

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-01284

Shawn Gagnon v. Vermont Department of Corrections

DECISION ON APPEAL

Appellant Shawn Gagnon was released to RISE House on community supervision furlough on September 25, 2020. He absconded nine days later, and remained on the loose, out of contact with DOC, until he was picked up in late February of 2022. DOC then revoked his furlough; this appeal follows. On the determination that DOC did not abuse its discretion, the court denies the appeal.

The material facts are not controversial; all are supported by at least a preponderance of the evidence. Mr. Gagnon left RISE House and cut off his GPS bracelet on October 4. When DOC learned from RISE House that Mr. Gagnon had missed curfew, they made several attempts to reach him by phone. He did not answer and there was no mailbox to leave a message in. Subsequently, his Probation Officer tried to reach him by phone and tried to leave a message, which she was not sure was being recorded. Mr. Gagnon testified that he made one attempt, several months later, to call his Probation Officer. DOC, however, has no record of such a call. The court need not resolve this discrepancy, however, as it is not material; one attempt to reach his Probation Officer several months after absconding is plainly insufficient, particularly in the face of DOC's multiple calls, which he did not answer.

On October 15, Mr. Gagnon attempted to see his daughter, as to whom his parental rights had been terminated, at her daycare. The daycare denied the attempt, went into lockdown, and notified the Burlington Police Department, who in turn notified DOC. Mr. Gagnon was unable to be located at that time. Evidently, he returned to Franklin County, where he remained until he was picked up 16 months later.

In Franklin County, Mr. Gagnon found a job and a place to live, and did the best he had done "in a while." Apart from the one attempt he claims to have made to contact DOC in the winter of 2021, however, he remained purposely under the radar. He did not want to turn himself in for fear of the consequences.

When he absconded, Mr. Gagnon's maximum release date was 13 months off; that, then is the effective length of the interrupt effected by DOC's decision to revoke furlough. While he acknowledges that cutting off the GPS bracelet and going on the run was "the stupidest decision of my life," he argues that DOC abused its discretion. He attempts to lay the blame for both the initial decision to abscond and the length of time on absconder status at DOC's doorstep—first, in failing to ensure that he had access to medications that would allow him to succeed in the community and then in failing to find him, when he was "in plain view." The court does not find these arguments persuasive. Even if the lack of medication helps explain Mr. Gagnon's initial impulsive decision to abscond, it in no way excuses his failure, for well over a year, to make contact with DOC. Similarly, while he blames DOC for failing to find him, he overlooks the obvious fact that it was his obligation to make contact with DOC, not vice versa.

DOC may release an inmate from prison and place him or her on community supervision furlough if the inmate has served his or her minimum sentence and agrees to comply with such conditions as DOC, in its sole discretion, deems appropriate. 28 V.S.A. § 723(a). The inmate's continuation on furlough is "conditioned on the offender's commitment to and satisfactory progress in his or her reentry program and on the offender's compliance with any terms and conditions identified by the Department." *Id.* § 723(b). If the offender commits a "technical violation" (*i.e.*, "a violation of conditions of furlough that does not constitute a new crime") that DOC believes warrant an "interruption" of the furlough, then DOC must hold "a Department Central Office case staffing review" to determine the length of the interruption. *Id.* § 724(b).

An offender whose community supervision furlough is revoked or interrupted for 90 days or longer has a right to appeal DOC's determination to the Superior Court under V.R.C.P. 74. The appeal must be "based on a de novo review of the record," the appellant "may offer testimony," and the court, "in its discretion and for good cause shown," "may accept additional evidence to supplement the record." *Id.* § 724(c)(1). Under the statute, "[t]he appellant shall have the burden of proving by a preponderance of the evidence that the Department abused its discretion in imposing a furlough revocation or interruption for 90 days or longer" *Id.* As recently amended, the statute makes clear that "[t]he length of interruption or revocation may be a consideration in the abuse of discretion determination." *Id.* § 724(c)(2). Lastly, the statute provides:

It shall be abuse of the Department's discretion to revoke furlough or interrupt furlough status for 90 days or longer for a technical violation,

unless:

- (A) The offender's risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable.
- (B) The violation or pattern of violations indicate the offender poses a danger to others.
- (C) The offender's violation is absconding from community supervision furlough. As used in this subdivision, “absconding” means:
 - (i) the offender has not met supervision requirements, cannot be located with reasonable efforts, and has not made contact with Department staff within three days if convicted of a listed crime as defined in 13 V.S.A. § 5301(7) or seven days if convicted of a crime not listed in 13 V.S.A. § 5301(7);
 - (ii) the offender flees from Department staff or law enforcement; or
 - (iii) the offender left the State without Department authorization.

Id. § 724(d)(2).

The statute makes clear that while DOC clearly has discretion with regard to the length of a furlough interruption, its exercise of that discretion must be tied to the criteria identified in § 724(d)(2). Equally, any exercise of discretion, under this statute or otherwise, must not be arbitrary and capricious. *See, e.g., In re Halnon*, 174 Vt. 514, 517 (2002) (mem.) (“Abuse of discretion occurs when that discretion is exercised on grounds or for reasons clearly untenable, or to an extent clearly unreasonable.”). To avoid characterization as arbitrary and capricious, any exercise of discretion under this consideration must be informed by some sense of proportionality—both to the nature of the violations and to the context in which DOC imposes a consequence for those violations.

Here, the court concludes that Mr. Gagnon has failed to met his burden of demonstrating an abuse of discretion. While he has made at least a bare showing that DOC bore some responsibility for his lapse in medication, the court cannot credit any suggestion that that was the cause of his absconding—and certainly does not excuse his remaining incommunicado for well over a year. Equally, he has failed to make any showing that DOC failed to make reasonable efforts to locate him. Instead, this argument is based on an inference: that since he was not actively hiding, but was “in plain view,” any reasonable effort by DOC would have found him. He offered scant evidence, however, for the assertion that he was “in plain view”—essentially, that he was living and working in Franklin County. He offered no evidence as to the conspicuousness of his presence or activity, such as would have brought him to the attention of anyone who might have been looking for him. The court cannot fill this gap with speculation.

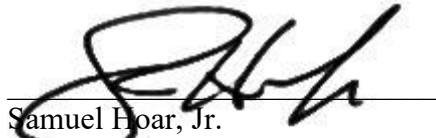
On the other side of the balance, it is a matter of record that this was the second time Mr. Gagnon had absconded. Earlier in 2020, he also removed his GPS monitor; he was missing for a few

months and received a six-month interrupt as a sanction. Here, he was missing for over 16 months. What is effectively a 13-month interrupt does not appear excessive.

ORDER

The court denies the appeal. The revocation of Mr. Gagnon's furlough stands.

Electronically signed pursuant to V.R.E.F. 9(d): 8/22/2022 2:34 PM



Samuel Hoar, Jr.
Superior Court Judge