STATE OF VERMONT
WINDSOR COUNTY, SS

In re Gerald Baker	SUPERIOR COURT Docket No. 845-12-09 Wrcv

FINAL ORDER ON PETITION FOR POST-CONVICTION RELIEF

Petitioner Gerald Baker was convicted for sexual assault and sentenced to a term of imprisonment in August 2002. He has now filed a petition for habeas corpus in which he seeks judicial review of a discrepancy between the oral sentence, the written mittimus, and the implementation of his sentence by the Department of Corrections. After a telephone status conference on December 17, 2009, the parties agreed that the court would decide the petition based upon the pleadings already filed.

A review of the record establishes the following facts. Petitioner was convicted for sexual assault and sentenced at a contested hearing held on August 27, 2002. At the hearing, the judge delivered the following sentence from the bench:

> The sentence is going to be this, it's going to be on this offense a minimum of 7 years, a maximum of 20 years, split to serve 12. And by this I mean that the sentence to serve should be 7 to 12, followed by functionally a 0 to 8, while the defendant is on probation.

In the same sentencing hearing, the judge also revoked petitioner's probation on an underlying offense. The details of the underlying offense are not clear from the record, but the transcript shows that the judge imposed "the underlying sentence of 4 to 12 months," and specified that it should be "served consecutively to the sentence just imposed."

A written mittimus was issued on the same day. It committed petitioner to the custody of DOC for a minimum sentence of seven years and a maximum sentence of 20 years, with the notation that the sentence was "all susp. but 12 Yr(s)."

Petitioner now seeks review of the discrepancy between the mittimus and the oral pronouncement of sentence. He further contends that the DOC has improperly implemented the sentence by requiring him to serve a twelve-year minimum. Petitioner argues that the "clear intent" of the oral sentence was to make him eligible for furlough release after seven years, and then to release him to probation after twelve years. He accordingly seeks an order from this court requiring DOC to "honor the seven year minimum of the sentencing court."

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At the outset, there is confusion about whether this petition is truly seeking habeas relief, or rather whether it is seeking post-conviction relief or even review of governmental action under Rule 75. There are elements of all three forms of relief in the pleadings, depending upon how the issues are characterized. In the final analysis, the fundamental problem here is that the oral sentence is ambiguous with respect to the time and manner in which the sentence is to be served. Since this is a problem with the sentence itself, the petition is best viewed as seeking post-conviction relief under 13 V.S.A. § 7131. *Coyle v. Hofmann*, 2009 VT 46, ¶¶ 5–7 (mem.). Given the wide range of relief available under the habeas and post-conviction statutes, however, the distinction means little in the end, and has had no practical significance in the court's evaluation of the petition.

The threshold problem is that the written commitment order is ambiguous. It explains that petitioner was sentenced to serve seven to twenty years, but then states that the unsuspended portion of the sentence is twelve years to serve. On its face, this split requires petitioner to serve twelve years in prison—which raises questions because it renders the minimum sentence meaningless. There is no possibility in this split that petitioner will serve less than twelve years in prison, and it is therefore not clear what the order means by referring to a seven-year minimum. The order does not say anything about releasing petitioner to furlough supervision or probationary supervision after seven years.

The next problem is that the mittimus does not exactly reflect the oral pronouncement of sentence. The general rule here is that "[i]n the event a variance exists between an unambiguous pronouncement of sentence and the written judgment and commitment, the oral pronouncement must control." *United States v. Pugliese*, 860 F.2d 25, 30 (2d Cir. 1988); accord *Letkowski v. Pallito*, 2009 VT 99, ¶ 5 (mem.). This makes sense because the oral sentence was handed down in the presence of the defendant, whereas the mittimus is prepared by the clerk, and is merely evidence of the sentence. *United States v. A-Abras, Inc.*, 185 F.3d 26, 29–30 (2d Cir. 1999). But the rule is helpful only insofar as the oral pronouncement of sentence does not leave "genuine doubt" as to the intentions of the sentencing court. *Pugliese*, 860 F.2d at 30.

In reviewing the oral pronouncement of sentence, the fundamental problem is that the court made two contradictory statements. The first statement was that the sentence was seven to twenty years, all suspended except twelve years to serve. Although this is consistent with the written mittimus, it raises the same questions about what was meant by the seven-year minimum. The court did not say anything about furlough supervision during the oral pronouncement.

The second statement was different: that what the court meant was that "the sentence to serve should be 7 to 12, followed by functionally a 0 to 8, while the defendant is on probation." The import of this statement is that the unsuspended portion of the sentence should be seven to twelve years to serve. This contradicts the preceding statement that the unsuspended portion of the sentence was twelve years to serve.

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A complicating factor is that DOC has taken the position here that it will not honor an amended mittimus that imposes an unsuspended sentence of seven to twelve years to serve. DOC asserts essentially that the sentencing court cannot delegate the authority to determine the unsuspended portion of the sentence, and that it will always respond by interpreting such sentences as requiring the defendant to serve the longest portion of the range. In other words, as applied here, DOC would interpret an unsuspended sentence of seven to twelve years as requiring petitioner to serve twelve years.

It is unnecessary to address the propriety of DOC's position at this time. The more pressing concern is that the sentencing court made two different statements at the sentencing hearing regarding the time and manner in which petitioner's sentence is to be served. The first statement was that the unsuspended portion of petitioner's sentence is twelve years to serve. The second statement was that the unsuspended portion was seven to twelve years to serve. Since these two statements are inconsistent, there is a need to clarify what petitioner's sentence was meant to be.

In attempting to ascertain the intent of the sentencing court, it is apparent that the judge meant for there to be a seven-year minimum. It is also apparent that the judge meant for something to happen at the twelve-year mark. But is not clear whether the judge meant for the intervening five years to be served in prison, on furlough supervision, or on probationary supervision. It is also unclear whether the judge meant for DOC to have discretion in determining the length of the incarcerative component of petitioner's sentence, and if so, whether this can be accomplished in a manner that DOC will honor.

In the final analysis, therefore, the oral pronouncement leaves genuine doubt as to the time and manner in which the sentence is to be served. This court cannot give effect to one interpretation over another without ignoring either the seven-year minimum or the repeated references to an unsuspended sentence of twelve years. Given this uncertainty, the best remedy here is to set aside the sentence and remand the case to the district court so that it may clarify the sentence, and correct it if need be. *United States v. Becker*, 536 F.2d 471, 473 (1st Cir. 1976). Of all the possible remedies, a limited remand makes the most sense because the district court is in the best position to clarify the ambiguity and ensure fidelity to the original intent of the sentencing court.

The remedy of immediate release is not supported by the present record. At the very least, there was a seven-year minimum sentence on the sexual assault conviction, followed by a consecutive four-month to twelve-month sentence on the underlying conviction. It has not been shown that the consecutive sentence has reached its maximum term as of yet.

For the foregoing reasons, the court will vacate the sentence and remand the case to the Chittenden District Court for the limited purpose of clarifying and correcting the original sentence, in accordance with 13 V.S.A. § 7133.

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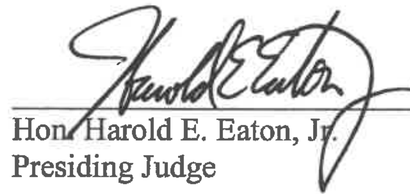
ORDER

The petition for post-conviction relief is ***granted***. The sentence is vacated in accordance with 13 V.S.A. § 7133, and the matter is remanded to the Chittenden District Court for the limited purpose of clarifying and correcting the original sentence in Docket NO. 6485-10-00 Cncr. Since it is possible that the remand may result in petitioner's release into the community, it is hoped that the matter will be taken up by the district court immediately. Petitioner shall remain in the custody of the Department of Corrections pending further proceedings in the district court.

Dated at Woodstock, Vermont, this 5th day of January, 2010.



Hon. Harold E. Eaton, Jr.
Presiding Judge

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