VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-02228

Joshua Powers v. Vermont Department of Corrections

DECISION ON APPEAL

Appellant Joshua Powers appeals DOC's determination to impose a two-year interruption of his eligibility for furlough. DOC made this determination after Mr. Powers was arrested and charged with multiple crimes. Mr. Powers admits the violation, but argues that DOC abused its discretion in imposing an interruption double the length of what would be suggested by its own criteria. The court denies the appeal.

Mr. Powers testified during the hearing on this appeal. His testimony established that while on furlough, he had been employed, had a stable place to live, was engaged in RRP programming, and had good a relationship with his Probation and Parole Officer. He testified further that if released again on furlough, he would still have a job, place to live, and ability to engage in programming. He also acknowledged the history that led to his violation: he had been convicted of domestic assault and placed on probation on September 7, 2021; he picked up a new domestic assault charge on October 11, 2021, was convicted of that charge on November 27, 2021, and continued on probation; he was arrested for a new charge of aggravated domestic assault on January 8, 2022, his probation was revoked, and he remained incarcerated until released on furlough on February 14, 2022; he was arrested and lodged on new charges, including domestic assault charges involving the same victim as in the January 8, 2022 charge, all arising out of an incident that occurred on February 27, 2022; and he eventually pleaded guilty to one charge of aggravated domestic assault arising out of that incident, with the remaining charges dismissed.

The administrative record further establishes that in the February 27, 2022 incident, Mr. Powers

> violently abused the listed victim . . . by means of strangulation 12 times, pushing and hitting her which caused bruising and small lacerations, striking her in the facial area causing a cut to her nose, kicking her with steel toed boots in the legs, punching her in the stomach after stating to [him] she was pregnant which then caused spotting. [Mr.] Powers also struck the listed victim in the head with her own cell phone which caused damaged [sic] to the phone. [Mr.] Powers also

> struck the listed victims [sic] stereo with his fist causing it to shatter. [Mr.] Powers also grabbed the listed victim by her hair and pulled her down causing pain.

DOC's Notice of Suspension accused Mr. Powers of violating two conditions of supervision: "1. I will not be cited or charged; I will not commit any act punishable by law, including city and municipal code violations"; and "3. I will not engage in threatening, violent, or assaultive behavior." He waived hearing, thereby admitting the violation. DOC argues that this forecloses his appeal. It observes that 28 V.S.A. § 724 allows appeals only with respect to "technical" violations; a "technical violation," in turn, is "a violation of conditions of furlough that does not constitute a new crime."

This argument might fly, but for the fact that each of the two conditions that Mr. Powers admitted violating is stated in the disjunctive. To prove a violation of condition 1, for example, DOC need only have demonstrated that Mr. Powers had been "cited or charged"; actual proof of criminal conduct would not be necessary. Similarly, proof of a violation of Condition 3 would require only proof of threatening behavior, which is not necessarily criminal conduct. Thus, in admitting each of these violations, Mr. Powers did not necessarily admit that he had committed a "new crime." The explanation of DOC's case staffing decision, from which Mr. Powers appeals, bears this out: it states, "[t]his is a non-technical violation due to the new criminal charges." In short, neither the Notice of Suspension, Mr. Powers's admission, nor even the case staffing decision rested on a "new crime." Accordingly, the court concludes that as both charged and found, this was a "technical violation."

Mr. Powers does not dispute the violation; indeed, he candidly admitted the underlying conduct and has accepted criminal responsibility for it. Instead, he argues that DOC abused its discretion by imposing a suspension double that suggested by its own sanctions grid. That grid, set forth in DOC's Policy Directive 430.11, suggests a one-year suspension for a first "significant" violation—which all agree this was. Indeed, the "CSS Recommendation and Rationale" stated, "II Powers is a high risk offender, with a significant violation of several new violent felony offenses and would fall within the grid for a 1 year interrupt and resolving new charges." The Case Staffing Committee, however, imposed a two-year interrupt, "[b]ased on number of violations, risk scores, and aggravating factors." Citing decisions from sibling courts, Mr. Powers argues that this is, in effect, double counting. *See Walker v. Vermont DOC*, no. 22-CV-4024 (Jan. 23, 2023) (Toor, J.); *Lowery v. Vermont DOC*, no. 22-CV-2519 (Jan. 19, 2023) (Richardson, J.). He points out that the criteria for determining whether a violation is "significant" are:

> a. The supervised individual was arrested or cited for a new felony or listed offense;

b. The supervised individual's behavior directly threatens or harms an identifiable person/individual;
c. There is evidence of behavior(s) that pose(s) a direct risk to public safety;
d. When an offender is returned from absconding from furlough;
e. There is a pattern of risk-related behavior where previous interventions have failed to mitigate the risk; or
f. There is a pattern or history of behavior that continues after the exhaustion of lower-level technical sanctions have failed to gain offender compliance.

Directive 430.11(D)(2). He then argues that DOC may not use the same factors that drive the "significant violation" determination as aggravating factors; in this, the courts above concur.

This court need not decide whether it would join its siblings in this regard, because it cannot conclude that DOC engaged in double-counting. DOC's directive makes clear that "[t]he Central Office Case Staffing Determination Committee may consider any aggravating or mitigating factors that could change the sanction selected." Directive 430.11(E)(1)(c). While the directive does not define aggravating factors, and DOC's Case Staffing Form is somewhat oblique as to what the Case Staffing Committee considered "aggravating factors," there is sufficient evidence to support its exercise of discretion. In addition to evidence of "significant violation criteria"—specifically, criteria a, b, c, e, and f—the Case Staffing Committee could properly have considered the number of charges, the severity of the conduct shown by the Affidavit of Probable Cause detailing the February 27, 2022 incident, the recency of release on furlough, and the proximity in time between two assaultive incidents involving the same victim. Thus, even if DOC could not use factors contributing to the "significant violation" determination as "aggravating factors," there was enough here to support its decision.

ORDER

The court denies the appeal. The 2-year furlough interruption is affirmed.

Electronically signed pursuant to V.R.E.F. 9(d): 5/10/2023 2:50 PM

Samuel Hoar, Jr.
Superior Court Judge