

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-148

APRIL TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
Stanley Beauregard	}	
	}	DOCKET NOS. 571-5-99 Frer &
	}	1947-12-02 Frer

Trial Judge: Mark J. Keller

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

Defendant appeals the district court's order revoking his probation and imposing the underlying sentence. Defendant argues that the court's decision (1) is not supported by the findings, (2) violates due process because it is based on old violations, and (3) was an abuse of discretion. We affirm.

In 1999, defendant was convicted of his third DUI and sentenced to two years to five years all suspended. His probation included a condition that he refrain from purchasing, possessing or consuming alcohol. In April 2000, defendant admitted to a probation violation for consuming alcohol and continued on probation with the additional condition of attending treatment. In December 2002, defendant was arrested and charged with another DUI. Pursuant to a plea agreement, defendant admitted a probation violation and pleaded guilty to DUI and driving with license suspended. Under the agreement, defendant received a one-to-five-year sentence, all suspended except sixteen days to serve. Defendant was also required to attend a residential treatment facility and attend ninety Alcoholics Anonymous meetings in ninety days. In December 2005, defendant admitted to violating his probation by failing to report to his probation officer and received a modified probation order with sixty days to serve and all alcohol conditions. The district court gave him a delayed report date and ordered him to report to the correctional facility on December 30, 2005, drug and alcohol free.

On December 30, 2005, defendant arrived at corrections under the influence of alcohol. The State charged him with a probation violation. At the merits hearing, defendant admitted to consuming alcohol on his way to the correctional center. Defendant's probation officer recommended that defendant serve his underlying sentences. The district court revoked probation and imposed the underlying sentences to serve.

Defendant argues that there was insufficient evidence to support revocation. Defendant does not dispute that he violated his probation by consuming alcohol, but contends that the district court lacked sufficient evidence to support its decision to revoke and order confinement. A court may revoke probation after the State establishes a violation by a preponderance of the evidence. State v. Millard, 149 Vt. 384, 385 (1988). Once a violation of probation is established, the trial court has discretion to revoke probation and require the original sentence to be served. 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). The decision to revoke probation and order confinement for violation of probation is appropriate if: “(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(b). At the hearing, the trial court explained that it was revoking defendant’s probation to protect the public. Defendant reasons that because his violation was for consuming alcohol, not for driving under the influence, there was no danger to the public and the court’s finding is therefore erroneous.

We reject defendant’s argument that because he was merely intoxicated and not driving while intoxicated, the court lacked sufficient evidence to find that he was a danger to the public and order confinement. The statute directs the court to consider whether to revoke probation and order confinement based on “the original offense and the intervening conduct of the probationer.” 28 V.S.A. § 303(b). Based on defendant’s multiple convictions for DUI and his demonstrated inability to remain sober, the court’s finding that he could not control his behavior and therefore was a danger to society was not an abuse of discretion. See Peck, 149 Vt. at 621 (affirming court’s finding that defendant posed a danger to society where he was not progressing toward rehabilitation).

Similarly, we find no merit to defendant’s argument that he was denied due process because the court revoked his probation based on stale violations. The trial court found defendant had consumed alcohol, which violated the court’s direct order as well as defendant’s probation conditions. Having found a violation, the court concluded that confinement was necessary based on defendant’s demonstrated inability to refrain from consuming alcohol and his history of driving while intoxicated. The court properly considered the nature of his original offense in making the second determination. See 28 V.S.A. § 303(b) (directing court to consider original offense and intervening conduct when deciding whether to order confinement). The federal cases cited by defendant do not persuade us otherwise. In fact, the Ninth Circuit agrees that where, as here, there is a fresh violation, it is within the court’s discretion to consider probationer’s underlying conviction and intervening conduct in its revocation decision. See United States v. Hamilton, 708 F.2d 1412, 1415 (9th Cir. 1983) (“We do not hold that under appropriate circumstances a probation officer or district court may not wait to assess the cumulative effect of several violations before initiating a revocation proceeding.”).

Finally, defendant argues that the trial court abused its discretion because defendant committed only a “technical violation” and that the trial court revoked his probation out of personal anger. We disagree both with defendant’s characterization of his violation of the no-drinking condition as a technical violation, and that the court’s decision to revoke was rooted in personal

anger. Defendant's underlying convictions are for DUI, thus, defendant's drinking was the major focus of his probation. As such, refraining from consuming alcohol was a vital part of defendant's probation and not a mere technicality. Further, pursuant to his plea agreements, defendant attended several types of treatment programs. Despite these programs, defendant continued to consume alcohol. Under these circumstances, the court's finding that defendant could not control his behavior and that revocation was necessary was not an abuse of discretion. See State v. Allen, 145 Vt. 593, 598 (1985) (affirming court's revocation where court found the defendant had a severe alcohol problem and that probation could not help him).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice