

VERMONT SUPERIOR COURT  
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CIVIL DIVISION  
Case No. 22-CV-04294

<p>Robert Mears, Appellant</p> <p>v.</p> <p>Vermont Department of Corrections, Appellee</p>	<p>DECISION ON MOTION TO DISMISS</p>
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This is a Rule 74 furlough revocation review case. Appellant Robert Mears 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. DOC moves to dismiss under Rule 12(b)(1) of the Vermont Rules of Civil Procedure, arguing that the Court lacks subject matter jurisdiction because DOC’s case staffing decision was based on Mears’ commission of a new crime. Mears opposes the motion, asserting that DOC made no findings or determinations that he committed a new crime and that his waiver of his right to a furlough violation hearing did not include an admission that his underlying conduct amounted to a crime. On February 14, 2023, the Court held a hearing by Webex on DOC’s motion and also heard testimony from Mears on the merits of the appeal. DOC was represented by AAG Kassie R. Tibbott. Mears appeared and was represented by Attorney Emily Tredeau, Esq. from the Prisoner’s Rights Office. Following the hearing, the Court took the matter under advisement for determination. For the reasons set forth below, DOC’s motion to dismiss is GRANTED.

#### Factual Background

The record before the Court shows that on January 21, 2021, Mears was released from DOC custody and placed on community supervision furlough. Admin. Rec. (“A.R.”) at 13. Upon release, Mears 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” and “Condition 1,” which states: “I will not be cited or charged; I will not commit any act punishable by law, including city and municipal code violations.” A.R. at 11-12.

On October 1, 2022, Vermont State Police troopers responded to a report of a domestic incident at a home in Salisbury, Vermont between Mears and his girlfriend, Donna Dean, and her adult son. A.R. at 9. Dean and other witnesses stated that Mears put both hands around Dean’s son’s neck and choked him, causing pain and difficulty breathing. *Id.* Dean also reported that

that the prior evening, while she was lying in bed, Mears was intoxicated and barged into the bedroom, saying, “I should f-ing kill you.” *Id.* He then grabbed a sword and knife that were in the room, held the knife across Dean’s neck, and stabbed the sword into the wall next to her head. A.R. at 10. Dean stated that this incident made her fear for her life. *Id.*

On October 18, 2022, the State filed a two-count Information charging Mears with Second Degree Aggravated Domestic Assault (as to Dean) and First Degree Aggravated Domestic Assault (as to Dean’s son), supported by a VSP trooper’s Affidavit of Probable Cause. *See State v. Mears*, No. 22-CR-09669 (Vt. Super. Ct. Oct. 18, 2022). On October 19, 2022, the Addison Criminal Division found probable cause as to Count 1 and issued an arrest warrant for Mears. A.R. at 7-8.<sup>1</sup>

On October 24, 2022, the arrest warrant was executed and Mears was taken into custody. A.R. at 6. Mears was arraigned on the domestic assault charge by the Addison Criminal Division that same day and then placed in DOC custody and given a Notice of Suspension Report from DOC. A.R. at 5-6.<sup>2</sup> The Suspension Notice stated that Mears was being accused of violating furlough Conditions 1 and 3, and provided the following statement as the explanation for the violation: “Judge Fenster issued a warrant based on the Affidavit written by Trooper Anthony from the Vermont State Police charging Robert Mears with two felonies of 1st Degree Aggravated Domestic Assault and 2nd Degree Aggravated Domestic Assault.” A.R. at 5. On October 25, 2022, Mears executed a waiver of his right to a hearing on the furlough violations, which were described as, “01 – Will not be cited or charged w/new crime,” and “03 – Will not engage in violent or threatening behavior.” A.R. at 4. By signing the waiver form, Mears admitted that he was guilty of the violations. *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, Mears’ case was reviewed at a DOC case staffing, which resulted in the following decision, dated November 9, 2022:

Based on his moderate risk scores, number of violations and the aggravating factor of his use of a sword and knife during the commission of his crime, he will not be eligible for community supervision release for 1 year from the date of his return to the facility and his pending charges must be resolved whichever is longer. This is a non-technical violation.

A.R. at 2. This appeal followed.

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<sup>1</sup> The Criminal Division did not find probable cause with regard to Count 2 since the affidavit failed to state that Dean’s son was a household member with Mears. However, on December 7, 2022, the State filed an amended Information and supplemental affidavit as to Count 2, and the Criminal Division then found probable cause. *See State v. Mears*, No. 22-CR-09669 (Vt. Super. Ct. Dec. 12, 2022).

<sup>2</sup> Although Mears did not sign the Suspension Notice, during the hearing he acknowledged receiving it from DOC.

## Discussion

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). 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.).

Here, there can be no question that DOC revoked Mears’ furlough for conduct that constitutes a new crime. Based on events that occurred while Mears was released on community supervision furlough, Mears was charged with two felony counts of domestic assault. The Suspension Notice referred to these criminal charges and the Addison Criminal Division’s issuance of an arrest warrant for Mears based on the VSP affidavit of probable cause. Indeed, Mears had been arraigned on the criminal charges the day before he signed the furlough revocation hearing waiver form. In waiving his right to a hearing, Mears admitted he was guilty of violating his furlough conditions, including C3 (“Will not engage in violent or threatening behavior.”). Mears’ violent and threatening conduct was also cited as a basis for revocation in DOC’s staffing decision. Thus, the record evidence is more than sufficient to show that the underlying facts of the furlough violation amount to a crime, and therefore the violation is nontechnical and outside of this Court’s review under 28 V.S.A. § 724.

Mears opposes the motion to dismiss, arguing that DOC relied on a technical violation because he did not admit to committing a new crime, nor did DOC make any finding that a new crime occurred. However, 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. 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”).<sup>3</sup>

In addition, Mears argues that his admission to Condition 3 was somehow limited and did not encompass the specific conduct described in the affidavit of probable cause. The Court

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<sup>3</sup> The parties’ briefing focuses exclusively on the C1 violation. The Court agrees that Mears’ waiver form cannot be fairly construed to include an admission that he is guilty of committing a new crime, because it lists only the first two elements of a C1 violation – that the offender will not be cited or charged with a crime. *See, e.g., Davis v. Vt. Dep’t of Corr.*, 21-CV-3093, Ruling on Mot. to Dismiss, at 2 (Vt. Super. Ct. Jan. 28, 2022) (Mello, J.) (finding that since a criminal citation is “just an accusation by a police officer,” admitting receipt of a citation is not an admission to the underlying conduct or to the commission of a crime). However, at oral argument, the Court raised and the parties addressed the issue of whether Mears’ admission to the C3 violation provides grounds for finding that the furlough violation was nontechnical.

rejects this argument. On the contrary, Mears' 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, Mears' waiver was made after receiving the Notice of Suspension which referred to his felony criminal charges and the affidavit of probable cause as the basis for the violations, and after he had been arraigned on the charge of second degree aggravated domestic assault. Thus, Mears was made aware that the basis for the violation was the criminal conduct he had been charged with, for which a judge had found probable cause. Yet, he took no steps to limit the scope of his admission to only certain allegations or to seek clarification of DOC's evidence, if that was needed.

Mears' after-the-fact testimony that he had not read the full affidavit of probable cause, and therefore did not have all the facts in mind when he waived his right to a hearing does not compel a different result. 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 nature of [the] revocation proceedings or interfere with exercise of discretion by the sentencing authority")). In the instant case, Mears was afforded sufficient procedural due process safeguards, including written notice of the alleged violations and 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"). If Mears wished to challenge the facts underlying the violation for violent and threatening conduct, the time to do so was at the DOC furlough violation hearing. Instead, he admitted to engaging in violent and threatening conduct with knowledge that the accusations were based on the evidence set forth in the affidavit of probable cause filed in support of the criminal charges. Just as DOC did in reaching its revocation decision, the Court may rely on Mears' admission in determining whether the underlying facts of the violation constitute chargeable criminal conduct, making the furlough violation nontechnical under § 724.

#### Order

For the foregoing reasons, DOC's motion to dismiss is GRANTED, and this appeal is hereby DISMISSED.

Electronically signed on March 22, 2023 at 1:02 PM pursuant to V.R.E.F. 9(d).



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Megan J. Shafritz  
Superior Court Judge