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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-386

MAY TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Grand Isle Circuit
Daniel Beaupre	}	
	}	DOCKET NO. 112-10-03 GiCr
		Trial Judge: Charon A. True

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

Defendant appeals from district court order revoking his probation and imposing the underlying sentence of four to eight years for a sexual assault conviction. Defendant contends the court erred in allowing the prosecutor to question defendant about certain uncharged offenses without offering him immunity, and in relying on information concerning the offenses in imposing sentence. We agree, and therefore reverse and remand for resentencing.

In April 2004, defendant pled guilty, pursuant to a plea agreement, to a charge of sexual assault. He was sentenced to four to eight years, all suspended, and placed on probation. Several months later, in June 2004, defendant was charged with violating several conditions of probation. Following a hearing, the court found that defendant had committed the violations as charged. Specifically, he had missed appointments with his probation officer, missed sex offender counseling sessions, tested positive for marijuana, and failed to participate in the DAEP (domestic abuse education project) program because of an unwillingness to accept responsibility for the offense. The court then turned to sentencing. Defendant testified in his own behalf, asserting that he had been in denial but was now prepared to accept responsibility for the assault. He acknowledged the marijuana use, explaining that it had been caused by stress.

On cross-examination, the prosecutor asked defendant whether he was currently charged in Chittenden County with sexual assault on a minor. Defense counsel immediately objected on the basis of lack of notice. The court responded that it did not "want to know any details" of the alleged charges, but did want to know the date of the alleged offense. Defendant responded that he had not been charged with anything. The prosecutor then asked whether the absence of charges was because defendant was working on a plea agreement. Defendant acknowledged that there were four potential counts of furnishing alcohol to a minor, and that he was "working" with the State police. The prosecutor then asked whether one of the alleged offenses involved "digital penetration . . . while you gave her alcohol?" Defendant responded that he did not "know anything about that right now." The prosecutor then asked, "Should we bring in the officer," and the court interrupted, "Could, could I just have the date of the offense, please?" At that point, defense counsel again objected, asserting that defendant had "a right to the fifth amendment at this point." A conversation among court and counsel followed, in which the prosecutor noted that defendant could be compelled to testify, but no further questions were put to defendant.

In imposing sentence, the court noted that defendant had committed several violations while on probation from an earlier conviction of lewd and lascivious behavior, and observed that it was "not impressed with his compliance with probation." The court also observed that defendant had been previously enrolled in a DAEP program and therefore knew its requirements. Additionally, the court stated that it was "concerned by [defendant's] admissions" concerning the potential charges of furnishing "[a]lcohol to minors . . . apparently at least one of them was a girl." The court also

recalled defendant's testimony that he "didn't inhale" while smoking marijuana, observing that it was "not impressed with the defendant's candor." Finally, the court concluded, "I think he's dangerous. And I think he should be sentenced to the underlying." Accordingly, the court imposed the underlying sentence of four to eight years. A subsequent motion to reconsider sentence was denied. This appeal followed.

Defendant contends the court erred in admitting defendant's testimony concerning the alleged charges in Chittenden County without first offering him use immunity. In State v. Begins, 147 Vt. 295, 299-300 (1986), we held a probationer who wishes to testify at a revocation hearing must be advised that the testimony and its fruits will not be admissible in a subsequent criminal trial on the underlying offense. We have also held that in any sentencing proceeding, evidence of other charges of prior criminal activity, whether pending or dismissed, should not be admitted without first offering use immunity to the defendant. State v. Drake, 150 Vt. 235, 238 (1988). These decisions dictate that defendant should have been offered immunity prior to answering the prosecutor's questions concerning the alleged Chittenden County offense. As noted, defendant acknowledged the existence and nature of the pending charges, and the court relied on them in imposing sentence. This was erroneous, and we cannot – on this record – confidently conclude that the error was harmless. See State v. Ingerson, 2004 VT 36, ¶ 10, 852 A.2d 567 (we will affirm sentence if "it was not derived from the court's reliance on improper or inaccurate information"); State v. Bacon, 169 Vt. 268, 273 (1999) (harmless error doctrine applies to sentencing proceedings). Accordingly, we hold that the sentence must be reversed, and the matter remanded for resentencing.

The sentence on the underlying offense is reversed, and the matter is remanded for resentencing consistent with the views expressed herein.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice