ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-116

JANUARY TERM, 2018

State of Vermont v. Claude Harrington	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Criminal Division
	}	
	}	
	}	DOCKET NO. 1286-4-16 Cncr
		Trial Judge: Nancy J. Waples

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

Defendant appeals his sentence for sexual assault. On appeal, defendant argues that the court erred in relying on hearsay in setting his sentence and that some of the court's findings were not supported by the evidence. We affirm.

Defendant was charged with sexual assault, sexual assault on a minor, and two counts of lewd and lascivious conduct with a child. He entered an agreement with the State whereby he pleaded guilty to sexual assault and the State dismissed the other charges. At the change-of-plea hearing, he acknowledged that he was over eighteen, and that without consent he put his mouth on the penis of the victim, who was under thirteen. The charge had a minimum term of three years and a maximum of life. See 13 V.S.A. § 3252(f)(1) (setting three-year minimum sentence and maximum term of life and directing that sentencing occur in accordance with § 3271); id. § 3271(b) (requiring a maximum sentence of "imprisonment for life"). The plea agreement contained the maximum life sentence, and the State agreed to argue for a cap of fifteen years to serve for the minimum. The court ordered a presentence investigation (PSI) and a psychosexual evaluation. The PSI was submitted to the trial court and to the defendant in February 2017. In response, defendant stated that he had "no objections to any statement contained in the PSI." The PSI relates information about defendant's past behavior, including incidents related in a 1989 psychosexual evaluation of defendant and a history of Department for Children and Families (DCF) investigations. The PSI states that the author met with defendant, who confirmed the information. The PSI also relates defendant's version of the events leading to the charge in this case and describes how defendant groomed the victim. It states that defendant stated he knew his risk factors but chose to ignore them.

The court held a contested sentencing hearing. At sentencing, defendant argued for a four-year minimum sentence. As mitigating factors, defendant asserted that the offense occurred during a difficult time in his life, that he had been compliant in the past when supervised, that he was remorseful for his conduct, and that his advanced age made incarceration difficult. He claimed that he had sufficient support and would be supervised sufficiently to protect the public. He presented testimony of a forensic psychologist, who had completed an evaluation of defendant following a referral by defendant's attorney. The report, which was admitted, opined that defendant could receive treatment while incarcerated and then be released into the community with "a very strict supervision schedule." The State briefly outlined defendant's prior history, stating that defendant had a prior conviction of sexual assault on a child from 1989. The State argued that there were a number of aggravating factors, including defendant's repeated behavior, defendant's betrayal of a relationship of trust with the victim and his mother, and the harm caused to the victim. Based on the PSI, the State argued for a minimum sentence of fifteen years. Defendant argued for a four-year minimum sentence.

The court imposed a sentence of ten years to life, explaining that the sentence was meant to reflect the seriousness of the crime, provide punishment, afford deterrence, and provide defendant with proper treatment. The court noted that defendant had sought out "vulnerable victims" and gained their trust. The court also explained that defendant had received "counseling in sex offender treatment on other occasions" but had still relapsed. The court balanced against that the mitigating facts highlighted by defendant that defendant had accepted responsibility for his conduct, and had committed the conduct during a difficult time in his life, and defendant's age. Defendant appeals.

In crafting an appropriate sentence, the trial court "has broad discretion." State v. Ingerson, 2004 VT 36, ¶ 10, 176 Vt. 428. If a sentence falls within the statutory limits, is not based on improper or inaccurate information, and is not the result of personal animus or bias, it will be affirmed on appeal. Id. In crafting a sentence, the court must consider "the history and character of the defendant, the need for treatment, and the risk [the defendant poses to] self, others, and the community at large." 13 V.S.A. § 7030(a). A sentence may not be based on improper information, but the court can consider more than the facts of the particular crime. Ingerson, 2004 VT 36, ¶ 10.

On appeal, defendant first argues that the court improperly relied on unreliable hearsay to support its sentencing decision. Defendant asserts that the court's reference to defendant's "past cases" and to defendant's pattern of seeking out vulnerable children as victims indicated that the court was relying on facts that were not proven at sentencing. He asserts that there was no evidence of past "cases" submitted at sentencing and alleges that the court must have been relying on hearsay or double hearsay from an unadmitted evaluation of defendant from 1989 and the State's psychosexual evaluation that was not admitted at the sentencing hearing. Defendant relies on State v. Williams, 137 Vt. 360, 364 (1979), for the proposition that the trial judge at sentencing may not rely on mere assertions of criminal activity in support of a sentencing decision.

As an initial matter, it is important to note that Williams was subsequently limited by this Court in State v. Ramsay, 146 Vt. 70 (1985), which clarified that existing authority did not support the Williams "broad exclusionary rule" precluding the use of criminal activity not validated by a judgment of conviction. Id. at 80. Ramsay explained that at sentencing the court can rely on evidence of criminal behavior, even if not supported by a conviction, if it is "based on reliable factual information, with full disclosure sufficiently in advance of sentencing to allow an adequate opportunity for rebuttal." Id. at 81. The process for disclosing and objecting to information is set forth in Vermont Rule of Criminal Procedure 32, which states that the defendant must receive all information that will be considered at sentencing, including the PSI. V.R.Cr.P. 32(c)(3). Defendant then has an opportunity to object in writing to facts contained in the PSI. V.R.Cr.P. 32(c)(4)(A). Where defendant does not object as required by Rule 32, he fails to preserve the issue for appeal. State v. Roy, 169 Vt. 611, 612 (1999) (mem.).

Defendant here failed to preserve his objections to the facts considered by the court at sentencing. Defendant received the PSI in advance of sentencing and all of the facts now challenged by defendant were contained in the PSI, including the recitation of the 1989 report and defendant's history of behavior involving children. In response, defendant reported that he had no objection to "any statement contained in the PSI." Having failed to object to those facts below, defendant cannot now challenge the reliability of those facts on appeal.

Next, defendant claims that some of the court's findings are not supported by the evidence. First, defendant claims that the evidence does not support the court's assertion that defendant "has relapsed multiple times over the years" and that counseling had not worked because defendant had reoffended after prior treatment. We conclude there was no error. The psychosexual evaluation commissioned by defendant and admitted at sentencing recounted that defendant had previously received sex-offender treatment. The conduct supporting this conviction is sufficient to demonstrate that there was a relapse following this treatment. In addition, the PSI indicated that defendant had received treatment and recounted how defendant engaged in sexual conduct with children after that date. This is sufficient to support the court's assertion that defendant relapsed following treatment.

Defendant also asserts that the evidence does not support two additional statements made by the court. First, the court stated that defendant's case was "typical" of people with troubled lives. Defendant claims that this generalization lacked a factual basis. Second, in considering defendant's age, the court commented that with a ten-year minimum defendant would be eighty if released on furlough and at that point would not be a threat to the community. Defendant argues that there was no evidence to show that he would be less of a threat after ten years versus the four years he sought. Defendant fails to demonstrate how he was prejudiced by either statement insofar as the statements were made in relation to the court's consideration of mitigating factors. As to defendant's troubled life, the court was recounting the mitigating factors in its sentence and explained that defendant had committed the offense during a difficult time in his life, something that was argued for by his counsel. There is no demonstration that the court's view of this as

typical prejudiced defendant. Similarly, as urged by defendant at sentencing, the court considered defendant's advanced age as a mitigating factor. The court made it clear that it would have imposed a longer sentence if defendant had been younger. The court was within its discretion in balancing the need to protect the public against defendant's age and determining that in ten years defendant would be less of a threat to the public. See State v. Scott, 2013 VT 103, ¶ 21, 195 Vt. 330 (emphasizing court's broad discretion at sentencing to craft sentence "that is both appropriate to the crime and consistent with the purposes of sentencing").

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice