VERMONT SUPREME COURT
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Case No. 2021-069

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

NOVEMBER TERM, 2021

State of Vermont v. Glenn I. Hill, III* } APPEALED FROM:
} Superior Court, Washington Unit,
} Criminal Division
} CASE NO. 122-1-20 Wncr
Trial Judge: Mary L. Morrissey

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

Defendant was convicted of various crimes pursuant to a plea agreement. He appeals from the trial court's imposition of an overall sentence of three-to-ten years to serve. We affirm.

Following the setting of a large fire that destroyed a commercial building in Barre, Vermont, defendant was charged with numerous crimes. He entered into a plea agreement and pled no contest to second-degree arson and reckless endangerment and guilty to providing false information to a police officer, negligent operation, and driving with a suspended license. Under the plea agreement, the State could seek a sentence of three-to-ten years to serve while defendant could seek a lesser sentence.

At the sentencing hearing, the court heard testimony from various witnesses about the harm that defendant had caused, which included more than one million dollars in financial losses. The State also submitted exhibits showing the fire and the resulting damage. Defendant and his family members also made statements. The State recommended a sentence of three-to-ten years to serve; defendant argued for a sentence of one-to-three years to serve on preapproved furlough.

The court accepted the State's recommendation and explained its decision on the record. It found that the fire had devastating impacts on the community, those directly involved, and defendant's own family. Defendant had a lengthy criminal history and was not currently employed. For many years, he struggled with alcohol abuse. Defendant indicated that he was now engaged in biweekly mental-health and alcohol meetings, but he refused to sign releases to allow DOC to confirm that. The court was persuaded that defendant accepted responsibility for setting the fire and causing the consequent damages. Defendant's family members testified that defendant had changed for the better following these crimes.

Based on these and other findings, the court determined that the sentence had to include a punitive component. Defendant had a long history of making very bad decisions while

consuming alcohol. The court also considered rehabilitation an important part of the sentence. Given defendant's long history with the DOC and his long history of alcohol abuse, including multiple relapses, there needed to be a lengthy period of supervision to ensure that the DOC had the ability to monitor defendant's compliance with alcohol conditions, that he could be pulled back into the facility, and that he could be held accountable for alcohol-driven behavior. The sentence also needed to provide general and specific deterrence. The court concluded that the State's recommended sentence provided a fair balance between punishment, supervision, and rehabilitation, and it took into consideration defendant's acknowledgement of responsibility. The court rejected defendant's proposed sentence, finding that it failed to account for the severity of the offenses, it was insufficiently punitive, and it failed to provide the necessary level of specific and general deterrence. Defendant now appeals.

Defendant argues that the court abused its discretion in imposing sentence because it failed to understand how much time he would spend in prison. His argument rests completely on a conversation that occurred between the sentencing judge and a different prosecutor during a status conference in a different case; the conversation happened after defendant was sentenced. According to defendant, at that status conference, the court agreed with certain observations made by the prosecutor about the challenge in predicting with certainty how much time a defendant would actually serve, whether there is "truth in sentencing" in Vermont, and whether "the number [of months of a sentence] itself is somewhat arbitrary."

As a threshold matter, defendant asks the Court to modify the record to include a transcript of this status conference. He argues that because the parties mentioned testimony given in his case by a DOC employee about recent changes in DOC programming, the transcript of the status conference "should be considered a transcript of the proceedings below pursuant to V.R.A.P. 10(a)(2)." Alternatively, defendant asks the Court to take judicial notice of these transcript pages. He argues that the parties' statements are "adjudicative facts" that are not subject to reasonable dispute and are "capable of accurate and ready determination by resort to [a source] whose accuracy cannot reasonably be questioned," citing Vermont Rule of Evidence 201(a) and (b). Defendant maintains that it is appropriate for this Court to take judicial notice of any materials in any proceeding within this state because Vermont has a unified court system.

We deny defendant's motion. A transcript of a status conference in an unrelated case that postdates a decision on appeal is not a "transcript of the proceedings" below under any reasonable construction of Vermont Rule of Appellate Procedure 10(a)(2). We further conclude that the statements made during a conversation in an unrelated case are not the type of "adjudicative facts" subject to judicial notice under Evidence Rule 201(b).

Rule 201(b) provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Reporter's Notes provide as examples of the first category "specific facts of common knowledge," such as the "place of publication of certain newspapers," "the laws of nature," "the nature of common occupations," or "the habits and qualifies of common animals." Reporter's Notes, V.R.E. 201 (citations omitted). "Matters in the second category . . . include," among other examples, "facts of geography," "census data," and "scientific principles." Id. (citations omitted). This category also includes "records of court proceedings between the same parties in the same court," id. (citing cases), a subject we addressed in detail in In re A.M., 2015 VT 109, ¶¶ 30-39, 200 Vt. 189. We explained in A.M. that "[j]udicial notice is the mechanism by which the court may incorporate or reference prior

findings within the same case, and the court may consider judicially noticed findings in combination with new evidence, if any, in reaching its decisions." Id. ¶ 32 (emphasis added). Although Vermont at that time had a unified court system, we recognized in A.M. that a different analysis applied and different policy concerns arose when a party requested that a court take "judicial notice of court records from one case to be used in a different case" and that other courts, including Vermont, were reluctant to do so. Id. ¶¶ 35-36 (citing cases).

Ultimately, we need not address defendant's argument that, because Vermont has a unified court system, any court can take judicial notice of any court records in any case in Vermont. We conclude that the exchange cited by defendant does not contain "adjudicative facts" subject to judicial notice. It reflects a conversation in which the prosecutor expressed his opinion in a general way about sentencing, noting, among other things, that a DOC employee had given "a really compelling explanation of the recent changes in DOC computations and math" during defendant's sentencing hearing. The court responded, "Yeah, no, I agree. I mean, that became evident this morning." It is not a fact "capable of accurate and ready determination" that the court agreed with each particular opinion offered by the prosecutor or that it specifically agreed with the proposition that "[t]here is no more truth in sentencing" or any other particular statement. The court could have been agreeing that the DOC employee gave a compelling presentation about recent changes at the DOC or simply acknowledging, as a general matter, that parties needed to work hard to understand how a particular sentence might play out in practice as the court did at defendant's sentencing hearing that morning. The exchange is nebulous and subject to multiple interpretations, and it is not an adjudicative fact subject to judicial notice, putting aside all of the other reasons why it could have had no bearing on a decision already rendered.

This post-decision conversation is the only basis for defendant's assertion that the court abused its discretion because it failed to understand how much time he would spend in prison. Given our conclusion above, we do not address this argument. We note, however, that this argument is belied by the record in this case, which shows that the court inquired in great detail of DOC employees about the amount of time defendant would actually serve given various programming options available to him and also explained its own understanding of that information.

Affirmed.

BY THE COURT:

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice