for a transcript of the VOP hearing at State expense. Absent a showing of good cause, it is within the Superior Court’s discretion to deny a motion for transcripts at State expense.⁷ As the Superior Court correctly determined, Pernot’s motion did not identify any factual or legal grounds that would merit postconviction relief or sentence modification.⁸ 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/ Collins J. Seitz, Jr. Chief Justice 6 See *State v. Diaz*, 2015 WL 1741768, at *2 (Del. Apr. 15, 2015) (describing extraordinary circumstances as circumstances that “specifically justify the delay; are entirely beyond a petitioner’s control; and have prevented the applicant from seeking the remedy on a timely basis” (internal quotations omitted)).

7 *McNeil v. State*, 2016 WL 5118302, at *4 (Del. Sept. 20, 2016). 8 See *Stover v. State*, 2018 WL 3245175 (Del. July 3, 2018). 5