IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
V.	)	DEF. I.D.: 0101011985
	)	
BRIAN CONNOR,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Upon Consideration of The Alleged Violation of Probation.
Defendant In Violation of Probation.

Date Submitted: November 3, 2004
Date Decided: January 19, 2005

Donald R. Roberts, Esquire, DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for the State of Delaware.

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SLIGHTS, J.

I.

In this opinion, the Court addresses whether a Defendant who has pled no contest to various sexual offenses can be found in violation of his probation for refusing to acknowledge his sexually inappropriate behavior while participating in court-ordered sex offender treatment. The defendant, Brian Connor ("Mr. Connor"), pled no contest to three counts of Unlawful Sexual Contact Third Degree and one count of Endangering the Welfare of a Child. He was sentenced to probation on all four counts. As a condition of his probation, the Court ordered that Mr. Connor complete a sexual disorders treatment program. In April of 2004, Mr. Connor was discharged from the treatment program for his failure to admit his sexually inappropriate behavior. As a result of his discharge from the program, Mr. Connor was charged with violating his probation.

Mr. Connor contests the violation. He contends that because he pled no contest to the charges, requiring him to admit his behavior at the treatment program would violate his Fifth Amendment privilege against self-incrimination and right to due process and his Sixth Amendment right to trial by jury. Mr. Connor also argues that even if the Court determines that requiring him to admit his behavior does not implicate constitutional rights, he should nevertheless be excused from this aspect of his probation because he was never given notice during the proceedings leading up

to the adjudication of guilt (including the plea colloquy) that he would be required to admit his behavior during treatment. Finally, Mr. Connor challenges the effectiveness of treatment as a condition of probation and argues that he is not a threat to society because he has complied with all other conditions of his probation.

For the reasons that follow, the Court finds that requiring Mr. Connor to admit his behavior during treatment is consistent with his no contest plea and does not violate his constitutional rights. In addition, the Court is satisfied that Mr. Connor was not entitled to notice that he would be required to admit his behavior during treatment and that sex offender treatment was, and continues to be, an appropriate condition of probation. Accordingly, the Court finds that Mr. Connor's discharge from the sexual disorder treatment program for refusing to acknowledge his behavior constitutes a violation of his probation.

II.

Mr. Connor was charged in the original indictment with one count of Sexual Extortion, seven counts of Unlawful Sexual Contact Second Degree, and sixteen counts of Unlawful Sexual Contact Third Degree. On July 16, 2002, an evidentiary hearing was held during which some of the victims testified regarding the events giving rise to the charges. The following day, the indictment was amended and Mr. Connor was permitted to plead no contest to four counts of the amended indictment.

Specifically, as noted, he pled no contest to three counts of the lesser included offense of Unlawful Sexual Contact Third Degree and one count of Endangering the Welfare of a Child, all misdemeanor offenses. After explaining the consequences of the pleas to Mr. Connor, the Court accepted the no contest pleas and found that they were entered knowingly, intelligently, and voluntarily.[1] Additionally, the Court was satisfied, based on the testimony of the victims, that there were factual bases for the pleas.[2]

As part of the plea agreement, the State recommended that Mr. Connor be sentenced in accordance with SENTAC's Truth-In-Sentencing Guidelines (the "SENTAC guidelines") along with other special conditions, including no contact with the victims and no unsupervised contact with children under sixteen. The SENTAC guidelines recommended twelve months at Level 2 probation for each of the three counts of Unlawful Sexual Contact and up to twelve months at Level 1 probation for Endangering the Welfare of a Child. A presentence investigation was completed and Mr. Connor was sentenced on September 13, 2002.

At sentencing, the Court found the vulnerability of the victims, the relationship that existed between the victims and the defendant, and the fact that the victims were

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[1]D.I. 33 (Case No. 0101011985A), at 16.

[2]*Id.*

children all were aggravating circumstances that justified an upward departure from the SENTAC guidelines.[3] Accordingly, the Court sentenced Mr. Connor on the first count of Unlawful Sexual Contact Third Degree to one year at Level 5, suspended for twelve months at Level 3 probation.[4] On the other two counts of Unlawful Sexual Contact Third Degree, Mr. Connor was sentenced to one year at Level 5, suspended for twelve months at Level 2 probation to run consecutive to the sentence on the first count.[5] For Endangering the Welfare of a Child, Mr. Connor was sentenced to one year at Level 5, suspended for twelve months at Level 2.[6] Additionally, Mr. Connor was ordered to pay his financial obligations, to have no contact with the victims, the Sterck School for the Deaf, or any children under the age of sixteen, to register with the State Bureau of Identification as a Tier 1 sex offender, to complete a sexual disorders treatment program, to receive a mental health evaluation, and to comply with all recommendations for counseling and treatment.[7]

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[3]D.I. 35 (Case No. 0101011985A), at 18-19. The defendant was a counselor at the Sterck School for the deaf where all of the victims were students. *Id.*

[4]*Id.* at 19-21.

[5]*Id.*

[6]*Id.*

[7]*Id.* at 21-22.

On April 26, 2004, Mr. Connor was discharged from the sexual disorders treatment program for non-compliance. The discharge resulted from his unwillingness to address his sexually inappropriate behavior despite numerous opportunities to do so. Consequently, Mr. Connor was charged with violating his probation for his failure to complete the treatment program in addition to violating his curfew in September of 2003.

Mr. Connor appeared before the Court on August 24, 2004 for a Violation of Probation hearing. At that hearing, he admitted violating his curfew, but argued that he should not be found in violation of probation for his failure to complete treatment. The State presented two expert witnesses: Dr. James Pedigo of the Joseph J. Peters Institute in Philadelphia, Pennsylvania, who treats sex offenders and victims of sex offenses, and Laurie Piezeck, head of the sexual offenders unit of the Delaware Department of Corrections Bureau of Community Corrections. Both witnesses testified concerning the effectiveness of sex offender treatment and the importance of requiring the offender to admit his behavior as part of this process. At the conclusion of the hearing, the Court requested that the parties submit legal memoranda supporting their respective positions regarding whether Mr. Connor violated his probation for refusing to admit his behavior during treatment. They have done so and the matter is now ripe for decision.

III.

Mr. Connor argues four grounds upon which the Court should conclude that his refusal to admit to sexually inappropriate conduct during treatment does not violate his probation. First, Mr. Connor argues that forcing him to admit his behavior during treatment violates his privilege against self-incrimination. Mr. Connor argues that because he was permitted by the Court to enter a plea of no contest to all charges, rather than guilty, he was relieved of the obligation to admit or acknowledge his crimes. Next, Mr. Connor argues that he should have been advised by the Court prior to entering his pleas that he would be required to admit details of his behavior in order to complete sexual offender treatment and complete his probation. He further alleges that because he was not advised of this requirement, the terms of his probation are vague and unenforceable. Next, he argues that complying with the treatment program will require him to admit additional facts over and above those to which he pled no contest. He alleges that this requirement is contrary to the United States Supreme Court's recent pronouncement in *Blakely v. Washington,*[8] and violates his Sixth Amendment right to trial by jury and his Fifth Amendment right to due process. Finally, Mr. Connor challenges the effectiveness of the treatment program as a condition of probation and argues that he is not a threat to society and

[8]124 S.Ct. 2531 (2004).

has complied with all other conditions of his probation, except for one curfew violation in 2003.

The State takes issue with each of Mr. Connor's arguments. First, the State argues that most courts have adopted the view that a defendant is required to admit his behavior in order successfully to complete sex offender therapy regardless of whether the defendant pleads no contest or guilty to the crimes. The State contends that such compelled admissions do not violate a defendant's Fifth Amendment privilege against self-incrimination. Additionally, the State contends that the court is not obliged to advise a defendant that he will be required to admit his behavior before accepting his plea. According to the State, Mr. Connor has not been deprived of due process or his Sixth Amendment right to a jury trial. And finally, the State points out that the literature relied upon by Mr. Connor to show the ineffectiveness of treatment actually supports the State's position that sex offender treatment programs are effective and discusses the importance of having the offender admit his behavior. The State also disputes Mr. Connor's allegation that he is not a threat to society and that he has complied with all other conditions of his probation.

These contentions raise five issues for the Court to decide: (i) whether requiring a defendant to admit behavior at treatment is consistent with the entry of a no contest plea; (ii) whether requiring the admission violates a defendant's privilege

against self-incrimination; (iii) whether a defendant is entitled to notice that he will be required to admit his behavior before entering his plea; (iv) whether requiring the admission violates due process and a defendant's Sixth Amendment right to trial by jury under *Blakely* and; (v) whether the court-ordered treatment program is an appropriate condition of probation for Mr. Connor.

IV.

A. The No Contest Plea

In essence, a plea of no contest is the equivalent of a guilty plea.[9] When a defendant enters a plea of no contest, he waives his right to trial and authorizes the court to treat him as if he were guilty for all intents and purposes going forward in that case.[10] The only distinction between a plea of guilty and a plea of no contest is a practical one. While the no contest plea has the same effect as a guilty plea in the case in which it is entered, it cannot be used against a defendant as an admission in a subsequent criminal or civil proceeding.[11] In other words, by pleading no contest,

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[9]*See State v. Piper,* 2001 WL 282918, at *1 n.1(Del. Super.)(citations omitted); *Sontag v. Ward*, 789 A.2d 778, 780 (Pa. Commw. Ct. 2001)("A plea of nolo contendre is to be treated the same as a guilty plea."). *See also* 21 AM. JUR. 2D *Criminal Law* § 728 (2004).

[10]*See North Carolina v. Alford*, 400 U.S. 25, 35 (1970).

[11]21 AM. JUR. 2D *Criminal Law* § 738 (2004). *See also Town of Groton v. United Steelworkers of America*, 757 A.2d 501, 510 (Conn. 2000)("A plea of nolo contendre has the same legal effect as a guilty plea on all further proceedings within the indictment. The only practical difference is that the plea of nolo contendre may not be used against the defendant as an admission in a subsequent criminal or civil case.").

"a defendant asserts that he does not contest the issue of his guilt or innocence of a specific charged act, and thus, he may be adjudicated guilty of the charged conduct; however, this admission of guilt only applies to the crime to which the defendant pleaded no contest."[12] Under the rules of this Court, a defendant entering a plea of no contest need not admit to the actual commission of the offense for the court to accept the plea.[13] Nevertheless, the court still must find that the no contest plea was entered knowingly, intelligently, and voluntarily, and that there was a factual basis for the plea, before it may accept the plea.[14]

There is a split of authority as to whether a court may require a defendant to admit his criminal behavior after the court accepts a plea of no contest.[15] The Court

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[12]*Id.* at § 726 *citing State v. Keaton*, 719 A.2d 430, 434 (Vt. 1998).

[13]*See* DEL. SUPER. CT. CRIM. R. 11(b) (2004)("A defendant may plead nolo contendre or guilty without admitting essential facts constituting the offense charged only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.").

[14]*See* DEL. SUPER. CT. CRIM. R. 11(c)(d)(f) (2004); *Howard v. State,* 458 A.2d 1180, 1184-85 (Del. 1983). *See also* 21 AM. JUR. 2D *Criminal Law* § 732 ("Before accepting a plea of nolo contendre, the court must determine that there is a factual basis for the plea....").

[15]In many of the cases dealing with this issue, the defendant has entered a so-called *Alford* plea. *See North Carolina v. Alford*, 400 U.S. 25 (1970). An *Alford* plea permits a defendant to assert innocence as to one or more elements of the offense, but consent to imposition of the conviction and penalty. *See Alford,* 400 U.S. at 36-7. Nonetheless, courts have held that an *Alford* plea constitutes "a guilty plea in the same way that a plea of no contest is a guilty plea." *State v. Alston*, 534 S.E.2d 666, 669 (N.C. Ct. App. 2000), *citing State ex rel. Warren v. Schwartz*, 579 N.W.2d 698, 706 (Wis.1998). *See also Alford,* 400 U.S. at 37("Nor can we perceive any material difference between a plea that refuses to admit commission of a criminal act [, a no contest plea,] and a plea containing a protestation of innocence when...a defendant intelligently concludes that his interest require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.").

is persuaded by the authority that has held that requiring a defendant to admit his behavior at treatment is consistent (or, at least, not inconsistent) with a plea of no contest. For purposes of sentencing generally, or setting conditions of probation specifically, there is simply no basis to elevate a no contest plea to a higher constitutional plane than a typical guilty plea.[16] A plea of no contest is not accompanied by any special promises, nor does it provide a guarantee that the defendant will never have to admit his behavior.[17] Indeed, the Court will not accept a no contest plea unless and until it finds that a factual basis for the plea exists. Requiring a defendant to admit his behavior, particularly in the context of rehabilitative treatment, is simply a requirement that a defendant acknowledge the existence of that factual basis.

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[16]*See State v. Faraday*, 842 A.2d 567, 587-88 (Conn. 2004)("Those decisions, [which have found requiring admission inconsistent with the plea], ...seem to be of the view that a guilty plea under the *Alford* doctrine carries greater constitutional significance than a standard guilty plea."). *But see People v. Walters*, 627 N.Y.S.2d 289 (Schoharie County Ct. 1995)("To require defendant to admit to his factual guilt after treatment, upon threat of incarceration, is directly inconsistent with the plea agreement...."); *State v. Birchler*, 2000 WL 1473152, at *1 (Ohio Ct. App.)("Requiring appellant to admit that there was a victim or to specific criminal conduct against a victim would be in contradiction to his maintenance of factual innocence pursuant to *Alford*.").

[17]*See Alston,* 534 A.2d at 669-70 ("[A]n *'Alford* plea' is in no way 'infused with any special promises'...nor does acceptance thereof constitute 'a promise that a defendant will never have to admit his guilt.'"); *Warren*, 579 N.W.2d at 707 ("There is nothing inherent in the nature of an *Alford* plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after conviction."); *State v. Jones*, 926 P.2d 1318, 1321 (Idaho Ct. App.1996)(finding that defendant's *Alford* plea "did not exempt him from fulfilling the terms of his probation, including the requirement of full disclosure which was deemed essential to successful participation in sexual abuse counseling and rehabilitation.").

The Court's acceptance of a defendant's no contest plea is not a license for the defendant to violate a condition of his probation.[18] Against this backdrop, the Court will now address Mr. Connor's remaining arguments.

B. The Defendant's Fifth Amendment Rights

Mr. Connor contends that requiring him to admit his behavior violates his Fifth Amendment privilege against self-incrimination and/or double jeopardy. He notes that because he maintained his innocence throughout the investigation of the crimes and pre-trial, and then entered a no contest plea, rather than a guilty plea, he has never admitted his guilt. According to Mr. Connor, to compel him to do so now as a condition of probation would be tantamount to coercing a confession in violation of his right against self-incrimination. The Court disagrees.

"The privilege against self-incrimination does not extend to consequences of a noncriminal nature, even if it would result in the loss of probation."[19] When Mr. Connor entered his plea and was sentenced, he waived certain constitutional rights,

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[18] *See Whalen v. State*, 2000 WL 724683, at *1 (Del.)("There is no merit to Whalen's argument that he can not be required to 'admit' as part of his treatment program because he entered a plea of nolo contendre. Whalen's plea does not confer upon him a right to violate a condition of his bargained-for plea agreement.").

[19] *Sontag*, 789 A.2d at 780.

including the privilege against self-incrimination he previously enjoyed with respect to the crimes to which he entered his plea.[20] The justification for the waiver is quite simple: once Mr. Connor was adjudicated guilty for his crime and was sentenced, the State could not prosecute him again for those same crimes, even if he admitted to committing them during treatment.[21]

Any concerns Mr. Connor has about future prosecution for other conduct is also misplaced. While the Court recognizes that the protection against subsequent prosecution does not extend to other crimes to which Mr. Connor may admit during treatment, it is premature for Mr. Connor to present a self-incrimination argument. Mr. Connor has been discharged from treatment for refusing to acknowledge his criminal behavior *in this case.* If Mr. Connor is asked during treatment to address other behavior that may expose him to criminal prosecution, his invocation of the Fifth Amendment (to protect against self-incrimination, double jeopardy, due process

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[20] *See Zebroski v. State*, 715 A.2d 75, 80-81 (Del. 1998)(holding that when a defendant pleads guilty under a plea agreement and is sentenced he relinquishes his right against self-incrimination); *Brown v. State*, 729 A.2d 259 (Del. 1999)(same); *Jones*, 926 P.2d at 1322 ("It is settled law that a plea of guilty waives the privilege against self-incrimination."); 5 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 21.4(e) (2d ed. 1999). *See also* D.I. 33 (Case No. 0101011985A), at 12-13.

[21] *See Poteat v. State*, 840 A.2d 599, 602-03 (Del. 2003)("The Fifth Amendment to the United States Constitution guarantees three protections. 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'")(citation omitted).

violations or otherwise) would become ripe at that time, but not before.[22] Presently, however, Mr. Connor has not shown that he would face a "real and appreciable" threat of prosecution based upon any admission he might make during treatment.[23] Consequently, this Court cannot find that requiring Mr. Connor to admit his behavior in treatment would violate his Fifth Amendment rights.

C. Notice To The Defendant of The Consequences of His Plea

Mr. Connor argues that the Court should have advised him that he would be required to admit his behavior in order to complete treatment prior to accepting his plea. As previously discussed, a plea of no contest is the equivalent of a guilty plea. As such, the Court's role in securing a knowing, intelligent and voluntary plea does not depend upon whether the plea to be entered is guilty or no contest.[24] In both

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[22] *See Minnesota v. Murphy*, 465 U.S. 420, 426 (1984)("[N]otwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted.") The Court notes that, according to the State, Mr. Connor will be asked during treatment to address specifically the conduct that gave rise to the indictment in this case.

[23] *State v. Huddleston*, 412 A.2d 1148, 1155 (Del. Super. Ct. 1980)("In order for disclosures to be self-incriminating, the threat of prosecution must be real and appreciable and not imaginary."). *See also Brown*, 729 A.2d at 263 ("The trial court must determine whether a witness invoking his or her Fifth Amendment privilege 'is confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination.'"); *State v. Mace*, 578 A.2d 104, 108 (Vt. 1990)("[W]e conclude that defendant has not shown that he faces a 'realistic threat of self-incrimination.'").

[24] *See People v. Birdsong*, 958 P.2d 1124, 1127-28 (Col. 1998)("[T]he trial court's obligations [when a defendant enters an *Alford* or no contest plea are] no greater than with any other guilty plea.").

instances, the Court's obligations to advise a defendant of the nature and consequences of his plea are well-settled.[25] The Court is not required to advise a defendant of all possible "collateral consequences" of his plea.[26] A collateral consequence is one that is not related to the length or punitive nature of the sentence imposed as a result of the plea.[27]

The fact that a defendant is required to admit his behavior at treatment is clearly a collateral consequence of a plea of guilty or no contest; it does not relate to the length or punitive nature of the sentence. A requirement that the trial court advise defendants of such collateral consequences of a plea would place an undue burden on

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[25] *See* DEL. SUPER. CT. R. 11(c) (2004). *See also Brown v. State*, 250 A.2d 503, 504 (Del. 1969)("The record to be made should make it indisputably clear that...Rule 11 has been complied with; i.e., that the plea is voluntarily offered by the defendant, himself, with a complete understanding by him of the nature of the charge and the consequences of his plea, and that the trial judge has so determined."); *Faraday,* 842 A.2d at 584-88 (discussing the colloquy required before the court accepts an *Alford* plea).

[26] *See State v. Thomas*, 2002 WL 970474, at *1 (Del. Super.).

[27] *Id. See also* WAYNE R. LAFAVE ET AL., *supra* note 20, § 21.4(d)("If a defendant offers a plea of guilty or nolo contendre...another responsibility of the judge is to advise the defendant of...those consequences which are 'direct' but not those which are only 'collateral' in nature...[which] turns on whether the result represents a 'definite, immediate and largely automatic effect on the range of the defendant's punishment.'"). *See, e.g., State v. Harvey*, 2002 WL 550978, at *2 (Del. Super.)(finding the fact a "defendant could be resentenced and additional conditions imposed were a result of his conduct in violating probation and were not a direct, automatic consequence of the plea; consequently, the Court was not required to inform defendant of these consequences in the event he violated his probation.").

the court and the criminal justice system itself.[28] Moreover, this Court cannot be expected to "maintain a working familiarity with all requirements of certain types of treatment programs so as to be able to advise defendants with particularity about those requirements before accepting pleas that involve probation."[29] This is the function of the Department of Corrections (the "Department"). In fact, the Department is required by law to provide probationers with a written statement of the conditions of their probation and to instruct them regarding these conditions.[30] In most instances, the conditions may be changed, added or deleted in the discretion of the Department.[31]

Mr. Connor cannot credibly argue that the terms of his probation were vague or that he did not know that he would be required to comply fully with the terms of his treatment. The Court advised him at sentencing that he "shall *complete* a sexual disorders counseling treatment program" and that he was required to "*comply with all*

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[28]*See Brown*, 250 A.2d at 505 ("We think [that requiring the Court to advise defendants [in accordance with Rule 11] does not place an undue burden on the trial judge. The record can be made with little effort and without wastage of time.").

[29]*Birdsong,* 958 P.2d at 1128. *See also State v. Faraday*, 842 A.2d 567, 587 (Conn. 2004)("[I]t is not incumbent upon the trial court also to list all the potential conduct that could result in a discharge from that program. Furthermore, because the office of adult probation is free to modify terms of the defendant's probation at any time...it is unrealistic to expect the court to canvass a defendant regarding the conduct necessary to comply with those terms.").

[30]*See* DEL. CODE ANN. tit. 11, § 4321 (2001).

[31]*See* DEL. CODE ANN. tit. 11, §§ 4332, 4333(i) (2001 & Supp. 2004).

recommendations for treatment and counseling."[32] Mr. Connor signed a written statement acknowledging his conditions of probation in which he acknowledged that he consented to the conditions and fully understood their meaning.[33] The Court notes that the first condition listed on the statement is that Mr. Connor will participate in sex offender group counseling as stipulated by the Department.

Mr. Connor received the required notice concerning his rights, the consequences of his plea, the terms of his sentence, and the general conditions of his probation.[34] Therefore, his failure to admit his behavior at counseling, after being given numerous opportunities to do so, demonstrates an intentional failure to comply with the terms of his probation.

D. The Defendant's Sixth Amendment Rights and Due Process

Mr. Connor argues that requiring him to admit sexual desires, urges, fantasies or plans, as well as any of the details of the offenses that appear in the presentence report, would exceed the bounds of the lesser included charges to which he ultimately

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[32]D.I. 35 (Case No. 0101011985A), at 21-22 (emphasis added). *Cf Brown v. State*, 563 S.E.2d 339, 341 (S.C. Ct. App 2002)(finding no violation of probation where the probation order "did not specifically order [the probationer] to *complete* treatment.").

[33]D.I.12 (Case No. 0101011985B). *See State v. Peck*, 547 A.2d 1329, 1331 (Vt. 1988)(finding that defendant had sufficient notice that he was required to complete treatment where he signed the probation agreement).

[34]D.I. 33 (Case No. 0101011985A), at 16.

pled no contest. According to Mr. Connor, this scenario, if countenanced by the Court, would violate due process and his Sixth Amendment right to trial by jury as interpreted by the United States Supreme Court in *Blakely v. Washington*.[35]

In *Blakely,* the United States Supreme Court held that the court cannot rely upon facts other than those presented to a jury in order to increase a defendant's sentence beyond the State's statutorily-created sentencing guidelines.[36] The applicable state (Washington) sentencing guidelines, in essence, created two "statutory" maximum penalties that were binding upon the sentencing court.[37] The first set forth the maximum penalties for classes of crimes.[38] The second categorized crimes by "seriousness level" which, along with an offender's criminal history score, yielded a "presumptive sentencing range" as set forth by way of a sentencing grid.[39] The court was authorized by statute to sentence above the range only if it found "substantial and compelling reasons justifying an exceptional sentence."[40] The Washington trial court sentenced the defendant within the maximum penalty but

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[35]124 S.Ct. 2531 (2004).

[36]*Id.* at 2533.

[37]*See id.* at 2535.

[38]*See id. See also* WASH. REV. CODE § 9A.20.021(1)(b) (2003).

[39]*See Blakely*, 124 S.Ct. at 2535. *See also* WASH. REV. CODE § 9.94A.510 (2003).

[40]*See Blakely*, 124 S.Ct. at 2535. *See also* WASH. REV. CODE § 9.94A.535 (2003).

exceeded the "standard range" in the guidelines.[41] The Supreme Court invalidated the sentence upon finding that the sentencing court had relied upon extraneous facts not presented to a jury, and that the sentence exceeded the maximum that could be imposed based solely on the jury verdict.[42]

Mr. Connor's invocation of *Blakely* misses the mark. First, the guidelines addressed by *Blakely* were embedded in the statutory penalties and were binding upon the sentencing judge. The Supreme Court of Delaware has held that *Blakely* is not applicable to Delaware's sentencing scheme because "the SENTAC guidelines are voluntary and non-binding."[43] The SENTAC guidelines can be ignored entirely if the sentencing judge is convinced that the facts of a particular case justify a departure as long as the sentence is within the statutory maximum.[44] Here, Mr. Connor's sentence was well within the statutory maximum penalty.

Additionally, even if *Blakely* pertained to Delaware's sentencing scheme, the Court's reasoning there is not implicated by this case. *Blakely* is limited to

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[41] *See Blakely*, 124 S.Ct. at 2535.

[42] *Id.* at 2537-38.

[43] *Benge v. State*, 2004 WL 2743431, at *1 (Del.). *See also U.S. v. Booker*, 2005 WL 50108 (U.S.)(holding that the provisions that make the Federal Sentencing Guidelines mandatory are unconstitutional, requiring that those provisions be excised, and rendering the Guidelines advisory).

[44] *See State v. Rojas*, 2002 WL 31421398, at *2 (Del. Super.) *citing State v. Gaines,* 571 A.2d 765, 766 (Del. 1990)("Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature.").

sentencing determinations. It is particularly limited to sentencing determinations where a court increases a defendant's sentence beyond the statutorily prescribed penalty based on facts other than those presented to the fact finder. Here, Mr. Connor is not challenging the degree of punishment (i.e. the length of incarceration or incarceration versus probation). He has not argued (or identified) any basis to suggest that the Court improperly imposed its sentence or that the Court considered an inappropriate aggravating factor. Instead, he is challenging the imposition of sex offender treatment as a condition of probation and the corresponding requirement that he admit his sexually inappropriate behavior. Mr. Connor's attempt to extend *Blakely* to the administrative and executive function of rehabilitation performed by the Department - - by suggesting that the Department's choice of treatment modality is somehow constitutionally tied to the facts of the underlying offenses - - finds absolutely no support in even the most liberal reading of *Blakely* or its recent progeny.[45] Accordingly, no such extension will be endorsed here.

E. The Effectiveness of Treatment

Mr. Connor argues that sexual disorder treatment is not a proper condition of

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[45]Indeed, under Mr. Connor's reading of *Blakely*, the Court could not order, and the Department could not implement, substance abuse treatment for any defendant unless the evidence presented to the fact finder indicated that the defendant's substance abuse played a role in the offense conduct. Obviously, this would unjustifiably obstruct the Court's and the Department's ability to rehabilitate offenders in need of treatment.

his probation because a number of studies have shown that such treatment is not effective. He has submitted literature in support of his position. The State contends that the literature relied upon by Mr. Connor actually supports the State's position that sex offender treatment programs are effective. According to the State, the literature also stresses the importance of having the offender admit his or her behavior as part of treatment. The State further relies upon the testimony of Dr. James Pedigo who testified at the hearing regarding the efficacy of treatment and the importance of having offenders admit the details of their behavior during treatment.

Determining the most effective way to treat and counsel defendants in rehabilitation, and then implementing those treatment modalities, both are the proper functions of the Department. Absent some compelling evidence that the Department is not properly carrying out these responsibilities, the Court must (and does) place its trust in the experts to determine the most appropriate means by which to rehabilitate offenders. Here, based on the testimony of Dr. Pedigo, the Court finds no evidence that the Department was deficient in its duties. Accordingly, the Court can see no reason why it should become involved in this purely executive and administrative function.

Finally, Mr. Connor argues that he is not a threat to society and has complied with all other conditions of his probation, except for one curfew violation. The State

disagrees. The Court considered the threat Mr. Connor posed when it sentenced him. Both now and at sentencing, the Court was and is satisfied that sex offender treatment is an appropriate condition of probation for Mr. Connor. If Mr. Connor has complied with all other conditions of probation as he contends, the Court applauds his efforts. His compliance with those conditions, however, does not relieve him of his obligation to complete a sex offender treatment program as ordered by the Court. This includes acknowledging and addressing in treatment the sexually inappropriate (and illegal) behavior that has brought him before the Court.

V.

For the foregoing reasons, the Court finds that Mr. Connor's discharge from the sexual disorder treatment program for his refusal to admit his sexually inappropriate behavior is a violation of his probation. Sentencing will occur on February 11, 2005 at 12:00 p.m..

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

Original to Prothonotary