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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-284

APRIL TERM, 2003

State of Vermont v. Gene E. Creller	}	APPEALED FROM: District Court of Vermont, Unit No. 3, Grand Isle Circuit DOCKET No. 51-6-01 Gicr Trial Judge: Ben W. Joseph

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

Defendant appeals from a judgment of conviction, based on a guilty plea, of sexual assault on a minor. He contends that, in imposing a sentence of eight to twenty-five years, the trial court improperly: (1) predetermined the sentence; (2) relied on inaccurate information; and (3) failed to hold a hearing or make findings attesting to the reliability of contested evidence. We affirm.

In June 2001, defendant was charged with sexual assault on a person under the age of sixteen, in violation of 13 V.S.A. § 3252(b)(1). The victim was defendant' s daughter. In May 2002, defendant entered a plea of guilty. In June, following a hearing, the trial court sentenced defendant to serve a term of eight to twenty-five years. This appeal followed.

Defendant contends the sentence should be vacated because the trial court improperly predetermined the sentence. In support of the claim, defendant cites several comments by the trial court at an earlier change-of-plea hearing in October 2001. Counsel had been describing in general terms the structure of a possible plea agreement when the court observed as follows:

> It seems to me that the proof of guilt is " is great and that under " understates it and the nature and frequency of these events is such that there certainly has to be some kind of punishment imposed by the Court so . . . I don' t want to be coy about this and I don' t want you to spend a lot of time on, you know, arguing about non-jail disposition because that' s " that seems to me " I . . . again I don' t want to be abrupt with you Mr. Ledden [defense counsel] but it seems to me to be " that is not a possibility in the case. Well, you know, this case involves a violation of a child repeatedly. I' m not going to go recite all the details because I' m sure you' re aware of them but this is [sic] a case where there is going to be community treatment and there' s no punitive element to the sentence. It just has to be but I' ll leave it to you to " I mean I " I want to give counsel the courtesy of " opportunity to work out plea proposals for the Court but on the other hand I don' t want to sit by and see us spend a lot of time, you know, arguing about things which I really just don' t think are " are possible here.

Defendant also cites a subsequent hearing in March 2002, where the court, recalling its earlier remarks, observed:

> And when I read the affidavit in this case and I was asked that kind of question by Mr. Ledden, I suggested to him that it didn' t appear to me to be a case in which there couldn' t be some kind of punitive sanction. Now, you know, perhaps I' m wrong and perhaps you can persuade me. What I saw in the file, however, I think again with all respect to counsel would be such that I

couldn' t consider a case like this in which there wouldn' t be an incarcerative sentence.

Based on these comments, defendant contends the court improperly decided before the sentencing hearing that defendant' s sentence would be incarcerative, thereby depriving him of his right to a fair sentencing hearing based upon a full consideration of the circumstances of the offense and defendant' s individual background and circumstances. See State v. Bacon, 167 Vt. 88, 96 (1997) (sentencing in Vermont is individualized, based on wide-ranging inquiry into defendant' s life, background, family relations, and nature of offense committed). Defendant also asserts that, in deciding upon an incarcerative sentence prior to the sentencing hearing, the court improperly deprived defendant of his right of allocution. See V.R.Cr.P. 32(a)(1) (before imposing sentence court shall ask whether defendant wishes to make a statement on his or her own behalf).

The argument is unpersuasive. In Vermont, unlike the federal courts and other jurisdictions, the trial court may directly participate in plea bargain discussions so long as the proceedings are reported. See V.R.Cr.P. 11(e)(1) (" The court shall not participate in any such [plea agreement] discussions unless the proceedings are taken down by a court reporter or recording equipment."); State v. Davis, 155 Vt. 417, 420-21 (1990) (" Vermont is almost unique in allowing judges to participate in plea bargaining, taking a position different from both the federal rule and from the ABA Standards because it has recognized that defendants derive benefits from judges' input."). Although, as acknowledged in the Reporter' s Notes to V.R.Cr.P. 11(e)(1), the rule has been criticized because it " may cause the defendant to doubt the judge' s objectivity in advance of formal sentencing," it offers the advantages of providing " some advance sense of the judge' s position" and occasionally the opportunity to forge a compromise where the parties are deadlocked.

The court' s comments here were essentially nothing more than a " weather forecast" as to the minimal terms of any potential plea bargain that it would find acceptable in light of the seriousness and circumstances of the offense, as expressly contemplated by the Rule. Nothing in the record suggests that defendant was subsequently deprived of a full and fair hearing at sentencing. The court heard testimony on defendant' s behalf by a clinical psychologist and a licensed clinical social worker, both of whom recommended community-based sexual offender counseling, as well as testimony from defendant' s employer, wife, brother, sister-in-law and defendant himself. The court also heard from the probation officer who prepared the pre-plea PSI that recommended an incarcerative sentence, as well as from the victim' s guardian. The court indicated that it had carefully reviewed the pre-plea PSI, the clinical psychologist' s report referenced therein, and the victim impact statement and other documents. In imposing sentence, the court expressly balanced its findings that the circumstances of the offense " involving multiple sexual assaults of defendant' s daughter " were violent in nature and egregious, and that defendant' s actions would have long-term consequences for the victim, against defendant' s expressions of remorse and willingness to enter rehabilitation. While noting that it could impose a maximum term of thirty-five years, the court found that eight to twenty-five years was appropriate in light of all the circumstances. The record reveals nothing to suggest that the court was prejudiced, or less than open-minded, at the hearing or that the sentence imposed constituted an abuse of discretion warranting reversal. See State v. Keiser, __ Vt. __, __, 807 A.2d 378, 389-90 (2002) (court enjoys broad discretion in sentencing). Accordingly, we discern no basis to vacate the sentence.*

Defendant also contends the court abused its discretion by relying on personal biases rather than materially accurate information in rejecting a probationary sentence, and by focusing solely on the punitive aspect of sentencing to the exclusion of other evidence presented. Defendant relies upon the clinical psychologist' s testimony and report, which indicated that defendant was within a category " that of father/daughter incest offenders with no prior sexual offenses " least likely to reoffend. The testimony was based on studies indicating that defendant' s likelihood of reoffending was four percent. Defendant also relies on the testimony of the clinical social worker, who indicated that he currently provided outpatient sex offender treatment under a contract with the Department of Corrections, and that defendant met the criteria for outpatient treatment.

The court expressed skepticism about the reliability of the reoffender studies, noting that incest offenses are generally under reported, and also expressed doubts about the effectiveness of probation supervision. Contrary to defendant' s claims, however, the court' s remarks do not demonstrate that it relied on materially inaccurate information or personal biases. The weight to be accorded the psychologist' s testimony was for the court as fact-finder to determine, State v. Muscari, __ Vt. __, __, 807 A.2d 407, 415 (2002), as was the suitability of a probationary sentence. Nor does the record support the claim that the court focused exclusively upon the punitive aspect of sentencing. As noted, the court properly

balanced its findings concerning the nature and circumstances of the offense against the mitigating evidence in determining a sentence. 13 V.S.A. § 7030. Accordingly, we find no error.

Finally, defendant contends the court erroneously failed to hold a hearing and make specific findings as to the reliability of information in the PSI to which defendant had objected. See V.R.Cr.P. 32(c)(4) (" When a defendant objects to factual information submitted to the court or otherwise taken into account by the court in connection with sentencing, the court shall not consider such information unless, after hearing, the court makes a specific finding as to each fact objected to that the fact has been shown to be reliable by a preponderance of the evidence, including reliable hearsay."). Specifically, defendant contends the court failed to respond to its objection that the PSI had omitted information from the clinical psychologist' s report indicating that defendant was a low risk to reoffend and an excellent candidate for community treatment. The record reveals, however, that the PSI expressly referred the trial court to the report in question, and the court stated at the sentencing hearing that it had carefully read the report. Therefore, any omission of findings in this regard was plainly harmless. Defendant also contends the court failed to make findings concerning his objections to the PSI' s sentencing recommendation. The objections merely stated that the recommendation ignored the experts' evaluations. The record, as noted, reveals that the PSI referred to the psychologist' s report, and that the court considered, and rejected, the experts' recommendations. Accordingly, we discern no error.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned

Footnote

* Defendant’s reliance on the decisions in United States v. Crowell, 60 F.3d 199 (5th Cir. 1995) and Commonwealth v. Martin, 351 A.2d 650 (Pa. 1976) is misplaced. In Crowell, the court held that the district court had violated the federal rule prohibiting the trial court from participating in plea bargain discussions. 60 F.3d at 204. Our rule, as noted, does not contain such a prohibition. In Martin, the court found error where several sentencing courts had apparently determined to impose a specific identical sentence on several defendants, and made virtually no inquiry into the circumstances of the crimes or the defendants’ backgrounds at the sentencing hearings. 351 A.2d at 653-54. The facts here are not remotely similar.