

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2002-199

DECEMBER TERM, 2002

	}	APPEALED FROM:
	}	
State of Vermont	}	
	}	
v.	}	District Court of Vermont, Unit No. 2,
	}	Bennington Circuit
Michael Kenneally	}	
	}	
	}	DOCKET NOS. 1067-8-01 & 1498-11-01
	}	
	}	Trial Judge: David Howard

In the above-entitled cause, the Clerk will enter:

Defendant entered a conditional plea of guilty to charges of resisting arrest, possession of a malt beverage by a minor, and violation of probation (VOP), reserving his right to appeal the trial court's denial of a motion to dismiss the charges in the interest of justice. Defendant contends the trial court abused its discretion in denying the motion to dismiss because the undisputed evidence showed that defendant had consumed the alcohol resulting in the charges at the home of his probation officer, with the officer's knowledge and consent. We conclude that, on balance, the factors in favor of dismissal of the possession and VOP charges " particularly the strong interest in preserving public confidence in the essential fairness and integrity of our justice system " clearly outweigh those against dismissal. The same factors, on balance, do not support dismissal of the resisting-arrest charge. Accordingly, we reverse in part, and affirm in part.

The material facts are largely undisputed. In August 2001, defendant was placed on probation for possession of a malt beverage by a minor. Several special probation conditions were imposed, including requirements that defendant not purchase, drink or possess any alcoholic beverages; that he attend and participate in alcohol screening, counseling, treatment and rehabilitation as directed by his probation officer; and that he attend and complete the DUI Impact Panel to the satisfaction of his probation officer.

On the evening of November 9, 2001, defendant " in the company of several other youths " was approached by a Bennington Police Officer, who smelled alcohol. Defendant ran away and was pursued by the officer, who called for backup. Another officer apprehended defendant, but when he attempted to apply wrist restraints defendant broke away, pushed the officer back with both hands, and ran. Defendant was apprehended again, brought to the ground, and eventually restrained. He was later charged with possession of malt beverage by a minor, resisting arrest, and violation of his probation conditions. Defendant moved to dismiss the charges under V.R.Cr.P. 48(b)(2), which provides that the court may dismiss an indictment or information " [i]f the court concludes that such dismissal will serve the ends of justice and the effective administration of the court's business."

At the hearing on the motion, defendant testified without contradiction that, on the evening of his arrest, he had been drinking at the home of his probation officer, Sean Ball. He stated that Ball routinely allowed defendant and other young probationers under his supervision to socialize at Ball's residence, and that he had consumed alcohol at Ball's home on at least one other occasion. Defendant was uncertain whether Ball had supplied the alcohol or whether it had been brought by someone else, but indicated that Ball was also drinking and had mixed one of defendant's drinks. Although

Ball did not, according to defendant, encourage the youths under his supervision to drink, he did not prohibit them from doing so. Ball later told defendant's mother that he would rather his probationers drink at his home than somewhere else.

Ball ultimately resigned from his position and a new probation officer was assigned to defendant. That officer testified that there was no indication that Ball had required defendant to participate in any alcohol screening, attend any alcohol counseling, or complete the DUI Impact Panel.

Following the hearing, the court issued a written decision denying the motion to dismiss. Although the court acknowledged that defendant's youth, the nature of his offenses, and the probation officer's misconduct weighed in defendant's favor, it found that these considerations were outweighed by the fact that the officer's actions were largely "passive" in allowing the drinking to occur rather than encouraging it, and that defendant had willingly consumed alcohol knowing that it was a violation of his probation. Thereafter, defendant entered a conditional guilty plea to the charges under an agreement that included eighty hours of community service and continued the probation conditions in effect. This appeal followed.

We explored the merits of a Rule 48(b)(2) motion in some detail in State v. Sauve, 164 Vt. 134 (1995), where the issue concerned the propriety of a dismissal in the interests of justice after one mistrial. We noted that the rule is worded "in general terms . . . to cover exceptional situations arising out of particular facts that are not susceptible to being labeled under a specific category." Id. at 139. After canvassing other jurisdictions with similar provisions, we delineated a non-exclusive list of factors for a court to consider in ruling on such a motion, including the seriousness and circumstances of the charged offense; the harm resulting from the offense; the evidence of guilt; the defendant's history, character and condition; the purpose and effect of imposing a sentence; the impact of dismissal on public confidence in the judicial system or the safety and welfare of the community; the existence of any misconduct by law enforcement personnel in the case; and any other relevant fact indicating that judgment of conviction would serve no useful purpose. Id. at 140-41. Applying those factors to the case at hand, we concluded that the trial court had abused its discretion in granting the motion, particularly since there had been only one trial, the offense was extremely serious, and there was no evidence of misconduct. Id. at 144-45; see also State v. Fitzpatrick, 172 Vt. 111, 118 (2001) (affirming court's Rule 48(b)(2) dismissal of rape prosecution after two mistrials).

The circumstances here are unlike any that we have previously considered in this context, but as we observed in Sauve, Rule 48(b)(6) is broadly worded to cover "exceptional" situations not susceptible to categorization. Sauve, 164 Vt. at 139. The trial court here found, and we agree, that in this case the possession and VOP offenses were not of the most serious variety and that the harm "absent other circumstances such as driving or fighting while intoxicated" was more to defendant and his family than to the public. We also agree with the court's finding that Ball utterly failed in his responsibilities as a probation officer to enforce the terms of the court's order to ensure that defendant received the alcohol screening and counseling that he required, and in allowing defendant to violate the very conditions of probation that Ball was duty-bound to enforce.

We cannot agree, however, with the court's characterization of that misconduct as "passive." In his role as an adult supervisor of a youthful probationer, Ball's actions themselves defined what was acceptable behavior. They effectively said that the court's order could be safely ignored, rather than violated at substantial risk to defendant's future. Given his authority and position as an officer of the Department of Corrections and, effectively, as an agent of the court, Ball's misconduct must be counted heavily in mitigation of the offense. As for public confidence in the judicial system, we concur fully in the trial court's summary of the issue, as follows:

The public could well see further prosecution in such a situation as the system punishing the defendant for actions allowed by the very state official who was suppose[d] to be most concerned with preventing such action. How, if one's probationer officer is not only not enforcing certain conditions but actually knowingly allowing their violations in his presence is it just to [punish] the defendant for [such violations of his probation]? Would not the public see this as the system punishing a young defendant when he did not even get the services he had a right to expect from the sentence the court imposed on him?

We agree with the trial court's suggestion that it is difficult to see the justice in punishing a youthful offender for conduct enabled by the very State official responsible for its prevention. In these circumstances, we do not believe that dismissal of the possession and probation-violation charges would have any deleterious effect on public confidence in the judicial system. Indeed, we believe that dismissal of these charges is necessary to preserve such confidence, for nothing is more harmful to the judicial system than the perception of officially condoned injustice. We observe, as well, that dismissal of these charges will return defendant to his former probationary status, where he will hopefully now receive the counseling and other services that might have prevented the current offenses.

The charge of resisting arrest, unlike the possession and VOP charges, were not directly occasioned by the probation officer's misconduct, and involved a much more serious offense. The undisputed evidence showed that defendant physically shoved a police officer while he was attempting to place defendant in wrist restraints, and that defendant had to be physically forced to the ground and restrained. However egregious the probation officer's misconduct, we do not find "on balance" that it excuses or mitigates this offense, or that dismissal would enhance public confidence in the judicial system. Whatever the cause of defendant's alcohol-related offenses, it did not entitle defendant to place the officers at risk. Accordingly, we will affirm that portion of the trial court's decision denying the motion to dismiss the charge of resisting arrest.

In summary, we hold that the trial court abused its discretion in denying the motion to dismiss the possession and VOP charges, but correctly denied the motion with respect to the resisting arrest charge. Our holding requires that the matter be remanded to the trial court for resentencing consistent with the views expressed herein.

That portion of the trial court decision denying the motion to dismiss the possession and violation of probation charges is reversed. That portion of the decision denying the motion to dismiss the charge of resisting arrest is affirmed, and the matter is remanded to the trial court for resentencing in accordance with this decision.

BY THE COURT:

---

Jeffrey L. Amestoy, Chief Justice

---

John A. Dooley, Associate Justice

---

Denise R. Johnson, Associate Justice