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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-065

OCTOBER TERM, 2006

State of Vermont } APPEALED FROM:

}

v. } District Court of Vermont,

} Unit No. 1, Windsor Circuit

Steven C. Klunder }

} DOCKET NO. 1101-8-02 WrCr

Trial Judge: Theresa DiMauro

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

Defendant Steven C. Klunder appeals from the trial court=s order denying his motion to reconsider his conditions of probation. He argues that the court erred in denying his request because the challenged conditions are not reasonably related to his underlying conviction. We affirm.

The underlying facts are largely set forth in our previous decision involving defendant=s first challenge to his probation conditions. State v. Klunder, 2005 VT 130. We briefly restate them here. In September 2003, defendant pleaded nolo contendre to felony sale of cocaine pursuant to a plea agreement. Pursuant to the

agreement, the State did not charge defendant with sexual misconduct toward a female child, E.N., and defendant agreed to a number of probation conditions designed to address his sexual misconduct. Among other conditions of probation, defendant specifically agreed to reside and work where directed by his probation officer, and he agreed to engage in mental health counseling. In January 2004, defendant moved to modify his conditions of probation to allow him to continue living with his mother, who lived in close proximity to E.N. The court denied defendant=s request, but added a special condition that allowed defendant to visit his mother on specific dates and times as approved by his probation officer. Id. at & 3.

In July 2004, the trial court found that defendant had violated probation by failing to participate in mental health counseling. Shortly thereafter, defendant filed a pro se letter with the court seeking the removal of the residency and counseling conditions, as well as the condition restricting his visits to his mother=s home. The court denied the motion, explaining that the conditions had been set at a hearing where defendant was represented by counsel and defendant gave no reason why the conditions should be changed. Defendant appealed both the violation of parole finding (VOP) and the trial court=s denial of his modification request to this Court. In a December 2005 entry order, we reversed the probation violation finding and affirmed the court=s denial of defendant=s motion to modify. Id. & 1.

While defendant=s appeal was pending, the State filed two additional VOP complaints against him. The State dismissed the first complaint in April of 2005. It withdrew the second in January of 2006, in exchange for the modification of the existing probation order. Specifically, defendant agreed to a modification of the mental health counseling provision; he also agreed to abide by all existing conditions of probation. Within a week, defendant filed a pro se motion with the court seeking the modification of his probation conditions. He again asked the court to modify the residency requirement and the condition allowing him to visit his mother at her residence only with permission from his probation officer. He asserted, without explanation, that these probation conditions were illegal. The trial court denied his request, explaining that it had denied a similar request in August 2004, and its decision had been affirmed by this Court. This appeal followed.

On appeal, defendant argues that the court erred in denying his motion to modify because the probation

conditions at issue are unrelated to the crime of which he was convicted. He maintains that these conditions are unduly restrictive of his liberty and autonomy and they do not further any objectives for imposing special conditions of probation.

Defendant did not raise these arguments in his motion to modify, although he touched on them in his notice of appeal. Assuming that his claim of error was preserved, the court acted well within its discretion in denying defendant=s request. See State v. Peck, 149 Vt. 617, 622 (1988) (defendant bears burden of showing that trial court abused its discretion in challenge to probation conditions). As part of his plea agreement with the State in 2003, defendant agreed to be subject to probation conditions designed to address his sexual misconduct with E.N., and he expressly agreed to the residency requirement. AUnder our precedents, the probation conditions contained in the original sentence represent a contract between the probationer and the court.@ State v. Whitchurch, 155 Vt. 134, 139 (1990). The court plainly had discretion to impose this condition. 28 V.S.A. ' 252 (a) (AThe conditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the offender will lead a law-abiding life or to assist him to do so.@). As we have explained, a probation condition is reasonable if it is not Aunnecessarily harsh or excessive@ in serving the following goals: (1) protecting the public from a recurrence of the crime that resulted in the imposition of probation; and (2) assisting the probationer in leading a law-abiding life. State v. Rivers, 2005 VT 65, & 9, 178 Vt. 180. Even if the only conduct at issue was defendant=s felony sale of cocaine, requiring him to obtain approval from his probation officer as to his choice of residence is simply not Aunnecessarily harsh or excessive.@ Id. (citation omitted). Given the nature of the underlying plea agreement, however, we note that the court acted within its discretion in refusing defendant=s specific request to live within one-half mile of E.N.

This case is not like Rivers, 2005 VT 65, on which defendant relies. The probation condition at issue in that case prohibited the defendant from having any contact with children under the age of sixteen without prior written approval from his probation officer. Id. & 1. The trial court found that the defendant violated probation by attending a state fair, and he appealed. We reversed the probation violation, finding the condition at issue overly broad and unduly restrictive of the defendant=s liberty and autonomy. In reaching our conclusion, we

distinguished the condition at issue from those no-contact provisions that involved specific victims. Id. & 10. The latter conditions, we explained, were Asubstantially less restrictive,@ and they were justified by a variety of factors, including the trauma and distress inflicted on the victims by such contact, as well as the Areawakening@ of the mental processes that led to past abuse. Id. & 11 (explaining that Areawakening can greatly undermine the rehabilitative process that probation is intended to foster.@). This case does not support defendant=s assertion that the residency condition at issue here is unduly restrictive. Indeed, the application of the condition to prohibit defendant from living near to E.N. serves one of the purposes underlying the 2003 plea agreement.

Defendant=s challenge to the visitation condition is equally without merit. This provision, which allows defendant to visit his mother=s home upon approval of his probation officer, was added by the court in response to defendant=s January 2004 request to modify. We rejected defendant=s previous challenge to this provision, finding it untimely. Klunder, 2005 VT 130, & 12 (citing 28 V.S.A. ' 253(b) and refusing to address merits of defendant=s argument that condition not supported by evidence because defendant failed to challenge the condition at the time it was imposed, and he failed to challenge it Awithin a reasonable period of time@). His renewed challenge is equally untimely. Even putting this aside, however, there is no support for defendant=s assertion that this provision unduly restricts his liberty and autonomy. This provision, like the residency requirement discussed above, is consistent with the underlying plea agreement. We find no error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice