

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-284

MARCH TERM, 2020

State of Vermont v. Ernest Phillips*	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 430-4-16 Wncr
		Trial Judge: Mary L. Morrissey

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

Defendant pleaded guilty to two counts of prohibited acts. On appeal, he argues that the court failed to make the necessary findings to support its sentencing decision, specifically, the eight-year term of probation it imposed. We affirm.

Defendant is a former dance instructor. He was originally charged with four counts of sexual assault and two counts of sexual exploitation of a minor based on allegations that he had sexual relationships with two minor dance students. Eventually, the parties reached an agreement whereby defendant would plead guilty to two counts of prohibited acts involving open and gross lewdness. The factual basis put forward at the change-of-plea hearing was that defendant engaged in open and gross lewdness by exposing his genitals to both victims. Defendant admitted that he had done so, that his conduct had a sexual aspect to it, and that his behavior was offensive and wrong.

A sentencing hearing was held in June 2019. A presentence investigation report (PSI) was submitted into evidence as was a deposition transcript of one of the victims. In the deposition, the victim recounted in detail her sexual relationship with defendant. This same victim also testified, as did the author of the PSI. The PSI author noted that defendant took minimal responsibility for his actions and that his “distorted account of the offense could prohibit his ability to participate meaningfully in group-oriented cognitive behavioral therapy.” Defendant presented witnesses and other evidence on his behalf.

The maximum sentence for each count was one year. As relevant here, defendant argued for no more than four years of probation; the State argued for no less than five years of probation. The court imposed an overall sentence of one-to-two years, all suspended, but 120 days to serve, half of which would be on furlough work crew. It imposed an eight-year term of probation and included special conditions of probation designed to protect the public’s safety, including prohibiting defendant from being alone with children under eighteen unless certain safeguards were met. The court noted that defendant could petition the court to be discharged from probation after five years if he was in full compliance with his probation conditions, but the presumption would be an eight-year term.

The court explained the basis of its decision on the record. It recounted the nature of the charges against defendant, including the factual basis for the charges admitted by defendant. It found that defendant painted a very different picture of what had occurred with the victims in the PSI. The court characterized defendant's version of events as highly unlikely and it expressed concern that he was minimizing his offense behavior. The doctor who conducted the psychosexual evaluation of defendant also found that defendant was minimizing his offense behavior. Even accepting defendant's version of events as true, the court found that his behavior still represented an incredible breach of trust toward the victims, their families, and the community. Defendant had been entrusted with ensuring the victims' safety and well-being but, instead, he engaged in inappropriate and concerning sexual behavior with the victims in very private settings. The court noted that defendant had a compelling personal history and he had support from friends, family, and community members. His prior criminal record was minimal. Nonetheless, the court remained concerned about defendant's ability to be forthcoming about the nature of the charges going forward. It found that in July 2017, when applying for a private-investigator license, defendant made plainly inaccurate statements about this case. Defendant indicated that the case against him was closed and that he had been vindicated. In fact, the charges against him were still pending.

The court discussed defendant's need for treatment, identifying risk factors that increased his risk to reoffend, including minimization of his offense behavior, espousing an attitude that supported sexual offending, poor sexual-risk-management skills, and others. The court found that defendant would benefit from sex-offender treatment and that such treatment was necessary to protect the community. It found a need for punishment and general and specific deterrence. It explained that the sentence needed to show that there were consequences for violating appropriate boundaries and abusing positions of trust. Defendant also needed to understand that he could not engage in this type of conduct going forward. The community must also be protected, and the court found that counseling and probation conditions would help hold defendant accountable for his offense behavior. There was also a need for rehabilitation, as defendant had struggled with mental health issues in the past and counseling had had a positive impact.

The court expressed concern that a straight to-serve sentence would mean that defendant would be done after two years. He was not required to be on the sex-offender registry, and the court found that the only protection for the community, in some ways, was placing defendant on probation. That would be the only notice that others would have about defendant's convictions. The court specifically found that it was not in defendant's or the community's best interests to end supervision of defendant after two years. It deemed "a probative sentence . . . appropriate to ensure public safety and rehabilitation." The court determined that the sentence must also have a to-serve component as punishment and deterrence. Given that the maximum sentence for each crime was one year, the court explained that it had done its best to structure a sentence that took into account public safety, rehabilitation, deterrence, and punishment. It thus imposed an eight-year term of probation and the aggregate sentence set forth above. It imposed special conditions of probation, including a condition designed to ensure "that other children [would] not be subjected to the similar types of activities that [the victims here] were" as well as sex-offender and mental-health screening and counseling. This appeal followed.

On appeal, defendant cites 28 V.S.A. § 205(a)(2), which states that "[t]he term of probation for misdemeanors shall be for a specific term not to exceed two years unless the court, in its sole discretion, specifically finds that the interests of justice require a longer or an indefinite period of probation." Defendant argues that the court failed to sufficiently justify its imposition of an eight-year term of probation here and he contends that the record does not support such a term.

We find no error, plain or otherwise. The trial court has discretion in imposing its sentence, including discretion in determining the length of probation. State v. Jones, 2019 VT 3, ¶ 19 (recognizing trial court’s “broad discretion” at sentencing (citation omitted)). In determining an appropriate sentence, the court may “consider a broad range of relevant information including the particular facts of the offense, even if such facts are not explicitly an element of the charge.” State v. Allen, 2010 VT 47, ¶ 7, 188 Vt. 559 (citing State v. Thompson, 150 Vt. 640, 645 (1989) (holding that court could consider defendant’s use of force in sexual assault, although not element of offense, “because it shed light on the nature of the assault and defendant’s proclivities, and therefore assisted the judge in determining an appropriate sentence”)). “[W]e will affirm a sentence on appeal if it falls within statutory limits and it was not derived from the court’s reliance on improper or inaccurate information.” Id. ¶ 14 (citation omitted)). We have noted that “[w]hile the court should ground its decision on legitimate goals of criminal justice, including such purposes as punishment, prevention, rehabilitation, and deterrence, the court is not obligated to explicitly address each factor.” Id. (citation omitted) (quotation omitted).

The court adequately explained the basis of its sentence here. As reflected above, it was concerned by defendant’s minimization of the offenses and his misrepresentation of the criminal case against him. It wanted to protect the community from defendant and concluded that probation was, in some ways, the only way to do so. It found that probation would ensure that the community had notice about defendant’s convictions, which was important given defendant’s minimization behavior and the fact that he was not required to register as a sexual offender. The terms of probation were designed to protect the community and to further defendant’s rehabilitation. The court found that the ending supervision of defendant after two years “was not in the community’s best interests” or “in [defendant’s] best interests.” Its findings show why it concluded that a longer term of probation served the interests of justice. The court also provided defendant with the option of seeking an earlier discharge if he was in compliance with the terms of his probation. The court did not need to specifically justify why it chose eight years of probation rather than five, seven, or nine, just as we do not require such justification for other types of sentences. The sentence here was within the statutory range and consistent with 13 V.S.A. § 205(a)(2). Defendant’s belief that his behavior warranted a shorter term of probation does not demonstrate an abuse of discretion.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice