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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-389

JUNE TERM, 2004

State of Vermont v. Kenneth Bluto	}	APPEALED FROM: District Court of Vermont, Unit No. 3, Franklin Circuit DOCKET No. 1421-12-97 Frcr Trial Judge: Hon. Michael S. Kupersmith

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

Defendant appeals from a district court order finding him in violation of probation and sentencing him to serve fifteen days of the underlying sentence. Defendant contends: (1) the evidence failed to support the court= s finding; (2) the finding violates his constitutional rights to privacy and due process; (3) he was not afforded notice of the probation condition that he violated; and (4) the court abused its discretion in revoking probation and imposing sentence. We affirm.

In November 2002, defendant was convicted of DUI, fourth offense. He was sentenced to a term of sixty days to four years, all suspended except twenty-eight days. Defendant's probation conditions included a requirement that he not purchase, possess, or consume alcohol, and that he A submit to urinalysis testing when requested by [his] probation officer or any other person authorized by [his] probation officer.@ On April 24, 2003, at about 1:00 p.m., defendant reported to the probation office in St. Albans, as requested by his probation officer Chris Paradee. Paradee ordered defendant to submit to urinalysis testing, but defendant claimed that he had insufficient urine to provide a sample. Paradee, in response, gave defendant permission to leave the building to purchase something to drink, and directed him to return and not leave until he had provided a sample under Paradee= s or another officer= s supervision.

Defendant testified that he went to a nearby store, purchased and consumed a bottle of soda and four bottles of water, and returned to the probation office. At about 1:40 p.m., under the supervision of officer Holliman (Paradee had briefly stepped out), defendant attempted to provide a sample, but was unable to produce a sufficient amount of urine for testing. Holliman then directed defendant to wait until Paradee returned, but defendant left, stating that he did not intend to spend the entire day in the office and that Paradee could cite him for leaving if he wanted to. About two hours later, defendant returned to the office and stated that he was willing to provide a sample. Paradee did not allow him to do so, however, stating that he was citing him for a violation.

Defendant was subsequently charged with violating the probation condition requiring that he submit to urinalysis testing when directed by his probation officer.* Following a hearing, the court found that defendant had violated the condition as charged, and revoked probation and imposed the underlying sentence, all suspended sentenced except fifteen days to serve on work crew. This appeal followed.

We note preliminarily that although defendant contested the violation, he raised none of the claims on appeal before the trial court. Accordingly, the trial court= s ruling must stand unless defendant demonstrates plain error. State v. Lockwood, 160 Vt. 547, 560 (1993). Such error occurs only in rare and extraordinary cases, and will be found only

where failure to recognize the error would result in manifest injustice. State v. Plante, 164 Vt. 350, 356 (1995). Defendant first contends the evidence failed to show that he willfully violated the probation condition. See State v. Danaher, 174 Vt. 591, 594 (2002) (mem.) (court must find that defendant intentionally violated probation condition). He argues that there was no evidence that he would not provide a sample, only that he was unable to do so. Defendant was not, however, found to be in violation for his inability to provide a urine sample, but rather for leaving the building contrary to the probation officer= s direction and refusing to submit to urinalysis testing when directed by the officer. The evidence clearly showed that defendant intentionally left the building, contrary to his probation officer= s direction, and with the understanding that he could be cited for doing so. See id. at 592 (findings fairly supported by credible evidence must stand). Accordingly, we discern no error.

Defendant next contends that the finding of a violation was invalid because the probation officer lacked the authority to detain him for testing. Defendant asserts that the attempted detention constitutes an infringement of his constitutional rights to A privacy and personhood,@ as well as A substantive and procedural due process.@ It is well settled, however, that probationers A properly are subject to limitations from which ordinary persons are free,@ State v. Emery, 156 Vt. 364, 369 (1991) (internal citation omitted), and that probation conditions permitting even warrantless searches are permissible if reasonably tailored to the needs and purposes of the individual= s probation. Lockwood, 160 Vt. at 556-57.

Defendant does not challenge the validity of the condition allowing the taking and testing of a urine sample, although it unquestionably constitutes a warrantless search, and there is no doubt that the ability to enforce such a condition requires the authority to detain defendant for some reasonable period of time. See United States v. Duff, 831 F.2d 176, 179 (9th Cir. 1987) (holding that urine testing of probationer was permissible based upon officer= s reasonable belief that it was necessary to accomplish probation condition prohibiting use of drugs). While there may be a point at which the length of the detention so far exceeds its purpose that it violates the probationer= s Fourth Amendment rights, that was not the case here. When he left, after being informed that officer Paradee would be right back and that he was to remain at the probation office, defendant had been at the office for only about one hour, which is not an unreasonable time under any standard. In these circumstances, therefore, we discern no basis to conclude that the order requiring defendant to remain at the office was a manifest violation of his constitutional rights.

Defendant next contends he was not put on notice that, as a condition of probation, he was required to remain at the office for testing as directed by his probation officer. See State v. Hammond, 172 Vt. 601, 602 (2001) (mem.) (due process requires notice of what conduct is forbidden before initiation of probation revocation proceeding). The probation condition expressly informed defendant that he was to A submit to urinalysis testing when directed by your probation officer or any other person authorized by your probation officer.@ Due process does not require that prior notice be given of all the techniques through which compliance will be monitored. See Duff, 831 F.2d at 179 (A Due process does not require that prior notice be given of the techniques through which noncompliance will be detected.@). Furthermore, Officer Paradee stated in his affidavit that similar problems had occurred in the past with defendant and that Paradee had A instructed him before to always be prepared to provide a urine sample as directed when he reported to my office.@ Accordingly, there is no doubt that defendant was informed of the requirement that he submit to testing A when directed@ by his probation officer, and that a failure to do so B as in this case by leaving the office before he had submitted a sample and directly contrary to the officer= s orders B would constitute a violation. See Hammond, 172 Vt. at 602 (probationer may be put on notice by officer= s instructions and directions). We thus discern no violation of due process.

Finally, defendant contends the court abused its discretion by revoking probation and imposing the underlying sentence, all suspended except for fifteen days to serve on work crew. He asserts that the revocation was improperly punitive because the violation was a minor infraction, and unnecessary in light of defendant= s otherwise consistent compliance with other conditions requiring attendance at counseling and maintenance of steady employment. When a violation of probation is established, the court has discretion to revoke probation and require the original sentence to be served, continue probation, or alter the conditions of probation. State v. Priest, 170 Vt. 576, 576 (1999) (mem.). We have observed that the primary purpose of a revocation hearing is not to determine culpability but to decide whether the rehabilitative alternatives to incarceration remain viable to the defendant and sufficient for the protection of the community. Lockwood, 160 Vt. at 552. Here, the court was aware that defendant had a record of five prior violations of probation for other offenses, and that defendant= s abuse of alcohol was a principal factor in several of the prior

offenses and violations. Accordingly, the record amply supports the court= s conclusion that revocation of probation for failing to submit to urinalysis testing when directed by his probation officer was warranted. The violation, in these circumstances, cannot be dismissed as minor, and the actual sentence of fifteen days to serve on work crew cannot be characterized as punitive. We thus discern no abuse of discretion or plain error warranting reversal.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Paul L. Reiber, Associate Justice

Footnote

* The complaint also charged a violation of the condition requiring that defendant serve a number of days on work crew, but the court did not find a violation on this basis.