*In re* Thomas Olsen, No. 602-12-05 Wrcv (Eaton, J., Oct. 7, 2008)



STATE OF VERMONT
WINDSOR COUNTY, SS

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| In re Thomas Olsen | SUPERIOR COURT<br>Docket No. 602-12-05 Wrcv |

ORDER

In December 1994, Thomas Olsen was convicted of second degree murder as the result of the death of two-year-old Melissa Stephens on November 3, 1992. On February 15, 2005, Mr. Olsen was sentenced to a term of imprisonment for 30 years to life. Mr. Olsen filed a motion for a new trial, which was denied. An appeal was taken to the Vermont Supreme Court, which affirmed the conviction in 1996. Following affirmance, Mr. Olsen filed for sentence reduction, which was denied. Mr. Olsen then sought sentence reconsideration, which was denied. In 1998, a second motion for a new trial was then filed, which was also denied. Mr. Olsen then filed and twice amended the current petition for post-conviction relief.

The parties have presented this court with a proposed settlement of this post-conviction relief proceeding. Two stipulations were presented, the last being a revised stipulation on October 3, 2008. The proposed agreement calls for a resentencing of Mr. Olsen to a "split" term with a minimum of 23 years and 3 months; less than the straight sentence of 30 years-life imposed by the trial judge following Mr. Olsen's conviction. As part of the agreement, Mr. Olsen would agree to waive this and any further post-conviction relief proceedings. The acceptance of this proposal would result in Mr. Olsen's anticipated release from incarceration in 2008.

The parties assert several grounds in support of this agreement. They include:

1. That the claim for post-conviction relief is at least colorable based, in part, upon the handling of medical issues by defense counsel.
2. That the proposed settlement still represents a substantial response to the convicted crime and in line with sentences imposed in similar crimes.
3. That Mr. Olsen has been compliant with institutional rules since he was incarcerated.

4. That a split sentence, as is proposed here, has been used in cases of this magnitude on other occasions.
5. That the proposed agreement will bring finality to this matter.
6. That the sentence enhancement used by the trial judge would no longer be allowed in light of the Vermont Supreme Court decision in *State v. Provost*, 179 Vt. 337 (2005).

This Court has considered the above-arguments and the others which have been advanced. The Court has already concluded that consideration of the *Provost* issue is not appropriate here given the very clear determination that *Provost* issues can not be raised in collateral appeals. *In re FitzGerald*, 2007 VT 51. The original proposed agreement created the impression that there are *Provost* sentencing issues in this case, although at the recent hearing counsel readily conceded such was not the case. To allow consideration of this issue as one of many factors supporting acceptance of this agreement is improper since it could not be considered were it the only issue being advanced.

It can not be gainsaid that the proposed sentencing response to this crime of 23 years and 3 months, from a punishment standpoint is a substantial one. It is, however, considerably less than that found appropriate by the sentencing judge at the time of imposition and upon subsequent requests for reduction and reconsideration. Had that judge, having heard the evidence, and having considered the reduction and reconsideration requests, felt such a sentence to be the appropriate response he could have imposed it. He did not.

This Court gives little weight to Mr. Olsen's compliance with institutional rules following his incarceration. Such conduct is to be expected, although not always achieved. For purposes of sentence review or reconsideration under 13 V.S.A. §7042 the conduct of a defendant after imposition of the original sentence is not relevant. *State v. Richardson*, 161 Vt. 613 (1994); *State v. LaPine*, 148 Vt. 14 (1987). Although this is not a sentence reconsideration case, similar issues are involved as the proposed agreement calls for a resentencing of Mr. Olsen. If this Court considers Mr. Olsen's compliance with institutional rules as a factor supporting resentencing, should not every other inmate demonstrating compliance receive similar consideration? Mr. Olsen's post-conviction behavior is more properly considered in the parole process.

The form of the proposed sentence does not cause the Court concern. A split sentence in a case such as this may well be appropriate for many reasons. The decision to accept or reject the proposal does not turn on the form of sentence proposed.

There is superficial appeal to the concept that this long-litigated matter might be concluded with finality. However, the length of litigation, or its fervor, should not provide a basis for acceptance of an agreement which is not acceptable otherwise. To do so is to reward those who contest longest and hardest, who are not necessarily those who are most deserving.

Lastly, this Court is mindful of both counsels' comments as to the prospective merit of the post-conviction relief petition. This Court has not had the opportunity to hear the evidence concerning that petition. Accordingly, this Court can not determine the merit to the post-conviction claim. Suffice it to say, however, that post-conviction relief proceedings are the remedy afforded to the petitioner for the ineffective assistance claims he is making. In the event they are found to be meritorious appropriate relief will be granted.

This Court can not be called upon to weigh the merits of the post-conviction relief claims when it has not heard any of the evidence. The parties would be free to stipulate to a set of facts for submission for the Court's determination of the ineffective assistance issue but they have not done so thus far. The proposed stipulation contains nothing upon which this Court might find ineffective assistance of counsel. In the absence of a determination of ineffective assistance, in the Court's view this is simply a sentence reconsideration in a different form and well outside the prescribed 90 day jurisdictional time frame for such matters. 13 V.S.A. §7042; V.R.Cr.P. 35; *United States v. Addonizio*, 442 U.S. 178 (1979).

It is not necessary to address the parties' authority to negotiate a resolution of the post-conviction relief claim on terms which contemplate a resentencing. Such practice has been followed in numerous other cases, although specific authority to do so has not been found. In this case, however, the parties have not stipulated to a set of facts upon which the court might consider the ineffective assistance claims. On the contrary, the respondent continues to contest the ineffective assistance claims. Regardless of the authority to negotiate a resolution, approval of the Court is required. This Court does not approve this agreement, in part, because it has no way to evaluate the merit of this settlement without having heard the ineffective assistance evidence.

Under these circumstances, it is appropriate that this case proceed to hearing on the post-conviction relief petition. In the event relief is granted, counsel will have the opportunity at that time to re-assess their respective positions relative to the underlying charge. In the alternative, the parties may stipulate to facts upon which this Court may assess the ineffective assistance claims. Should this Court find that ineffective assistance of counsel was rendered, the matter would be remanded to the District Court, where the parties could proceed with the prosecution or negotiate a resolution, subject to approval of the District Court Judge.

For these reasons, the Court does not accept the proposed settlement agreement. Counsel are directed to submit a proposed discovery stipulation, including a hearing-readiness date, within 30 days.

Dated at Woodstock this 7th day of October, 2008.

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Harold E. Eaton, Jr.
Superior Court Judge