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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-389

MAY TERM, 2002

State of Vermont v. Thomas Comstock	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Chittenden Circuit DOCKET NOS. 899/900-2-01 CnCr Trial Judge: Michael S. Kupersmith

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

Defendant appeals his conviction and sentence for driving while intoxicated (DWI), second offense, and for driving with a suspended license (DLS). He argues that (1) he was denied due process when he was sentenced for committing perjury without notice and an opportunity to be heard, and (2) the district court committed reversible error by failing to offer him use immunity at sentencing. We affirm.

The main issue at trial was whether defendant had been driving the vehicle at the time it was stopped. The arresting officer testified that he observed defendant switch seats with a passenger as the car came to a stop, and that he immediately confronted defendant about the switch. The State submitted into evidence a videotape that suggested, but was inconclusive in and of itself as to whether, a switch had taken place. Defendant and the other person who was in the car both testified that they had not switched seats. The jury convicted defendant on both counts. Defendant received a sentence of twelve-to-twenty-four months, all suspended except for three days, with a $1500 fine, for the DWI 2 conviction, and a consecutive sentence of twenty-to-twenty-four-months, with a $5000 fine, for the DLS conviction. The court informed defendant that it was imposing a harsh sentence because he had blatantly lied on the stand about not switching seats.

Defendant first argues on appeal that the district court denied him due process by sentencing him for perjury without notice and an opportunity to be heard. We find no merit to this argument. "[I]f the sentencing judge believes that a defendant lied on the stand, . . . the sentencer may take defendant's lying into account." State v. Noyes, 157 Vt. 114, 119 (1991). The Court in Noyes relied upon United States v. Grayson, 438 U.S. 41, 50 (1978), which held that "defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing."

We find unavailing defendant's assertion that the district's court's failure to warn him of its intention to take his lying into account deprived him of due process. See State v. Ramsay, 146 Vt. 70, 81 (1985) ("sentencing must be based on reliable factual information, with full disclosure sufficiently in advance of sentencing to allow adequate opportunity for rebuttal"). Here, both the court and the jury heard testimony from the witnesses on whether defendant switched seats following the stop. After considering the evidence, the jury found defendant guilty of DWI, demonstrating that it did not believe his testimony that he had not switched seats. Irrespective of whether the court placed defendant on notice that it intended to take into account his untruthful testimony, defendant has failed to meet his "burden to show that materially inaccurate information was relied upon by the sentencing court." Id. at 79. Indeed, defendant has failed to proffer, and it is difficult to conceive of, what information he could have presented at sentencing to demonstrate that he had not lied at trial; the main question at trial was whether he had been driving, and he had a full opportunity to present any evidence he had to support his testimony that he had not been driving. Nor can defendant show that it would have made a

difference if, upon notice of the court's intention to punish him for lying on the stand, he had decided to admit that he gave false testimony. See Noyes, 157 Vt. at 119 (defendant's speculation that admitting guilt at eleventh hour would have resulted in more lenient sentencing is unrealistic, given that statement of awakening repentance after trial would more likely have been perceived as cynically self-serving).

Next, defendant argues that the court committed reversible error by not providing him with judicial use immunity at sentencing after the prosecutor announced that it intended to file perjury charges against him. In making this argument, defendant relies upon State v. Cate, 165 Vt. 404 (1996). In Cate, the defendant challenged a probation condition requiring him to sign an acknowledgment of responsibility for sexually assaulting the victim. We held that a defendant cannot be forced to incriminate himself by admitting criminal responsibility as a condition of probation unless he first received immunity from any future criminal prosecution arising from the admission. Id. at 415, 417.

The present case is more like State v. Hayes, 783 A.2d 957 (Vt. 2001) (mem.), however. In Hayes, the defendant argued that the trial court had violated his privilege against self-incrimination by failing to provide him with judicial use immunity before basing its sentencing decision on his refusal to acknowledge criminal responsibility for having committed the domestic assault charge for which he was convicted. Stating that Cate dealt with a very narrow situation, we refused to allow defendants to say nothing about their self-incrimination concerns at sentencing and then later argue for the first time on appeal that they might have made statements accepting criminal responsibility had they been given judicial use immunity. Id. at 959. Similarly to Hayes, there is not the slightest indication that defendant failed to admit the truth at sentencing out of fear of his statement being used against him in a perjury prosecution. See id. at 959-60. If defendant or his counsel had had such concerns, "he should have made those concerns known to the court at the sentencing hearing." Id. at 960. "As it stands, defendant cannot raise for the first time on appeal legal issues that he could have presented before the trial court for consideration." Id. Further, even if defendant had not waived the issue by failing to raise it at sentencing, he has failed to demonstrate why our narrow holding in Cate should be extended to the situation presented here. See id.

Affirmed.

BY THE COURT:

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice