STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0246

State of New Hampshire

v.

Jeremy Surrell

MEMORANDUM IN LIEU OF BRIEF PURSUANT TO SUPREME COURT RULE 16(4)(b)

ISSUES PRESENTED

1. RSA 651:20, I(a) provides, "the sentence to imprisonment of any person may be suspended by the sentencing court" pursuant to a petition filed by a person sentenced to state prison for a minimum term of 6 years or more who has served at least 4 years or 2/3 of his minimum sentence, whichever is greater. Neither the plain language of RSA 651:20, I(a), nor its legislative history limits or purports to limit the evidence that courts may consider when determining whether to suspend a sentence. Despite this silence, does RSA 651:20, I(a) preclude courts from considering the facts of the petitioner's underlying offense in conjunction with a motion to suspend sentence?

2. If RSA 651:20, I(a) does not preclude courts from considering the facts of the petitioner's underlying offense, was it error for the trial court, after weighing the defendant's mitigating evidence of rehabilitation against the facts of his underlying crimes, to determine that it could not "ignore the punitive aspect of the original sentence" and deny the defendant's motion for suspended sentence?

STATEMENT OF THE CASE AND FACTS

The State charged the defendant with four counts of aggravated felonious sexual assault related to two acts of fellatio performed by the defendant on his son, then nine years old, and two acts of fellatio performed on the defendant by his son, also when his son was nine years old. RSA 632-A:2, I(l) (2016); A1-A4[1], A60; Supp. 1. The defendant subsequently pled guilty to two counts of aggravated felonious sexual assault. A5-A8. The court (*Kissinger*, J.) sentenced the defendant to a stand-committed term of 7½ to 15 years, and to a suspended term of 10 to 20 years. *Id.* The State entered a *nolle prosequi* on the remaining indictments. A3-A4.

The defendant filed a motion to suspend the balance of his minimum term on January 20, 2017. A10. The defendant supported his motion with a personal affidavit and documentation of his successful completion of educational and rehabilitative programming while incarcerated. A10-A58. The State objected to the motion on appropriateness and timeliness grounds. A60. Relevant here, the State argued that the heinousness of the defendant's crime, particularly that he engaged in sex acts with his nine-year-old son, dictated that the defendant should serve his full minimum term. *Id.*

Prior to ruling on the motion, the trial court requested a complete a synopsis of the defendant's incarceration record from the Warden "to consider prior to ruling on the Defendant's motion to suspend his sentence." A67. The Warden complied with his request on or around February 10, 2017. A68-A69. Thereafter, the court denied the defendant's motion, stating, "The offense conduct against the defendant's own son does not warrant a lesser sentence." Supp. 1.

The defendant filed a motion for reconsideration, which he again supported by affidavit, though which he failed to execute. A70-A72. Therein, the defendant argued that the court

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[1] Citations to the record are as follows:
"A" refers to the defendant's appendix
"Br." refers to the defendant's brief
"Supp." refers to the supplement to the defendant's brief

applied the wrong standard to his motion. A71. The defendant argued, "RSA 651:20 is meant to give relief to those who at the time of sentencing were given an appropriate sentence for the crime committed, but since intervening and mitigating circumstances have arisen that would make the sentence inappropriate today." *Id.* He argued that his purported success rehabilitating himself constituted sufficient mitigating and intervening circumstances to warrant the suspension of the balance of his minimum sentence. *Id.* The defendant further argued that the trial court erred by "us[ing] the act/conduct of the crime to make his decision and not the intervening and mitigating circumstances that the defendant brought forward." *Id.*

The court again disagreed and denied the defendant's motion to reconsider. Supp. 2. By order dated April 3, 2017, the court stated that it "carefully considered all of the mitigating evidence submitted by the defendant," but that it could not "ignore the punitive aspect of the original sentence." *Id.*

This appeal followed.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUSPEND SENTENCE.

RSA 651:20, I(a) (2016) authorizes a trial court to suspend a prison sentence upon receipt of petition timely filed by any person sentenced to state prison for a minimum term of 6 years or more who has served at least 4 years or 2/3 of his minimum sentence, whichever is greater.

On appeal, the defendant makes two arguments that bear on the proper interpretation of RSA 651:20, I. First, he argues that RSA 651:20, I, precludes trial courts from taking into account at all the facts of the defendant's underlying crime when considering his motion to suspend sentence, and that the trial court erred by doing so here. Br. 13. Second, and alternatively, he argues that even if RSA 651:20, I, permits courts to consider the facts of the underlying crime, the trial court improperly denied his petition to suspend based only on the facts of his underlying crime. *Id.* For the reasons stated below, both arguments fail.

A. RSA 651:20, I(a) does not preclude a trial court from considering the facts of a prisoner's underlying crime on a motion to suspend sentence.

This Court has recognized that "[s]entencing is not about one decision made at a single time and place, but about a process that involves a number of interrelated decisions that may span several years in a given case and involve a number of different decision makers." *Petition of State of N.H. (State v. Fischer)*, 152 N.H. 205, 211 (2005) (citing *State v. Kierstead*, 141 N.H. 803, 804 (1997)). "The legislature has vested in the trial court the power to adapt sentencing to best meet the constitutional objectives of punishment, rehabilitation and deterrence—within these parameters, *the judge has broad discretion to* assign different sentences, *suspend sentences*, or grant probation. *Id.* (emphasis added). Nonetheless, the legislature may circumscribe the trial court's power to suspend to a greater or lesser degree, provided that the sentencing process as a whole complies with the requirements of due process and with other

constitutional constraints. *Id.* (citing *State v. Callaghan*, 125 N.H. 449, 451-52 (1984)). Thus, the precise question here is whether the legislature in RSA 651:20, I, circumscribed the trial courts' ability to deny a motion to suspend sentence by precluding courts from considering the facts of the prisoner's underlying crimes when ruling on the motion. This presents a question of statutory interpretation.

The interpretation of a statute is a question of law, which this Court considers *de novo*. *State v. Lathrop*, 164 N.H. 468, 469 (2012). "In matters of statutory interpretation, [this Court is] the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." *Id.* The goal of this Court's review "is to apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme." *Id.* The Court "construe[s] provisions of the Criminal Code according to the fair import of their terms and to promote justice." *Duquette v. Warden, N.H. State Prison*, 154 N.H. 737, 740 (2007).

This Court "first examine[s] the language of the statute, and, when possible, ascribe[s] the plain and ordinary meanings to the words used." *Id.* The Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Hogan v. Pat's Peak Skiing*, LLC, 168 N.H. 71, 73 (2015). This Court also "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Id.* "Moreover, [this Court does not] consider words and phrases in isolation, but rather within the context of the statute as a whole." *Id.* "This enables . . . [it] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id.*

The plain language of the statute supports the construction urged by the State. RSA 651:20, I, authorizes trial courts to suspend sentences. The only relevant statutory limitations on this authority relate to *when* the court may suspend a sentence. *See* RSA 651:20, I(a) (a court may suspend a sentence upon receipt of a timely filed petition by a person sentenced to state prison for a minimum term of 6 years or more who has served at least 4 years or 2/3 of that minimum, and who has not moved to suspend his sentence within the prior three years). The statute does not contain any limitation on the evidence that courts may consider related to motions to suspend sentences once these conditions are met. Instead, as this Court has held, trial courts have "broad discretion." *Fischer*, 152 N.H. at 211.

Despite the statute's plain language and this Court's prior holdings, the defendant attempts to manufacture a limitation on a court's discretion from unsupported "inferences" drawn from the statute's legislative history. As a preliminary matter, this Court should not consider legislative history here because RSA 651:20, I, is unambiguous.

"When interpreting a statute, [this Court] first look[s] to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous." *Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 677 (2011). A statute is ambiguous when there is "more than one reasonable interpretation of the[] statutory provision[]" at issue. *Id.* at 678 (quoting *Appeal of Gamas*, 158 N.H. 646, 649 (2009)).

The defendant does not contend that RSA 651:20, I, contains any language from which one could reasonably interpret that the legislature intended to categorically preclude courts from considering the facts of the prisoner's crime. Instead, the defendant argues that the statute is ambiguous because of what it does not say—it fails to delineate an exhaustive list of factors that courts may consider when considering whether to suspend a sentence. Br. 10-11. This Court has expressed skepticism for finding ambiguity in such circumstances, *In re Juvenile 2005-212*, 154

N.H. 763, 766 (2006) ("The statute's silence as to the consequences of a finding of lack of competence arguably creates an ambiguity. Thus, we cannot say that the trial court erred by consulting legislative history."), and should decline to do so here.

The legislature's failure to limit a trial court's decision does not make the statute ambiguous; instead, the statute makes an unambiguous statement affirming the trial court's broad discretion to suspend sentences. In light of this, the defendant urges this Court to add statutory language to RSA 651:20, I, specifically, a prohibition on considering the facts of an underlying crime. But this would be improper since this Court will not interpret a statute to add words that the legislature did not see fit to include. *Hogan*, 168 N.H. at 73. Thus, the Court should reject the defendant's argument.

Regardless, even if this Court consults the legislative history, the defendant's argument fares no better. The legislative history does not elucidate any legislative intention to prohibit what a trial court may consider when considering whether to suspend a sentence, particularly the facts of the petitioner's underlying crime. Instead, the legislative history, like the plain language of RSA 651:20, I, is silent with regard to the factors a court may consider when deciding a motion to suspend sentence.

Because the legislature did not create—or even discuss— a categorical prohibition on a court's ability to consider a prisoner's underlying crime when ruling on a motion to suspend sentence, the defendant further attempts to manufacture legislative intention to create one from "inferences" drawn from the legislative history associated with prior iterations of RSA 651:20, I. He then urges this Court to read those inferences into the present language of RSA 651:20, I. Setting aside that this purposed course would be an improper method of statutory interpretation, the legislative history does not even support the inferences that the defendant urges this Court to draw.

The defendant focuses on statutory amendments to RSA 651:20, I, from 1971 to 2008, which relate exclusively to who can move to suspend an inmate's sentence and when, as well as when, if at all, the Court can suspend a sentence *sua sponte*. The timing of when such relief is appropriate of statute has changed under different iterations of the statute—from between shortly following the imposition of a sentence to years into an inmate's sentence. The defendant argues that these timing changes dictate the precise parameters of what courts may consider when ruling on motions to suspend. For example, the defendant argues that in 1979, when courts could suspend sentences *sua sponte* within 180 days of imposition, the only factor to consider was whether the court made an error. Br. 16, 17-18. The defendant next argues that by 1981, when the legislature amended the statute to permit inmates to petition to suspend a sentence after serving two years, the legislature signaled that the petitioner's rehabilitative efforts were relevant to his entitlement to a suspended sentence.[2] Br. 19.

However, the defendant's argument here hinges on the 1994 amendment, which eliminated court-initiated suspensions and required inmates to serve 4 years or 2/3 of their sentence, whichever was greater, prior to petitioning to suspend their sentence. The defendant argues that because the 1994 amendment required an inmate to serve at least 2/3 of his sentence, the legislature eliminated the possibility that an inmate could petition for a suspended sentence very early in his sentence. Br. 25. Thereby, he argues, the legislature effectively attributed "two-thirds of any minimum sentence to the interest in punishment, and the remaining one-third to the interest in rehabilitation." *Id.* Thus, according to the defendant, the 1994 amendment "eliminated the need for a judge, in considering whether to suspend a sentence, to assess whether a sufficient measure of punishment had yet been exacted," instead requiring courts to focus

[2] The defendant also attempts to create support for his interpretation by arguing that the legislature implicitly adopted the Warden's statements related to the 1981 amendment because it ultimately adopted the amendment that he supported. However, absent an express statement that the legislature intended to do so, the opinions of the public related to legislation is not relevant to determining the legislature's intent.

entirely on the petitioner's rehabilitative efforts. *Id.* What's more, the defendant goes so far as to argue that the amendment created an "expectation" for truly reformed inmates that "after serving two thirds of their sentences, a persuasive demonstration of their reformation *would result* in the suspension of the remaining balance of their minimum . . . ." *Id.* at 26.

The defendant's argument fails because there is no support whatsoever for the proposition that the legislature attributed two-thirds of any minimum sentence to the interest in punishment, and the remaining one-third to the interest in rehabilitation. This division of penological purpose is central to the defendant's argument on appeal, and there is simply no support for it in the statutory language, legislative history, or otherwise. *See* Br. 25. Instead, the legislature has broadly vested in the trial court the power to adapt sentencing, including by suspension, "to best meet the constitutional objectives of punishment, rehabilitation, and deterrence." *Fischer*, 152 N.H. at 211. Neither the legislature nor this Court has ever stated that the objective of punishment becomes irrelevant once an inmate serves two-thirds of his sentence. Thus, his conclusion that "the outcome of a prisoner's petition for suspension after serving two-thirds of a minimum term . . . depend[s] entirely on whether the prisoner has demonstrated successful rehabilitation" must fail. Br. 30; *see* Br. 9, 25.

Finally, the defendant appeals to the rule of lenity, and argues that it requires the court to adopt its urged construction of RSA 651:20, I. Br. 11-12. This argument is equally unavailing.

> The rule of lenity is not to be applied lightly: it applies only if, after seizing everything from which aid can be derived, *the court can make no more than a guess* as to what the legislature intended.
>
> Under the rule of lenity, grievous ambiguity in a penal statute is resolved in the defendant's favor. The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. Rather, the rule only applies if there is a grievous ambiguity or uncertainty in the statute.

State v. Ravell, 155 N.H. 280, 283 (2007) (*Duggan*, J., dissenting) (internal and parallel citation omitted) (emphasis added). "[L]ike other canons of statutory construction, the rule of lenity is neither absolute nor exclusive. Other considerations may also be applicable in arriving at a principled decision." *Gardner v. State*, 20 A.3d 801, 811 (Md. 2011) (quotation omitted).

Here, there is no grievous ambiguity or uncertainty in RSA 651:20, I. The plain language of the statute, as well as the corresponding legislative history, makes clear that the legislature never contemplated the limitation for which the defendant advocates. Thus, there is no grievous ambiguity.

Moreover, the trial court's interpretation of the statute did not "increase the punishment imposed upon" the defendant. Br. 12. The sentencing court sentenced the defendant to 7½ to 15 years stand committed. Thus, the defendant would be eligible for conditional release after serving his minimum. This is still the case under the trial court's decision. The fact that the defendant did not receive a benefit—the opportunity for earlier release—does not mean the court increased his punishment. For these reasons, the rule of lenity does not apply to this case.

Thus, consistent with the plain language of RSA 651:20, I, this Court should affirm that trial courts have broad discretion when ruling upon properly-filed motions to suspend sentences, the exercise of which includes considering the facts of the petitioner's underlying crime. The court should further affirm the trial court's denial of the defendant's motion in this this case.

B. The defendant did not preserve the argument that the trial court applied the proper standard, but nonetheless erred by denying his motion based only on the facts of his underlying crime and by failing to consider his rehabilitative

efforts. But otherwise, the Court properly considered the defendant's rehabilitative efforts and the facts of his underlying crime prior to denying his motion to suspend sentence.

The defendant next argues that even if RSA 651:20, I, permits courts to consider the facts of the underlying crime, the trial court improperly denied his petition to suspend based only on the facts of his underlying crime. This argument fails for two reasons.

First, the defendant has not preserved this argument. This Court abides by the "general procedural requirement that all issues be presented to the trial court to adequately preserve them for appellate review." *State v. McAdams*, 134 N.H. 445, 446-47 (1991). "This court has consistently held that . . . [it] will not consider issues raised on appeal that were not presented in the lower court." *Id.* (internal quotations omitted). Here, the defendant raised one argument before the trial court—that the court applied the wrong standard to his motion to suspend sentence and erred by considering the facts of his underlying crime. A10-A12; A63-A64; A71-A72. He did not alternatively argue, as he does here, that while the trial court applied the correct standard, it did so improperly by failing to make specific findings, particularly regarding the quality of the defendant's rehabilitation, the need for further rehabilitation, or the need for further punishment. Br 31. Thus, the defendant has not preserved this argument for appeal and the Court should not address it. A10-A12; A63-A64; A71-A72.

Second, even if courts must consider a petitioner's rehabilitative efforts when deciding whether to suspend a sentence, the trial court's decision in this case was proper because it did just that. The defendant submitted to the trial court extensive evidence of his rehabilitative efforts. A13-A58. The Court then sought confirmation of these efforts from the Warden. A67. The court "carefully considered" all of his mitigating efforts, yet ultimately decided that could not "ignore the punitive aspect of the original sentence," and denied the defendant's motion. Supp. 2. In doing so, the court implicitly found that the defendant's rehabilitative efforts were

insufficient to overcome the heinous nature of his crimes, and determined that the full punitive purpose of the sentence had not yet been exacted. This is a proper basis upon which to deny a motion to suspend sentence. Accordingly, the trial court's denial should be affirmed.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's judgment for the reasons explained above.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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CERTIFICATION

I hereby certify that two (2) copies of the foregoing were mailed this 4th day of December 2017 to Christopher M. Johnson, Esq., counsel of record for the defendant.

Elizabeth A. Lahey