VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-02156

Destin Greene, 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 Destin Greene 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. On October 19, 2022, this matter came before the Court for a bench trial on the merits, held by Webex. DOC was represented by AAG Patrick T. Gaudet. Appellant Greene appeared and was represented by Attorney Emilia M. King-Muzza, Esq. from the Prisoner's Rights Office. During the hearing, the Court heard testimony from Greene and argument from counsel. Based upon a de novo review of the record and the credible evidence admitted at the hearing, the Court makes the following findings, conclusions and orders.

Factual Background

Greene is 32 years old and is serving a sentence for aggravated assault with a weapon. Admin. Rec. ("A.R.") at 1. He also has convictions for giving false information to a police officer, grand larceny, petit larceny, VAPO, DUI, and DLS. *Id.* On April 29, 2021, DOC placed Greene on community supervision furlough. A.R. at 15-17. At that time, Greene agreed to follow a number of Standard Conditions of Supervision, including "C04," which states: "I will report to my supervising officer, or designee, as required." A.R. at 15. He was also given a curfew and agreed to participate in electronic monitoring as directed.

While out on furlough, Greene lived in Bennington with his girlfriend and their children. He testified that he became the main caretaker for the children, and stayed home with them due to issues created by the Covid-19 pandemic. However, he also testified that he worked on and off as a carpenter and roofer to make some money to get through the winter. He was employed by a construction company and believes he could return to this job if released on furlough again. Greene kept his GPS monitoring bracelet on and charged, and observed his curfew.

However, Greene struggled to comply with one of the most basic rules governing his supervision: that he report and meet with his supervising officer regularly and as required. Greene acknowledged that he did not physically check in at the Probation and Parole Office, and stated that he tried to call his PO but could not get through. According to an Incident Report written by Greene's supervising officer Milton McWayne, dated April 26, 2022, Greene received a progressive sanction of 60 days on GPS monitoring in December 2021 for his failure to report for five of the six previous weeks. A.R. at 12. Before that, Green was sanctioned for failure to report in September 2021 as well. A.R. at 1. Greene reported for a few weeks into January 2022, but then stopped doing so. He no-called, no-showed for appointments on January 21 and 28, 2022. On that date, McWayne went to Greene's home and woke him up by knocking on the door. Greene was directed to report on January 31, 2022, but failed to do so. In February, Greene would call after hours and leave a message for McWayne, promising to call or stop in the following day, but he never did. On February 23, 2022, McWayne went to Greene's residence to see him, but no one answered the door. Greene later called, saying he was sleeping and did not hear the door. A.R. at 13. In March 2022, Greene continued to fail to report to McWayne. McWayne was aware that on March 8, 2022, Greene attended a hearing for a pending criminal case in the Bennington Criminal Division, which is in the same building as the Probation and Parole Office, but he did not report to McWayne. *Id*. The last time McWayne saw Greene in person was on January 28 and the last time they spoke on the phone was on February 1. *Id*. A Return on Mittimus was issued for Greene, and on March 14, 2022, McWayne swore an Affidavit of Probable Cause in support of a charge of Absconding from Supervision. A.R. 19-20. On March 25, 2022, a Commissioner's Warrant was issued. A.R. 8-9.

On April 27, 2022, Greene was picked up and returned to the correctional facility. A.R. at 6. He was given a Notice of Suspension Report, which stated that he was accused of violating furlough Condition 4 and was advised of his right to a hearing. A.R. at 6. Greene waived his right to a hearing on the furlough violation, admitting guilt. A.R. at 5. Thereafter, Greene's case was reviewed at a DOC case staffing to determine the consequence for the violation. A.R. at 1-4. Greene's supervising officer recommended a two-year interrupt, based on the fact that Greene had accrued two significant violations within a year, and had a very high risk score. A.R. at 3. In his view, Greene could not be safely supervised in the community and demonstrated complete disregard for his conditions of supervision. *Id*. On May 19, 2022, a decision issued to revoke Greene's furlough for at least one year. DOC's decision was based on Greene's "high risk score and second significant violation," as well as the fact that Greene was "arrested on a Commissioner Warrant for absconding" and his "pattern or history of behavior that continues after the exhaustion of lower-level technical sanctions have failed to gain offender compliance." A.R. at 4. The Case Staffing Form contains further findings that Greene's "risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable" and the pattern of violations indicates that Greene "poses a danger to others or to the community or poses a threat to abscond or escape from furlough." *Id*. This appeal followed.

Discussion

"DOC may release an inmate on furlough if the inmate has served the minimum sentence and agrees to conditions that . . . DOC imposes." *Davis v. Dep't of Corr.*, Docket No. 22-AP-

129, 2023 WL 2473539, at *4 (Vt. Mar. 2023) (unpub. mem.) (citing 28 V.S.A. § 723(a)).[1] In order to remain on furlough, the offender must "comply with any terms and conditions identified by . . . DOC." *Id*. (citing § 723(b)). If the offender commits a "technical violation" and DOC interrupts furlough status for a period greater than ninety days, the offender may appeal the determination to the Superior Court pursuant to Rule 74. 28 V.S.A. §§ 724(c)(1), (d)(1). On appeal, "[t]he appellant shall have the burden of proving by a preponderance of the evidence that [DOC] abused its discretion in imposing a furlough revocation or interruption for 90 days or longer." *Id*. § 724(c)(1). Section 724(d) provides that

> [i]t shall be abuse of [DOC'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. [or]
>
> (C) The offender's violation is absconding from community supervision furlough.

Id. § 724(d)(2). In addition, the "length of interruption or revocation may be a consideration in the abuse of discretion determination." *Id*. § 724(c)(2).

Greene argues that the one-year interrupt was excessive and should be reduced to six months. He asserts that he was out in the community for some time and was doing well, working a job and being an active father to his children. Further, he contends that he was not running from DOC but rather remained in Bennington during the entire period. DOC argues the one-year interrupt should be affirmed, as it is well within DOC's furlough revocation policies and the standard sanction for an offender with a second significant violation and a high risk score.

Given the record in this case, the Court cannot conclude that DOC abused its discretion in imposing a furlough interrupt for one year. In less than a six-month period, Greene committed two significant violations of his furlough condition concerning reporting to his supervising officer as directed. This is one of the most basic and important conditions of supervision that an offender must agree to follow in exchange for being granted the privilege of release into the community. Thus, Greene's efforts to minimize the seriousness of his actions are not persuasive. Prior to revocation, DOC imposed graduated sanctions which were ineffective at bringing Greene's behavior back into compliance. Greene continued to demonstrate a disregard for the requirement that he remain in contact and under supervision. After being out of contact for five

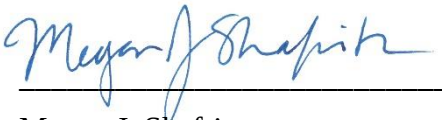
[1] Trial courts are free to "consider three-justice decisions from [the Vermont Supreme] Court for their persuasive value, even though such decisions are not controlling precedent." *Washburn v. Fowlkes*, Docket No. 2015-089, 2015 WL 4771613, at *3 (Vt. Aug. 2015) (unpub. mem.) (citing V.R.A.P. 33.1(d), which provides that an "unpublished decision by a three-justice panel may be cited as persuasive authority but is not controlling precedent," except under limited circumstances).

or six weeks, DOC found Greene had absconded from community supervision furlough. *See* 28 V.S.A. § 724(d)(2)(C)(1) (for furlough purposes, absconding" means "the offender has not met supervision requirements, cannot be located with reasonable efforts, and has not made contact with [DOC] staff within three days" for listed crimes or "seven days" for non-listed crimes"). As a result of the case staffing, DOC reasonably concluded that Greene's risk to reoffend or abscond 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 "offender's risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable" or the "offender's violation is absconding from community supervision furlough." 28 V.S.A. § 724(d)(2); *see also Gero v. Vt. Dep't of Corr.*, No. 21-CV-2445, Decision on Merits, at 3 (Vt. Super. Ct. Dec. 6, 2021) (Mello, J.) (affirming one-year furlough interrupt where DOC imposed graduated sanctions in an attempt to bring the offender back into compliance, but eventually concluded that the "risk to others in the community could no longer be mitigated on furlough"). Moreover, under DOC's rubric, Greene's two significant violations and high risk score could have supported a two-year interrupt; however, the case staffing team concluded revocation for one-year was appropriate. *See* DOC Directive 430.11, dated 01/01/2021, at 7. The Court finds no abuse of discretion.

Order

For the foregoing reasons, DOC's one-year interrupt of Appellant's community supervision furlough is AFFIRMED.

Electronically signed on March 21, 2023 at 9:48 AM pursuant to V.R.E.F. 9(d).



Megan J. Shafritz
Superior Court Judge