

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-049

JANUARY TERM, 2019

State of Vermont v. Randy A. West*	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1431-12-16 Wncr

Trial Judge: Howard E. Van Benthuisen

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

Defendant appeals his sentence following a conviction for violating a condition of release. On appeal, he argues that the sentence is grossly disproportionate to his crime and that the court impermissibly imposed an incarcerative sentence in lieu of a fine based one on an assumption that defendant lacked an ability to pay a fine. We affirm.

In December 2016, defendant was arraigned on one count of aggravated domestic assault. He was released on conditions, including one requiring him to report to the police department within seven business days for photographing and fingerprinting. In April 2017, the State charged him with violating his conditions of release (VCR) by failing to report to the police station as required. A jury found defendant not guilty of aggravated domestic assault and guilty of violating his conditions of release.

The court proceeded to sentencing. A VCR conviction is subject to a maximum penalty of a fine of \$1000 or imprisonment of six months. 13 V.S.A. § 7559(e). The State requested a sentence of six months to serve. The State explained that defendant had a lengthy criminal history and a record of failing to abide by court orders, including nine prior convictions for violating court orders, four prior felony convictions, thirty-one prior misdemeanor convictions, eleven violations of probation, and nine violations of parole. Given defendant’s record of violating court orders, the State argued that defendant was not a good candidate for supervision on probation. Defendant argued that the suggested sentence was unprecedented and inappropriate given the technical nature of the violation and defendant’s eventual compliance with the condition. Defendant asked the court to impose a fine.

The court acknowledged that defendant’s conviction “if viewed in a vacuum” was not serious, but determined that the sentence should include some deterrent effect given that defendant had “an absolutely horrendous record” of violating court orders. The court concluded that some punishment was a reasonable response to defendant’s repeated behavior of not complying with court orders and sentenced defendant to two-to-six months to serve. Defendant filed a motion to reconsider his sentence, arguing that it was disproportionate to his offense under both the U.S. and

Vermont Constitutions. The court denied the motion, explaining that the sentence for defendant's offense was appropriate and necessary "when viewed against the backdrop of his lengthy and serious criminal record, especially his chronic violation of orders of the Court." Defendant appeals.

On appeal, defendant argues that his punishment is grossly disproportionate to his crime and violates both the U.S. and Vermont Constitutions. See U.S. Const. amend. VIII; Vt. Const. chap. II, § 39. To determine if a punishment is grossly disproportionate, this Court employs a three-part test.

"[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other [similarly situated] criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

State v. Venman, 151 Vt. 561, 572 (1989) (alteration in original) (quoting Solem v. Helm, 463 U.S. 277, 292 (1983)). The second and third factors need not be reached if a threshold comparison of the crime committed and the sentence imposed does not lead to an inference of gross disproportionality. In re Stevens, 2014 VT 6, ¶ 7, 195 Vt. 486.

Therefore, we begin with the gravity of the offense in relation to the harshness of the penalty. Defendant asserts that his failure to appear for fingerprinting and photographing is a minor offense that deserves a much less severe sentence. In assessing the gravity of an offense, a court must consider not just the present conviction, but a person's criminal history. Ewing v. California, 538 U.S. 11, 29 (2003). As the U.S. Supreme Court has explained, to exclude recidivism would fail to recognize that the State has an interest in punishing those who repeat criminal acts in a harsher manner. Id.

We conclude that defendant's sentence is not grossly disproportionate to his offense. Defendant's failure to appear is severe in light of his criminal record, which includes repeated failures to comply with court orders. His punishment of two-to-six months to serve is not overly harsh given defendant's criminal history and therefore we do not reach the second and third factors.

Defendant next argues that the court abused its discretion and violated his due process rights in imposing incarceration because it did so based on its assumption that defendant did not have the ability to pay a fine. Defendant submits that he was, in fact, able to pay a fine. The trial court has discretion in sentencing and we review for an abuse of discretion. State v. Webster, 2017 VT 98, ¶ 45. "A sentencing court is not confined only to the facts and circumstances of a case in fashioning an appropriate sentence and it may consider factors, such as a prior conviction." Id.

Here, the court acted within its discretion. At sentencing and following the motion to reconsider, the court explained that its sentence was meant to punish and deter defendant. The court did not, as defendant suggests, impose incarceration because defendant could not pay a fine. Thus, whether defendant was able to pay a fine was not relevant in the Court's analysis. The sentence is well within the statutory limit and the court's decision was based on legitimate factors and concerns and absent any bias or animus. See Id. ("If a sentence falls within the statutory limits,

is not based upon improper or inaccurate information, and is not the result of personal animus or bias, it will be affirmed.”). There are no grounds for reversal.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice