THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0009

The State Of New Hampshire

v.

Ernesto Rivera

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

STATEMENT OF THE CASE

The defendant was tried and convicted in two separate trials in the fall of 2015. AD 29. In Docket No. 226-2013-CR-636, the defendant was convicted of: (1) two counts of armed career criminal ("ACC"), RSA 159:3-a; (2) one count of possession with intent to sell or dispense cocaine, RSA 318-B:2, 318-B:27; and (3) four counts of criminal solicitation to witness tampering, RSA 629:2, 641:5. In Docket No. 226-2013-CR-612, the defendant was convicted of: (1) possession of a narcotic drug, RSA 318-B:6; (2) criminal threatening, RSA 631-4; and (3) four counts of domestic violence ("DV") simple assault, RSA 631:2-a, 173B:1 (hereinafter, collectively, the "DV charges"). AD 15-30, 32.[1]

[1] References to the record are as follows: "A" refers to the defendant's appendix and page number. "AD" refers to the addendum to the defendant's brief and page number. "DA" refers to the appendix to the defendant's brief and page number. "DB" refers to the defendant's brief and page number. "2015 ST" refers to the 2015 sentencing transcript and page number of the transcript.

At the behest of the defendant, AD 30, the sentencing court (*Garfunkel*, J.) imposed sentence on all of the charges in a single sentencing hearing. 2015 ST.

On December 17, 2015, the sentencing court held the sentencing hearing. 2015 ST 1. The State asked the sentencing court to impose aggregate sentences of a minimum of 35 years. 2015 ST 12. The State made this recommendation based on the ACC charges "coupled with the history of the two women he was involved with" and actions taken after his arrest, presumably the related witness tampering charges. 2015 ST 14. The State was clear that the charges involving the two women were significant to its recommendation and described the defendant as "controlling, calculat[ing], [and] manipulating" and as a "violent individual." 2015 ST 15. The State described the defendant's drug trafficking offenses, 2015 ST 16, and his extensive criminal record, 2015 ST 19.

In response, defense counsel told the sentencing court that, when he first met with the defendant, he told the defendant that the case was "a life sentence case." 2015 ST 24. The defense contended that the two ACC charges, which required a minimum 20-year sentence, would result in a life sentence for the defendant who was 50 years old. 2015 ST 24. Because the ACC charges had such significant sentences, defense counsel asked the sentencing court to suspend the sentences on all remaining charges. 2015 ST 26.

"2020 ST" refers to the 2020 resentencing transcript and page numbers. Other transcripts are identified by the date, followed by "T" and the page number.

When the sentencing court imposed sentence, it told the defendant that the 33½ year sentence was a "harsh" sentence, in part, because the ACC charges carried mandatory minimum sentences. 2015 ST 35. The sentencing court added that the defendant's "entire lifestyle" "demonstrated a complete and total disregard for the law." 2015 ST 36.

The sentencing court then imposed the following minimum sentences: (1) 10 years on each ACC conviction, running consecutively; (2) 10 years on the possession with intent to sell charge, to be served consecutive to the ACC charges; (3) 3½ years on each witness tampering charge, concurrent with each other, but consecutive to the ACC convictions; and (4) 12-months on the DV simple assault charges, concurrent with the witness tampering charges, but consecutive to the ACC charges. AD 32-33. The sentencing court imposed suspended sentences on the rest of the charges. AD 33.

Thereafter, this Court decided *State v. Folds*, 172 N.H. 513 (2019), and "it became clear that the defendant's ACC convictions should be vacated and that he should instead be sentenced on the lesser-included felon in possession convictions." AD 33. The defendant's lawyer filed a motion for a new sentencing hearing, A 89, asking the sentencing court to hold a new hearing "on the remaining charges" because the court should not have considered the ACC convictions in imposing the sentences, A 93. However, the defense asked the sentencing court to vacate only the ACC sentences, not the DV and possession sentences arising from the defendant's crimes at the San Francisco Kitchen. AD 34, A 93. However, the defendant did ask for a new sentencing hearing to include the charges in all of his cases. A 93.

On January 20, 2020, the resentencing court (*Temple,* J.) held a resentencing hearing. AD 34. At that hearing, defense counsel told the resentencing court that the defendant should be "resentenced on everything." AD 35. During that same hearing, the resentencing court, with the acquiescence of the defendant, stated that it would proceed with a "full resentencing." AD 36-37. *See also* 2020 ST 3-4 (THE COURT: "[B]oth parties agree that he should be resentenced on everything.").

Defense counsel argued that the sentence imposed by the 2015 sentencing court was unfair because the 2015 court labored under the misimpression that the defendant was a career criminal, when, according to the defense, he was not. 2020 ST 31-32, 44. The defense contended that the State had not "produce[d] anything" that justified the 10 to 20 year sentence imposed on the intent to sell charge. 2020 ST 44. With respect to the witness tampering charges, defense counsel returned to the presentence investigation report, which stated that the offenses occurred on three consecutive days, and he urged the resentencing court to listen to the calls, implying that the charges were less than a concerted effort, but more a failure to follow his lawyer's directions. 2020 ST 66. The defense also pointed out that in the presentence report, the probation officer had recommended "a vastly different sentence" than that imposed by the 2015 sentencing court. 2020 ST 38.

Defense counsel then recommended the following sentence: (1) felon in possession charge involving the .380 caliber firearm: a suspended sentence, 2020 ST 40; (2) felon in possession charge involving the .40 caliber firearm: 3½ to 7 years; (3) possession with intent, 2 to 5 years to "follow[ ]" the felon in possession charge, 2020 ST 42; (4) witness

tampering charges: 12 months on each charge, concurrent with each other and consecutive to the other charges, 2020 ST 47-48; and (5) the DV charges, including the criminal threatening and the possession charges: 3½ to 7 years, all suspended for five years, 2020 ST 48.

In short, the defense recommended a total sentence of six and one-half years of incarceration. At the conclusion of his lawyer's argument, the defendant said that he thought that the sentencing recommendation made by his lawyer was "appropriate." 2020 ST 53.

The resentencing court told the parties that it was not going to review the 2015 sentencing court's sentencing hearing, but rather it would consider sentencing "anew." 2020 ST 55. Both counsel said that they understood and did not object. 2020 ST 55.

Before the conclusion of the hearing, defense counsel also asked the resentencing court to detain the defendant at Valley Street jail, not the state prison. 2020 ST 57. Defense counsel pointed out that the sentence was a "de novo resentencing" and that, therefore, the defendant should be "preventatively detained post-trial pending a sentencing hearing." 2020 ST 57. The State objected, 2020 ST 57, and the resentencing court declined to have the defendant "ship[ped] back and forth," particularly as the resentencing court intended to schedule the next hearing quickly. 2020 ST 58.

When the hearing reconvened a week later, the resentencing court imposed the following sentences: (1) 7½ years on the possession of a narcotic with the intent to sell charge; (2) 3½ years on the possession of a narcotic charge, to run consecutive to the intent to sell charge; (3) 1 year on the criminal threatening charge, consecutive to the intent to sell charge, but

concurrent with the possession charge; (4) 12 months on each DV simple assault charge, consecutive to each other, but suspended; (5) 3½ years for the witness tampering, concurrent with each other, but consecutive to the intent to sell and possession charges; and (6) 3 ½ years on the two felon in possession charges, concurrent with each other, but consecutive to the previous sentences. AD 38. As the resentencing court noted, the defendant was sentenced to 18 years of imprisonment, as opposed to the 33½- year sentence that had been imposed when the ACC charges were before the sentencing court. AD 38.

On July 13, 2020 the defendant moved to vacate the new sentences, arguing that the resentencing court had no authority to resentence the defendant on all of the charges and that counsel had been ineffective in his representation. A 3-14; AD 39. The defendant did not style this as a motion to reconsider, as the time for filing that motion had long passed. *See N.H. Super. Ct. R.* 43. Rather, he filed the motion as a motion to vacate the sentences imposed six months earlier. A 3-14. The State objected. A 98.

On October 19, 2020, the resentencing court held a hearing on the motion to vacate the sentences. 10/19/20 T 1. The State argued that when the court resentenced the defendant, it did so on all charges because the change in the ACC sentences affected the overall sentence. 10/19/20 T 7. Defense counsel contended that the resentencing was not "a single sentencing scheme" and that, therefore, resentencing on all charges was error. 10/19/20 T 16.

On December 22, 2020, the resentencing court denied the defendant's motion. AD 45. Addressing the contention that it had no

jurisdiction, the resentencing court found that, once the defendant's ACC were vacated, the court had the jurisdiction to "issue new sentences for those convictions." AD 41. The court further found that, in imposing the sentences on the DV and possession charges arising from the criminal behavior at the San Francisco Kitchen, the 2015 sentencing court had "repeatedly referenced the defendant's ACC convictions." AD 41. The 2015 sentencing court had also referred to the mandatory minimum sentences in the ACC charges. AD 41.

Finally, the resentencing court found the defendant's argument that he should be resentenced only on the ACC charges "disingenuous," noting that, at resentencing, "everyone – the court, the State, and the defendant – was on the exact same page regarding" the resentencing. AD 42. The resentencing court found that the defendant had waived the post-resentencing objection. AD 42.

The resentencing court also rejected the defendant's contention that sentencing counsel had been ineffective. AD 44. The court found that when it vacated the ACC sentences, "it was proper – if not necessary – for the Court to resentence the defendant on the sentences stemming from his second trial." AD 44. If sentencing counsel had objected to resentencing on all of the charges, the court observed, it would have overruled the objection. AD 44. The court concluded that the defendant had failed to show that the outcome probably would have been different if sentencing counsel had objected. AD 44.

ARGUMENT

I. THE RESENTENCING COURT CORRECTLY CONCLUDED THAT IT HAD JURISDICTION TO RESENTENCE THE DEFENDANT ON ALL OF THE CHARGES WHICH THE PREVIOUS COURT HAD IMPOSED.

The resentencing court correctly concluded that the sentences imposed should all be revisited because the sentences imposed by the 2015 sentencing court were interrelated. The fact that the parties acquiesced in this approach for resentencing reinforces the resentencing court's ruling. The fact that the defendant did not object to this procedure and, instead, affirmatively acquiesced in it, means that this Court should review his claim under the plain error doctrine.

As a general rule, this Court defers to the factual findings of a trial court and considers legal questions *de novo*. *State v. Daniel*, 142 N.H. 54, 58 (1997) (considering the trial court's ruling on a motion to suppress). In this case, however, because the resentencing court revisited all of the sentences imposed without objection from the defendant until months after the sentences were re-imposed, the plain error test should apply. For a successful plain error claim, "(1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *State v. Russell,* 159 N.H. 475, 489-90 (2009) (quotation omitted). The defendant cannot meet this test.

First, it is not clear that the resentencing court erred. Although the defendant contends that the resentencing court exceeded its authority by resentencing him on all of the charges, DB 17, his reliance on this Court's opinion in *State v. Abram*, 156 N.H. 646 (2008), to support this contention is misplaced. In *Abrams*, the parties agreed that the trial court should resentence the defendant after this Court had reversed the convictions on nine of the twenty-six counts of conviction. *Id.* at 648. This Court concluded that the trial court had the authority to resentence the defendant and that his contention to the contrary "fail[ed] to appreciate the breadth of the trial court's discretion." *Id.* at 651. This Court, however, concluded that, because the trial court increased the sentences on the remaining counts after the defendant had successfully challenged some of his convictions on appeal, the resentencing "had the overall impact of increasing the sentences on the affirmed charges, which is sufficiently harsher for due process purposes." *Id.* at 653.

This Court then presumed that the trial court's sentence was based on vindictiveness because the trial court did not identify a basis for increasing the sentences, except to note that the defendant was a dangerous person. *Id.* at 653. Notably, although the State asked the trial court to restructure the sentences on the remaining counts so that the same sentence would be imposed, the defendant "argued, in contrast, that the trial court could amend the sentence solely to remedy the gap in sentencing noted above, but was not otherwise permitted to resentence him on the affirmed convictions." *Id.* at 649.

This is simply not the case here. To the contrary, the defendant asked the resentencing court to revisit all of the sentences and he did so

because he wanted to seek lower sentences on the other charges. When the defendant was resentenced in 2020, he argued that all of the sentences imposed in 2015 were unfair, in part because the 2015 sentencing court had misunderstood the defendant's criminal record. As a result, the defendant not only wished to revisit the 10 years on each ACC conviction, running consecutively, he wanted to challenge: the ten-year sentence on the possession with intent to sell charge; the 3½ years on each witness tampering charge, concurrent with each other, but consecutive to the ACC convictions; and the 12-month sentences imposed on the DV simple assault charges, concurrent with the witness tampering charges, but consecutive to the ACC charges. 2020 ST 40-48. In short, the defendant did not want his two mandatory minimum sentences replaced with two 3½ to 7 year sentences. He wanted to challenge the 14½ years imposed on the remaining charges, and he did exactly that. *See* 2020 ST 40-48. Defense counsel not only recommended a significantly reduced sentence, he did it with the defendant's approval. *See* 2020 ST 53 (defendant told the court that counsel's recommendation was "appropriate").

In addition, this Court's opinion in *State v. Fletcher* suggests that the resentencing court retained jurisdiction to revisit the sentences imposed in 2015. In *Fletcher*, this Court reiterated that trial courts "retain jurisdiction over their own final judgments in criminal cases under the following exceptions: (1) *to correct a void sentence*; and (2) to correct clerical errors in judgment." *Id.* at 210 (internal quotation marks and citation omitted). Since the ACC charges were void, and since the parties sought resentencing on all charges, the resentencing court correctly concluded that the 2015 sentences were all affected by the voided mandatory minimum ACC

charges. As the resentencing court noted, all of the considerations of the *Fletcher* decision did not apply in this case because the sentences were not amended; rather, as the resentencing court observed, the defendant in this case moved to vacate his sentences, and that motion was granted. AD 40.

The resentencing court further observed that if it had not vacated the two ACC convictions, this Court would have done so on appeal and then remanded the case for resentencing on the remaining charges. AD 41. The resentencing court then concluded that this Court would have probably remanded the case for a new sentencing hearing on the other offenses because the ACC charges could have influenced the sentences imposed on the other charges. AD 41-42 (citing *State v. Gordon*, 148 N.H. 710, 723 (2002)).

The defendant contends that he cannot claim vindictiveness on the part of the resentencing court as the defendant did in the *Abrams* case because the resentencing justice was not the same justice who had imposed the 2015 sentences. DB 19. This is certainly true, as the 2015 justice had retired four years earlier. But the assertion misses the mark: this defendant cannot claim that the resentencing court was vindictive because the resentencing court was reconsidering all of the sentences anew because the defendant asked the resentencing court to do so.

The defendant contends that this Court rejected the notion of a sentencing plan in *Abram*, in which this Court declined to adopt the "sentencing package" doctrine applied by some federal courts. DB 19; *see also Abram*, 156 N.H. at 654. But the resentencing court and the 2015 sentencing court were not applying a "sentencing package" analysis in imposing sentence. Both courts acted at the request of both parties: both

parties wanted the cases sentenced at the same time and both parties wanted all of the sentences revisited anew in 2020. While this Court has not adopted the sentencing package approach as mandatory in the trial courts, it also has not prohibited trial courts from sentencing multiple cases in the same proceeding if the parties have requested that procedure.

In this case, it is undisputed that, in 2015, the parties wanted the ACC and DV cases sentenced at the same time. It is also undisputed that, at the time that the resentencing was scheduled, both parties thought that the resentencing court should reconsider all of the defendant's sentences. To argue now that the resentencing court did not have authority to resentence on all charges is to attempt to claim advantage from his own informed choices. This Court should not reward the defendant for encouraging the resentencing court to follow the course that he preferred and recommended. *See State v. Goodale*, 144 N.H. 224, 227 (1999) ("Under the 'invited error' doctrine, a party may not avail himself of error into which he has led the trial court, intentionally or unintentionally.") (internal quotation marks, brackets, and citation omitted).

Although the defendant now contends that the resentencing court did not have the authority to resentence on all charges, he cites no case by this Court that it lacked authority to do so. Since there is apparently no case that restricts the resentencing court's authority in this manner - and since the parties agreed that the resentencing court could do as it did – the resentencing cannot satisfy the plain error test. *Russell,* 159 N.H. at 489-90. In other words, any error, to extent it even exists, was not plain. To the contrary, the resentencing court acted in a manner consistent with the

authority of the Sentence Review Division, which reviews the appropriateness of imposed sentences. *See* RSA 651:59.

The argument raised here, that the resentencing court did not have the authority to do what the parties agreed it could do, though no statute or case law precludes it, is simply a case of buyer's remorse. The defendant hoped for a very lenient sentence. He received a reduced sentence, but not the lenient sentence for which he had hoped. The resentencing court did not commit plain error when it resentenced the defendant on all of the charges and its sentence should be affirmed.

II RESENTENCING COUNSEL WAS NOT INEFFECTIVE.

The defendant contends that, if this Court agrees with him regarding the sentencing issue, it will also necessarily find that resentencing counsel was ineffective and that the defendant has shown prejudice. DB 23-25. This is incorrect.

First, as noted above, the defendant agreed with his counsel that all of the sentences should be revisited. That agreement alone should undercut any claim that counsel was ineffective. *Cf. United States v. Masat*, 896 F.2d 88, 92 (5th Cir. 1990) ("Cutting through the smoke, it is apparent that we are being asked to permit a defendant to avoid conviction on the ground that his lawyer did exactly what he asked him to do. That argument answers itself."); *Lobosco v. Thomas*, 928 F.2d 1054, 1057 (11th Cir.1991) (holding that, largely because the defendant concurred in the strategy, it was not ineffective assistance under *Strickland* for defense counsel to use his closing argument at the guilt stage of the trial to concede the defendant's guilt and begin building a case for mercy based on his contrition); *United*

States v. Weaver, 882 F.2d 1128, 1140 (7th Cir.1989) ("Where a defendant, fully informed of the reasonable options before him, agrees to follow a particular strategy at trial, that strategy cannot later form the basis of a claim of ineffective assistance of counsel [under *Strickland*]."); *United States v. Williams*, 631 F.2d 198, 204 (3d Cir.1980) (no ineffective assistance existed because the defendant ultimately concurred in trial counsel's tactical decision).

Second, the claim that counsel was ineffective in agreeing to a global resentencing imposes on counsel an ability to predict what the court would do. This overstates counsel's role. Trial counsel is expected to be competent. He is not expected to be clairvoyant. *See* *Cooks v. United States*, 461 F.2d 530, 532 (5th Cir. 1972) ("Clairvoyance is not a required attribute of effective representation."); *see also Knight v. United State*s, 37 F.3d 769, 775 (1st Cir. 1994) ("It is well-established in the First Circuit that 'an inaccurate prediction about sentencing will generally not alone be sufficient to sustain a claim of ineffective assistance of counsel.").

On this record, counsel was not ineffective and this Court should decline to find otherwise.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment of the Hillsborough County Superior Court (Southern Division).

The State waives oral argument. *See Sup. Ct. R.* 16(4)(b).

Respectfully submitted,

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February 28, 2022

CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(4)(b) of the New Hampshire Supreme Court Rules, this memorandum of law in lieu of brief contains approximately 3,725 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

s/Elizabeth C. Woodcock
Elizabeth C. Woodcock

February 28, 2022

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, do hereby certify that Chief Appellate Defender Christopher M. Johnson, the lawyer for the defendant, has been served with a copy of this memorandum in lieu of a brief through this Court's electronic filing system.

s/Elizabeth C. Woodcock
Elizabeth C. Woodcock

February 28, 2022