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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-132

MARCH TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
Bernard Curtis	}	
	}	DOCKET NO. 489-8-02 OsCr

Trial Judge: Dennis R. Pearson

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

Defendant appeals a jury conviction for sexual assault, arguing that his sentence must be vacated and the matter remanded to a different sentencing judge because the court failed to comply with the requirements of 28 V.S.A ' 204 and 13 V.S.A ' 7030. We affirm.

In August 2002, defendant was charged with sexual assault based on an incident in which he allegedly approached a woman he did not know on a lakefront beach and inserted his finger into her vagina. On January

21, 2004, the morning that the matter was set for a jury trial, the district court accepted a plea agreement under which defendant agreed to plead no contest to the charged offense and submit to a pre-sentence investigation and psychological evaluation that would determine whether the Department of Corrections could manage him on a probationary status with appropriate counseling or treatment, in which case the court could consider imposing a deferred sentence. The court warned defendant that if the DOC determined that defendant could not be managed on a probationary basis, the court would not accept a deferred sentence, and defendant would be given an opportunity to withdraw his plea.

After accepting the plea, the court ordered that an investigation report and psychological evaluation be completed before sentencing. The report was prepared and filed with the court on March 15, 2004. It recommended that defendant not be given a probationary deferred sentence, but rather serve a significant period of time in jail. Following submission of the report, defendant moved to withdraw his plea, and the district court granted the motion on July 26, 2004. The case went to trial on October 5, 2004, and the jury convicted defendant of the charged offense the next day. Between October 12, 2004 and January 25, 2005, the district court held a number of status conferences in which it prodded defendant=s counsel to schedule a supplemental investigation with the DOC and to complete the psychological evaluations that he was having done.

On January 25, 2005, the district court entered an order referring the matter to the DOC for Apossible consideration@ of a supervised community sentence and requiring defendant to Aimmediately arrange for PSI interview, and arrange for psycho-sexual evaluation to be completed ASAP in compliance with DOC requirements.@ The court added that these requirements were A[a]ll w/o prejudice to 2/24-25/05 sentencing dates already scheduled.@ On February 8, 2005, defendant moved to continue the sentencing hearing, alleging that the DOC had refused to conduct a supplemental pre-sentence investigation, and that the doctor who had written defendant=s psychosexual evaluation would be on vacation on the date of the sentencing hearing. The court denied defendant=s motion, stating that (1) it had been more than a year since defendant had first pled to the charged offense and four months since his conviction; (2) defendant should have been on notice that he needed to pursue any psychosexual evaluation evidence sooner rather than later; (3) the court=s earlier order did not require a full pre-sentencing investigation and, in any case, was expressly made without

prejudice to the scheduled sentencing hearing; and (4) the court had had to juggle its entire schedule to make room for the sentencing hearing.

On February 22, 2005, defendant filed with the district court various reports and evaluations from four different doctors. The following day, a representative of the DOC filed a statement indicating that defendant was not eligible for supervised community sentencing. Following a hearing on February 24, 2005, the court sentenced defendant to a term of five to fifteen years to serve. The court stated its belief that defendant could be managed on a probationary basis if rehabilitation were the sole consideration, but that other considerations of deterrence and punishment warranted the imposition of a five-to-fifteen-year term.

On appeal, defendant argues that his sentence must be vacated because the district court failed to insist on obtaining information required by 13 V.S.A. ' 7030, 28 V.S.A. ' 204(b) and (f), and Vermont Rule of Criminal Procedure 32(c). We disagree. Section 7030 of Title 13 requires the court to consider, in determining what type of sentence to impose, Athe nature and circumstances of the crime, the history and character of the defendant, the need for treatment, and the risk to self, others and the community at large presented by the defendant.@ Section 204(b) of Title 28 requires the court to order from the DOC a report concerning the circumstances of the offense and the character of the defendant before sentencing a person found guilty of committing a felony, and ' 204(f) requires reports concerning those charged with sexual assault to address the availability of appropriate treatment programs and the defendant=s eligibility for such programs. See V.R.Cr.P. 32(c)(2) (requiring pre-sentence report to contain, among other things, Acircumstances affecting [the defendant=s] behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant@). Section 204(b) further states that any report made to the court within a two-year period of sentencing may satisfy the requirements of the section. Moreover, Rule 32(c)(1) allows pre-sentence reports to be done before an adjudication of guilt as long as the defendant consents.

Here, although a supplemental pre-sentence report was not done, a statutorily required pre-sentence report was prepared and filed with the court after defendant entered his no contest plea. Further, at sentencing, defendant filed several psychiatric and psychosexual reports and evaluations in support of his request for a

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probationary sentence. Based on this evidence, the court expressly acknowledged that defendant could be managed on an outpatient and probationary basis if rehabilitation were the only consideration, but nonetheless imposed a term of imprisonment based on considerations of deterrence and punishment. In short, all of the statutory requirements were fulfilled, but even if some shortcoming existed with respect to the DOC=s obligation to present treatment alternatives that would allow imposition of a probationary sentence, there was no prejudice because the court explicitly stated that a term of incarceration was called for despite the potential for a probationary sentence. Cf. State v. LeClaire, 2003 VT 4, & 18, 175 Vt. 52 (noting defendant=s failure to demonstrate trial court committed prejudicial error by not ordering pre-sentence investigation report).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice