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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-297

FEBRUARY TERM, 2006

In re Jason B. Thayer	}	APPEALED FROM:
	}	
	}	
	}	Windham Superior Court
	}	
	}	
	}	DOCKET NO. 166-3-04 Wmcv
		Trial Judge: Karen R. Carroll

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

Petitioner Jason B. Thayer appeals from a summary judgment of the Windham Superior Court denying his petition for post-conviction relief. Petitioner contends the court erred in: (1) concluding that the State had not breached its plea agreement to recommend a maximum twenty-year sentence when a Department of Corrections officer testified at sentencing that DOC recommended a maximum of twenty-five years; and (2) finding that the omission of defendant=s complete criminal record from the Pre-Sentence Investigation Report was not prejudicial. We affirm.

In October 2003, defendant pled guilty, pursuant to a plea agreement, to burglary and accessory to assault and robbery. Under the terms of the agreement, the State agreed to recommend a sentence of no more than ten to twenty years and to dismiss two additional counts, and defendant remained free to argue for a lesser sentence. In accepting the plea, the court informed petitioner that DOC would be preparing a PSI and a sentence recommendation Awhich may be different than either of the State=s Attorney=s recommendation or your attorneys= recommendation.@

At the sentencing hearing in February 2004, the State=s Attorney recommended a ten-to-twenty year sentence, as agreed. The State then called one witness, the DOC officer who had prepared the PSI. The officer testified that DOC recommended a sentence of five to twenty-five years. The officer explained that the twenty-five-year maximum was based on petitioner=s lengthy criminal record and history of substance abuse. The officer referred to the PSI, which specifically referenced petitioner=s juvenile record, numerous DUI and other motor vehicle violations, and prior convictions in Massachusetts for armed robbery, possession of crack, and domestic assault. The officer further explained that because the computer system was down when the PSI was being prepared, it did not list petitioner=s numerous additional criminal convictions in Massachusetts and Vermont, including several for assault and battery, breaking and entering, and disturbing the peace. The officer noted, however, that defendant had readily acknowledged the prior convictions in his interview with the officer. The officer also explained that while the PSI did not list all of petitioner=s prior convictions, it accurately reported defendant=s total time under criminal sentence for the priors as seven years and three months. Finally, the officer indicated that DOC had recommended a five-year minimumCless than the State=s recommendationCbased on his interview with petitioner in which petitioner had been Aforthright in his discussion of his history@ and appeared to be amenable to treatment and rehabilitation.

At the conclusion of the hearing, the court adopted DOC=s recommendation of a five-year minimum and the State=s recommended maximum of twenty years, for a total sentence of five to twenty years. In March 2004, petitioner filed a pro se petition for post-conviction relief. One year later, following the assignment of counsel, petitioner filed an

amended petition, asserting two grounds for relief. First, petitioner alleged that the State had violated the plea agreement by calling the DOC officer to testify in support of a twenty-five-year maximum. Second, petitioner claimed that the sentence was unfairly based on prior convictions not disclosed in the PSI.

The parties filed cross-motions for summary judgment, and the court issued a written decision in June 2005, granting the State=s motion and denying petitioner=s. The court ruled that DOC was not a party to the plea agreement; that the PSI was designed to provide an independent recommendation for the court separate from the plea agreement; and that the PSI=s recommendation and the officer=s testimony did not therefore violate the agreement. The court also noted that petitioner had been put on notice at the change-of-plea hearing that the PSI might contain a recommendation different from the sentence which the State=s attorney had agreed to recommend. As to the omissions in the PSI, the court noted that petitioner did not argue he lacked notice of the prior convictions. There was no claim that the criminal records check provided petitioner during the discovery process was incomplete, or that defendant was somehow unaware of his own criminal history. Accordingly, the court concluded that the omissions in the PSI were not prejudicial. The court entered an order dismissing the petition. This appeal followed.

In State v. Black, 151 Vt. 253 (1988), the defendant raised a claim similar to petitioner=s, arguing that his plea agreement with the State was violated when a probation officer testified at sentencing in favor of a sentence longer than that which the State=s attorney had agreed to recommend. We declined to address the issue, however, concluding that any violation was cured when defendant was offered an opportunity by the sentencing court to withdraw his plea. Id. at 254-55. Here, similarly, the record obviates any need to address the issue. It is axiomatic Athat a post-conviction relief petitioner must show both error and prejudice arising from that error,@ In re Carter, 2004 VT 21, & 35, 176 Vt. 322, and it is readily apparent here that petitioner suffered no prejudice from the alleged violation. Despite DOC=s recommendation of a longer maximum sentence, the court in fact sentenced defendant to a maximum term of twenty years, consistent with the plea agreement. Therefore, the DOC recommendation was essentially harmless. To avoid this conclusion, petitioner argues that DOC=s recommendation might have influenced the court to reject petitioner=s request for a maximum of five years, but the record belies the assertion. In imposing sentence, the court explained that the twenty-year maximum was based on defendant=s criminal record, the circumstances of the current offenses (which involved a knife and put children at risk), and the safety of the community. The court made no mention of DOC=s recommended maximum, although it did explain at length why it was adopting DOC=s recommended minimum. Accordingly, we conclude that any error was harmless.

Petitioner also renews his claim that the sentence was unfair because it was based, in part, on petitioner=s prior criminal convictions, a number of which were omitted from the PSI. The claim is unpersuasive. Petitioner does not claim that the information adduced at the hearing about his criminal record was inaccurate, but rather that, without a list of the prior convictions, he was denied the opportunity to offer explanations or mitigating factors. The record shows, however, that the State included petitioner=s criminal record as part of its discovery disclosures prior to the change-of-plea and sentencing hearings. Petitioner does not claim that these records were incomplete, that he lacked notice of his prior criminal record of eighteen misdemeanors and sixteen felonies, or that he was unaware of the State=s intent to rely on that record at the sentencing hearing. See State v. Pellerin, 164 Vt. 376, 382 (1995) (rejecting claim that defendant was denied fair sentencing by lack of notice of prior victim=s testimony where criminal records were disclosed prior to sentencing and defendant was aware of State=s intent to rely on defendant=s past offenses). Accordingly, we agree with the trial court=s finding that petitioner had sufficient notice and opportunity to respond to the State=s evidence, and that the omission was therefore harmless. See State v. Senna, 154 Vt. 343, 347 (1990) (holding that failure to provide document to defense counsel prior to sentencing hearing was harmless where counsel was otherwise on notice of its contents).

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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Brian L. Burgess, Associate Justice