

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-047

OCTOBER TERM, 2008

State of Vermont	} APPEALED FROM:
	}
	}
v.	} District Court of Vermont,
	} Unit No. 2, Bennington Circuit
	}
Richard Lizzie	} DOCKET NO. 400-5-92 BnCr

Trial Judge: Katherine A. Hayes

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

Defendant appeals an order revoking his probation and imposing his underlying sentence. Defendant argues that the court's decision to revoke his probation is fundamentally unfair because there was a fourteen-year delay between the violation of probation and the revocation proceeding. We conclude that the court did not abuse its discretion, and affirm.

The parties do not dispute the relevant facts. In 1992, defendant pleaded guilty to lewd and lascivious conduct with a child in violation of 13 V.S.A. § 2602. He was sentenced to six months to three years, all suspended except for six months. Defendant served his sentence and was released on probation. Among other things, his probation conditions required him to report to his probation officer, not to purchase or consume alcohol, to participate in an alcohol treatment program, to do community service, and not to have contact with juveniles under sixteen. He was not required to participate in sex-offender treatment. In 1993, defendant was charged with two violations of probation. One violation alleged that defendant did not report to his probation officer or participate in alcohol treatment. The other alleged that defendant purchased alcohol on two occasions. After defendant failed to appear at the merits hearing, the court issued a warrant for defendant's arrest. In the following years, it became clear that defendant had left Vermont, but the State missed several opportunities to extradite him and prosecute the violations. In June 1995, defendant was arrested as a fugitive in Maine, but was released after Vermont indicated it did not want to extradite him. A few months later, Maine again arrested defendant, but Vermont again did not extradite. In 1996, the State dismissed the violation-of-probation charges erroneously and then reinstated them. In May 2007, a new probation officer took over defendant's case and the arrest warrant was amended to note that Vermont would extradite defendant. In October 2007, defendant was arrested and extradited to Vermont. During defendant's fourteen-year absence, he accumulated four convictions and one violation of probation in New York, Maine, Florida, and New Hampshire. None of the new convictions were for sex crimes; they were primarily alcohol-related.

At the probation-revocation hearing, defendant admitted to the two violations, and the court held a contested hearing on the appropriate sentence. The State argued that defendant's probation should be revoked and the underlying sentence imposed. Defendant's probation officer testified that it would be difficult to put defendant on probation because defendant did not have a residence in Vermont. The probation officer also explained that it was unlikely defendant would have received sex-offender treatment if incarcerated because of the limited amount of time left to serve and defendant's plan to move back to Maine. Defendant asked for time served so he could resume his life in Maine where he has a girlfriend and two children. Defendant explained that he thought that Vermont did not want him because Vermont chose not to extradite him when he was first arrested in Maine.

The trial court revoked defendant's probation, imposed the underlying sentence, and recommended defendant for the Cognitive Self-Change program. The court found that defendant committed a very serious offense and had not been treated. Further, the court explained that defendant's probation violation was serious because he failed to abide by any of the conditions and essentially disappeared. Thus, the court concluded that the need to protect the public and to get treatment for defendant weighed in favor of revocation. The court found that the delay in extraditing defendant did not alter this conclusion because any delay benefitted defendant and did not prejudice him. The court explained that defendant's fellow citizens were the ones who were harmed by having an untreated sex offender on the street.

On appeal, defendant argues that the court's decision to revoke his probation was fundamentally unfair given the length of time between the violation and the revocation, and an abuse of discretion. The State responds that defendant waived any objection to the constitutional fairness of the proceeding when defendant pleaded guilty to the violations. See In re Torres, 2004 VT 66, ¶ 9, 177 Vt. 507 (explaining that a defendant who knowingly and voluntarily pleads guilty waives objection to all nonjurisdictional defects to his conviction). Thus, the State contends that the sole issue is whether the district court abused its discretion in revoking defendant's probation.

We agree with the State that defendant cannot attack the validity of the violations based on a due process violation, given that defendant chose not to challenge the extradition, and admitted the violations. See id. Defendant argues that it is unfair to revoke his probation after fourteen years and in support cites People ex rel. Bowman v. Woods, 264 N.E.2d 151 (Ill. 1970). In Woods, the Illinois Supreme Court held that Alabama forfeited its right to extradite the defendant for a parole violation after an unexplained thirteen-year delay. Id. at 153. The court recognized that ordinarily the mere passage of time will not discharge a violator of an out-of-state parole violation, but concluded it was manifestly unfair in the defendant's case because Alabama knew that the defendant was in Illinois and twice refused to extradite him. While this case also involves a long delay in extradition, defendant has challenged the delay under much different circumstances. Defendant did not challenge his extradition from Maine. In addition, defendant did not raise any due process objection at the violation hearing based on the delay in prosecuting the violations; rather, defendant admitted the violations and only contested the resulting sentence. Cf. State v. Ellis, 149 Vt. 264, 268 (1988) (holding that there was no due process violation from a one-year delay in prosecuting the defendant's probation violation because the defendant did not demonstrate how he suffered actual prejudice from the delay or that the State intentionally caused the delay). Under these circumstances, defendant has waived any due process objection to the prosecution itself and we consider the delay in prosecuting the

violations only in the context of whether the trial court abused its discretion in revoking defendant's probation and imposing the underlying sentence.

Once a violation of probation is established, "the court may, in its discretion, revoke probation and require the probationer to serve the sentence which was suspended." 28 V.S.A. § 304(a). "Absent a showing that the trial court abused or withheld its discretion, the enforcement of the original sentence after a finding of violation of probation is without error." State v. Peck, 149 Vt. 617, 621 (1988). In considering whether to revoke, the district court is directed to consider whether: "(1) Confinement is necessary to protect the community from further criminal activity by the probationer; or (2) The probationer is in need of correctional treatment which can most effectively be provided if he is confined; or (3) It would unduly depreciate the seriousness of the violation if probation were not revoked." 28 V.S.A. § 303.

Defendant argues that he remains a good risk for probation because he has not committed another sex crime since 1992 and he has addressed his drinking problem, and that therefore the court abused its discretion in revoking probation. See State v. Brunet, 174 Vt. 135, 140 (2002) ("The goal of a revocation hearing is not to decide guilt or innocence, but to determine whether the defendant remains a good risk for probation."). These facts notwithstanding, other evidence supported the trial court's decision that probation was not a viable option: defendant's admitted violation of his probation by leaving the State after only a couple of months on probation and defendant's additional probation violation in another state during his fourteen-year absence. In addition to these concerns, the court's decision to revoke probation and impose defendant's underlying sentence was based on the seriousness of the underlying offense, the seriousness of defendant's violations, and the fact that defendant had received no treatment. Given these findings, the court's revocation was reasonable and not an abuse of discretion. See State v. Priest, 170 Vt. 576, 577 (1999) (mem.) (affirming revocation where the trial court found that the probationer needed correctional treatment and that it would depreciate the seriousness of the violation if probation was not revoked).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice