VERMONT SUPERIOR COURT
Rutland Unit
83 Center St
Rutland VT 05701
802-775-4394
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 22-CV-01664

Justin Gaboriault, Appellant v. Vermont Department of Corrections, Appellee	FINDINGS OF FACTS AND CONCLUSIONS OF LAW

RULING ON THE MERITS

This is a Rule 74 furlough revocation review case. Appellant Justin Gaboriault has filed an appeal seeking review of a Department of Corrections ("DOC") case staffing decision to interrupt his community supervision furlough for at least one year. Under 28 V.S.A. § 724, such decisions are not reviewable if they are based on a supervised inmate's conduct that violates a condition of furlough and also constitutes or amounts to the commission of a new crime. On October 4, 2022, this matter came before the Court for a bench trial on the merits, held by Webex, during which the Court heard testimony from Gaboriault and argument from counsel. DOC was represented by AAG Lauri A. Fisher. Gaboriault appeared and was represented by Attorney Jill P. Martin, Esq. from the Prisoner's Rights Office. During the hearing, the Court also raised the issue of its subject matter jurisdiction and whether Gaboriault's furlough was revoked for a nontechnical violation. The parties were given the opportunity to submit post-hearing memoranda, and then the Court took the matter under advisement for determination. For the reasons set forth below, the Court concludes that it lacks subject matter jurisdiction over the appeal, and that, in any event, DOC did not abuse its discretion in imposing a one-year interrupt.

Factual Background

The record before the Court shows that Gaboriault is 35 years old. He has prior convictions for domestic assault, simple assault, interference with emergency services, and also for escape from furlough, DUI, and other driving/eluding law enforcement offenses. Admin. Rec. ("A.R.") at 1; A.R. pt. 2 at 31-32. On January 14, 2021, Gaboriault was released from DOC custody and placed on community supervision furlough. A.R. at 9. At that time, Gaboriault agreed to follow a number of Standard Conditions of Supervision, including "Condition 3," which states: "I will not engage in threatening, violent, or assaultive behavior." A.R. at 7-8.

During his time on community supervision furlough, Gaboriault was doing well for some period. However, he suffered setbacks at the end of 2021 when he experienced the devastating

loss of two close family members, including his younger brother. He relapsed into using crack cocaine heavily, OD-ed and was hospitalized, and generally "was not himself." He did not fully complete the MAT program. *See* A.R. at 1. Gaboriault testified that while he was struggling, his probation officer did not impose graduated sanctions and offered no additional support.

On April 8, 2022, Gaboriault's ex-girlfriend, Chelsea Fitzgerald, filed a Complaint for a Relief from Abuse ("RFA") protective order against Gaboriault. A.R. at 10. In her sworn affidavit filed in support of the Complaint, Fitzgerald alleged that on the evening of April 7, 2022:

> I caught Justin in my pantry using drugs. . . . When confronted by me, Justin became extremely angry. He called me a dumb cunt, he threatened to hit me, he took his knife off his belt loop and threatened to stab me, and said I was making him want to drive his knife into my skull because I kept repeating that I caught him and he needed to get help and leave my house. When I went to make a phone call my phone was up to my ear, Justin reached for my phone quickly which led to the phone hitting my ear and me almost dropping it. Justin then proceeded to hit my hand down so I dropped the phone, and stomped on it causing my screen protector to crack. He told me he would kill me and threatened to punch me like a man multiple times. . . .

A.R at 12, 15.

On April 8, 2022, the Rutland Family Division issued a Temporary RFA Order, finding that Gaboriault abused Fitzgerald by causing physical harm and placing her in fear of imminent serious physical harm, and that there was an immediate danger of further abuse. A.R. at 10. Gaboriault was served with the temporary order, and on April 15, 2022, following a contested hearing attended by Gaboriault and Fitzgerald, the Family Division issued a Final RFA Order. *See Fitzgerald v. Gaboriault*, Docket No. 22-FA-00935 (Vt. Super. Ct. Apr. 15, 2022).[1] Gaboriault was present at the hearing and received notice that the order was issued, and was also served with the Final Order.

On April 15, 2022, a DOC Probation and Parole officer in Rutland received notice of the Family Division's Final RFA order and obtained a copy of Fitzgerald's supporting affidavit. A.R. at 6. Based on Fitzgerald's allegations and the issuance of the RFA Order, Gaboriault was taken into DOC custody and given a Notice of Suspension Report, which stated that he was accused of violating furlough Condition 3. A.R. at 4-5. On April 20, 2022, Gaboriault executed a waiver of his right to a hearing on the furlough violation, listed as "C03: I will not engage in threatening, violent or assaultive behavior." A.R. at 3. By signing the waiver form, Gaboriault

[1] At trial, the parties agreed the Court should take judicial notice of the Temporary RFA Order, which is part of the record on appeal, and the docket entries and other orders issued by the Rutland Family Division in Case No. 22-FA-00935. *See* V.R.E. 201(b); *see also Peachey v. Peachey*, 2021 VT 78, 215 Vt. 570 (court may take judicial notice of docket entries in related case); *In re T.C.*, 2007 VT 115, ¶ 16, 182 Vt. 467 ("The existence of a prior order is an appropriate subject of judicial notice.").

admitted that he was guilty of the violation. *Id*. (providing that, "I realize that by waiving my right to appear or have a hearing on this matter I am admitting that a preponderance of the evidence supports being found guilty of alleged violation(s)").

Thereafter, Gaboriault's case was reviewed at a DOC case staffing, which resulted in a decision issued on April 27, 2022 to revoke furlough for at least one year, based on "aggravating circumstances of threatening to kill victim with a knife." A.R. at 2. The Case Staffing Form also contains findings that Gaboriault's "behavior directly threatens or harms an identifiable person/ individual," that there was evidence of "behavior(s) that pose a direct risk to public safety," and that Gaboriault's "risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable." *Id*. This appeal followed.

Discussion

I. Jurisdictional Analysis.

Under 28 V.S.A. § 724, "[a]n offender whose community supervision furlough status is revoked or interrupted for 90 days or longer for a technical violation shall have the right to appeal the Department's determination to the Civil Division of the Superior Court in accordance with Rule 74 of the Vermont Rules of Civil Procedure." 28 V.S.A. § 724(c)(2)). A "technical violation" is defined as "a violation of conditions of furlough that does not constitute a new crime." *Id*. § 724(d)(1).[2] Accordingly, "if the underlying facts of the violation compose or establish a new crime, then the violation is a nontechnical violation and falls outside the purview of Section 724." *Tabor v. N.E. Corr. Complex*, No. 22-CV-01861, Entry re Mot., at 2 (Vt. Super. Ct. Aug. 8, 2022) (Richardson, J.). DOC argues this Court lacks jurisdiction because Gaboriault's threatening and violent conduct toward his ex-girlfriend which DOC relied on in revoking his furlough constitutes at least simple assault under 13 V.S.A. § 1023. Gaboriault asserts that since DOC never made any findings below that he had committed a crime, nor did he admit to doing so, the Court cannot conclude that the violation was nontechnical. Gaboriault further contends that since there was no "independent probable cause review" of the underlying conduct, it would violate due process principles to conclude his behavior constituted a crime. The Court does not find Gaboriault's arguments persuasive.

Here, the record contains sufficient evidence to support the conclusion that Gaboriault was returned to the facility for conduct that was criminal in nature. As an initial matter, Gaboriault does not dispute the underlying facts of his furlough violation. Nor does Gaboriault assert that he was unaware of the alleged conduct DOC was relying on to support a violation of Condition 3 when he waived his right to a hearing. Indeed, at the time he received the Suspension Notice, Gaboriault had attended the RFA final hearing and received the Family Division's RFA protective orders which included findings based on Fitzgerald's statements. Lastly, Gaboriault does not argue that the underlying conduct described in Fitzgerald's affidavit fails to rise to the level of a new criminal offense. The Court agrees with DOC's position that

[2] Act No. 124, § 1, of the Vermont Legislature's 2021 Adjourned Session included amendments to 28 V.S.A. § 724 that took effect on May 23, 2022, after this appeal was filed. However, the language concerning the Court's jurisdiction was not affected by the amendment.

Gaboriault's conduct – brandishing of a knife and striking Fitzgerald's phone from her hand, together with making angry threats to punch her, stab her skull, and kill her – fairly falls within the scope of the crime of simple assault, as defined by 13 V.S.A. § 1023. Accordingly, the Court concludes that the underlying facts of Gaboriault's furlough violation amount to a new crime, and therefore the violation is nontechnical and outside of this Court's review under 28 V.S.A. § 724.[3]

While Gaboriault is correct that DOC never made any findings that he had committed a new crime, nor did he expressly admit to doing so, this is irrelevant to the issue of jurisdiction. According to the plain statutory language, the right to appeal under § 724(c) does not require that *DOC* find that an offender has committed new crime, or that the offender make such an express admission. Rather, it is up to the Court, in determining whether it has subject matter jurisdiction, to review the underlying facts of the violation to determine if they would constitute a new crime. *See, e.g., Mullinnex v. Menard*, 2020 VT 33, ¶ 11, 212 Vt. 432 (noting that courts have the "independent obligation to ensure that [they] act only in cases where [they] have subject-matter jurisdiction").

Likewise, Gaboriault's assertion that he executed only a limited waiver and admission to a violation of Condition 3 is not well taken. The waiver form signed by Gaboriault includes the full language of C3, and contains no reservation of the right to challenge the allegations as to the underlying conduct. *See* A.R. at 3. Thus, Gaboriault's reliance on *Hornbeck* is misplaced. In that case, the offender admitted to a violation of Standard Condition 1, but only that he "would not be cited or charged" with a criminal offense. *Hornbeck v. Deml*, 22-CV-01966, Decision on Mot. to Dismiss, at 2 (Vt. Super. Ct., Sept. 29, 2022) (Shafritz, J.). On such grounds, the court concluded that the waiver was limited and could only be construed as an admission to having been "cited or charged," which is not proof of the commission of a criminal offense. *Id*. at 3. On the other hand, Gaboriault's waiver was general and not limited in any way; therefore, it is read broadly. *See Ryan v. Vt. Dep't of Corr.*, No. 21-CV-3525, Ruling on Mot. to Dismiss, at 2 (Vt. Super. Ct. Jan. 28, 2022) (Mello, J.) (finding that general waiver of Conditions 1 and 3 (or A and C) constituted admission of underlying conduct). Moreover, Gaboriault's waiver was made after attending the contested RFA hearing and receiving the RFA protective orders with the Court's findings. Thus, Gaboriault was on notice of his conduct that was alleged to be threatening, violent or assaultive. Had Gaboriault wished to challenge the facts underlying the violation for violent and threatening conduct, the time to do so was at the DOC furlough revocation hearing.

Finally, Gaboriault argues that, consistent with due process protections, the underlying facts of a furlough violation cannot be deemed to "constitute a new crime" for purposes of § 724 unless an "independent probable cause review" has occurred below. The Court disagrees. As the *Ryan* court noted, "[f]urlough revocation is an informal process." *Ryan*, No. 21-CV-3525, at 2 (citing *Black v. Romano*, 471 U.S. 606, 611 (1985) (explaining that the Court's jurisprudence regarding probation or parole revocation proceedings has "sought to accommodate [due process] interests while avoiding the imposition of rigid requirements that would threaten the informal

[3] We recognize, as Gaboriault pointed out at trial, that in July 2022, the RFA Order was vacated at Fitzgerald's request. However, this later development does not impact Gaboriault's admission to the underlying conduct or DOC's reliance on it.

nature of [the] revocation proceedings or interfere with exercise of discretion by the sentencing authority"). In the instant case, Gaboriault was afforded sufficient procedural due process safeguards, including written notice of the alleged violation, disclosure of the evidence against him, and an opportunity to be heard and to present evidence regarding the underlying conduct, which he waived. *See Black*, 471 U.S. at 612 (stating that, to comport with due process in the context of probation revocation, the probationer "is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation"). Thus, Gaboriault admitted to engaging in threatening, violent and assaultive behavior with the understanding that the accusations were based on Fitzgerald's allegations in support of the RFA petition. Just as DOC did in reaching its revocation decision, the Court may rely on Gaboriault's admission in determining whether the underlying facts of the violation constitute chargeable criminal conduct, making the furlough violation nontechnical under § 724. Moreover, Gaboriault's interpretation is contrary to the plain language of the furlough statute, which does not require the filing of criminal charges or findings of probable cause by any particular agency in order for a violation to be considered nontechnical. *See* 28 V.S.A. § 724(d)(1). In fact, § 724(a) expressly grants DOC itself the authority to make *all* determinations affecting furlough: "The Department shall make *all* determinations of violations of conditions of community supervision furlough . . . and any resulting change in status or termination of community supervision furlough status." 28 V.S.A. § 724(a) (emphasis added). While due process still must be satisfied, the Legislature's exclusive authorization of DOC to find violations of conditions of furlough and any necessary change in status belies the suggestion that DOC must look to an outside source to determine whether the furloughee's underlying conduct is criminal in nature.[4]

II. Review of DOC's Furlough Revocation Decision.

Even if it had jurisdiction over the appeal, given the record in this case, the Court cannot conclude that DOC abused its discretion in imposing a furlough interrupt for one year. 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." 28 V.S.A. § 724(c)(1). Section 724(d) provides that

> [i]t 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; [or]
>
> (B) The violation or pattern of violations indicate the offender poses a danger to others.

[4] To the extent a different conclusion was reached in *Lowery v. Vermont Dep't of Corr.*, No. 22-CV-02519, Entry re Mot. to Dismiss, at 2-3 (Vt. Super Ct. Oct. 3, 2022), we must respectfully disagree with that court's analysis.

Id. § 724(d)(2).

Gaboriault argues that the one-year interrupt was excessive and should be reduced to six months. The Court disagrees. Gaboriault committed a significant violation of his furlough condition that he would not "engage in threatening, violent, or assaultive behavior" by threatening and terrorizing his ex-girlfriend when she caught him using drugs. His conduct included the aggravating factors of brandishing a knife at his victim, threatening to kill her, and striking her phone from her hand and attempting to destroy it. This conduct caused Fitzgerald to seek and obtain an RFA protective order. Gaboriault acknowledged that while on furlough, he did not successfully complete the MAT program, and at the time of his suspension, he had relapsed several times and was still using crack cocaine. DOC reasonably concluded that Gaboriault's behaviors directly threatened or harmed a specific person and posed a direct risk to public safety, and that this risk to others could no longer be effectively mitigated on furlough. As noted above, a furlough interrupt of 90 days or longer is not an abuse of discretion if the "violation or pattern of violations indicate the offender poses a danger to others." 28 V.S.A. § 724(d)(2). Thus, if DOC had interrupted Gaboriault's furlough status for a technical violation, the Court would find no abuse of discretion in imposing a one-year interrupt.

Order

For the foregoing reasons, the Court concludes that it lacks subject matter jurisdiction over this matter, and the appeal is hereby DISMISSED.

Electronically signed on March 22, 2023 at 12:55 PM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge