The State of New Hampshire
Superior Court

Hillsborough-North

STATE OF NEW HAMPSHIRE

v.

ANTWAN STROUD

No. 216-2020-CR-00820

ORDER

On January 7, 2021, the defendant, Antwan Stroud, pled guilty to one count of misdemeanor Riot. He was sentenced to twelve months in the House of Corrections stand committed, with all but thirty days suspended, and two years of probation. See Mittimus (Doc. 23).[1] He now moves to withdraw his plea, alleging it was not made knowingly, intelligently, or voluntarily, based on ineffective assistance of counsel and Brady violations. In the alternative, he has requested a new sentencing hearing. The State objects. The Court held a hearing on April 9, 2021. After consideration of the pleadings and the relevant law, the Court finds and rules as follows.

FACTUAL BACKGROUND

For purposes of this motion, the following facts are taken from the affidavit in support of the defendant's arrest warrant. See Aff. (Doc. 3). On the night of June 2, 2020, a Black Lives Matter protest was held on South Willow Street in Manchester, New Hampshire. On June 3, 2020, Detective Ryan Heile was searching Facebook for video

[1] Unless otherwise specified, all citations to the docket are to entries in the defendant's case, Docket No. 216-2020-CR-00820.

footage of that night. He came across a video taken by the defendant on his Facebook page that depicted the following events.

A large group of people stood outside of Budget Gas on South Willow Street. The group walked south, yelling “fuck the police,” among other things. A few minutes into the video, a group of Manchester Police Officers approached the group and told them to keep moving. The group continued down South Willow Street and stopped in front of Laundromax.

A woman off-camera said, “Kyle is lighting off the firework right now.” About thirty minutes later, the defendant, from behind the camera, twice said, “light that shit.” A man in a blue shirt, Kyle Toledo, then showed off for the video multiple cylindrical, brown items in his front pocket. The defendant again said “light that shit” a few more times. Toledo lit a firework and threw it over the crowd. It landed in front of the Laundromax near an occupied vehicle. That vehicle drove away as the firework sparked. The group then moved on towards the strip mall.

Around this time, the group encountered Officer Mark Aquino in an unmarked vehicle. As Officer Aquino began to drive away, the defendant and Toledo walked toward him. The defendant yelled profanities at the officer as the crowd followed him. As Officer Aquino was stopped at a red light, the defendant stated, “run this bitch ass nigga out of this shit.” The defendant then spat on Officer Aquino’s vehicle. It is unclear whether others also spat on the officer’s SUV, but the defendant can be heard on the video saying, “we spitting on his shit.” While the defendant was engaged in these actions, there were several other individuals in the vicinity of Officer Aquino’s cruiser. Officer Aquino requested assistance because his vehicle had been blocked in by the

crowd and someone had kicked his vehicle. Shortly after, a group of officers arrived on the scene.

The defendant was arrested on July 2, 2020, based on these events and charged with one count of misdemeanor Reckless Conduct and one count of felony Riot. His Reckless Conduct charge contained the following narrative:

> [The defendant] was an accomplice of another person in the commission of an offense with the purpose [of] the commission of the offense when he told Kyle Toledo (10/11/1999) multiple different times to li[gh]t a firework while they were both located on South Willow Street within a large group of people. Toledo recklessly engaged in conduct which placed another in danger of serious bodily injury when Toledo lit a firework and threw it over a group of individuals, which caused an actively lit firework to land roughly 10 feet from an occupied vehicle that was parked in Laundro Max (465 South Willow Street) which caused the vehicle to reverse and leave the area.

Compl. (Doc. 3). His original Riot charge stated the following narrative:

> Simultaneously with 2 or more persons, [the defendant] engaged in tumultuous or violent conduct and thereby purposefully or recklessly created a substantial risk of causing public alarm, when Toledo along with a large group of people got in close conduct [with] Officer Mark Aquino while he was located in an unmarked Police Cruiser, this group then blocked Officer Aquino's exit, spit on his vehicle, and threatened violence on Officer Aquino which included pulling him out of his police cruiser.

Compl. (Doc. 2). On December 29, 2020, after plea discussions were underway, the State amended the Riot charge to a misdemeanor and changed the narrative to: "simultaneously, with 2 or more persons, Antwon Stroud engaged in tumultuous conduct and thereby purposefully created a substantial risk of causing public alarm, when he and a group of other individuals surrounded Officer Mark Aquino, spitting on his police car, and threatened violence against him." Compl./Indictment Amend. Form (Doc. 17); Complaint/Indictment Amend. Form (Doc. 22).

The defendant was represented by Attorney Justin Shepherd. The parties reached a plea agreement in which the defendant agreed to plead guilty to one count of misdemeanor Riot and the State agreed to nolle pross the Reckless Conduct charge. See State's Sentencing Mem. at ¶ 2 (Doc. 15). The parties further agreed that the State would argue for the following capped sentence: twelve months in the House of Corrections, all but thirty days suspended for two years, and two years' probation. Id. ¶ 4. As part of the agreement, the defendant could request the Court to suspend the entire sentence. The defendant pled guilty on January 7, 2021. Immediately following the entry of a conviction based on the guilty plea, the Court heard sentencing arguments from both parties. After a brief recess to consider the parties' respective positions, the Court imposed a sentence of twelve months in the House of Corrections with thirty days stand committed and the balance suspended for two years with two years' probation. Due to the COVID-19 pandemic, the Court gave the defendant the option to begin serving his sentence immediately or delay sentencing for six months. The defendant opted for the latter. The defendant is set to begin his thirty-day incarceration period on June 7, 2021.

The same affidavit discussed above also supported the arrest warrant for Toledo. Toledo was charged with felony Riot and his charge documents contained the exact same narrative description as the defendant's initial felony charge. See State v. Toledo, No. 216-2020-CR-00815, Compl. (Toledo Doc. 3). He was also charged with misdemeanor Reckless Conduct for lighting a firework and throwing it towards a vehicle. Compl. (Toledo Doc. 4). The parties in that case appeared for a status conference on December 16, 2020. The Court (Messer, J.) scheduled the matter for a plea and

sentencing hearing on January 19, 2021. Rather than appearing for a formal plea and sentencing hearing, the parties in Toledo submitted a "paper plea packet," on January 15, 2021. Toledo waived his presence in court for a plea hearing and entered a plea of guilty to one count of misdemeanor Reckless Conduct and the State nolle prossed his felony charge. See Mittimus (Toledo Doc. 13). The Court (Nadeau, C.J.) approved the plea agreement and sentenced Toledo to the parties' agreed-upon sentence: six months in the House of Corrections suspended for good behavior, fifty hours of community service, and writing an apology letter to the Manchester Police Department. Id.

Over a dozen people were arrested and charged in connection with the Black Lives Matter protest. See Def.'s Mot. to Withdraw Plea at 3 (Doc. 29). These defendants have been charged in various superior courts and circuit courts and sentenced by different judges. No aspect of Toledo's case, nor the case of any other person arrested in connection with the protest, was brought to the Court's attention before or during the defendant's plea and sentencing hearing. The defendant also represents that Attorney Shepherd's file on his case contains no inquiries, notes, or discovery relating to Toledo's plea negotiations or the negotiations or sentences of any others who participated in the protests.

The defendant's motion further contains broad allegations of racism in the charging and sentencing disparities, noting that "all non-White protesters were charged with Riot, whereas nearly all White protesters were charged with disorderly conduct." Id. at 4. He states that of those who have been sentenced so far, the defendant—a Black man—"is the only protester to receive jail time," and "[t]he other sentenced

protesters—all White—will not see a jail cell. The difference? Mr. Stroud is Black." Id. at 3-4.

ANALYSIS

The defendant argues his plea was not knowing, intelligent, and voluntary as required under Part 1, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments under the United States Constitution. "When a defendant moves to withdraw a guilty plea, he has the burden to prove that his earlier plea was made involuntarily and that withdrawal of the plea must be allowed to correct a manifest injustice." State v. McGurk, 157 N.H. 765, 774 (2008). "It is within the trial court's discretion to grant the withdrawal of a guilty plea . . . ." State v. Laforest, 140 N.H. 286, 289 (1995). "In order for a plea to be knowing, voluntary, and intelligent, the defendant must understand the essential elements of the crime to which he is pleading guilty." State v. Thorton, 140 N.H. 532, 537 (1995). Here, the defendant signed an acknowledgment of rights form and engaged in a full plea colloquy, neither of which he alleges was defective. See Acknowledgement and Wavier of Rights (Doc 20).

The defendant alleges that his plea was involuntary because Attorney Shepherd was ineffective for failing to request from the State information relating to plea negotiations, plea deals, and sentences of others arrested and charged in connection with the Black Lives Matter protest. He also alleges that the State's failure to disclose the same prior to his plea and sentencing amounts to a Brady violation. He alleges both Attorney Shepherd and the State failed at bringing this information to the Court's attention. Despite his grievances of disparate treatment based on race, he confirmed at the hearing that he is not alleging an equal protection violation. The Court addresses

the defendant's ineffective assistance argument first. Because the State Constitution is at least as protective as the Federal Constitution with respect to ineffective assistance of counsel, see State v. Cable, 168 N.H. 673, 680 (2016) (noting that "[b]oth the State and Federal Constitutions guarantee a criminal defendant reasonably competent assistance of counsel"), the Court addresses the defendant's motion pursuant to the State Constitution, citing to federal cases for guidance only, see State v. Ball, 124 N.H. 226, 231-33 (1983).

"During plea negotiations[,] defendants are entitled to the effective assistance of competent counsel." Lafler v. Cooper, 566 U.S. 156, 162 (2012). "In today's criminal justice system, . . . the negotiation of a plea bargain . . . is almost always the critical point for a defendant." Missouri v. Frye, 566 U.S. 134, 144 (2012). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "[T]he two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel." Id. at 58. "To successfully assert a claim for ineffective assistance of counsel, a defendant must first show that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." State v. Flynn, 151 N.H. 378, 389 (2004).

To establish that trial counsel's performance was deficient, "a defendant must overcome the strong presumption that counsel's conduct fell within the limits of reasonable practice, bearing in mind the limitless variety of strategic and tactical

decisions that counsel must make." State v. Croft, 145 N.H. 90, 91 (2000). A defendant must prove that "counsel made such egregious errors that he was not functioning as the counsel guaranteed by both constitutions." State v. Morse, 135 N.H. 565, 567 (1992). This "turns upon a determination of whether 'counsel's assistance was reasonable considering all the circumstances.'" State v. Whittaker, 158 N.H. 762, 768 (2009) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)). "Trial counsel's strategic decisions are afforded a high degree of deference, and it is not th[e] [C]ourt's function to seize on the fact of a defendant's conviction to speculate as to the propriety of a defense tactic." State v. Wisowaty, 137 N.H. 298, 301 (1993).

To demonstrate actual prejudice in the context of guilty pleas, the focus is "on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59; see also State v. Fitzgerald, 173 N.H. 564, 577 (2020) ("In the context of pleas[,] a defendant must show the outcome of the plea process would have been different with competent advice."). "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Fitzgerald, 173 N.H. at 577. "If that right is denied, prejudice can be shown if the loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." Id. Alternatively, the defendant can show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

The defendant alleges that Attorney Shepherd's performance was deficient in two ways. First, he "failed to conduct even a basic investigation into Mr. Toledo's and

others' sentences and plea deals," despite being, at minimum, aware of "numerous others [who] were involved in similar actions" as the defendant, including Toledo, who was specifically named in the defendant's charges. Doc. 29 at 14. Second, that he "failed to investigate charging discrepancies," thereby "ineffectively fore[going] charge-bargaining." Id. The defendant contends these actions "clearly resulted in prejudice," because it rendered his plea involuntary and subjected him to charging disparities. Id. Further, he claims he "may not have pled guilty at all, he may have charge-bargained to a lesser charge, and he would certainly have received a lesser sentence." Id.

The defendant's allegation with respect to charge-bargaining is curious. The defendant's charges were, in fact, reduced from felony Riot to a misdemeanor Riot as a result of the plea deal negotiated by defense counsel. The defendant has not articulated what more he expected Attorney Shepherd to have done in this regard. Accordingly, this assertion is wholly without merit.

The defendant's contention that he may not have pled guilty at all if Attorney Shepherd had investigated the outcomes of the other individuals charged in connection with the protest is similarly devoid of substance. There is no basis to believe that the defendant would have risked a felony conviction after a trial, even if he knew of Toledo's plea agreement. There is also no affidavit to support his claim that Attorney Shepherd's deficient performance prejudiced his decision to enter a plea of guilty. See N.H. R. Crim. P. 35(i)(1) ("The court will not hear any motion grounded upon facts, unless they are verified by affidavit . . . .").

The one claim that warrants more detailed analysis is the defendant's assertion that Attorney Shepherd was ineffective by not investigating related cases and

presenting that information to the Court during sentencing. The New Hampshire Supreme Court has recognized that "it is the responsibility of the attorney to investigate mitigating circumstances and present such factors to the sentencing court . . . ." State v. Glidden, 127 N.H. 359, 362 (1985) (citing ABA Standards For Criminal Justice § 4-8.1). That said, the defendant has cited no persuasive authority that places on defense counsel an affirmative duty to inquire about the status of potentially related defendants. Indeed, such circumstances appear to be rare. This Court's review found only one case in which co-defendants were similarly situated and where defense counsel had not inquired about a plea reached by or a sentence imposed on a co-defendant. State v. Warner, No. A-5348-14T2, 2017 WL 541460, at *2 (N.J. Super. Ct. App. Div. Feb. 10. 2017) (affirming the trial court's finding that defense counsel's failure "to investigate the co-defendant's plea bargain fell below the norm of professional competence, [but] there was no showing that had he performed that investigation the outcome would have been different"). Far more prevalent are cases where defense counsel did inquire, but for legitimate reasons, did not present such evidence to the sentencing court. For instance, courts have held that counsel was not ineffective when counsel did not present evidence of a co-defendant's lesser sentence when there is a reason for the lesser sentence, such as cooperation with the government or less culpability by the co-defendant. See, e.g., State v. Gerlaugh, 698 P.2d 694, 708-09 (Az. 1985) (where the defendant's co-defendants were less culpable because the defendant "acted as the leader of his two accomplices and received all the proceeds of their criminal wrongdoing"); Vignoli v. State, No. 51174, 2009 WL 1437617 at *4 (Nev. Mar. 26, 2009) (where the defendant's co-defendant "provided substantial assistance," the two were

not similarly situated); Ross v. Mirandy, No. 14-1093, 2015 WL 5513531 at *5 (W.Va. Ct. App. Sept. 18, 2015) (defendant's sentence was not unconstitutionally disproportionate where he was convicted of multiple offenses and had a long criminal history while his co-defendant pled guilty); accord State v. Fraser, 120 N.H. 117, 122-23 (1980) (finding a rational basis to support sentence disparities between co-defendants when one was not armed at the time of the crime and cooperated with police after the fact).

In making his arguments about sentence disparities, the defendant points to a handful of others who were charged and sentenced in connection with the Black Lives Matter protest. These other individuals include a white male who pled guilty to misdemeanor arson and was sentenced to twelve months in the House of Corrections, all suspended, State v. Brisendine, 216-2020-CR-00804, Mittimus (Brisendine Doc. 11); a white male who pled guilty to felony Riot and was sentenced to two-to-four years in the state prison, stand committed, State v. Smith, 216-2020-CR-00811, Mittimus (Smith Doc. 21); a white female who pled guilty to misdemeanor disorderly conduct and was sentenced to forty-five days in the House of Corrections, all suspended, State v. Sharp, 456-2020-CR-01677 (Doc. 29, Ex. U); and a white male who pled guilty to misdemeanor disorderly conduct and was sentenced to pay a $248.00 fine, State v. Yianakopolos, 456-2020-CR-01676 (Doc. 29, Ex. V). Like Gerlaugh, Vignoli, and Ross, these cases present different circumstances that reasonably explain the defendant's disparate sentence. More importantly, although they were all at the same event, no party alleges that any of these individuals (or any others that are not explicitly referenced above) knew or worked with the defendant. It would be an onerous burden to place on defense

counsel to investigate the charges, plea negotiations, and sentences imposed on individuals who, despite all being present at the same event or place, had little to no connection to the defendant and ultimately were charged with different crimes based on very different conduct. Thus, Attorney Shepherd was not deficient in his performance by failing to investigate these cases or present this evidence at the defendant's sentencing hearing.

That said, there are enough similarities between the defendant and Toledo to warrant an inquiry by defense counsel into the status of Toledo's case. Significantly, Toledo is explicitly named in both of the defendant's original charges and the defendant was charged as Toledo's accomplice. Their initial felony Riot charges were worded exactly the same and their Reckless Conduct charges were nearly identical. Furthermore, the affidavit supporting Toledo's arrest was materially indistinguishable from the defendant's. All told, the two were essentially charged as co-defendants. All of these circumstances should have put Attorney Shepherd on notice that there was another person who might be similarly situated to the defendant and it was worth an inquiry into whether his client and that co-defendant should receive the same plea and sentence. Cf. Warner, 2017 WL 541460, at *2.

The State has not requested an evidentiary hearing to explore why Attorney Shepherd did not inquire about or investigate Toledo's case status, but there is no dispute that Attorney Shepherd did not make this inquiry. "[C]ounsel simply cannot make a reasonable decision whether or not to present any mitigating evidence, or certain mitigating evidence, without informing himself or herself of the available choices. Unless some investigation is made into the available evidence, counsel cannot

make a strategic choice." John M. Burkoff, Ineffective Assistance of Counsel § 8:2 (Aug. 2020 Update). Additionally, unlike the great burden previously mentioned for defense counsel to inquire about every person charged in connected with a single large-scale event, it would not be a significant imposition on defense counsel to inquire about the status of such a closely-related defendant, let alone a co-defendant.

Furthermore, the failure of Attorney Shepherd to inquire about Toledo's status and learn of his plea negotiations actually prejudiced the defendant: the defendant lost not only the opportunity to bargain for a lesser sentence but actually received a harsher sentence than his co-defendant. See Fitzgerald, 173 N.H. at 577; Fraser, 120 N.H. at 122 (noting that though "[n]ot all persons convicted of a particular crime must receive the same sentence, . . . [w]here there exists a rational basis for disparate sentencing, [the court] will not disturb the trial court's exercise of discretion"); see also State v. Handley, 796 P.2d 1266, 1274-75 (Wash. 1990) (applying equal protection principles to sentencing co-defendants). But see State v. Bacon, 733 A.2d 50, 53 (Vt. 1999) (holding that "disparate sentences for co-perpetrators do not implicate federal equal protection so long as there is no showing of invidious discrimination and the sentences imposed are within the statutory limitations").

Long ago the New Hampshire Supreme Court recognized that "[d]isparity of sentencing . . . strikes at the fundamental basis of our penal system. A convicted criminal should generally receive the same punishment as another with a like background who has committed the same crime. This is not a matter for executive clemency but justice to be rendered by the courts." State v. Streeter, 113 N.H. 402, 405 (1973). Although one defendant's sentence is not determinative of whether a co-

defendant should receive the same penalty, information about the outcome of the co-defendant's case "is relevant." State v. Robbins, 114 N.H. 427, 430 (1974) (citing Streeter). "[I]n order for a trial judge to effectively exercise his discretion, it must appear that he considered all the relevant factors necessary to that exercise." Streeter, 113 N.H. at 407 (citing Townsend v. Burke, 334 U.S. 736, 741 (1948)..

Neither party asserts there were significant differences (if any at all) between the defendant and Toledo with respect to criminal history, cooperation, character, background, or likelihood of rehabilitation. At the hearing to withdraw the guilty plea, the State attempted to distinguish the two cases by asserting that the defendant pled guilty to more serious and dangerous conduct than Toledo's crime. Adopting the State's position about the relative seriousness of these two offenses, the State has the ultimately authority to determine which charges to nolle pross and which to pursue. The problem here, however, is that the State failed to justify why it allowed Toledo to plead guilty to Reckless Conduct while insisting that the defendant here plead guilty to Riot. The Gerstein affidavits in both cases are virtually indistinguishable. As noted above, both men were charged with the exact same crimes for acting as accomplices to one another. The State has presented no justification for dropping the Riot charge against Toledo or not allowing the defendant to plead guilty to Reckless Conduct. In light of the similarities in backgrounds between the two men and the overlap in factual allegations against them, the current sentence disparity cannot rationally be sustained. See Fraser, 120 N.H. at 122; cf. Fitzgerald, 173 N.H. at 579 (noting that "because prosecutors and judges . . . are assumed to be familiar with the boundaries of acceptable plea bargains and sentences, 'it should not be difficult to make an objective assessment as to whether

or not a particular fact or intervening circumstances would suffice, in the normal course, to cause judicial nonapproval of a plea bargain'" (quoting Frye, 566 U.S. at 149)).

Had Attorney Shepherd inquired about Toledo's case and learned that the State had offered him a more favorable plea, he could have used that to the defendant's advantage and negotiated a more favorable plea for the defendant. Given that the prosecutor told Attorney Shepherd that the plea the parties ultimately reached was "the best [he] could do," Doc. 29, Ex. F, it appears unlikely that the State would have extended a plea agreement equal to Toledo's. In such a circumstance, Attorney Shepherd should have informed the State of the unlawful and unjustified sentence disparity. In the event the parties did not then reach a different plea agreement, but the defendant nevertheless still did not want to go to trial, Attorney Shepherd should have notified the Court at the plea and sentencing hearing of the sentencing disparity, leaving it up to the Court's discretion to accept or modify the sentence. See, e.g., State v. Martin, 164 N.H. 687, 690 (2013) (noting that "a sentencing court has broad discretion to assign different sentences, suspend a sentence, or grant probation in order to achieve the goals of punishment, deterrence, protection of society[,] and rehabilitation").

An appropriate remedy "must neutralize the taint . . . while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." Lafler, 566 U.S. at 170 (citation omitted). Here, the actual prejudice of Attorney Shepherd's failure to inquire into Toledo's case was a disparate sentence between similarly situated co-defendants, not that the defendant pled guilty in the first place. Though the defendant claims in his motion that he would not have pled had he known the status of Toledo's plea

bargaining, he also states that knowing that information would have caused him to bargain for a different plea. Given these inconsistent positions, and that the defendant does not assert through affidavit or other testimony that had Attorney Shepherd inquired into Toledo's case he would certainly not have pled guilty, the Court cannot conclude that Attorney Shepherd's performance rendered the defendant's plea involuntary to the point where withdrawal from the plea is warranted.

Furthermore, there are other aspects of the State's handling of this matter that the Court finds troubling. The State represented to Attorney Shepherd in October 2020 that the plea offer was "the best [he] could do." Doc. 29, Ex. F. Thereafter, the State reached a more lenient deal with Toledo without correcting its representation about its offer to Attorney Shepherd. In its objection to the defendant's motion, the State represented to this Court: "Kyle Toledo's case had not resolved before Mr. Stroud's January 7, 2021 sentencing hearing." State's Obj. to Def.'s Mot. Withdraw Plea ¶ 42 (Doc. 30). While technically true, this representation is grossly incomplete. According to the status conference hearing on December 16, 2020, the State and Toledo told Judge Messer that they had reached a fully negotiated plea agreement. The issue discussed at that hearing was how best to present that to the Court, i.e., with a formal hearing or by submitting a paper plea packet for the Court's approval. Thus, by the time of the defendant's plea and sentencing hearing, the State was well aware of the likely outcome in Toledo's case. In fact, the State must have been so confident that the Toledo plea would be approved by the Court, that it nolle prossed the Riot charge against Toledo on January 7, 2021—the same day as this defendant's plea and sentencing hearing. See Misdemeanor Paper Plea (Toledo Doc. 11). To not bring that

to the Court's attention—even in response to the defendant's motion to withdraw his guilty plea—is troubling.

When this Court imposed a thirty-day stand committed sentence for Antwan Stroud, the Court made it clear that its main objective was general deterrence. As this Court stated:

> I think that if I were allowed to focus just on you as an individual, my choice about the sentence here would be pretty easy because I do think that the proposal that Attorney Shepherd has put forward would serve you best . . . But I have to balance that against a broader consideration here, which is what effect does the sentence I impose have on other cases and other individuals in this situation. What are the boarder ramifications of this case. And peaceful protest is one of the most cherished rights that we have in the United States and in the State of New Hampshire. And we all saw last summer what happens when those peaceful protests turn violent and we also don't have to go very far to see that it doesn't take much to ignite a crowd into violence. So in order to protect the right of people to protest peacefully, the criminal justice system needs to deal firmly with those individuals who try to tip that balance over into violence . . . for that, there has to be some very serious and firm consequences beyond the rehabilitation components that Attorney Shepherd has put in place. For that, I am adopting the State's proposal . . . .

The Court's confidence in its deterrent message is gravely shaken by the information that the defendant's co-defendant/accomplice was allowed to plead guilty and be sentenced to no incarceration. Additionally, deterrence is only one factor in the sentencing calculus. The Court must be conscious about the rehabilitative effect of the sentences it imposes. "'Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives. Whether a sentence is fair cannot, of course, be gauged simply by comparing it with the punishment imposed upon others for similar offenses. But that test, though imperfect, is hardly irrelevant.' Penologists agree that disparity of sentences without a rational basis has an inhibiting effect upon the possibilities of rehabilitation." Streeter, 113 N.H. at 405

(quoting Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958)). "While no judge can predict that his sentence will help to rehabilitate the criminal, the sentence should not retard this result." Id.

The disparate outcome of the Toledo and Stroud cases not only undermines the Court's deterrent message, but it casts grave doubt onto the criminal justice system's ability to rehabilitate the defendant. How could any defendant have confidence in the fairness of the criminal justice system when he knows that he will go to jail while his similarly-situated co-defendant, who was standing right next to him during the entire criminal episode, will do no time behind bars simply because the prosecutor decided to treat one man more harshly than the other?

Even if Attorney Shepherd were not ineffective for failing to present evidence of Toledo's plea agreement at the defendant's sentencing hearing, the Court would not hesitate to order a new sentencing hearing in this case. In this case, the State has failed to establish a rational basis for the disparate treatment of the two co-defendants. In that situation, "the sentencing court retains jurisdiction of the defendant's sentence where there is clerical error or the sentence is illegal and void." State v. Fletcher, 158 N.H. 207, 210 (2009). "[A]n illegal sentence . . . can be reduced, modified[,] and corrected at any time." State v. Thomson, 110 N.H. 190, 190 (1970). In fact, in State v. Streeter, the New Hampshire Supreme Court recognized that a trial judge may sua sponte order a new sentencing hearing when the court later learns that a co-defendant received a disparately lenient sentence from another judge. See Streeter, 113 N.H. at 407; cf. State v. Baud, No. 2014-0682, 2015 WL 11071589, at *2 (N.H. Dec. 22, 2015) (non-precedential order) (trial court has authority to reconsider a sentence in

response to a timely filed motion to reconsider); N.H. R. Crim. P. 37(a) ("[A]s justice may require, the court may waive the application of any rule."). "A trial court has broad discretion to determine the duration of a sentence. . . . Such an abuse of discretion will . . . occur if the trial court fails to consider all the relevant factors necessary to the exercise of its discretion." State v. Stone, 122 N.H. 987, 989 (1982) (citing Streeter). The Court finds it would work an injustice not to hold a new sentencing hearing in light of the information presented about Toledo's case.

The defendant's sentence imposed on January 7, 2021, is VACATED. The Court shall schedule a new sentencing hearing as the docket permit.

SO ORDERED.



May 27, 2021

Date

N. William Delker
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/28/2021