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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-243

MAY TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
v.	}	Criminal Division
	}	
	}	
Douglas S. Cavett	}	DOCKET NO. 1967-5-09 Cncr
		Trial Judge: Thomas J. Devine

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

Defendant appeals the trial court's decision concluding that he violated the condition of his probation requiring him to complete the Vermont Treatment Program for Sexual Abusers (VTPSA). We affirm.

The violation-of-probation (VOP) complaint upon which this appeal is based was filed in May 2013. Following an evidentiary hearing in November 2013, the trial court issued a decision concluding that defendant failed to complete the VTPSA program, but it refused to review the underlying disciplinary action of the Department of Corrections (DOC) that resulted in defendant's removal from the program. We reversed the trial court's conclusion that it had no jurisdiction to review the DOC's decision and remanded for further review. State v. Cavett, 2015 VT 91, ¶ 1, 199 Vt. 546, 547. On remand, the trial court held a hearing at which defendant appeared and was represented by counsel. Counsel stipulated that no new testimony or evidence would be presented and that the court's decision would be based on the transcript of the November 2013 VOP hearing along with the exhibits admitted during that hearing.

The trial court issued a written decision in February 2016 in which it made the following findings. Defendant was convicted of aggravated sexual assault in 2010. He was sentenced to a term of five to fifteen years, all suspended except for four years to serve. Defendant's probation conditions included Condition 34, which states: "You shall participate fully in the VT Treatment program for sexual abusers during the course of your suspended sentence. Failure to complete said program while incarcerated may result in a violation of your probation."

In November 2012, defendant attended a brief orientation for the VTPSA in which he was provided with a treatment agreement and a copy of the VTPSA orientation handbook. One of the program rules listed in the handbook is a "cardinal rule" stating "No physical violence or threats of physical violence." The handbook warns that "[b]reaking a cardinal rule may result in termination from the program." The VTPSA treatment agreement includes a statement that "I have read the 'VTPSA Orientation Handbook' and the facility 'Inmate Handbook' and agree to follow all the rules and regulations in these handbooks." After asking some questions, none of

which related to the prohibition against physical violence or threats of physical violence, defendant signed the treatment agreement and began the program.

In April 2013, defendant was asked to meet with a DOC officer who was assigned to investigate two disciplinary reports (DRs) against defendant. During the meeting, defendant sat in a small office on the opposite side of a desk from the DOC officer. In order to exit the room, the DOC officer would have had to walk past defendant. The DOC officer testified that defendant was agitated and upset and that his tone of voice was higher-pitched and louder than normal. When she handed defendant a document detailing the DR allegations, he became flushed. He crumpled up the first page of the document into a ball in his left hand and threw the ball toward th e DOC officer. The DOC officer testified that she put up her hands to deflect the ball, but it struck her in the face. She testified that defendant's "gross motor activity" had increased to the point that she was concerned for her safety. She asked defendant to calm down or she would call for an officer to escort him out. Defendant calmed down somewhat and they proceeded to discuss the DRs.

A video recording of the incident captured by a surveillance camera, which was admitted into evidence, shows that defendant threw the paper. Based on the evidence presented, including the video recording, the trial court found that the paper hit the officer. The trial court found that the video did not corroborate the officer's testimony that defendant was flailing his arms or that he cocked his arm back before throwing the paper ball. The court found that it was not a hard throw but it was sudden.

Earlier that same day, the VTPSA treatment team had met to discuss defendant's status in the program. The group decided to place defendant on a thirty-day probationary period due to concern about his lack of progress in the program. Defendant received notice of the probationary period the following day.

As a result of the paper-throwing incident, a new DR was filed against defendant for violent and threatening behavior. Defendant contested the DR in an administrative proceeding and the DR was upheld. A week later, the VTPSA team decided to terminate defendant from the program. The notice of termination stated that defendant was terminated as the result of

> "Assault of a corrections officer on 4-9-13 in violation of VTPSA cardinal rule: 'No physical violence or threats of physical violence.' As recorded on camera, when given DR paperwork by the officer you wadded up the paper, drew back and threw it at the officer, hitting her in the shoulder when she ducked to avoid the projectile."

The notice of termination stated that "this behavior is of additional concern as the team decided to place [defendant] on probation on 4-9-13" for his lack of progress in the program. A VOP complaint was subsequently filed based on defendant's violation of Condition 34.

The trial court found that the paper ball did hit the DOC officer. It further determined that although the DOC officer was not injured, defendant's behavior was threatening under the circumstances: defendant and the DOC officer were alone in a small office; defendant was not shackled; the DOC officer would have had to pass by defendant to exit the room; defendant was agitated and speaking in an elevated, high-pitched tone; defendant's movement in throwing the ball was sudden; and the paper ball struck the officer in the face. The court found that this was not an isolated incident, but rather was the culmination of a series of incidents for which defendant had already been placed on probation from the program by the VTPSA team. The court concluded that defendant had engaged in threatening behavior in violation of VTPSA rules, leading to his

termination from the program, and that this failure to complete the program was a willful violation of Condition 34.

After the VOP decision was issued, defendant requested and was granted permission to proceed pro se. A sentencing hearing was held in July 2016 at which defendant appeared and testified. At the conclusion of the hearing, the trial court revoked defendant's probation and imposed the underlying sentence of five to fifteen years to serve. This appeal followed.

The State must establish a probation violation by a preponderance of the evidence. State v. Klunder, 2005 VT 130, ¶ 7, 179 Vt. 563 (mem.). Whether a probation violation has occurred is a mixed question of fact and law. Id. The trial court must first make a factual determination of the probationer's actions, then reach a legal conclusion as to whether those actions violated the terms of his probation. Id. We will uphold the court's factual findings if supported by credible evidence. Id. Likewise, we will uphold its legal conclusions if supported by the findings. Id.

Defendant's primary argument on appeal is that the paper ball did not hit the DOC officer and that the video recording conclusively establishes this fact.[1] This Court has reviewed the video recording and there is nothing in the recording to contradict the trial court's finding that the paper did hit the officer. The image resolution of the recording is poor, and while the recording clearly shows that defendant threw the paper in the direction of the DOC officer, it is not possible to say for certain that the paper did or did not hit her. The trial court found the officer to be credible in her testimony that she was struck by the paper ball. The court's finding is not clearly erroneous.

Further, the record supports the trial court's determination that defendant's behavior was objectively threatening in light of the circumstances as a whole, providing an adequate ground for defendant's termination from the VTPSA for violating its rule against violent or threatening behavior. This finding, supported the conclusion that defendant had willfully violated Condition 34.

Defendant claims that he could not be sentenced to serve the remaining portion of his underlying sentence in jail because of a probation violation. To the contrary, when a probation violation is established, the trial court has the authority to revoke probation and require the probationer to serve the underlying sentence. 28 V.S.A. § 304(a). At the sentencing hearing, the court found that (1) confinement was necessary to protect the community due to defendant's unsuccessful track record with community-based probation; (2) defendant remained in need of correctional treatment; and (3) failure to complete the VTPSA was a serious violation of a central component of the probation order. These findings supported its decision to order defendant to serve the remainder of his sentence under confinement. See 28 V.S.A. § 303(b); State v. Millard, 149 Vt. 384, 387 (1988).

[1] Defendant has submitted three still frames from the video recording in support of his argument. As this Court indicated in its rulings on defendant's pre-argument motions, the record on appeal is limited to "the original documents, data, and exhibits filed electronically or nonelectronically in the superior court." V.R.A.P. 10(a); see also In re Estate of Perry, 2012 VT 9, ¶ 13, 191 Vt. 589, 593. The Court will not consider these photos because they were not part of the record considered by the trial court.

Defendant argues that to re-enter the VTPSA program, he is required to admit to the allegations in the VOP complaint, which would violate his Fifth Amendment privilege against self-incrimination. This issue is outside the scope of this appeal.[2]

Finally, defendant argues that his counsel rendered ineffective assistance by agreeing that no new evidence would be presented to the trial court following remand in this case. In general, ineffective-assistance-of-counsel claims may only be raised in petitions for post-conviction relief. See State v. Lund, 168 Vt. 102, 106 (1998) (holding that unless defendant raises issue of ineffective assistance of counsel at trial and gives court opportunity to rule on issue and create record from which this Court can review claim, we will not consider ineffective assistance claim on direct appeal).

Affirmed.

BY THE COURT:

_____
Marilyn S. Skoglund, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

_____
Karen R. Carroll, Associate Justice

[2] However, we note that defendant has already been found guilty of violating his probation condition and received a sentence, and thus cannot be prosecuted again for this offense. The Fifth Amendment privilege against self-incrimination does not apply where a probationer faces "no realistic threat of incrimination in a separate criminal proceeding." State v. Gleason, 154 Vt. 205, 212 (1990).