

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-410

JUNE TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Caledonia Circuit
	}	
Gordon Kidder	}	DOCKET NOS. 430-6-03 Cacr,
		844-12-04 Cacr

Trial Judge: Thomas A. Zonay

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

Defendant appeals the district court's order revoking his probation and imposing the full underlying sentence. We affirm.

In January 2004, after pleading no contest to charges of burglary, unlawful mischief, and attempted grand larceny, defendant was sentenced to a term of five-to-ten years' imprisonment, all suspended except for 105 days. He was placed on probation during the suspended portion of the sentence, but violated his probation and was resentenced to a term of five-to-ten years' imprisonment, all suspended except for two years. In late 2004 and early 2005, defendant was arraigned on two charges of sexual assault on a minor. He pled no contest to both charges and was sentenced to a term of three-to-eight years consecutive to the prior sentence, all suspended except for seven months. Again, he was placed on probation for the suspended portion of the sentence, resulting in an effective sentence of eight to eighteen years, all suspended except for two years and seven months.

In March 2007, defendant was released after serving the incarceration portion of his sentence. The day that he was released, his probation officer reviewed his probation conditions with him and explicitly denied his request to have contact with his own young children. In April 2007, less than one month after his release, defendant was charged with violating conditions prohibiting him from engaging in violent or threatening behavior, from being alone with any child under sixteen years of age unless accompanied by an approved adult aware of his criminal history, and from knowingly establishing contact with a child under sixteen years of age without the permission of his probation officer.

At his probation revocation hearing, defendant's probation officer testified that defendant's sister-in-law called him on April 25, 2007 to let him know that defendant was at his wife's home and refusing to let her leave, and that the police had been called. The probation officer apparently went to the wife's home, observed defendant talking to police, and directed defendant to come to his office. The probation officer testified that he arrested defendant for violating conditions of probation, and that defendant acknowledged having had contact on several occasions with his children since his release and being in possession of a knife when he visited his wife that day. Defendant's sister-in-law testified that her sister was upset and crying when she asked her to come to her home on April 25, and that she noticed her sister was frightened when she arrived at the home. The sister-in-law also testified that she had seen defendant at her sister's home on a few occasions since his release playing with his children and putting them on his lap. Defendant's wife testified that defendant came to her home uninvited on April 25 saying that he thought she might be with another man. When the wife claimed a failure of memory as to specific events that occurred that day and further claimed that she had filed a relief-from-abuse complaint only because she feared that the Department for Children and Families would take her children away if she did not, the court allowed the State to read into the record, as past recollection recorded, the affidavit the wife had prepared on April 25. It stated she was concerned for her and her children's safety because defendant had abused her and her eldest daughter in the past, had told her that day that he had come looking for her boyfriend and would have killed him if he had been there, and had threatened to kill her. During his testimony, defendant admitted that he was carrying a knife when he visited his wife and children on April 25, and that prior to the visit he had heard his wife was having an affair. He denied threatening his wife or anyone else, however.

At the conclusion of the hearing, the district court found that defendant had violated probation conditions by having repeated unauthorized contact with his children and by engaging in threatening behavior. The court further found that the affidavit of defendant's wife, read into the record, was an accurate account of what had taken place on April 25. At the later sentencing hearing, defendant's probation officer testified that, since defendant's arrest and incarceration for violating his probation conditions, he had received several disciplinary reports and had been placed in segregation due to his history of noncompliance with facility rules. The probation officer recommended revocation of probation and imposition of the full underlying sentence in light of defendant's extensive criminal record, his history of violence, his need for treatment, and his poor track record on probation. The probation officer stated that defendant would receive treatment in a correctional facility and then be released on furlough or parole, which would optimize the ability of the Department of Corrections to respond to any behavior that endangered the community. The probation officer advised that a treatment program would require between thirty to sixty months to complete. Defendant asked the court to impose only the remainder of the five-to-ten-year sentence, which he argued would allow him to complete a treatment program, and to retain his probation for the three-to-eight-year sentence.

After weighing the criteria set forth in 28 V.S.A. § 303(b), the court determined that the previous violations, the need to protect the public, and defendant's need for treatment mandated revocation of probation and imposition of the full underlying sentence. On appeal, defendant argues that the court abused its discretion by imposing the full underlying sentence, because imposition of only the five-to-ten-year sentence would have allowed sufficient time for him to receive the treatment he needs. According to defendant, imposing the full underlying sentence

would subject him to “dead time” in prison beyond the time needed for treatment. Thus, in defendant’s view, the goals of sentencing could have been fully achieved without imposing the full sentence.

We find no abuse of discretion. A court’s discretionary ruling about whether to impose an underlying sentence following a probation violation is not subject to revision “unless it clearly and affirmatively appears that such discretion has been abused or withheld.” State v. Priest, 170 Vt. 576, 576 (1999) (mem.). In reviewing probation revocation rulings, we view the evidence most favorably to the prevailing party, State v. Sylvester, 2007 VT 125, ¶ 7 (mem.), and will not overturn the district court’s decision so long as there is a reasonable basis to support it, Priest, 170 Vt. at 576. Here, there was overwhelming evidence supporting the court’s imposition of the full underlying sentence, including defendant’s violent criminal history, his repeated probation violations, some of which occurred even after defendant had received additional jail time based on prior violations, and his most recent violations shortly after his release from prison—all of which demonstrate the need to protect the community and to provide treatment for defendant. Even if it were undisputed that defendant would complete the treatment program if a shorter sentence were imposed, there is no requirement under the present circumstances that the court impose a shorter sentence.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice