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. 2019-313

OCTOBER TERM, 2020

State of Vermont v. Christian James*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 981-10-17 Bncr
		Trial Judge: William D. Cohen

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

Defendant appeals the trial court's denial of his motion to reconsider the sentence it imposed for his conviction of driving under the influence of alcohol (DUI) with a fatality resulting. We affirm.

The following facts are drawn from the charging affidavits submitted by the State and are undisputed except where otherwise noted. One early morning in September 2017, defendant was driving home from a bar on Route 7A in Manchester when his Jeep crossed the center line and struck a vehicle being driven by the victim in a head-on collision. The victim died at the scene. Defendant sustained severe injuries and was in a coma for three days. He had no memory of the crash. Defendant's Jeep had an event data recorder, which indicated that defendant was traveling at about seventy miles per hour in a forty-mile-per-hour zone and did not apply the brakes before the crash. Based on evidence at the scene, an accident reconstructionist determined that the victim's vehicle was traveling less than one mile per hour at the time of impact, indicating that the vehicle was likely stopped or slowing to a stop. The accident reconstructionist interpreted this to mean that the victim had observed a hazard in his lane and tried to stop or slow his vehicle in an attempt to avoid collision. Defendant was found to have a blood alcohol content of 0.239%. He was charged with DUI, operating while over the legal limit, and grossly negligent operation of a motor vehicle, each enhanced by the fatality.

Defendant eventually agreed to plead guilty to one count of DUI-1, fatality resulting. The statute requires that a person convicted of this offense be sentenced to at least one year, and up to fifteen years, of imprisonment. See 23 V.S.A. § 1210(f)(1). The parties agreed that defendant could argue for a sentence of no less than four-to-eight years, all suspended except for eighteen months, while the State was permitted to argue for a sentence of five-to-ten years.

The court held a sentencing hearing in January 2019 at which the victim's family members testified, defendant gave a statement expressing remorse for the victim's death, and defendant and the State argued in favor of their proposed sentences. The State argued that defendant's actions warranted significant punishment and that a sentence of five-to-ten years would further the goals of specific and general deterrence. Defense counsel argued that defendant was a law-abiding

citizen who had always been employed, that defendant had accepted responsibility and expressed remorse for the crime, that he had been sober and had been undergoing counseling since the crash, and that he was at a low risk to re-offend according to the pre-sentence investigation report prepared by the Department of Corrections. Defense counsel also pointed to letters submitted by family and friends, which showed that defendant had a strong support network. He argued that a lengthy prison sentence would deprive defendant of necessary treatment and counseling and this "dead time" behind bars would hamper any efforts to rehabilitate him. He therefore asked the court to impose the partially suspended sentence contemplated by the plea agreement.

During the State's argument, the court asked whether the victim's pre-impact fear could be considered as a factor in sentencing. The victim's sister had described her own experience of being struck in a head-on collision and the "indescribable fear and anxiety" she felt over the course of a few seconds. The State's attorney stated, "we will never know what [the victim] was thinking, but we do have a statement from his sister, Eileen, who was in a similar situation and—." The court interjected, "No. We have the facts of the case. He slowed to either stop or to—a few miles an hour based on the vehicle being in his lane." The State's attorney responded, "Yes. So, he knew there was an impact coming and unfortunately he could not prevent it. So, yes, I do believe that [the] court can consider that factor in its sentence." Defense counsel, during his argument, stated that it did not appear that the victim had done anything wrong, and argued that "[w]e can presume he may have seen the oncoming car and attempted to brake, but we don't know."

The court imposed a sentence of four-to-eight years' imprisonment. It found that there were several mitigating factors, including defendant's acceptance of responsibility, his lack of a criminal record, and the fact that he plainly felt remorse. However, the court found that defendant's blood alcohol content was "extraordinarily high," completely eliminating his judgment and motor skills. The court found that defendant's decision to drive home in that condition deserved punishment. The court also factored in the victim's "pre-impact fear," stating that it was clear that the victim had seen defendant's car in his lane because he slowed to a stop. The court stated that the sentence was designed with general deterrence in mind, explaining that it had "a responsibility to the State of Vermont to ensure that people who put themselves in the same situation that [defendant] did that night think more critically about how their actions are and how their actions are perceived and the consequences of their actions."

Defendant timely moved for sentence reconsideration. See 13 V.S.A. § 7042(a) (permitting court to reduce sentence within ninety days of its imposition upon court's own initiative or defendant's motion). Defendant argued that the transcript indicated that the court incorrectly believed his blood alcohol content to be 0.39 % at the time of the crash, when it was in fact 0.239%. Defendant also contended that the court erred in considering the victim's pre-impact fear as an aggravating factor. He argued that the court failed to consider the victim's own high blood alcohol content of 0.183%, and that without an event data recorder in the victim's vehicle it was impossible to know what his actions were prior to the crash. Defendant suggested that the court was unduly influenced by the emotional nature of the sentencing hearing. Finally, defendant argued that the court improperly weighed the need for general deterrence against the specific need for deterrence and rehabilitation of defendant, and failed to consider the facts that defendant had no criminal record, had lived in the community while the case was pending without violating his conditions of release, and needed alcohol abuse treatment that would not be available to him under the imposed sentence for at least three years.

The court held a hearing on the motion in July 2019. The court stated that its sentence was based on defendant's actual blood alcohol content of 0.239% and that there must have been a transcription error. In response to defendant's other arguments, the court stated that it had put "a

lot of thought and heartache into this sentence," and that the sentence was difficult to impose for the reasons stated by defense counsel. However, it declined to modify the sentence, explaining that "the sentence was based on the circumstances of the evening and the information that I had and that was presented at the time of sentencing." This appeal followed.

"We review the denial of the motion for sentence reconsideration for abuse of discretion." State v. King, 2007 VT 124, ¶ 6, 183 Vt. 539 (mem.). The purpose of sentencing reconsideration "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). We have explained that sentence reconsideration is "of limited utility when a defendant's original sentence was based on a plea," because the defendant presumably considered the sentence to be fair when agreeing to it. King, 2007 VT 124, ¶¶ 6-7; see also State v. Hance, 157 Vt. 222, 226-27 (1991) (noting that sentence reconsideration is "a highly discretionary remedy for a lawful, but inappropriate, sentence," and is of limited usefulness when defendant pleads guilty because sentence "was not born out of the heat of trial pressures and presumably was considered fair by defendant when he agreed to it" (quotation omitted)).

Similarly, we review the sentence itself for abuse of discretion, and the underlying factual findings for clear error. State v. Herring, 2019 VT 33, ¶ 27, 210 Vt. 144. "We 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." State v. Ingerson, 2004 VT 36, ¶ 10, 176 Vt. 428 (citation omitted).

Defendant argues that the trial court erred in declining to reconsider his sentence because the court's conclusion that the victim felt pre-impact fear was unsupported by the record. Defendant argues that he objected to this conclusion in his motion for sentence reconsideration and the court failed to make sufficient findings on the reliability of its factual finding. See V.R.Cr.P. 32(c)(4)(B) ("When a defendant objects to factual information submitted to the court or otherwise taken into account by the court in connection with sentencing, the court shall not consider such information unless, after hearing, the court makes a specific finding as to each fact objected to that the fact has been shown to be reliable by a preponderance of the evidence, including reliable hearsay.").

The record before the court was sufficient to support its finding that the victim likely felt fear prior to impact. The evidence showed that the victim's car had slowed to a stop or near-stop just before being struck by defendant's vehicle. The accident reconstructionist opined that this demonstrated that the victim had observed a hazard in his lane and slowed or stopped his vehicle in an attempt to avoid a collision. It was reasonable for the court to infer from this circumstantial evidence that the victim felt pre-impact fear, and to take this into account in fashioning its sentence. See 13 V.S.A. § 7030 (listing factors court must consider in sentencing, including nature and circumstances of crime); cf. State v. King, 2006 VT 18, ¶ 18, 179 Vt. 400 (holding that it was reasonable for sentencing court to infer that defendant lied about being provoked into fighting where State showed that defendant repeatedly lied about other aspects of incident); State v. Bushway, 146 Vt. 405, 407 (1985) (explaining that court may consider wide range of relevant information at sentencing); State v. Paradis, 146 Vt. 345, 347 (1985) ("[P]roof of facts includes reasonable inferences properly drawn therefrom." (quotation omitted)). Although defendant argues that there could have been other explanations for the victim's behavior, given his relatively high blood-alcohol content, we must uphold the sentencing court's findings "if they are supported by credible evidence, even where there may be substantial evidence in the record to the contrary." State v. Sullivan, 2018 VT 112, ¶ 9, 208 Vt. 540 (quotation omitted).

Furthermore, the trial court substantially complied with the requirements of V.R.Cr.P. 32(c)(4). Rule 32 ensures that a defendant is not sentenced "on the basis of materially untrue information" by giving defendant an opportunity to rebut facts considered by the court and requiring the court to find that challenged facts are reliable. See V.R.Cr.P. 32(c)(4)(B); State v. Ramsay, 146 Vt. 70, 78 (1985). At sentencing in this case, the court and the parties discussed whether the victim's pre-impact fear could be factored into the sentence. The trial court stated that the evidence showed that the victim slowed to a stop because he saw defendant's vehicle in his lane. Defense counsel argued that there was no way to know why the victim had stopped his vehicle. The court found, to the contrary, that it was "very clear" that the victim saw defendant's vehicle and experienced pre-impact fear, and that this could be factored into the sentence. This was equivalent to a finding that the information was reliable and, as discussed above, was a reasonable inference to draw from the evidence. At sentence reconsideration, the trial court essentially declined to alter its previous findings. The court's decision provides a sufficient basis for us to determine the basis for its decision and the record supports its exercise of discretion. See King, 2007 VT 124, ¶ 6.

Defendant also argues that the sentence was arbitrary, excessive, and disproportionate to the underlying offense, in violation of the Eighth Amendment to the U.S. Constitution and Chapter II, § 39 of the Vermont Constitution. In determining whether a sentence is grossly disproportionate to an offense under either constitutional provision, we consider the following "objective criteria": "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other [similarly situated] criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." State v. Venman, 151 Vt. 561, 572 (1989) (quoting Solem v. Helm, 463 U.S. 277, 292 (1983)). However, "only in 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality' should the court consider the second and third" factors. In re Stevens, 2014 VT 6, ¶ 7, 195 Vt. 486 (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring)).

Here, the gravity of the crime committed and the sentence imposed do not lead to an inference of gross disproportionality. Defendant chose to drive with a blood alcohol content of 0.239, which is nearly three times the legal limit. He was traveling at seventy miles per hour in a forty-mile-per-hour zone when he crossed over the center line and struck the victim's vehicle, killing the victim instantly. The court found that the victim's death was random and needless and that he experienced pre-impact fear. Under these circumstances, the court's sentence of four-to-eight years' imprisonment was not "clearly out of all just proportion to the offense." Venman, 151 Vt. at 572 (quotation omitted); see also Stevens, 2014 VT 5, ¶ 8 (holding that trial court's sentence of life without parole was not clearly disproportionate to defendant's offense of attempted murder where he attacked ex-girlfriend and her boyfriend with hammer and then dragged her toward van where he planned to restrain her and burn vehicle). Because the first Solem factor is not present, we need not conduct an intrajurisdictional or interjurisdictional analysis of the sentence. Stevens, 2014 VT 5, ¶ 11.

Finally, defendant claims that the court failed to adequately explain the basis for its sentence. We disagree. The record shows that the court weighed the mitigating and aggravating factors and concluded that a longer sentence was required due to the nature of the crime, the fear likely felt by the victim, and the need for general deterrence. The sentence imposed was within statutory limits and was within the range contemplated in the plea agreement. It was grounded explicitly on legitimate goals of criminal justice: punishment and deterrence. Ingerson, 2004 VT 36, ¶ 13 (explaining that proper goals of sentencing include punishment, prevention, restraint,

rehabilitation, deterrence, education, and retribution). We therefore see no abuse of discretion warranting reversal.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice