Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-191

OCTOBER TERM, 2017

In re Mitchell Bowen	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 13-1-17 Rdcv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Petitioner appeals the superior court's denial of his petition for post-conviction relief. We affirm.

The following facts are undisputed. On January 15, 2015, pursuant to a plea agreement, petitioner pleaded guilty to a charge of sexual assault on a minor and admitted to a violation of probation. The plea agreement stated: "The State is capped at arguing for a sentence of 2 years to 15 years to serve, concurrent to his current sentence in [a separate docket], for which the State will seek revocation. The defendant is free to argue for a lesser sentence." The court ordered a presentence investigation, including a psychosexual evaluation, to be conducted. On March 22, 2016, petitioner was sentenced to two to eight years to serve.

In November 2016, petitioner was designated a high-risk sex offender by the Department of Corrections (DOC). Petitioner filed a petition for post-conviction relief, arguing that the sex offender designation effectively changed his minimum sentence from two years to five years, seven months due to the so-called 70% rule. See 28 V.S.A. § 204b (providing that a person who is sentenced to incarceration for a listed offense and who is designated as high-risk by DOC shall not be eligible for release "until the expiration of 70 percent of his or her maximum sentence"). He claimed that his due process rights were violated because he did not receive the benefit of his plea bargain**.** The civil division granted summary judgment in favor of the State, concluding that the plea agreement did not promise that petitioner would be released in two years, and that it was "crystal clear" at the sentencing hearing that petitioner might be incarcerated for longer than the minimum sentence. This appeal followed.

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). We review a summary judgment decision de novo, using the same standard as the trial court. In re Barrows, 2007 VT 9, ¶ 5, 181 Vt. 283.

On appeal, petitioner argues that his plea was involuntary because he bargained for a two-year minimum sentence, which became impossible once he was designated as a high-risk sex

offender. Petitioner argues that the application of the 70% rule amounts to a material breach of the plea agreement, and that he should therefore be allowed to withdraw his plea.

As petitioner notes, Vermont Rule of Criminal Procedure 11 requires "that the defendant knows and understands the full array of legal consequences that attach to a guilty plea." In re Hall, 143 Vt. 590, 595 (1983). However, neither the trial court nor defense counsel has a duty to inform defendants of information beyond that required by Rule 11, including information about parole eligibility. In re Moulton, 158 Vt. 580, 583 (1992). Petitioner's complaint involves the collateral consequences of his high-risk designation by DOC, which—contrary to petitioner's argument—did not violate the terms of the plea agreement. The plea agreement does not mention parole eligibility, or state that petitioner would only be incarcerated for two years. Nor does the designation increase petitioner's minimum sentence, as he argues. "The application of the 70% rule to a particular sentence . . . is not an enhancement of a sentence any more than would be a denial of parole once the minimum sentence had been reached." State v. Goewey, 2015 VT 142, ¶ 30, 201 Vt. 37. "The sentence imposed by the court remains the sentence for which the defendant will be in execution." Id.

We have held that "misinformation regarding parole eligibility may provide a basis for a successful attack on the voluntariness of a plea." In re Moulton, 158 Vt. at 584. It is the petitioner's burden to prove that "he entered his plea while reasonably relying on a material misunderstanding regarding his parole eligibility" and was prejudiced thereby. Id.

Petitioner has failed to meet this burden. He did not allege in his petition or statement of undisputed facts that he was provided with inaccurate information by his attorneys or anyone else. He offered no evidence that he was misinformed regarding his parole eligibility. Cf. id. at 582 (describing petitioner's allegations that his attorneys failed to explain that he would not be eligible for parole unless he completed sex offender treatment program). The transcript of the plea hearing contains no mention of petitioner's potential release date or eligibility for parole, and reflects petitioner's acknowledgment that he understood that the State could argue for two to fifteen years to serve.

As the superior court noted, the possibility that petitioner would have to serve longer than his minimum was specifically discussed at the sentencing hearing. The prosecutor pointed out that petitioner had denied responsibility for his actions in the psychosexual evaluation, which meant that "he may have to stay in past his minimum to complete sex offender counseling, assuming he's even amenable to doing so and takes responsibility for his actions once incarcerated. If not, he could find himself staying in, I suppose, for a longer period of time." The prosecutor stated that petitioner had been found to be at "moderate risk to reoffend, general recidivism, and moderate to high to reoffend when it comes to sexual recidivism." Petitioner's attorney also referred to the possibility that petitioner might have to serve longer than the proposed minimum in order to complete counseling. The judge, in imposing sentence, noted that petitioner had failed to take responsibility for his actions in the psychosexual evaluation or at the sentencing hearing and that he was at moderate-to-high risk for sexual offense. The judge therefore found it necessary for petitioner to be incarcerated until he had "engaged in appropriate risk reduction programming and DOC concludes that he is able to be safely supervised in the community." Petitioner did not object to these statements or attempt to withdraw his plea at that point.

Petitioner also argues that he should be allowed to withdraw his plea because the application of the 70% rule violates his Sixth Amendment right to have all facts that were used to increase his sentence determined by a jury. He did not raise this issue before the superior court. This Court will not address claims that are raised for the first time on appeal. See Bain v. Hofmann,

2010 VT 18, ¶ 8, 187 Vt. 605. We note that this Court previously rejected a substantially similar argument in the case of State v. Goewey, 2015 VT 142, ¶¶ 24-30, 201 Vt. 37.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice