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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-025

MAY TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
v.	}	Criminal Division
	}	
	}	
Timothy D. Wiley	}	DOCKET NO. 804-6-04 Wmcr
		Trial Judge: Katherine A. Hayes

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

Defendant appeals pro se from the trial court's denial of his motion to reconsider his sentences for two counts of obstruction of justice. We affirm.

In 2005, defendant was convicted of aggravated sexual assault, lewd and lascivious conduct with a child, and two counts of obstruction of justice. Defendant was sentenced to fifteen-to-twenty years to serve on the aggravated sexual assault count, four-to-five years all suspended on the lewd and lascivious conduct count, concurrent to the aggravated sexual assault charge, and four-to-five years, all suspended, each consecutive, on the obstruction of justice counts. The probation order, signed by the judge, similarly provides that probation on these counts was "until further order of the court."

In February 2011, defendant admitted to six violations of probation (VOP). Probation was revoked on the lewd and lascivious conduct charge and on the two obstruction of justice counts, and the underlying sentences were imposed. Defendant did not appeal from this decision. Instead, five years later, in March 2016, he filed a motion to correct, reduce, and/or modify his sentence pursuant to Vermont Rule of Criminal Procedure 35(a). Defendant argued that the court lacked the authority to impose the underlying sentences on the obstruction of justice charges following his admission to violating probation. He cited 28 V.S.A. § 205 and argued that the sentencing court was required and failed to make specific findings that the "interests of justice" justified placing him on probation longer than the five-year maximum term of imprisonment for the crime. Defendant appears to have relied on a 2008 version of 28 V.S.A. § 205(a)(3)(A) (stating that term of probation for nonviolent felonies "shall not exceed the statutory maximum term of imprisonment for the offense unless the court, in its sole discretion, specifically finds that the interests of justice require a longer or an indefinite period of probation"). Given the absence of the required finding, defendant maintained that his probationary term expired in 2010, five years after his sentence was originally imposed. The court denied defendant's motion. It found that the sentencing court had indicated at the hearing that an indefinite term of probation on these counts was required in the interests of justice. This appeal followed.

Defendant raises a different argument on appeal than he did below. He now asserts that he was not in fact placed on probation "until further order of the court," and that the trial court erred in so finding. He suggests that the trial court should have applied the rule of lenity and interpreted the sentencing court's comments at the sentencing hearing to impose a more lenient punishment of a five-year fixed probationary term. Finally, defendant complains that in its opposition to his motion below, the State misrepresented the sentencing court's words.

We find no error. As indicated above, defendant is raising a new argument on appeal. Because he failed to raise this precise argument below, we do not address it. See State v. Sole, 2009 VT 24, ¶ 13, 185 Vt. 504 ("Arguments that are neither litigated nor decided below will not be addressed for the first time on appeal." (quotation omitted)). We note, however, that pursuant to the probation order signed by the court, defendant was plainly placed on probation "until further order of the court." Defendant did not appeal from the court's initial imposition of sentence, nor did he argue at his VOP hearing that he was no longer on probation.

As to the argument defendant did raise below—that the court was required to make specific findings in order to place him on indefinite probation—defendant relies on a statute that was not in effect at the time that his sentence was imposed. The language on which defendant relies was adopted in May 2006, a year after he was sentenced. See 2005, No. 192 (Adj. Sess.), §§ 18, 32 (adding provision relied upon by defendant and stating that act "shall take effect on passage"). At the time of his sentencing, the court was authorized to place defendant on probation "for such time as it may prescribe in accordance with law or until further order of the court." 28 V.S.A. § 205(a); 2003, No. 145 (Adj. Sess.), § 1. It chose the latter option. Defendant's claim that his sentence was illegal is thus unavailing. Finally, we reject defendant's assertion that the State misrepresented the record in its filing below. In its motion, the State quoted the statute, and correctly asserted that defendant had been placed on probation "until further order of the court."

Affirmed.

BY THE COURT:

_____
Marilyn S. Skoglund, Associate Justice

_____
Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice