

THE STATE OF NEW HAMPSHIRE

SENTENCE REVIEW DIVISION

SUPERIOR COURT

The State of New Hampshire

vs.

Chad Evans

Strafford County #00-S-888, 891, 893, 895, 896, 934, 935

Sentence Review #22-02-ST

MOTION FOR RECONSIDERATION

NOW COMES the State of New Hampshire, by its attorneys, the Office of the Attorney General, and moves the Sentence Review Division to reconsider its order dismissing the State's petition for sentence review. In support thereof the State says as follows:

1. The defendant was convicted in the Strafford County Superior Court after trial on one count of second-degree murder; on five counts of second-degree assault; on one count of endangering the welfare of a child; and on one count of simple assault.

2. On April 16, 2002, the superior court (T. Nadeau, J.) sentenced the defendant to the New Hampshire State Prison for not more than life nor less than twenty-eight years on the second-degree murder charge. On one second-degree assault charge, the defendant was sentenced to the New Hampshire State Prison for not more than ten years nor less than five years, consecutive to the murder sentence, but all suspended for sixty years. On the remaining four second-degree assault convictions, the defendant was sentenced to the New

Hampshire State Prison for not more than thirty years nor less than ten years, consecutive to the murder sentence and the initial second-degree assault charge, but all suspended for sixty years. Finally, on both the endangering the welfare of a child and the simple assault misdemeanors, the defendant was sentenced to twelve months' incarceration, concurrent with the murder sentence.

3. The defendant was notified at sentencing by the deputy clerk of his right to apply for sentence review.

4. On or about April 20, 2002, the State filed an application for sentence review with the Sentence Review Division. In a letter dated June 10, 2002, Clerk Aquizap acknowledged receipt of the State's application.

5. On October 29, 2002, the Sentence Review Division issued its order rejecting the State's application for sentence review. In that order, the Division stated that it had "reviewed the transcript of the sentencing hearing and [had] determined that the defendant was not informed at sentencing in plain and certain terms that the state could seek an enhancement of his sentence." The Division ruled that therefore, "any relief afforded to the state would violate the defendant's due process rights." The Division apparently based this ruling on the arguments presented by the defense in another case, State v. Bruce Apostolas. In that case, as in this one, the Division "rejected the state's application . . . for failure to fully advise the defendant at the time of sentencing." The Division's consideration of the due process issue in the instant case, however, was done sua sponte.

6. Reconsideration and reversal of the Division's decision is required for three reasons. First, the Division acted beyond its statutory authority when it considered and ruled on a matter of constitutional law which was collateral to the question of the appropriateness of the defendant's sentence. Second, the Division erred in ruling that due process requires specific notice to the defendant at sentencing of the State's right to petition for sentence review. Third, the Division acted beyond its authority when it raised a constitutional issue for the defense sua sponte.

7. The scope of the Division's authority to review sentences is strictly defined by statute and court rule. It has the limited authority "to consider an appeal with or without a hearing; to review the judgment insofar as it relates to the sentence imposed; to review any other sentence imposed when the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence; to amend the judgment by ordering substituted therefor a different appropriate sentence or sentences; or to make any other disposition of the case which could have been made at the time of the imposition of the sentence or sentences under review." RSA 651:59, I (1996). In making its decision, the Division can only consider matters that were part of the original record of sentencing. SUPER. CT. SENTENCE REV. DIV. Rs. 15, 16. The scope of the Division's review of a sentence is similarly limited by court rule to "(a) The excessiveness or lightness of the sentence having regard to the nature of the offense, the protection of the public interest and safety, and the character of the offender;" and "(b) The manner in which the sentence was imposed, including the sufficiency and accuracy of the information before the sentencing court." SUPER. CT. SENTENCE REV. DIV. R. 22.

8. The rules of the Division clearly, and strictly, limit the range of the Division's decisions: It may only increase the original sentence, decrease the original sentence, impose a different sentence so long as that sentence could have been imposed by the original sentencing court, or let the original sentence stand. SUPER. CT. SENTENCE REV. DIV. R. 14. Although the Division may "review the sufficiency and accuracy of the information before the sentencing court, it is not empowered to determine the constitutionality of a sentence." Petition of Turgeon, 140 N.H. 52, 54 (1995) (quotation and internal citation omitted); see RSA 651:59, I. Thus, the Division does not have the authority to consider whether the imposition of a sentence, which was within the bounds defined by the relevant statute, violated a defendant's constitutional rights. See Petition of Turgeon, 140 N.H. at 54 (although "[t]he division could review the petitioner's sentence to determine if there was sufficient evidence of two prior convictions, . . . it was not empowered to determine whether the imposition of an extended sentence based on the victim's age violated double jeopardy."). Such constitutional determinations are simply beyond the statutory authority of the Sentence Review Division.

9. The question raised by the Division's order in the instant case is whether the Division's review, itself, would violate due process because of a lack of notice that such review was possible upon petition by the State. The determination of this question, however, requires the Division to make a ruling of constitutional law, collateral to its consideration of the appropriateness of the defendant's sentence. Under Petition of Turgeon, any such rulings of constitutional dimension are beyond the Division's authority.

52-53. There is no statute or court rule that will give a defendant full notice of the specific terms and conditions of his individual sentence. The right of the State to petition for sentence review, however, is unambiguously set out in RSA 651:58, I. The plain language of the statute provides notice to every defendant of the possibility that the State will petition to have his sentence increased.

12. The situation at bar is analogous to Stewart v. Cunningham, 131 N.H. 68 (1988), in which the petitioner, relying on the fourteenth amendment and part I, article 15, claimed that he should not have been subjected to an enhanced sentence because he had been given no notice before trial of the possibility of enhancement. Id. at 70. Stewart had been sentenced under RSA 651:6, II (1974), at a time before RSA 651:6, II, had been amended to require pre-trial notice. Stewart, 131 N.H. at 70; see 1981 N.H. Laws 511:1. Citing to State v. Morehouse, 120 N.H. 738 (1980), the Supreme Court reaffirmed that “the enhanced sentencing statute under which [Stewart] was sentenced [met] the constitutional notice requirement by clearly delineating that the enhanced sentencing provision is applicable to all crimes.” Stewart, 131 N.H. at 70. The Court further held that “[d]ue process [did] not require that the State give particular defendants individual pre-trial notice that they may be subject to extended term sentencing.” Id. at 71 (emphasis added).

13. The right of the State to petition for sentence review is clearly set out in RSA 651:58, I, just as the possibility of a sentence enhancement was set out for Stewart in RSA 651:6. Because RSA 651:58, I, puts all defendants on notice that the State may petition the Sentence Review Division for a sentence increase, there is no constitutional requirement that a defendant be given individual and specific notice at sentencing.

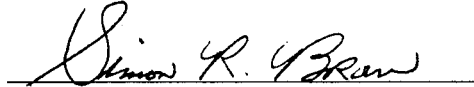
14. Finally, the Division erred in raising the due process issue sua sponte. Even if the defendant had a constitutional claim before the Division, it was the defendant's to raise or waive. Constitutional issues that are not raised by the defendant at the appropriate time are deemed waived. See State v. Westover, 127 N.H. 130, 131 (1985). It was therefore inappropriate for the Division to raise the constitutional issue sua sponte on the defendant's behalf. Furthermore, the Division's rejection of the State's petition based on an issue that the defense did not raise denied the State an opportunity to argue the merits of the issue before the Division rendered its decision.

WHEREFORE, the State respectfully requests that the Sentence Review Division:

- A. Reconsider its order dismissing the State's petition for sentence review;
- B. Schedule a hearing on the State's petition for sentence review; and
- C. Grant whatever further relief the Sentence Review Division deems just and appropriate.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE
By its attorneys,

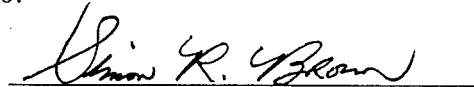
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November 8, 2002

I hereby certify that I have this day forwarded a copy of the within to Mark Sisti, Esquire, 387 Dover Road, Chichester, NH 03234, Alan Cronheim, Esquire, 78 Fleet Street, Portsmouth, NH 03801, and to Julie W. Howard, Clerk, Strafford County Superior Court, County Farm Road, P.O. Box 799, Dover, New Hampshire 03820.



Simon R. Brown