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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-273

DECEMBER TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
William Snow	}	DOCKET NOS. 2301-6-08, 1942-5-09
	}	& 4636-12-09 Cncr
		Trial Judge: Linda Levitt

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

Defendant appeals pro se from the trial court's denial of his motion for sentence reconsideration. On appeal, defendant argues that the court abused its discretion in considering his behavior following sentencing. We affirm.

In December 2009, defendant pleaded guilty to one charge of second-offense driving while under the influence (DUI-2), four charges of false pretenses, and a violation of probation. The plea agreement recommended that defendant be referred for the Intensive Substance Abuse Program (ISAP), a pre-approved furlough program. The plea agreement explained that if defendant was not accepted into the program, then both sides would be free to argue for an appropriate sentence, but defendant would not be free to withdraw his plea. In January 2010, the Department of Corrections (DOC) determined defendant was ineligible for ISAP due to his extensive criminal record.

At the sentencing hearing on March 19, 2010, the State requested a twenty-seven-month-to-four-year sentence, based on the parole officer's recommendation that this would allow defendant to participate in the Discovery program, an in-prison substance abuse program. Defendant argued that a twenty-seven-month minimum sentence was "harsh" given that in the preceding three months defendant had been alcohol free and productive, operating a small business and getting his life back on track. He requested a three-to-twenty-seven-month sentence. The court accepted the State's recommendation and sentenced defendant to twenty-seven months to four years. The court based its decision on defendant's "years and years and years of criminal activity." The court emphasized that if defendant did not qualify for the Discovery program, it was not "going to go backwards." Following the court's announcement of his sentence, defendant had the following outburst: "Are you kidding me, man? You're putting me away? Are you crazy? I've got fucking responsibilities. My daughter's going to graduate. What the fuck's wrong with you? What the fuck is wrong with you?" Following this outburst, there was some sort of confrontation between defendant and court staff. Defendant characterizes the incident as an emotional outburst, whereas at resentencing the trial court described it as "one of the more violent confrontations I've ever seen in this courthouse."

In April 2010, defendant filed a motion for sentence reconsideration alleging that he was deemed ineligible for the Discovery program based on a preexisting heart condition, which existed at the time of sentencing, but was unknown to defendant or the court. Defendant thus requested the court to reconsider his sentence in light of this unknown circumstance. The court scheduled a hearing on the matter. At the hearing on June 22, 2010, the State claimed there were no grounds to alter defendant's sentence because defendant's ineligibility for Discovery was unrelated to defendant's medical issues and instead based on his violent behavior at the sentencing hearing. The State presented the testimony of defendant's parole officer, who testified that defendant's heart condition had an impact on his ability to participate in work camps generally, but it was his violent behavior at the sentencing hearing that precluded his acceptance into the Discovery program. The court denied the motion for reconsideration, explaining that the Discovery program was not promised at sentencing and, in any event, that defendant's inability to participate in that program was caused by defendant's own actions. Therefore, the court concluded that there was no basis to alter the original sentence.

On appeal, defendant argues (1) the court erred in finding that his ineligibility for Discovery was caused by his outburst at the sentencing hearing, and (2) it was error for the court to consider this behavior because it happened after sentencing.

The trial court has authority to consider a defendant's request for sentence reconsideration under 13 V.S.A. § 7042 and Rule of Criminal Procedure 35(b), and we review the denial of such a motion for abuse of discretion. State v. King, 2007 VT 124, ¶ 6, 183 Vt. 539 (mem.). Sentence reconsideration is a limited remedy, the purpose of which is to allow the sentencing judge "an opportunity to consider anew the circumstances and factors present at the time of the original sentencing." State v. Sodaro, 2005 VT 67, ¶ 9, 178 Vt. 602 (mem.) (quotation omitted). It is not a forum to address "post-incarceration matters." Id.

Defendant first argues that the court erred in relying on his probation officer's testimony and finding that defendant was ineligible for the Discovery program because of his behavior at the sentencing hearing. "We will affirm the court's findings if they are based on the evidence, even where conflicting or contradictory evidence exists." Sodaro, 2005 VT 67, ¶ 8. Defendant claims that the probation officer presented "perjured testimony," and argues that it was indeed his medical condition that precluded him from participating in the Discovery program. In support, defendant submits a DOC document, dated July 26, 2010, which responds to a grievance defendant filed with DOC following his ineligibility for work camp. The document states that defendant is "not medically cleared" for Discovery. This document was not presented to the trial court and is not part of the record on appeal. Therefore, we do not consider it. See Hoover (Letourneau) v. Hoover, 171 Vt. 256, 258 (2000) (excluding facts presented for the first time on appeal because this Court's "review is confined to the record and evidence adduced at trial"). The evidence that was presented to the trial court at the resentencing hearing, including the probation officer's testimony, supports the court's finding that defendant was ineligible for Discovery due to his violent conduct following sentencing, and therefore we decline to disturb this finding on appeal.

Next, defendant argues that the court erred in considering this violent outburst because the conduct happened after sentencing. See State v. Platt, 158 Vt. 423, 426 (1992) ("It is not the purpose of sentence reconsideration to review circumstances that come about following the imposition of the sentence; generally, the review is only of the circumstances and factors present at the time of the original sentencing." (quotations omitted)). While defendant is correct that post-sentencing behavior is not a ground for sentence reconsideration, there was no error because defendant's sentence was not revised based on his conduct following sentencing. Defendant

sought sentence reconsideration based on his contention that medical issues, which existed but were unknown at the time of sentencing, precluded his participation in a program that the court expected him to participate in as part of the sentence. The court, however, rejected defendant's contention, instead crediting the probation officer's testimony that defendant's violent behavior precluded his participation in the program. The court did not use defendant's post-sentencing behavior to alter defendant's sentence, but to rebut defendant's proffered argument for reconsideration.

In any event, even if defendant's inability to participate in the Discovery program was indeed a result of his medical issues, we are still not convinced that the court erred in this case. The court had authority to impose the sentence that it did initially and defendant's inability to participate in the Discovery program, which was anticipated but not promised at sentencing, did not require the court to alter its original sentence. Therefore, we conclude the court did not abuse its discretion in denying defendant's motion for sentence reconsideration.

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