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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-116

OCTOBER TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont, Unit No. 2, Chittenden Circuit
	}	
Robert P. Jones	}	DOCKET NO. 2981/2982-6-03 Cncr
		Trial Judge: Michael S. Kupersmith

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

Defendant appeals the district court's denial of his motion to reconsider and reduce his sentence. We affirm.

Following a jury trial, defendant was found guilty of second degree murder and aggravated domestic assault for the death of his domestic partner. He was also adjudicated a habitual offender. At sentencing, defendant stated that he was sorry for the victim's death, but claimed that it was not his fault and the result of an accident. The district court recounted defendant's criminal history, including violence against the victim and concluded that it was important to protect others from defendant. The court sentenced defendant to a term of twenty years to life on the second-degree murder conviction and imposed a concurrent sentence of fifty years to life on the aggravated assault/habitual offender conviction. This Court affirmed defendant's conviction on direct appeal. State v. Jones, 2008 VT 67, 184 Vt. 150.

Thereafter, defendant filed a pro se motion for sentence reconsideration. Defendant's motion expressed that he was sorry for his "actions that contributed to [the victim's] death," and felt that a reduction in his sentence was warranted so that he could be there for his children and his aging mother. Defendant also expressed a desire to participate in rehabilitative programming. Defendant was assigned counsel, and counsel filed a supplemental motion raising the claim that aggravating factors should have been considered by the jury and not the sentencing judge.

The trial court denied the legal claim in the supplemental motion and ordered a hearing on the issues presented in defendant's pro se motion at which defendant could participate by telephone. The court explained: "If it appears from the evidence received at the hearing that there may [be] a substantive basis for modifying Defendant's sentence, the Court will order that he be transported to Vermont for further proceedings." At the hearing, defendant was represented and appeared by telephone. The court offered defendant an opportunity to explain why the court should modify or reduce his sentence. Defendant stated that he wanted to be present for the hearing and claimed that he had "some things that [he] wanted to say that [he]

didn't get to say in the beginning." He claimed that he was sorry for the victim's death, but maintained that he did not kill her. The court denied defendant's motion.

The purpose of a sentence reconsideration is to allow the district court to "consider anew the circumstances and factors present at the time of the original sentencing." State v. King, 2007 VT 124, ¶ 6, 183 Vt. 539 (mem.) (quotation omitted). The trial court has broad discretion in determining what factors to consider when presented with such a motion, and on appeal we review the denial of a motion for sentence reconsideration for an abuse of that discretion. Id. The court may in its discretion dispose of a motion without a hearing where there is no real dispute as to any relevant fact. State v. Allen, 145 Vt. 393, 395 (1985).

On appeal, defendant claims that he was entitled to be physically present at the sentence reconsideration hearing and that the court abused its discretion in denying his request. We conclude that defendant's presence was not required at the hearing and the court did not err in denying defendant's request in this case.

We find no merit to defendant's argument that sentence reconsideration is part of sentence imposition and therefore under Vermont Rule of Criminal Procedure 43(a) defendant's presence is required. V.R.Cr.P. 43(a) (requiring defendant's presence "at the imposition of sentence"); cf. State v. Dean, 148 Vt. 510, 513-14 (1987) (although sentencing is part of trial for Sixth Amendment purposes, sentence reconsideration is not part of trial because it is more akin to an appeal). Defendant makes two statutory construction arguments to demonstrate that Rule 43 requires a defendant's presence at a sentence reconsideration hearing: first, Rule 43 sets out specific situations where defendant's presence is not required and does not exempt sentence reconsideration; and second, the analogous Federal Rule of Criminal Procedure 43 was amended to specifically state that a defendant's presence is not required at a proceeding for sentence correction, but Vermont's rule was not so amended.

We find these arguments unpersuasive. At the outset, it is important to reiterate that sentence reconsideration is not equivalent to sentence imposition, but is treated like a motion, and the procedures are governed by Rule 47 concerning motions. See V.R.Cr.P. 35(d) ("A request for relief under this rule shall be by motion, and the procedure shall be governed by Rule 47."). Under Rule 47, defendant's presence is not required at a hearing; indeed we have held that the trial court may dispense with a motion for reconsideration without any hearing. V.R.Cr.P. 47(b)(2) (court may dispose of a motion without argument); Allen, 145 Vt. at 395. Thus, the fact that Rule 43 does not specifically exempt defendant's presence from a sentence reconsideration hearing is irrelevant since these proceedings are governed by Rule 47. Next, we do not find the Federal amendment indicative of any intent in the Vermont rule given the differences between the criminal rules on sentence reconsideration. Most importantly, Federal Rule of Criminal Procedure 35 does not specify how procedures for sentence reconsideration will be governed, whereas, as explained above, our own Rule 35 specifically states that procedures are governed by Rule 47, the motions rule.

Defendant's attempt to distinguish his situation from Allen is unavailing. Defendant claims that in Allen no hearing was required because there was no factual dispute in that case and the defendant had testified at the original sentencing. In this case, defendant claims that he wanted to testify about new facts that he never had an opportunity to tell the court. There is no meaningful difference between Allen and this case. Like in Allen, defendant in this case spoke at his original sentencing hearing. At that time, defendant was offered an opportunity to provide

additional evidence, but declined. Further, the trial court afforded defendant an adequate opportunity to explain his position by holding a hearing and allowing defendant to appear by telephone. Defendant failed to raise any new facts or to explain why he was prejudiced by presenting his case over the telephone rather than in person.

Defendant's final claim is that the court exercised its discretion on impermissible factors because the court stated "the State of Vermont is millions of dollars in the hole and we're not spending money unnecessarily." Reading the court's decision in its entirety, it is evident that the court denied defendant's request to be transported because defendant failed to explain what he could offer in person that could not be offered over the telephone. The court's remark simply stated the obvious—that it did not want to spend money to transport defendant to the hearing unless there was a reason. Given that defendant failed to provide such a reason, the court was not obligated to transport defendant to the hearing, and properly exercised its discretion in denying defendant's request.

Affirmed.

BY THE COURT:

Raul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice