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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-132

DECEMBER TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Addison Circuit
	}	
Timothy LaFlam	}	DOCKET NO. 260-6-09 Ancr
		Trial Judge: Cortland Corsones

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

Defendant appeals from a judgment of conviction of driving with a suspended license, third offense, and a sentence of two to six months to serve. He contends the sentence was presumptively vindictive and a denial of his right to due process because it was longer than the sentence discussed earlier as part of a plea agreement. We affirm.

In May 2009, defendant was charged with driving with a suspended license (DLS) for a DUI violation. The information charged that it was defendant's third such offense. At a calendar call in September 2009, defendant's attorney informed the court that he had discussed with the prosecutor a possible plea agreement providing for a sentence of 29 to 30 days to serve. Following some further discussion, the court asked defendant if he wished to enter a guilty plea in exchange for a sentence of 29 to 30 days to serve. Defendant responded "No." The court then asked if it would make "any difference to you even if I tell you that I'm in agreement with that and that's what I will impose?" Defendant indicated that it would not, and the court responded, "All right. Okay. Fair enough," and scheduled the matter for trial.

A one-day bifurcated trial was held in January 2010. During the first phase, the arresting officer testified as to the circumstances of the traffic stop that resulted in the charge, and the DMV's custodian of records verified that defendant's license had been suspended for a DUI violation. The jury returned a verdict of guilty. During the second phase, testimony was adduced establishing defendant's prior DLS convictions, and the jury again returned a verdict of guilty.

A sentencing hearing was held in March 2010. The State argued for a sentence of three to eighteen months to serve, based principally on defendant's prior convictions. Defendant argued for 30 days of work crew, citing the non-violent nature of the offense. The court prefaced its findings by explaining that it had reviewed the entire file and arguments of counsel, as well as

the nature and circumstances of the offense. It explained that it found the most compelling factor to be defendant's lengthy criminal history, which included not only convictions for driving with a suspended license, but also larceny and possession of stolen property, among others, as well as several violations of probation. In light of that history, and the need to send an adequate message to the community, the court concluded that a period of incarceration was required, and that a sentence of two to six months to serve was appropriate.

Defendant contends that the longer sentence than that contemplated as part of the plea agreement is presumptively vindictive and a violation of due process because it was likely imposed in retaliation for defendant's decision to go to trial. The claim is without merit. In State v. Davis, 155 Vt. 417, 419 (1990), we specifically held that the presumption of vindictiveness that otherwise applied, in some cases, where a defendant received a higher sentence after retrial did not apply when the defendant's sentence exceeded the terms previously imposed pursuant to a plea agreement. "[T]he mere disparity between plea-bargained and post-trial sentences does not mandate a presumption of vindictiveness," we concluded. Id. at 421. Rather, the record must show some evidence of vindictiveness, such as comments by the trial judge indicating that the sentence was the result of defendant's exercise of his or her trial right. "Without such comments, vindictiveness will not be presumed." Id.; see also State v. Thompson, 158 Vt. 452, 456-58 (1992) (invalidating sentence where the record contained trial court comments suggesting that defendant's sentence was imposed in retaliation for her stated intent to appeal an unlawful restitution order).

The reason for this rule, we explained, was that plea-bargained sentences often reflect a variety of pragmatic considerations that result in favorable sentencing treatment, such as the benefit of sparing a crime victim the burden of trial, while sentencing after trial is based upon a far fuller record. Thus, we concluded, "[w]e cannot make a meaningful comparison between a plea-bargained sentence, based on complex practical and policy considerations, and the sentence the same judge would find acceptable after a fully litigated trial, including a presentence investigation and sentencing hearing." Davis, 155 Vt. at 420. Our holding in Davis was consistent with the United States Supreme Court's decision in Alabama v. Smith, 490 U.S. 794, 801 (1989), where the Court held that a greater penalty imposed after trial than after a prior guilty plea is not presumptively "attributable to . . . vindictiveness on the part of the sentencing judge." As the Court there explained, "[e]ven when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial." Id.

Defendant claims, nevertheless, that the sentence here was presumptively vindictive because none of the "practical" considerations mentioned in Davis, such as a sparing a crime victim the burden of trial, were present in this case. The holding in Davis, however, was not, predicated upon such circumstances being present in every case, but also recognized that sentences after trial are invariably based upon a fuller record and more informed considerations. Thus, the record here shows that, in imposing the sentence, the court weighed a number of factors, including in particular defendant's extensive criminal record and poor performance on earlier probations, as well as the need to send a clear message to the community in light of that record. Moreover, as defendant concedes, the record contains no statement by the court of

anything suggesting vindictiveness in its sentencing decision. Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice