Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-011

NOVEMBER TERM, 2004

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Daniel Valentine	}	
	}	DOCKET NO. 4121-7-00 Cncr
		Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a district court order denying his motion for reconsideration of sentence. He contends the court abused its discretion in: (1) failing to evaluate newly discovered evidence offered in support of the motion; (2) failing to grant a continuance at trial; (3) imposing a sentence that was disproportionate to the offense and in violation of the Eighth Amendment prohibition against cruel and unusual punishment; (4) improperly relying on the vulnerability of the victim as an aggravating factor; and (5) failing to consider Department of Corrections regulations that make him ineligible for earned reduction of term credit against his sentence. We affirm.

In July 2003, defendant was charged with the attempted second-degree murder of Diana April, with whom he had an infant son. The information and supporting affidavit alleged that defendant had brutally assaulted the victim with a beer bottle, beating her repeatedly about the head and cutting her throat with the broken bottle. After several continuances, trial was scheduled for May 13, 2003. On May 2, defense counsel moved for a continuance, citing unspecified concerns about his trial readiness, the fact that he had recently taken over the case, and that the defense's expert psychiatrist, Dr. Weker, might be unavailable for part of the trial. At a status conference on May 5, counsel argued for the continuance solely on the basis of his concern about the availability of Dr. Weker. The court denied the motion, noting that the expert's schedule could be accommodated.

On the third day of trial, defense counsel indicated that defendant would be willing to enter a plea in exchange for a sentence in the range of eighteen to thirty-six years. Although the State opposed it, the court eventually accepted a written plea agreement in which defendant pled guilty to second degree murder, the court agreed to impose a sentence ranging between a minimum of

eighteen to thirty-six years and a maximum of twenty-three to fifty-five years, and defendant agreed to waive his right to appeal. The State did not sign the plea agreement.

Three months later, on August 26, 2003, the court held a sentencing hearing. Dr. Weker testified at length on behalf of defendant, stating that, based on his interview of defendant and review of defendant's medical records, defendant suffered from post-traumatic stress disorder (PTSD) and was in the midst of a disassociative flashback at the time of the offense, triggered by a feature of the victim's face that reminded him of his abusive aunt. Dr. Weker thus concluded that defendant was insane at the time of the offense. The state presented the testimony of Dr. Cotton, a psychiatrist, who disagreed with Dr. Weker's diagnosis and opined that defendant suffered from an anti-social personality disorder and attacked the victim simply because he was upset and angry with her.

In September, the court issued a nine-page sentencing memorandum in which it carefully reviewed the circumstances of the offense and the aggravating and mitigating factors. With respect to defendant's mental state at the time of the offense, the court specifically found Dr. Weker's opinion that defendant was experiencing a post-traumatic flashback to be "not credible," noting that it was based solely on defendant's statements, and observing that there was no indication in defendant's medical history that he suffered from PTSD. While acknowledging defendant's "dreadful childhood" from abuse and neglect, the court found that defendant knew what he was doing when he brutally attacked the victim. The court also found as aggravating factors that the victim was particularly weak and vulnerable, 13 V.S.A. § 2303(d)(4), and that the attack was particularly severe, brutal, and cruel. Id. § 2303(d)(5). The court imposed a sentence of twenty-three to fifty-five years, and awarded credit for time served. Defendant did not appeal the conviction and sentence.

In December 2003, nearly three months after the court's sentencing decision, defendant filed a motion for sentence reconsideration, under V.R.Cr.P. 35 and 13 V.S.A. § 7042. The motion stated that its purpose was to allow the court to consider "additional material exculpatory evidence that was not presented at the original sentencing hearing and that was unknown to the Defendant." The new material consisted of an examination form, dated April 8, 1994, by a Dr. Kantar from Bournewood Hospital in Brookline, Massachusetts. On the form, Dr. Kantar diagnosed defendant as suffering from PTSD, and described his symptoms as including depression and flashbacks. The reconsideration motion did not explain why defendant had failed to present the form at the original sentencing hearing, but alleged that defendant had earlier "sought a continuance specifically to determine whether or not this prior diagnosis existed." The motion also claimed that the court was "not fully cognizant" at the time of sentencing that defendant's sentence would make him ineligible for certain earned reduction of term credit, that the sentence was cruel and unusual and disproportionate to the crime, and that the court had relied on inappropriate aggravating factors. The court denied the motion in a brief entry order, without a hearing, stating that the sentence was within the range agreed to by defendant, and had been carefully considered. This appeal followed.

Defendant first contends the court erred in failing to evaluate the new evidence offered in support of the reconsideration motion. We have explained that

> [t]he purpose of sentence reconsideration is to allow a second look at the sentencing decision absent the heat of trial pressures and in calm reflection to determine that it is correct, fair and serves the ends of justice. The statute allows modification of a sentence which, upon reflection and in the presence of unchanged circumstances, might be shown to be unwise or unjust. In making these determinations, the trial court has wide discretion to consider such factors as it believes are relevant.

State v. Dean, 148 Vt. 510, 513 (1987) (internal citations and quotations omitted). "It is not the purpose of sentence reconsideration to review circumstances that come about following the imposition of the sentence; generally, the review is only of the circumstances and factors present at the time of the original sentencing." State v. Platt, 158 Vt. 423, 426 (1992) (internal quotations omitted) (emphasis added).

A motion for reconsideration of sentence is not, therefore, the equivalent of a new trial motion or petition for post-conviction relief, where newly discovered evidence might be material if "truly new and not undiscovered merely through a lack of diligence," and where it would "lead to a different result upon retrial." State v. Sheppard, 155 Vt. 73, 75 (1990). The motion for reconsideration of sentence is designed, rather, to permit the court to reconsider its decision based on the "factors present at the time of the original sentencing." Platt, 158 Vt. at 426; accord State v. Richardson, 161 Vt. 613, 613 (mem.) (reaffirming rule that "only circumstances and factors present at the time the sentence was originally imposed . . . are relevant in a sentence reconsideration proceeding pursuant to 13 V.S.A. § 7042"). As it is undisputed here that the medical evaluation in question was not offered at the original sentencing hearing, it was not properly before the court in the subsequent motion for reconsideration. Therefore, we discern no error in the court's failure to expressly evaluate the evidence in denying the motion.[1]

Defendant next contends the court erred in denying his motion to continue the trial, alleging that it was necessary to allow additional discovery of defendant's medical records and would have disclosed the PTSD diagnosis in time for the sentencing hearing. Apart from the fact that defendant's guilty plea waived the alleged error, In re Torres, 2004 VT 66, ¶ 9, 15 Vt. L. Wk. 227 (mem.), defendant did not assert in the continuance motion, or at the status conference addressed to the motion, that a delay was necessary to seek additional discovery of his medical records. Accordingly, the claim was not preserved for review. State v. White, 172 Vt. 493, 499 (2001).

Defendant next contends the trial court erred in failing to address his assertion that the court "was not fully cognizant" at the time of sentencing of DOC regulations limiting his ability to accumulate earned reduction of term credit against his sentence. Although the precise nature of the

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[1] Nothing we have said bars defendant from filing a petition for post-conviction relief to review the sentence, in light of the allegedly new evidence, under 13 V.S.A. § 7131. See In re Provencher, 127 Vt. 558, 560 (1969) (scope of review in post-conviction relief proceedings is broad).

claim is unclear, the issue—as defendant notes—was not raised at sentencing and therefore was not properly before the court in the motion for reconsideration. Richardson, 161 Vt. at 613.

Defendant next asserts that the court abused its discretion in failing to address his claim that the sentencing court improperly relied on the vulnerability of the victim as an aggravating factor, under 13 V.S.A. § 2303(d)(4). Defendant asserts, in this regard, that the statute requires some special vulnerability of which the defendant was aware, such as extreme youth, ill health, or disability. This Court has specifically rejected such a claim, see State v. Kelley, 163 Vt. 325, 331 (1995), and we therefore discern no error in the court's failure to expressly reject the contention in denying the motion for reconsideration.

Finally, defendant contends the court erred in failing to address his claims that the sentence was disproportionate to the offense and constitutes cruel and unusual punishment, in violation of his constitutional rights. Apart from the fact that the sentence was within the range that defendant expressly agreed to, we observe that the trial court is afforded "wide discretion" in deciding a motion for reconsideration of sentence. Dean, 148 Vt. at 513. We discern nothing in the record of the initial sentencing hearing and decision or the subsequent reconsideration motion to fault the court's original analysis, suggest that it failed to engage in the calm reflection that the law requires, or indicate that the sentence was "unwise or unjust." Id. Accordingly, we discern no basis to conclude that the court abused its discretion in denying the motion.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned