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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-256

MARCH TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
John Barbera	}	
	}	DOCKET NO. 1496-10-01 WmCr

Trial Judge: Karen R. Carroll

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

Defendant appeals from two district court court orders, the first denying a motion to amend his sentencing mittimus to obtain credit for time served, and the second denying a motion for reconsideration of sentence. We affirm.

The material facts may be briefly summarized. In June 2000, defendant was convicted of second-degree aggravated domestic assault and sentenced to a term of two-to-four years to be served on pre-approved furlough. On September 7, 2001, defendant=s furlough was revoked and he was incarcerated. On October 17,

2001, defendant was arraigned on a charge of sexual assault on a minor. The offense had occurred the preceding August, while defendant was still on furlough. Although still incarcerated on the domestic assault, defendant was detained on the new charge. In October 2002, he was convicted of the sexual assault.

On February 6, 2003, defendant completed his sentence on the prior domestic assault conviction, but remained in jail under the detainer. About a month later, on March 10, 2003, defendant was sentenced to fifteen-to-twenty years to serve for the sexual assault. In February 2005, this Court affirmed the judgment on appeal. State v. Barbera, 2005 VT 13.

In July 2004, while the appeal was pending, defendant filed a pro se motion to amend his mittimus, arguing that he was entitled to credit for time served from October 17, 2001, when he was detained on the sexual assault charge, until his sentencing in March 2003. The court assigned the Prisoners= Rights Office to represent defendant. Later, in May 2005, following this Court=s decision affirming the sexual assault conviction, defendant filed a pro se motion for reconsideration of sentence. After a hearing in June 2005, the court denied the motion to reconsider sentence, but granted the motion to amend the mittimus to reflect credit for time served between February 6, 2003 (when defendant completed his sentence on the domestic assault) and March 10, 2003 (when defendant was sentenced on the sexual assault). This appeal followed.

Defendant contends the court erred in denying his request for credit for the sixteen months he served between his detainer (in October 2001) and sentencing (in March 2003) on the sexual assault. Defendant=s argument runs as follows: The trial court was required to specify whether the sexual-assault sentence was to be served concurrent with, or consecutive to, his prior sentence on the domestic assault; absent such a specification the sentences must be presumed to be concurrent; accordingly, defendant was entitled to double credit against both sentences. See State v. Blondin, 164 Vt. 55, 61 (1995) (observing that Ain determining whether to give double credit for period of incarceration between imposition of sentences, [the] crucial factor is whether sentences are to be served concurrently or consecutively@ (internal quotations omitted)); State v Kasper, 137 Vt. 134, 213 (1979) (sentencing statutes embody common law under which sentences are presumed to run concurrently unless expressly ordered otherwise). Defendant=s argument fails, however, because defendant was not serving a sentence on the domestic assault when the trial court imposed sentence

on the sexual assault; defendant had completed his sentence on the former in February 2003, and was being held on detainer for the latter when he was sentenced in March 2003. The court could not make the sexual-assault sentence concurrent with or consecutive to a sentence that had been completed.* Thus, the court=s failure to specify whether the sexual assault sentence was to be consecutive or concurrent could not trigger the common-law presumption. While this result may partly reflect the Avagaries of timing,@ as defendant asserts, there is no basis here to conclude that it was unfairly contrived or that defendant was treated differently from any other inmate whose prior term was completed at the time of sentencing.

Defendant was not entitled to double credit for the same time spent while incarcerated for the domestic assault and on detainer for the sexual assault. See Blondin. 164 Vt.at 56-57 (declining to award double credit to defendant for time spent in jail on pretrial detention for new charges and for parole violation of prior underlying sentence). He was, however, entitledCas the trial court correctly ruledCto credit for the thirty-three days that he was held on detainer between the expiration of the domestic-assault sentence, on February 6, 2003, and the date of sentencing for the sexual assault, on March 10, 2003. We thus discern no basis to disturb the court=s ruling.

In a separate pro se brief, defendant also contends the court erroneously denied his motion for reconsideration of sentence. The trial court has wide discretion to modify a sentence if it determines, based on the same circumstances that were present at the original sentencing and upon further reflection, that the sentence was illegal or unjust. State v. Hance, 157 Vt. 222, 226 (1991). The record here discloses that the court imposed the sentence of fifteen-to-twenty years to serve that the Department of Corrections had recommended. The sentence was within the lawful range for the offense of sexual assault on a minor under the age of sixteen. See 13 V.S.A. ' 3252(a)(3). Defendant argues, nevertheless, that the court was required to impose a lower minimum because, if he were to earn the full amount of automatic and earned reduction of term under the version of 28 V.S.A. ' 811 applicable to his sentence, his maximum could be less than his minimum sentence. As the trial court observed, however, the argument was contingent on defendant=s receipt of full credit and thus speculative, at best. Furthermore, while the statute has been amended a number of times, the version applicable to defendant=s sentence anticipated this situation by specifically providing that

A[i]n no case shall the reductions to an inmate=s sentence as provided for in this section result in the inmate=s maximum sentence being less than the inmate=s minimum sentence.@ 1999, No. 127 (Adj. Sess.), ' 1 (former ' 811(g) of Title 28). Contrary to defendant=s claim, nothing in these circumstances violates defendant=s right to become eligible for parole after he has served the minimum term of sentence. 28 V.S.A. ' 501(2). Accordingly, we find no error.

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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Brian L. Burgess, Associate Justice

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[*] Defendant relies on 13 V.S.A. ' 7032(a), which provides that, where a person has been sentenced to a term of imprisonment and Ais convicted of another offense punishable by imprisonment before he has been discharged from the former sentence or sentences, the court may sentence him to an additional term of imprisonment and shall specify whether this additional term shall be served concurrent with or consecutive to the @

prior sentence or sentences. We do not read this provision to be applicable, however, where the prior sentence has expired prior to sentencing on the subsequent offense.