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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-440

JULY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Washington Circuit
	}	
Stephen Synnott	}	DOCKET NO. 1630-12-01 WnCr
		Trial Judge: Brian J. Grearson

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

Defendant appeals from a district court order revoking his probation and imposing the full underlying sentence. He contends the court erred in: (1) failing to consider intermediate sanctions authorized by statute; and (2) finding that it was necessary to treat defendant's substance abuse before his mental health problems. We affirm.

The material facts are undisputed. Defendant was convicted of lewd and lascivious behavior, second degree unlawful restraint, and attempted sexual assault stemming from an encounter with a woman whom defendant met in a bar in 2001. Defendant was on probation at the time of the offenses. Defendant was sentenced to consecutive terms of four-to-eight years for the first two offenses and a suspended term of five-to-twenty years for the third offense. This court affirmed. State v. Synnott, 2005 VT 19, 178 Vt. 66. During his incarceration from 2002 to 2006, defendant completed sex offender programming but was cited for numerous disciplinary infractions.

In November 2006, defendant was released on furlough, but after a month he disappeared. He was found four days later and admitted that he had been drinking. The incident resulted in a conviction of furlough escape and an additional nine-month sentence. Defendant was released on probation in September 2007. About six weeks later, defendant took a cab from his Montpelier apartment to Burlington, where he was found, late at night at the bottom of a stairwell, heavily intoxicated. He was taken to a hospital but refused to submit to an alcosensor test or to let a nurse check his vital signs. He was later less than candid with his probation officer concerning the incident. During his release, defendant saw a therapist, whose observations of defendant confirmed an earlier psychiatrist's diagnosis of bipolar disorder and chronic substance abuse.

Defendant was charged with violations of three probation conditions: that he abstain from alcohol, maintain a curfew imposed by his probation officer, and participate in outpatient sex-offender counseling. Defendant admitted the alcohol and curfew violations but contested the treatment charge. He was found guilty of all counts and sentenced to the full underlying

sentence of five-to-twenty years. Defendant appealed to this Court, but before argument the State agreed to vacate the treatment-violation charge and the case was remanded, by stipulation, for a new sentencing hearing based on the two admitted violations. An evidentiary hearing was held in which defendant's probation officer and therapist testified. At the conclusion of the hearing, the court made oral findings, and again sentenced defendant to the full underlying sentence. This appeal followed.

A court's discretionary decision to impose the underlying sentence for a probation violation will not be overturned on review "unless it clearly and affirmatively appears that such discretion has been abused or withheld." State v. Priest, 170 Vt. 576, 576 (1999) (mem.). We view the evidence in the light most favorable to the prevailing party, and will not disturb the court's findings if supported by credible evidence. State v. Sylvester, 2007 VT 125, ¶ 7, 183 Vt. 541 (mem.).

Defendant first contends the court "unlawfully withheld its discretion" in failing to consider intermediate sanctions short of the full underlying sentence. Defendant argued at the hearing for continuing him on probation with enhanced probation conditions requiring daily contact with his probation officer, alcosensor testing, and/or electronic monitoring. See 28 V.S.A. § 304(b)(2) (providing that as an alternative to revocation, court may consider "necessary or desirable changes or enlargements in the conditions of probation"); id. § 202(3) (authorizing use of electronic monitoring for supervision of individuals placed on probation). Defendant argues that these lesser dispositions were appropriate in light of the evidence that defendant had incurred no disciplinary infractions and completed an anger management course since his reincarceration, and his therapist's testimony that defendant was a good candidate for the intensive outpatient treatment program at the Windham Center, which specializes in dual diagnosis, i.e., patients such as defendant with both bipolar disorder and substance abuse problems.

The claim is unpersuasive. The court here acknowledged defendant's progress in prison since his reincarceration but found that his positive record during the preceding eight or nine months was far outweighed by his overall lack of progress during the prior seven years of incarceration. The court further acknowledged the testimony of defendant's therapist that he would benefit from a placement at the Windham Center. The court correctly observed, however, that its principal concern had to be the safety of the community, and it found in this regard that defendant represented an unwarranted risk if released into the community for treatment and that incarceration for the balance of defendant's term was necessary to protect the community. See id. § 303(b)(1) (court shall not revoke probation and order confinement unless it finds that "[c]onfinement is necessary to protect the community from further criminal activity").

The court cited in this regard defendant's record of repeated violations while under supervised release. The underlying offenses were committed while defendant was on probation, the furlough release in 2006 lasted only a month before petitioner escaped and admitted drinking, and his most recent release on probation lasted only 48 days before petitioner left without notice and became highly intoxicated. The court found that these were not minor violations in view of defendant's past violence associated with drinking, and demonstrated that defendant could not safely or effectively manage himself if released. See State v. Allen, 145 Vt. 593, 596 (1985) (upholding revocation of probation for violation of condition prohibiting use of alcoholic beverages where evidence demonstrated "a severe alcohol problem" and a history of associated violence). The findings and conclusions thus clearly demonstrate that the court rejected the

release alternatives urged by defendant as an unwarranted risk to the safety of the community. Accordingly, we find no merit to defendant's claim.

Defendant also contends that the court erroneously found that it was necessary to address defendant's substance abuse problem before his mental health issues. Defendant cites his therapist's testimony that alcohol is not a cause of bipolar disorder, but is often used by people with the disorder as a form of medication, to deal with the highs and lows. Whatever the merits of the claim, the record shows that the court's decision to impose the underlying sentence was based on a finding that it was necessary to protect the community based upon defendant's repeated violations while on release, not—as defendant suggests—to provide substance abuse counseling in prison. Accordingly, the finding—such as it was—was immaterial to the decision, and provides no basis to disturb the judgment. See State v. Leggett, 167 Vt. 438, 440 n.1 (1997) (we need not decide whether ruling in probation-revocation proceeding was erroneous where it did not affect the decision and was harmless).

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice