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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-502

SEPTEMBER TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No.1, Windham Circuit
Vito R. Russo	}	
	}	DOCKET NO. 1619-11-02 WmCr

Trial Judge: Karen R. Carroll

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

Defendant appeals the district court=s denial of his request for sentence reconsideration. We affirm.

Defendant was convicted of aggravated assault, driving while intoxicated, unlawful trespass, driving with a suspended license, and four counts of violation of conditions of release. The district court imposed an aggregate sentence of 15 to 21 years. The conviction for aggravated assault accounted for 12 to 15 years of the sentence. Defendant appealed his conviction and sentence to this Court; we affirmed. State v. Russo,

Defendant then filed a pro se motion for sentence reconsideration in the district court, and requested that counsel be appointed. In his pro se motion, defendant asserted a conflict of interest with his public defender at trial which caused defendant to be sentenced unfairly. Defendant further argued that the 21-year sentence was excessive. Defendant asked that the district court not limit its consideration of his motion to the issues raised in his pro se filing, but allow appointed counsel to develop additional bases for challenging the sentence.

The district court denied defendant=s motion without appointing counsel, but then appointed counsel upon defendant=s motion for reconsideration of the ruling. Two days before the hearing, defendant moved for a continuance, asserting that additional time was needed to secure the testimony of an expert on sentencing guidelines. The district court denied the request. At the hearing, defendant argued that the court should reconsider the sentence in light of the fact that the statewide average sentence for aggravated assault first offense ranged from 2 to 6 years. Defendant further argued that the court should reconsider the sentence in light of the mitigating factors acknowledged by the court at the original sentencing hearing. At times during the hearing, defendant sought to interject argument separately from his attorney. With respect to the violations of conditions of release, defendant attempted to tell the court that they were based on the same conduct as another count of unlawful trespass that had been dismissed with prejudice. The court stated that the issue was not relevant to the motion for reconsideration. Defendant had asked to speak at the close of the hearing but the court denied this request.

The court denied the motion for reconsideration, concluding that any mitigating factors affecting defendant=s sentence were outweighed by the concern that defendant needed to be incapacitated to protect the public. The trial court further concluded that the sentencing information of other individuals was irrelevant to an assessment of defendant=s sentence because defendant presented no information about the underlying facts in those cases.

On appeal, defendant argues that the district court erred in denying a continuance to present expert

testimony regarding sentencing guidelines and in disallowing him to speak at the hearing. Generally, where a sentence is within the statutory range, the district court=s decision will stand unless the court failed to exercise its discretion or exercised it for untenable purposes or to an unreasonable degree. State v. Turner, 150 Vt. 72, 75 (1988); see also 13 V.S.A. ' 1024(b) (setting maximum sentence for aggravated assault at 15 years).

Regarding the denial of the continuance, we review the district court=s decision for an abuse of discretion. State v. Patch, 145 Vt. 344, 353 (1985). Further, the district court is afforded discretion in determining which factors are relevant to sentence reconsideration. State v. Dean, 148 Vt. 510, 513 (1987). Here, the district court had already granted two continuances of the hearing date. Further, the substantive basis for the district court=s denial of the continuance was its conclusion that expert testimony regarding sentencing guidelines was not relevant to the review of defendant=s sentence, as there are no sentencing guidelines in Vermont and defendant=s sentence fell within the statutory range. We find no abuse of discretion.

Defendant further argues that the district court violated his constitutional rights when it did not permit him to speak on his own behalf at the hearing. Specifically, defendant relies on Chapter 1, Article 10 of the Vermont Constitution, which provides A[t]hat in all prosecution for criminal offenses, a person hath a right to be heard by oneself and by counsel.@ Defendant also cites V.R.Cr.P. 32(c)(4), which provides that prior to sentencing, Athe court shall afford the state, the defendant and his attorney an opportunity to comment upon any and all information submitted to the court for sentencing.@ Finally, defendant points to V.R.Cr.P. 32(a)(1)(C), which provides that during sentencing the court must Aaddress the defendant personally and ask him if he wishes to make a statement on his own behalf and to present any information relevant to sentencing.@ There is no authority for the proposition that a defendant has an equivalent right to be heard at a hearing on sentence reconsideration. Because sentence reconsideration is a creature of statute and a procedure in which the district court is accorded wide discretion, it should not be seen as an extension of the criminal trial or original sentencing to which such rights apply. See Dean, 148 Vt. at 513-14 (holding that Sixth Amendment rights did not apply to proceedings on motion for reconsideration of sentence).

Defendant makes a number of additional arguments in a pro se reply brief. First, defendant generally

asserts that a jury, rather than the district court, must decide whether aggravating or mitigating factors are present. Defendant does not indicate how this rule would apply to the facts of his case. Presumably, defendant refers to the United States Supreme Court=s decision in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which held that A[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.@ Apprendi was decided on June 26, 2000; accordingly, it was available to be argued, if applicable, in defendant=s direct appeal, which was filed on July 29, 2003. The issue is waived. Defendant also argues that the district court should not have relied on the presentence investigation report because it contained inaccurate and false information. Defendant attacked the PSI report on other grounds in his direct appeal. See Russo, 2004 VT 103, && 25-26. To the extent other arguments regarding the PSI report were not raised at that time, they are waived. Waiver also prevents us from considering defendant=s argument that his sentence is disproportionate to his crime in violation of the Eighth Amendment. Defendant argues that the condition of release requiring him not to have contact with the victim Astemmed from@ a trespass charge that was later dismissed. Therefore, according to defendant, he should not have been sentenced for four violations of his conditions of release. This argument goes to defendant=s underlying convictions rather than his sentence, and is not properly considered in the context of a motion to reconsider sentence. For the same reason, we will not consider defendant=s argument that there was insufficient evidence to support his assault conviction.

In short, sentence reconsideration under Rule 35 is a limited, statutory remedy in which the district court is granted wide discretion. It provides an opportunity to ask the court to reconsider the fairness of the sentence, not to pose a collateral attack on the underlying conviction or to raise arguments related to sentencing that could have been raised in a direct appeal but were waived.

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