

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

ENTRY ORDER

**VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE**

SUPREME COURT DOCKET NO. 2009-175

JAN 15 2010

JANUARY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Orange Circuit
	}	
Amos R. Wallen	}	DOCKET NO. 212-5-04 Oecr
	}	
	}	Trial Judge: Mary Miles Teachout

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

Defendant appeals the district court's order denying his motion for sentence reconsideration. We affirm.

In May 2005, defendant pled guilty to sexual assault on a minor and was sentenced to three to fifteen years, all suspended except for nine months. The unsuspended portion of the sentence was later amended to six months and seven days. In September 2008, based on defendant's positive test for marijuana, defendant's probation officer filed a violation of probation. Later that month, the probation officer filed a second violation of probation, alleging that defendant had engaged in threatening behavior and had consumed alcohol. The latter allegation was based on a test reporting defendant's blood alcohol content level at 0.04. The district court held a hearing on December 31, 2008. At the hearing, defendant denied drinking alcohol. His girlfriend testified that he had drunk two ounces of golden seal root, which contained alcohol.

The district court found that defendant had violated the conditions regarding marijuana and alcohol usage. The court credited the girlfriend's testimony, but found that defendant had consumed the golden seal root to mask his alcohol consumption. The court next considered what sentence to impose. Defendant's probation officer recommended revocation of defendant's probation. The probation officer explained that defendant had completed the main portion of sex offender counseling, but highlighted that marijuana and alcohol usage are risk factors for a sex offender. The officer explained that alcohol use was an especially risky behavior in defendant's case because defendant was drunk when he committed the sexual assault. The officer also explained that defendant needed a higher level of supervision than probation. The court expressed its concern that defendant's alcohol and drug use were serious risk factors, but questioned the parties concerning what types of treatment would be available to defendant if his probation were revoked. Ultimately, the court decided to continue the hearing for the taking of further evidence, explaining that it did "not have sufficient information about whether or not the overall goals of the sentencing are going to best be met by that complete revocation."

On February 4, 2009, the court reconvened the hearing. The probation and parole district manager testified that if defendant's probation were revoked, defendant would receive no treatment in jail other than AA and NA. The district manager explained that when defendant was released on furlough, he could resume his sex offender treatment. The district manager testified that defendant required greater supervision than could be provided through probation. Defendant's attorney argued that defendant was in good standing regarding sex offender treatment and that having two years of "dead time" in jail was counterproductive to rehabilitation.

The court revoked defendant's probation and imposed his underlying sentence. The court explained that defendant's offense was a serious one and alcohol was a "huge factor" in the crime. The court concluded that defendant's recent use of alcohol raised a "big red flag" that raised the question of the community's safety and the success of defendant's past treatment for substance abuse. Given defendant's alcohol usage, the court concluded that defendant required a higher level of supervision than that available on probation.

Defendant did not appeal the court's decision. On May 1, 2009, defendant filed a pro se motion for reconsideration, citing 13 V.S.A. § 7042 and V.R.Cr.P. 35(b). Defendant's motion stated that: his alcohol violation was a technical one that did not warrant further incarceration; he would receive better treatment on probation than incarcerated; and the court should have considered graduated sanctions instead of revocation. The district court denied the motion in a one-line order, stating that it "had previously considered all of the factors [defendant] identifie[d]."

On appeal, defendant argues that the court withheld its discretion by failing to fully consider defendant's arguments.

Sentence reconsideration is a "limited remedy" in which the trial court has "wide discretion." State v. King, 2007 VT 124, ¶ 6, 183 Vt. 539 (mem.). The purpose of sentence reconsideration under 13 V.S.A. § 7042 "is to permit the trial judge to reconsider the sentencing decision absent the heat of trial pressures and in calm reflection to determine that it is correct, fair, and serves the ends of justice." State v. Therrien, 140 Vt. 625, 627 (1982) (per curiam). "We review the denial of the motion for sentence reconsideration for abuse of discretion." King, 2007 VT 124, ¶ 6.

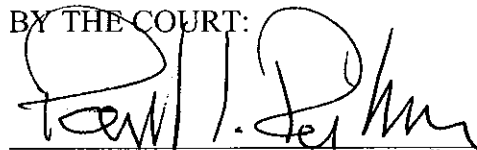
The State argues that the trial court lacked jurisdiction to entertain defendant's motion for reconsideration because it was filed more than ninety days after defendant's original sentence was imposed. In support, the State relies on State v. Therrien. In Therrien, the defendant was sentenced in October 1979, and after his probation was revoked in February 1981, the defendant sought reconsideration of his original sentence. This Court held that "[a]fter a revocation of probation, the defendant's proper avenue for relief is through an appeal or habeas corpus proceeding." 140 Vt. at 627. Therefore, his appeal was dismissed for lack of jurisdiction. Defendant responds that his motion was not untimely in this case because he is not asking for reconsideration of his original sentence, but of the court's decision to revoke his probation.

Assuming that the trial court had jurisdiction to entertain defendant's motion, and that the standards for sentence reconsideration apply to these circumstances, we conclude that the court did not withhold or abuse its discretion in denying defendant's request to reconsider. It is not a withholding or abuse of discretion where the trial court fully considers defendant's objections following a lengthy and detailed proceeding. See State v. Allen, 145 Vt. 393, 396 (1985)

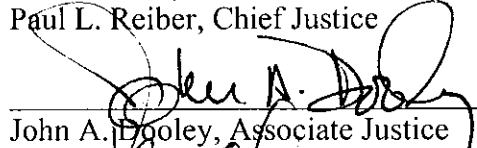
(holding that court did not abuse its discretion in denying motion for reconsideration without a hearing where the court imposed sentencing with “obvious consideration” following “lengthy and detailed proceedings”). In this case, the trial court’s decision to revoke followed two days of hearings during which the court considered all of the relevant sentencing factors. The court listened to testimony at the first hearing and reconvened a second hearing to fully hear all of the sentencing and treatment options available. Afterwards, the court explained the basis for its decision at length, balancing the need for treatment with the need to protect the community. Following defendant’s motion to reconsider, the court was not required to again explain in detail why defendant’s objections to revocation were without merit. It is evident from the record that the court considered defendant’s arguments. Nothing more was required. See King, 2007 VT 124, ¶ 8 (holding that trial court was within its discretion to deny defendant’s motion for reconsideration of sentence without a hearing or explicit findings).

Affirmed.

BY THE COURT:



Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice