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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-014

DECEMBER TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Stephen G. Marsh	}	DOCKET NO. 3249-8-08 Cncr
		Trial Judge: Michael S. Kupersmith

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

In this automatic appeal from a life sentence, defendant argues that two special probation conditions are invalid because they are unrelated to his crime or to protecting the community. The State argues that defendant waived his ability to contest these conditions by entering into a knowing and voluntary plea agreement, which specifically included the conditions. We agree, and affirm.

The facts underlying defendant's charge were described by the prosecutor at the sentencing hearing as follows. Defendant was with the victim, his girlfriend, sitting on the bed in his bedroom. At some point he picked up a handgun that he had loaded a month or two previously. Apparently, not realizing the gun was loaded, he pointed the gun at the victim's head and pulled the trigger, sending a bullet through her head and killing her. He was initially charged with first-degree murder.

Defendant entered a plea agreement with the State wherein he pleaded guilty to second-degree murder for disregarding a high risk of death by failing to adequately check that the gun he held was unloaded and then pointing it at the victim's head and pulling the trigger. The plea agreement included nine special probation conditions, including that defendant's probation officer "may restrict defendant's associates," and "may restrict internet usage." At the change-of-plea hearing, the court reviewed these special conditions during the plea colloquy and defendant agreed that he had discussed them with his attorney and they were "okay." The court accepted defendant's plea, finding it to be knowing and voluntary. The parties waived a presentence report and the court sentenced him to the plea's recommended sentence of twenty-five years to life, all suspended but twenty years. Because of defendant's life sentence, his appeal to this Court was automatic. V.R.A.P. 3(b)(2). On appeal, defendant argues that two of the special conditions—that defendant's probation officer may restrict defendant's associates and internet usage—are overly broad, unduly restrictive and not reasonably related to protecting the public from recurrence of the crime.

The court may impose probation conditions that are "reasonably necessary to ensure that the offender will lead a law-abiding life or to assist the offender to do so." 28 V.S.A. § 252(a). Our cases have explained that probation conditions are valid if they are "reasonably related to the crime for which the defendant was convicted." State v. Whitchurch, 155 Vt. 134, 137 (1990).

On appeal, defendant claims that the court committed plain error in imposing two of the special probation conditions because they neither "reasonably relate to the crime [he] committed" nor aid him "in avoiding criminal conduct." State v. Moses, 159 Vt. 294, 297 (1992). The State responds that defendant waived his right to challenge the special conditions by specifically agreeing to them as part of his plea.

We do not reach the waiver argument because we conclude that defendant's challenge to his probation conditions must be viewed as a facial attack and the conditions are valid under that standard. A similar challenge to probation conditions was raised in Whitchurch, where the defendant had entered a plea of nolo contendere to lewd and lascivious conduct, and consented to a suspended sentence. 155 Vt. at 135. The terms of the defendant's probation were included in the plea agreement, and no presentencing report was prepared. The defendant later challenged two probation conditions as overbroad and unrelated to his sentence. This Court explained that because the defendant had entered a plea agreement and no presentence investigation was completed, "almost no information in support of the sentence was placed on the record." Id. at 138-39. Given the lack of a factual record, it was impossible to determine the validity of each condition in relation to the specific conduct of the crime, and therefore we treated the defendant's motion "as a facial attack." Id. at 140. Under this standard, a condition will be struck "only if the condition could not be justified by any set of circumstances." Id.

Similarly, defendant's challenge to his probation conditions must be construed as a facial attack. As in Whitchurch, there are no details in the record regarding defendant's crime because defendant accepted a plea and waived a presentence investigation. Therefore, there is no factual record from which we can review his as-applied challenge—that two of the special probation conditions are unrelated to the crime he committed. Under the standard for a facial attack, we affirm the conditions that defendant challenges. There are a conceivable set of facts that would make it reasonable for defendant's probation officer to be able to restrict those individuals with whom defendant associates and the internet sites that defendant accesses. See id. at 139.

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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Denise R. Johnson, Associate Justice