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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-274

JUNE TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Rutland Circuit
Steven Golden	}	
	}	DOCKET NO. 196-2-03 RdCr
		Trial Judge: Nancy Corsones

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

Defendant appeals his drug convictions, arguing that the district court abused its discretion in sentencing him by (1) improperly considering his failure to obtain treatment; (2) incorrectly concluding that he was selling more drugs than necessary to support his habit; and (3) relying on information outside the record. We affirm.

Defendant pled no contest to three counts of selling heroin, one count of possessing heroin, and one count of possessing marijuana. There was no plea agreement. Following a lengthy sentencing hearing, the district court imposed an aggregate sentence of four-to-fifteen years to serve. In challenging the sentence, defendant first argues that the court improperly considered, as an aggravating factor, his failure to seek treatment for his heroin addiction. According to defendant, the court demonstrated its ignorance of the nature of heroin addiction by expecting him to quit on his own. We find no abuse of discretion. The court noted defendant=s failure to obtain treatment even after losing his job and even though he had two children for whom he was responsible. Defendant, who had previously been addicted to heroin thirty years earlier, testified that he had briefly visited a treatment center to obtain information, but had never followed through with it because he thought he could quit on his own. The court=s reliance on defendant=s failure to make any effort to seek treatment was proper. Cf. State v. Campbell, 58 P.3d 1080, 1087 (Colo. Ct. App. 2002) (sentencing court properly considered defendant=s failure to seek treatment for his drug addiction even after he witnessed two drug-related deaths).

Next, defendant argues that the district court erroneously determined that he was profiting from the sale of heroin beyond his need to support his own drug addiction. Again, we find no error. Although the court stated at one point that profiting from the sale of heroin might be an aggravating factor, the court ultimately focused on the effect of defendant=s heroin dealing in the community rather than on how much he profited from his dealing. The court noted that defendant was supplying his neighbor=s habit and also providing heroin on a less regular basis to eight or ten other members of the community. The court did not abuse its discretion in considering, as an aggravating factor, the negative impact on the community resulting from defendant=s heroin dealing. Cf. Fassoth v. State, 525 N.E.2d 318, 324 (Ind. 1988) (citing sentencing court=s reliance on amount of cocaine sold as aggravating factor).

Finally, defendant argues that the district court improperly relied upon information outside the record in refusing to impose a sentence that would have allowed him to be furloughed into an intensive substance abuse program, as recommended in the pre-sentence report. Specifically, defendant contends that the court relied upon information, obtained in a previous day=s case, indicating that (1) a tough sentence can act as a deterrent to others dealing drugs on

the street; (2) drug testing for furloughed prisoners in the substance abuse program is inconsistent; and (3) furlough is often inappropriate for persons who have been incarcerated for more than sixty days. Defendant=s first point is based on a statement made by a prosecutor, not the judge. Other statements the court made related to defendant=s latter two points were based, at least in part, on the testimony of a Department of Corrections employee who wrote the pre-sentence report and was called as a witness for defendant. In the end, the court acted within its discretion in rejecting the furlough option based on the weight of aggravating factors and the lack of effective supervision of furloughed prisoners. See State v. Ingerson, 2004 VT 36, & 10, 176 Vt. 428, 433-34 (noting district court=s broad discretion in imposing sentence, and listing various factors court may consider).

Affirmed.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice