2017 IL App (2d) 160638-U
No. 2-16-0638
Order filed April 17, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DOUGLAS MARSHALL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 12-CF-3236 Honorable John S. Lowry, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: On defendant's motion to reconsider his sentence, the trial court properly declined to consider evidence that, after his original sentence was imposed, he was diagnosed with terminal cancer; evidence of events occurring after the imposition of the original sentence was inadmissible.

¶ 2 Defendant, Douglas Marshall, appeals the trial court's order ruling on his motion to reconsider his sentence for armed robbery (720 ILCS 5/18-2(a)(1) (West 2012)), in which he asked the court to reduce his sentence from 22 years' incarceration to 6 based on his diagnosis of a terminal illness. The trial court held that, under *People v. Vernon*, 285 Ill. App. 3d 302 (1996),

it could not consider the diagnosis because it occurred after defendant was sentenced. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted in November 2012. In August 2013, he pleaded guilty in exchange for the dismissal of charges in other cases. It was agreed that defendant was eligible for an extended-term sentencing range of 6 to 60 years' incarceration. The factual basis for the plea included that defendant pulled out a knife at a sandwich shop and demanded money. He was arrested the next day in connection with a different armed robbery in which he also pulled out a knife and demanded money.

¶ 5 Evidence at sentencing showed that defendant was 52 years old and had an extensive criminal history beginning when he was 21. Much of his history was driven by drug addiction. Defendant spoke in allocution and expressed remorse. On October 30, 2013, after considering the aggravating and mitigating circumstances, the court sentenced defendant to 22 years' incarceration. Defendant filed a motion to reconsider, arguing that the sentence was excessive in light of his rehabilitative potential. The court denied the motion, and defendant appealed. On October 13, 2015, in response to an unopposed motion by defendant, we summarily vacated and remanded for counsel to file a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013), the opportunity to file a new motion to withdraw his plea and/or reconsider the sentence, and a new hearing on the motion. *People v. Marshall*, No. 2-14-0398 (Oct. 13, 2015) (minute order).

¶ 6 On March 11, 2016, defendant filed a motion to reconsider the sentence. Defendant restated his original arguments concerning the sentence but added a request that the court take into account his diagnosis of cancer and the limitations that it put on his life expectancy. At a

May 4, 2016, hearing, defendant testified that, after his incarceration, he was diagnosed with cancer and had been receiving chemotherapy since August 2014. At a July 5, 2016, hearing, defendant offered a letter from a doctor dated June 28, 2016, stating that defendant had metastatic cancer, was unable to tolerate treatment, and had a life expectancy of three to six months. Applying *Vernon*, the court declined to consider the new evidence, ruling that the evidence was beyond the scope of the original sentencing hearing and that the court could not hold an essentially new sentencing hearing based on evidence that did not exist at the time of the original sentence. However, the court found that it did not give appropriate weight to defendant's rehabilitative potential at the original hearing and reduced his sentence to 20 years. Defendant appeals.

¶ 7 II. ANALYSIS

¶ 8 Defendant contends that the trial court erred by declining to consider the new evidence of his terminal illness and asks that we reduce his sentence.

¶ 9 "[T]he purpose of a motion to reconsider the sentence is not to conduct a new sentencing hearing. Rather, '[t]he purpose of a motion to reconsider a sentence is to allow the trial court an opportunity to review the appropriateness of the sentence imposed and correct any errors made.' " *Vernon*, 285 Ill. App. 3d at 304 (quoting *People v. Root*, 234 Ill. App. 3d 250, 251 (1992)). Thus, we have held that "[w]hen ruling on a motion to reconsider a sentence, the trial court should limit itself to determining whether the initial sentence was correct; it should not be placed in the position of essentially conducting a completely new sentencing hearing based on evidence that did not exist when defendant was originally sentenced." *Id.*

¶ 10 In *Vernon*, on remand for the filing of a proper Rule 604(d) certificate, the defendant filed a new motion to reconsider his sentence and requested that the trial court hear new evidence

about his rehabilitative potential based on a progress report from his correctional center. The trial court declined to consider the evidence, and we affirmed. In doing so we stated:

> "The evidence defendant wishes to admit is clearly outside that which a trial court is required to consider. If trial courts were required to consider such evidence, the character of hearings on motions to reconsider a sentence would essentially be more like *ad hoc* parole hearings where the trial court would view defendant's conduct in prison and determine, based at least partially on that conduct, how much longer defendant should spend in prison. We do not believe that this comports with the purpose of a hearing on a motion to reconsider a sentence." *Id.*

¶ 11 We also both distinguished and declined to follow the first district case of *People v. Smith*, 258 Ill. App. 3d 633 (1994). There, the defendant was sentenced to 12 years' incarceration for aggravated arson and was diagnosed with cancer after her sentence. On appeal, the first district found that her sentence was not an abuse of discretion but, without discussion, remanded for the trial court to determine what effect, if any, the cancer diagnosis should have on the appropriate sentence. *Id*. at 645. Discussing *Smith* in *Vernon*, we stated that its unique facts were distinguishable because the defendant in *Smith* might have had the condition, although it remained undetected, at the time of the original sentence. We further noted that evidence that a defendant suffers from a potentially fatal illness is qualitatively different from evidence that a defendant has achieved a good behavior record during incarceration. However, we also stated that "[t]o the extent that *Smith* suggests that evidence of events occurring after the original sentencing hearing is admissible in a hearing on a motion to reconsider the sentence, we decline to follow it. To do so would completely alter the character of hearings on motions to reconsider

the sentence." *Vernon*, 285 Ill. App. 3d at 306. Finally, we held that cases allowing new evidence when the original sentence was set aside were not applicable. *Id*. at 305-06.

¶ 12 Here, the rule in *Vernon* applies and evidence of events occurring after the original sentencing hearing was not admissible. Defendant asks that we apply *Smith* and distinguish *Vernon* based on his unique circumstance of having a terminal illness. He also argues that a motion to reconsider is an appropriate means to present newly discovered evidence. But, while we distinguished *Smith* in *Vernon* based in part on the unique circumstance of the occurrence of a terminal illness, we also firmly declined to follow *Smith* to the extent that it held that evidence of events occurring after the original sentence is admissible. Thus, any newly discovered evidence must pertain to facts that existed at the time of the original sentence. Defendant did not provide evidence or an offer of proof that his cancer existed at the time of his original sentence; he relied only on his diagnosis, which occurred afterward. Accordingly, we apply *Vernon* to defendant's case.

¶ 13 Defendant also suggests that *Vernon* was wrongly decided. However, he bases his argument on cases and statutory provisions that would allow new evidence when a conviction or sentence was set aside. See 730 ILCS 5/5-5-3, 5-5-4 (West 2014); *People v. Taylor,* 288 Ill. App. 3d 21 (1997). As we stated in *Vernon*, such cases are not applicable. Here, defendant's original sentence was not set aside. Instead, as was the case in *Vernon*, the matter was merely remanded for compliance with Rule 604(d) and a new hearing on the motion to reconsider. Under *Vernon*, he could not present evidence of events occurring after the original sentencing hearing.

¶ 14 III. CONCLUSION

¶ 15 The trial court properly declined to consider evidence of defendant's terminal illness. Accordingly, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 16 Affirmed.