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. 2020-165

OCTOBER TERM, 2020

In re John Brooks*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 919-10-19 Cncv
		Trial Judge: Helen M. Toor

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

Petitioner appeals from the trial court's summary judgment decision in favor of the State on his petition for post-conviction relief (PCR). He argues that the sentencing court relied upon undisclosed and inaccurate information in imposing its sentence, which violated his due process rights and rendered his sentence unlawful. We affirm.

The record indicates the following. In 2014, petitioner pled no contest to lewd and lascivious conduct with a child and obstruction of justice pursuant to a plea agreement. The State dismissed numerous other charges and agreed to cap its recommended sentence at ten-to-fifteen years, all suspended but ten years; defendant was free to argue for a lesser sentence but no less than fifty-four months to serve.

At the sentencing hearing, the defense presented expert testimony from a forensic psychologist. The expert testified that based on petitioner's traumatic life experiences, he had "developed a series of attitudes that amount to personality disorders." The expert stated that, given his personality disorders, petitioner would only grudgingly accept responsibility for his actions. The expert acknowledged on cross-examination that at the time he wrote his report, petitioner denied doing anything inappropriate in this case. Defendant told the expert that he had not had sexual contact with the victim and that "the victim had essentially set him up by placing saliva on his own penis." Defendant told another doctor that he reached into the victim's pants to grab a bag of drugs, he thought the victim was aroused, and he then spit on his own hand and grabbed the victim's penis. When asked if defendant was treatable for purposes of programs like the Vermont Treatment Program for Sexual Abusers (VTPSA), the expert responded, "Yes. It's not easy to treat personality disorders, but they're treatable." He described petitioner as a "challenging but treatable client." He indicated that the VTPSA program could "help [petitioner] work with his sexual offending issues and with his reoffense risk, and that then on an outpatient basis he could continue with . . . sexual offense prevention counseling, trauma counseling, and suicidality and depression counseling." The expert recognized that petitioner had been "in and out of treatment with the Howard Center any number of times," including during the year of the offenses here, and that the treatment had not been completely successful.

The sentencing court considered petitioner's crimes very serious and found "no clear path to rehabilitation" for petitioner. It noted that while the defense expert thought petitioner was treatable, the expert "acknowledged as something that [the court had] heard many times, and that is that personality disorders are very, very difficult to treat. They're not really amenable to treatment." As indicated above, given the seriousness of the offense and the lack of any clear path to successful treatment or rehabilitation, the court accepted the State's recommended sentence and sentenced petitioner to ten-to-fifteen years on the lewd-and-lascivious-conduct count, all suspended except ten years to serve, and one-to-five years on the obstruction-of-justice count to serve concurrently. It imposed indefinite probation.

Petitioner filed a PCR in December 2019, alleging that the sentencing court improperly relied on inaccurate and undisclosed information about the treatability of personality disorders. The parties filed cross-motions for summary judgment, and the PCR court granted summary judgment to the State. The PCR court concluded that the sentencing court was "not unjustified" in its interpretation of the expert's testimony.

On appeal, petitioner asserts that the sentencing court relied on outside information that was not properly disclosed to the parties in advance as required by Vermont Rule of Criminal Procedure 32(c)(3). He further contends that the source of this information was undisclosed. Petitioner argues that his expert could have testified differently had he known of the court's "predisposed notions about personality disorders." Petitioner maintains that this information played a material role in the court's sentencing decision and the court's reliance on this information "raises serious concerns about the essential fairness, integrity, and reputation of the judicial process." State v. Delisle, 2015 VT 76, ¶ 20, 199 Vt. 397 (quotation omitted).

To be entitled to post-conviction relief, petitioner had "the burden of proving by a preponderance of the evidence that fundamental errors rendered [his] conviction or sentence defective." In re Shaimas, 2008 VT 82, ¶ 8, 184 Vt. 580 (mem.). Rule 32(c)(2) requires the sentencing court to disclose "all information submitted to it for consideration at sentencing" and to do so "sufficiently prior to the imposition of sentence as to afford reasonable opportunity for the parties to decide what information, if any, the parties intend to controvert by the production of evidence." See also Reporter's Notes—1982 Amendment, V.R.Cr.P. 32 (explaining that "disclosure is justified by the demands of fundamental fairness since the defendant should be able to ensure the sentence is based on accurate and fair information" (quotation omitted)). The undisputed facts show that the court acted consistently with Rule 32 here, and summary judgment was properly granted to the State. See In re Brown, 2015 VT 107, ¶ 9, 200 Vt. 116 (explaining that summary judgment appropriate "when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law" (citation omitted)); see also V.R.C.P. 56(a).

As recited above, the expert testified that petitioner had a series of personality disorders, had only a grudging ability to accept responsibility for his actions, and was a "challenging but treatable client." The expert further testified that personality disorders are "not easy to treat" and that the VTPSA program would not address petitioner's personality disorders. The expert said that petitioner could get other needed treatment on an outpatient basis but acknowledged that petitioner had been in outpatient treatment with the Howard Center "any number of times" already. The sentencing court's statement that personality disorders are "not really amenable to treatment" is consistent with this testimony. Its sentencing decision was grounded in the evidence presented at the hearing, and it did not violate Rule 32 by observing that the evidence was consistent with what it had heard "many times" before. The record does not support petitioner's contention that

the sentencing court improperly relied upon undisclosed information in violation of his due process rights.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice