VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-03786

Ryan Perry v. Vermont Department of Corrections

DECISION ON APPEAL

Appellant Ryan Perry appeals DOC's suspension of his furlough for a violation that occurred on September 7, 2022. He argues that the violation was "technical," within the meaning of 28 V.S.A. § 724, and that DOC abused its discretion in imposing a one-year interrupt. While the court agrees with the former assertion, it cannot conclude that the one-year interrupt was an abuse of discretion. Accordingly, it denies the appeal.

The record establishes the following factual narrative. On December 22, 2021, Mr. Perry was released on furlough. One of the conditions of his supervision, to which he agreed, was "I will not be cited or charged; I will not commit any act punishable by law, including city and municipal code violations." On September 6, 2022, DOC learned that the Shelburne Police Department was investigating Mr. Perry for lewd and lascivious conduct arising out of an incident that occurred several days earlier at a massage parlor. On September 7, a Shelburne P.D. officer met with Mr. Perry at the DOC Probation and Parole Office in St. Albans and cited him for lewd and lascivious conduct. DOC then suspended Mr. Perry's furlough and returned him to custody.

The DOC Notice of Suspension Report accused Mr. Perry of violating the condition quoted above. As explanation for the accusation, the Notice recited, "On September 7, 2021, Mr. Perry was charged with a new crime by Shelburne PD." It listed the date of violation as September 7, and advised Mr. Perry that the hearing on the violation would be held no later than September 13. On September 13, Mr. Perry signed a waiver of hearing. The waiver form recited the charge as a violation of "Condition #1: Will not be cited or charged with a new crime." Similarly, the Case Staffing Form that followed set forth the following "Narrative of Violation": "On September 7, 2022, Mr. Perry was charged with Lewd and Lascivious Conduct by Shelburne PD for masturbating while receiving a massage." The Case Staffing team concluded that Mr. Perry had committed a violation. It decided that "Based on number of violations and high-risk scores, [Mr. Perry is] not eligible for community

supervision furlough for 1 year from the date of return and resolve pending charges whichever is longer."

On these facts, DOC argues first that Mr. Perry's furlough was not suspended for a "technical violation"; thus, this court has no jurisdiction. A "technical violation" is "a violation of conditions of furlough that does not constitute a new crime." 28 V.S.A. § 724(d)(1). DOC had competent evidence that Mr. Perry had engaged in behavior that did constitute a new crime, in the form of the affidavit of probable cause supporting the lewd and lascivious charge. That, however, was not the violation with which it charged Mr. Perry (and to which he admitted). Instead, DOC accused Mr. Perry of having been charged with a crime. While that was indeed a violation of his conditions of supervision, it cannot be a crime to be charged with a crime. Thus, the violation here was technical, and the court has jurisdiction to review the length of the interruption.

On that question, the statute makes clear that the burden falls on Mr. Perry to demonstrate that DOC "abused its discretion in imposing a furlough revocation or interruption for 90 days or longer." *Id.* § 724(c)(1). He has failed to carry that burden. The record reflects that DOC had, and considered, evidence of a new crime—one that was particularly troubling concerning Mr. Perry's record and his status as a High Risk Sex Offender. It did not need to await a resolution of those charges before considering the underlying evidence, along with his criminal record and history of supervision. Those factors well supported the determination that Mr. Perry's risk to offend could no longer be adequately controlled in the community, and that no other method to control noncompliance was suitable; equally, the behavior described in the affidavit of probable cause indicated that he posed a danger to others. *See id.* § 724(d)(2)(A), (B). In then determining the length of any interruption for what was an admitted violation of probation, DOC could and did properly rely on its own departmental criteria, set forth in Directive 430.11. That guidance itself is entitled to deference. Its application, in turn, dictated the interruption imposed here. Thus, the court cannot conclude that it was an abuse of discretion to impose a one-year interruption of furlough.

Electronically signed pursuant to V.R.E.F. 9(d): 3/27/2023 2:02 PM

Samuel Hoar, Jr.
Superior Court Judge