ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-235

JANUARY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
	}	
Stephen Bain	}	DOCKET NO. 897/915-7-03 Wmcr
		Trial Judge: Karen R. Carroll

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

Defendant appeals from the denial of his various post-trial motions, arguing that the trial court abused its discretion. We affirm.

Defendant was convicted of possessing stolen property and possession of marijuana. Based on several prior felony convictions, he was also adjudicated a habitual offender. Defendant appealed to this Court challenging, among other things, the police search of his home which uncovered the stolen property and marijuana. We concluded that the search was properly conducted and affirmed. State v. Bain, 2009 VT 34, ___ Vt. ___. A month later, defendant filed five motions. The crux of defendant's motions was his allegation that police conducted a warrantless search of his property on May 22, 2003, the day before a warrant to search his house was issued. Defendant asserted that the state's attorney's office and the police department then colluded to conceal this fact by refusing to produce certain evidence, including police logs. Based on the assumption that an illegal search was conducted and that the State withheld evidence to conceal the warrantless search, defendant sought sentence reconsideration, a new trial, judgment of acquittal, to compel production of the police records, for return of property, and appointment of counsel. The trial court denied all of defendant's motions. Defendant appeals.

At the outset, we reject the premise of defendant's motions. In the trial court, defendant filed a motion to suppress, arguing that officers illegally searched his home before obtaining a valid search warrant. Following a hearing, the trial court found the officer's testimony credible that he did not enter defendant's home until after he obtained a warrant. Bain, 2009 VT 34, ¶¶ 3, 16. On appeal, this Court affirmed the trial court's finding that no warrantless search of defendant's home occurred. Id. ¶ 16. As for the police logs that defendant asserts the State is concealing, the record evidence demonstrates that during discovery defense counsel requested these materials and the State responded by indicating that the materials did not exist. In defendant's post-trial motion, defendant baldly asserted that "radio dispatch unit logs . . . were fraudulently misrepresented by the state as nonexistent" and that "the Sheriff's attorney has admitted in open court that [the documents] do indeed exist and in great quantity." Beyond these

allegations, defendant does not present any evidence to demonstrate that these police logs exist and contain evidence that would be exculpatory. Without more, we cannot credit defendant's allegations.

With this background in mind, we consider defendant's motions. Defendant first argues that the trial court erred in denying his request for sentence reconsideration. The purpose of sentence reconsideration under 13 V.S.A. § 7042 "is to permit the trial judge to reconsider the sentencing decision absent the heat of trial pressures and in calm reflection to determine that it is correct, fair, and serves the ends of justice." State v. Therrien, 140 Vt. 625, 627 (1982) (per curiam). The trial court has "wide discretion" in this area, and "[w]e review the denial of the motion for sentence reconsideration for abuse of discretion." State v. King, 2007 VT 124, ¶ 6, 183 Vt. 539 (mem.). Defendant essentially argues that the allegedly suppressed additional evidence would influence sentencing. The trial court stated that there was no proper basis for reconsideration. We agree that sentence reconsideration was not an appropriate means for defendant to challenge the legality of the search or to attempt to bring new evidence before the trial court. Sentence reconsideration is a "limited remedy" and is not the proper means for challenging a defendant's underlying conviction. State v. Oscarson, 2006 VT 30, ¶¶ 9, 11, 179 Vt. 442. It is also not a means to challenge issues that have already been litigated, State v. Grega, 170 Vt. 573, 575 (1999) (mem.), or to review circumstances that come about following the imposition of the sentence, State v. Platt, 158 Vt. 423, 426 (1992). Defendant argues that his motion for reconsideration of sentence should be remanded so that the same judge who originally sentenced him can consider the motion. See 13 V.S.A. § 7042. We need not address this issue because we find that there were no proper grounds for sentence reconsideration. Thus, any error was harmless. See King, 2007 VT 124, ¶ 9.

Defendant next argues that the trial court abused its discretion in denying his motion for a new trial. A motion for a new trial based on newly discovered evidence may be filed "within two years after final judgment." V.R.Cr.P. 33. "The generally accepted criteria for determining whether evidence is 'newly discovered' require that the evidence must (1) be material and discovered after the trial, (2) be truly new and not undiscovered merely through a lack of diligence, (3) give reasonable assurance that it will lead to a different result upon retrial, and (4) not be merely cumulative or of impeaching effect." State v. Sheppard, 155 Vt. 73, 75 (1990). Defendant asserts that the evidence of an illegal search is new evidence that warrants a new trial. The court found that there was no basis for a new trial because defendant did not present any newly acquired evidence. We agree. As noted above, defendant has not produced anything beyond allegations to demonstrate that new evidence exists. Defendant has also not demonstrated that this new evidence was discovered after trial and that it would, with reasonable assurance, result in a different result at trial. Therefore, the court did not abuse its discretion in denying defendant's request.

Defendant also appeals the court's denial of his motion for acquittal. A motion for acquittal must be made within ten days after the jury is discharged. V.R.Cr.P. 29(c). Defendant's motion was filed well beyond this time period and was therefore untimely. See Sheppard, 155 Vt. at 77-78 (holding that motion for a new trial in the interests of justice filed beyond ten-day period was untimely and therefore trial court lacked jurisdiction to entertain it).

Defendant also filed a motion to compel the State to disclose "all radio dispatch unit logs and/or Brady material." The trial court denied the motion, noting that there was no active proceeding. We conclude there was no abuse of discretion. As discussed above, defendant has

not demonstrated that the prosecution withheld information; therefore, there is no basis to compel the State to produce material that does not exist.

Similarly, we conclude the court properly denied defendant's motion for return of property. When there is an unlawful search, the aggrieved person "may move the court . . . for the return of the property." V.R.Cr.P. 41(e). In that this Court already concluded that the search of defendant's home was legal, Bain, 2009 VT 34, ¶ 16, there are no grounds for return of property.

Finally, we address defendant's claim that he was entitled to counsel in the trial court. Defendant filed his pro se motions on April 24, 2009. The State responded May 11, 2009. Defendant replied to the State's opposition with a memorandum received by the trial court on May 26, 2009. This reply memorandum is the first time defendant requested counsel. The court ruled on the other motions on May 26, 2009, without any mention of a request for counsel. There was no error in failing to assign counsel, in that defendant did not request any appointment initially. In any event, at the time defendant filed his motions, his appellate counsel, Allison Fulcher, was still counsel of record. According to the trial court's docket sheet, his appellate counsel did not withdraw until June 15, 2009. That defendant decided to submit filings pro se, rather than through his attorney, was his choice.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice