IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL D. PRITCHETT,	§	
	§	No. 99, 2012
Defendant Below-Appellant,	§	
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware, in and
	§	for New Castle County
STATE OF DELAWARE,	§	Cr. ID No. 1009007341
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: April 12, 2012
Decided: April 20, 2012

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 20th day of April 2012, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Michael D. Pritchett, filed an appeal from the Superior Court's February 2, 2012 order denying his motion for sentence modification pursuant to Superior Court Criminal Rule 35. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.[1] We agree and affirm.

(2) The record before us reflects that, in May 2011, Pritchett entered a plea of guilty to one count of Drug Trafficking. He was sentenced to 7 years at Level V, with credit for 12 days previously served, to be suspended after 3 years for 18 months at Level III probation. Pritchett's sentence should have begun immediately, but the Department of Correction ("DOC") mistakenly released him. Pritchett remained free from May 31, 2011 until August 4, 2011, when he was apprehended by police. He began serving his sentence on August 4, 2011.

(3) In September 2011, Pritchett filed a "Motion to Compel My Sentence" requesting the Superior Court to credit him with the time he remained at large. Pritchett cited no legal authority in support of his motion. The Superior Court denied the motion, ruling that the DOC's error merely acted to stay Pritchett's sentence, not shorten it. Pritchett did not file an appeal. Instead, in November 2011, he filed a "Rule 35 Motion for Correction or Reduction of Sentencing." This time, Pritchett cited legal authority to support his position. Again, Pritchett asked the Superior Court to credit him with the time he remained at large. The Superior Court,

[1] Supr. Ct. R. 25(a).

treating the motion as a motion for reargument, denied it as untimely. The Superior Court also ruled that the lack of supporting legal authority in Pritchett's original motion constituted a waiver of his claim.

(4) In his appeal, Pritchett claims that the Superior Court erred and abused its discretion by a) denying his request that his sentence be credited with the time he remained at large; b) violating his right to due process; and c) treating his second Rule 35 motion as a motion for reargument.

(5) We conclude that none of Pritchett's claims has any merit. It is axiomatic that a defendant should receive Level V credit only for time actually spent at Level V.[2] As such, the Superior Court correctly concluded that Pritchett was not entitled to Level V credit for the time he spent at large. The Superior Court acted within its discretion when it treated Pritchett's second filing as a motion for reargument.[3] The motion clearly was out of time and the Superior Court properly denied it on that ground.[4] Moreover, the Superior Court acted within its discretion when it declined to consider the legal authority advanced by Pritchett in his second motion and ruled that his failure to advance it initially constituted a waiver of his claim.[5] Finally,

[2] *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).
[3] Super. Ct. Civ. R. 59(e); Super. Ct. Crim. R. 57(d).
[4] Super. Ct. Crim. R. 45(a); *Brooks v. State*, Del. Supr., Nos. 106 and 236, 2008, Holland, J. (Dec. 18, 2008).
[5] *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008).

we find no legal or factual basis for a finding of a due process violation in this case.[6]

(6) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[6] The case cited by Pritchett in his second motion, *Harley v. State*, Del. Supr., Nos. 93 and 230, 1986, Horsey, J. (May 27, 1987), is inapposite to the situation presented here in any case. In that case, the Court's ruling was limited to whether the prisoner was properly re-incarcerated after a period spent at large and does not support Pritchett's claim for Level V credit for time spent at large.