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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-143

NOVEMBER TERM, 2008

David Tower, Jr.	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
	}	
Vermont Criminal Information Center	}	DOCKET NO. 465-7-07 Wncv
		Trial Judge: Dennis R. Pearson

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

Petitioner appeals from the superior court's order denying his motion for extraordinary relief to have a felony conviction removed from the Vermont Criminal Information Center (VCIC) database. On appeal, petitioner argues that the court erred in denying his petition because there is insufficient documentation for VCIC to report a felony conviction for petitioner. We affirm.

The parties do not dispute the basic facts. In September 1973, petitioner was charged with breaking and entering during the daylight—a felony. In January 1974, petitioner changed his plea from not guilty to either nolo contendere or guilty. There is no existing record of petitioner's change-of-plea hearing. Petitioner's conviction report indicates on one page that petitioner was convicted of a felony, and on another page boxes corresponding with "misdemeanor" appear to have been checked. The report also explains that petitioner was convicted of breaking and entering during the daytime and reports that petitioner received a suspended sentenced of not more than two years with a $100 fine. Petitioner does not dispute that at the time of his offense breaking and entering was a felony. Based on this information, the VCIC, which maintains and disseminates criminal record information, reports that petitioner was convicted of a felony.

Petitioner asked first VCIC and then the Commissioner of Public Safety to correct his record by removing the felony conviction based on his argument that there was inadequate information to indicate that he had been convicted of a felony. Petitioner argued that the conviction report internally contradicted itself, indicating in one place that he had been convicted of a felony and in another a misdemeanor. Consequently, he asked that the felony be removed from the VCIC records. The VCIC and the Commissioner denied petitioner's request, concluding that petitioner's record was correct because the report listed petitioner's offense as

breaking and entering, which petitioner agreed could only be a felony. The Commissioner further explained that "the only evidence that does not definitively confirm that [petitioner's] conviction was for a felony is the unclear marking of the felony/misdemeanor boxes. I find, therefore, that [petitioner] has not proven by even a preponderance of the evidence that the record of felony conviction is erroneous."

Petitioner then filed a petition for extraordinary relief in superior court asking the court to prevent VCIC from maintaining or disseminating petitioner's VCIC record with a felony conviction. See V.R.C.P. 75 (providing for review of "[a]ny action or failure or refusal to act by an agency of the state"). Petitioner moved for summary judgment, arguing: (1) that the conviction report was internally inconsistent because it indicated that he was convicted of a felony on one page and a misdemeanor on a second page; (2) that the lack of a verbatim record of his change of plea hearing, in violation of Vermont Rule of Criminal Procedure 11(g), rendered it impossible to correct the conviction report and thus voided the report; and (3) that the length of his sentence was more appropriate for a misdemeanor conviction and thus further added to the ambiguity of his actual conviction. The court granted VCIC summary judgment.

On appeal, petitioner renews the arguments he made in the trial court. Relief under Rule 75 is the modern form of extraordinary relief by mandamus and certiorari. Ahern v. Mackey, 2007 VT 27, ¶ 8, 181 Vt. 599 (mem.). "Under either writ, the standard of review is necessarily narrow." Id. (quotation omitted). We defer to the judgment of the administrative agency "absent a compelling indication of error." Id. In this case, we conclude that VCIC's decision was within its discretion and not "patently arbitrary or contrary to law." Id. ¶ 10.

We begin with petitioner's contention that the report is invalid because it contradicts itself. We agree with the Commissioner and the superior court that any ambiguity due to the check marks in the boxes is minor and that any possible confusion is clarified by the written explanation of petitioner's conviction. The report clearly identifies that petitioner pled to breaking and entering in daylight. Since this charge can only be a felony—and, indeed. petitioner admits that it was—we conclude that the agency's decision denying petitioner relief was rational and absent compelling error. Consequently, there is no basis to alter the VCIC records.

The lack of a record from petitioner's change-of-plea conference does not persuade us otherwise. Rule 11(g) requires "[a] verbatim record of the proceedings at which the defendant enters a plea" to be made. V.R.Cr.P. 11(g). "The purpose of the record is to provide evidence that the requirements of the rule were complied with if a conviction based on a plea of guilty or nolo contendere is challenged in post-conviction proceedings." Reporter's Notes, V.R.Cr.P. 11. The Rule was not designed to act as confirmation of a defendant's conviction record. We conclude that lack of a verbatim record does not undermine the information in petitioner's conviction report.

Furthermore, petitioner's sentence of two years probation, while perhaps more common for a misdemeanor, is not evidence that he was not convicted of a felony. Felony designation depends on the maximum sentence available, not the sentence actually imposed. See 13 V.S.A. § 1 (defining felony to include offense punishable by a maximum term of more than two years). As the superior court explained, the actual sentence imposed is irrelevant to whether petitioner

pled to a felony. The sentence petitioner received is fully consistent with the charge of breaking and entering. In sum, the evidence supports the denial of petitioner's request for relief.

Affirmed.

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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Marilyn S. Skoglund, Associate Justice