Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-129

MAY TERM, 2019

State of Vermont v. Kenneth E. Pecor, Jr.*	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 228-2-17 Wncr & 66-1-17 Wncr
		Trial Judges: John L. Pacht, Howard E. Van Benthuysen

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

Defendant pled guilty to aggravated assault with a deadly weapon, unlawful trespass of an occupied residence, and driving under the influence-fourth offense (DUI #4). He appeals from the trial court's imposition of sentence. We affirm.

Defendant was charged with the crimes above, as well as other crimes, in early 2017. He pled guilty to the three crimes referenced above in August 2017 pursuant to a plea agreement. The remaining charges were dismissed. Pursuant to the agreement, the State was capped at arguing for twelve-days-to-three-years to serve on the felony DUI #4 count and eighteen-months-to-eight-years on the aggravated assault with a deadly weapon, to be served concurrently. No sentence was specified for the remaining count. Defendant was free to argue for a lesser sentence.

A pre-sentence investigation (PSI) was prepared and the court held a contested sentencing hearing. Among other things, the PSI summarized the offenses to which defendant pled guilty, apparently based on the arresting officers' affidavits of probable cause. The PSI also included defendant's and the victims' description of events. The summary of the aggravated assault and unlawful trespass counts reflects the following. Police responded to a report that defendant had entered a residence with a gun and demanded money and a car. Defendant admitted that he intended, in part, to get money. He also indicated to police that he wanted to get warm. Defendant pointed a rifle at the victims and told them to sit down. One of the victims stated that defendant told the victim to call off his dogs, which the victim did, and that defendant continued to threaten him with a rifle while he locked the dogs away. Defendant told the victims the gun was loaded. He showed them a screwdriver he had taken from their garage and asked them if they had heard him fire his gun in their garage. Defendant told the victims that he did not want to hurt anyone and that he did not know they were home. Defendant said to police that the key had been left in the outside lock at the home and that he turned the key and went inside. At some point, defendant put his gun on the counter. The victims obtained possession of the gun after a scuffle and held

defendant at gunpoint until police arrived. One of the victims struck defendant with a tomahawk during the scuffle. The victims indicated that they thought defendant would kill them.

The victims provided a written and oral statement to the sentencing court. They described feeling helpless and afraid when defendant invaded their home, pointed a gun at them, held them hostage, and "quite frankly, terroriz[ed] them." Defendant offered testimony from several witnesses, including: a homeless-outreach social worker with the Veterans Administration with whom he working; the director of the Phoenix House RISE programs, who had worked with him during his stay at the Phoenix House; as well as several relatives.

The State asked the court to impose the maximum sentence allowed by the plea agreement, eighteen-months-to-eight-years to serve. It acknowledged that defendant had engaged in some rehabilitation efforts following his arrest but maintained that "a home invasion with a firearm" was a significant offense that warranted incarceration. The State noted that even defendant's attorney referred to the fact that defendant had "terrorized" the victims with a firearm.

Defendant acknowledged that he had engaged in "the worst crime that [one] can do, short of physically harming someone," causing the victims here "to fear for their lives" and depriving them of "their sense of security and safety in their home." He argued that he had acted out of desperation and that he had been homeless, cold, and hungry. He cited the progress he had made in addressing his alcoholism and noted that he had followed the rules at the Phoenix program. Defendant stated that he accepted responsibility for his actions, and he asked the court to impose a one-to-eight-year sentence, all suspended except for credit for time served. He asked to be placed on probation until further order of the court. As to the DUI #4, defendant asked the court to impose a twelve-day-to-three-year-to-serve sentence with the understanding that he had served the twelve days.

The court sentenced defendant to twelve-days-to-three-years to serve for the felony DUI #4; eighteen-months-to-eight-years to serve for aggravated assault with a firearm; and twelve-days-to-three-years on the unlawful trespass of an occupied residence to run concurrently. The court recognized the emotional toll that the victims suffered from a home invasion in which they were assaulted. It also acknowledged that defendant had made some progress in his life since being released from jail. It noted that defendant had served in the military about fifty years earlier and that he was an alcoholic. The court found that the military service and alcoholism were "statuses," or experiences that defendant had had. And while the court wanted defendant to move forward with his treatment and sobriety, it found that "being an alcoholic, or being a veteran, . . . [weren't] excuses for what [he] did." While there was no post-traumatic-stress-disorder (PTSD) diagnosis in the record, the court found that this would similarly not excuse defendant's behavior. The court added, moreover, that defendant himself had stated that there were no excuses for what he did.

The court expressed relief that the victims were not physically injured during the incident but observed that the victims had "every right to use deadly force to stop [defendant] from doing what [he] w[as] doing." The court found it important to "send a message that a home invasion by someone armed with a rifle is a . . . very, very serious matter." As to rehabilitation, the court noted that defendant had finally engaged in services though the U.S. Department of Veterans Affairs (VA). But the evidence showed that he had many options for help, even before he was arrested

for DUI #4 and committed a home invasion, which he did not pursue. His criminal record consisted of three DUIs.

The court discussed the various goals of sentencing throughout its decision. See generally United States v. Giraldo, 822 F.2d 205, 210 (2d Cir. 1987) ("The proper purposes of the sentencing of criminal offenders are generally thought to encompass punishment, prevention, restraint, rehabilitation, deterrence, education, and retribution."). It emphasized the importance of punishment in this case given the gravity of defendant's actions in invading the victims' home and pointing a gun at them. Regardless of whether defendant's actions were premeditated, as the State argued, or an act of desperation, as defendant asserted, the court found that the consequences were profound to the victims and that the meaning of this kind of offense to society was profound. The court noted that the terms of the plea agreement were very favorable to defendant. Ultimately, it concluded that, in recognition of the factors discussed above, as well as other factors, the sentence recited above was appropriate. This appeal followed.

Defendant argues that the sentencing court demonstrated a "lack of familiarity" with the record evidence. He cites State v. Manning, 141 Vt. 192, 198 (1982), and appears to suggest that he should have been sentenced by the judge who entered his guilty pleas. According to defendant, the court demonstrated its unfamiliarity with the record by describing his conduct as a "home invasion." He asserts that his conduct cannot be characterized this way because Vermont law does not identify "home invasion" as a crime. Defendant further asserts that the undisputed evidence shows that he thought the home was unoccupied and that there was no forced entry. He relies on his own statements in the PSI in support of this assertion and in support of a more favorable view of his actions inside the home than that described by the victims. Defendant also takes issue with the court's observation that the victims would have been justified in using lethal force to defend themselves, asserting that this statement also shows a "lack of familiarity of the record evidence." Finally, defendant argues that the court "refus[ed] to consider his mitigating circumstances"—that he was an alcoholic, a veteran, and may have suffered from PTSD—"because it had deemed them excuses for committing the crime." Defendant asserts that this "denied him the ability to have a sentence imposed based on his individual situation or the right to present mitigation evidence."

We reject these arguments, which do not accurately reflect the requirements of Vermont law or what occurred at sentencing. Nothing in our law requires, or presumes, that the judge who held the change-of-plea hearing must conduct the sentencing. In fact, in cases such as this one where a defendant pleads guilty, the need for "continuity" is minimal. See id. at 198-99 (explaining that ABA standards on sentencing procedures reflect that when defendant pleads guilty, "a new sentencing judge, if necessary, can easily bring before the court all of the persons relevant to his [or her] decision," and "[i]n these cases the standards recognize that rotation systems may interrupt continuity with little damage done, so long as the judge who does the sentencing takes care to place himself [or herself] in as good a position as the original judge who took the plea was in"). We find no support for defendant's assertion that the sentencing court was unfamiliar with the record evidence or that it somehow was not in "as good a position" to sentence defendant as the judge who took defendant's guilty pleas.

Defendant also appears to misconstrue what the court must consider at sentencing. He asserts that the court was required to weigh "mitigating factors alongside any other relevant factors." As support for this proposition, he cites a second-degree murder case where the court

was required, by statute, to consider certain mitigating and aggravating factors. See State v. White, 172 Vt. 493, 502 (2001) ("When an individual is convicted of second degree murder, the trial court must consider the aggravating and mitigating factors specifically enumerated in the sentencing statute or as suggested by the parties." (citing 13 V.S.A. § 2303(d)(1)-(8), (e)(1)-(7), now codified at 13 V.S.A. § 2303(d)-(f))).

The appropriate standard in this case is that set forth in 13 V.S.A. § 7030(a): In fashioning its sentence, "the court shall consider the 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." The court complied with the statute here. It considered defendant's "history and character," including his assertion that he was an alcoholic, a veteran, and that he might have PTSD; it also recognized that defendant had made progress in becoming sober and accessing services through the VA. It nonetheless found that alcoholism and being a veteran did not excuse defendant's behavior, which was consistent with defendant's own position at sentencing. The court did not ignore this evidence or in any way deny defendant's ability to present such evidence; it simply did not give this evidence the weight in its sentencing decision that defendant now urges us to give it on appeal. We do not reweigh the evidence on appeal. As we have repeatedly emphasized, our review of the court's sentencing decision is highly deferential: "absent exceptional circumstances, we will defer to the court's judgment so long as the sentence is within the statutory limits and was not based on improper or inaccurate information." State v. Hughs, 2018 VT 74, ¶ 11 (quotation and alterations omitted). The court plainly based its sentence on an assessment of defendant's individual circumstances, and we reject defendant's argument to the contrary.

We similarly reject defendant's assertion that by referring to this as a "home invasion," the court somehow reflected its unfamiliarity with the record. In fact, the record here plainly shows that defendant did invade the victims' home. The court was not suggesting that defendant committed the crime of "home invasion," and the fact that "home invasion" is not a crime in Vermont is immaterial. The court could properly consider "the circumstances of the offense" at sentencing, State v. Ingerson, 2004 VT 36, ¶ 10, 176 Vt. 428, which here involved defendant's entering the victims' home, pointing a rifle at them, and demanding food and a vehicle. As we explained in State v. Scott:

> A sentencing court necessarily has broad discretion over what information may be considered in fashioning a just and fair sentence and may consider a wide range of factors, including the propensity and nature of the offender, the particular acts by which the crime was committed, . . . [and] the circumstances of the offense . . . to arrive at a sentence that is both appropriate to the crime and consistent with the purposes of sentencing.

2013 VT 103, ¶ 20, 195 Vt. 330 (quotation omitted). The court acted within its discretion here.

The court's observation about whether the victims of the home invasion would have been legally justified in killing defendant has no bearing on the appropriateness of the sentence in this case, and we do not address this hypothetical by the court. The record does not support defendant's assertion that the court "used [the victim's] unlawful and excessive use of force against [defendant]

to support the imposition of a retributive sentence." We find no error in the court's imposition of sentence here, a sentence which was within the range defendant recognized as a possible outcome when he entered into the plea agreement.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice