

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-305

APRIL TERM, 2003

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 1,
	}	Windham Circuit
v.	}	
	}	
Sean David Duffy	}	DOCKET NoS. 1908-12-97, 69-1-99 and .
	}	1668-10-99 Wmcr
	}	
	}	Trial Judge: Karen R. Carroll

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

Defendant appeals from a district court order revoking his probation and imposing the remainder of his underlying sentence. Defendant contends: (1) the evidence failed to support the court' s finding that he failed to complete sexual offender counseling; and (2) the court abused its discretion in revoking probation and imposing the underlying sentence for de minimis violations. We affirm.

In January 2000, defendant pled guilty under a plea agreement to possession of marijuana, domestic assault, and lewd and lascivious conduct with a child and was sentenced to a term of three years to ten years and five months, all suspended except three years to serve. Defendant was released to his probationary sentence in February 2002. In April, he was charged with violating the probation conditions that prohibited the possession or consumption of drugs, and required completion of drug and alcohol screening, residence where directed by his probation officer, and successful completion of sexual offender counseling. Following a two-day evidentiary hearing, the court found that the violations had been established and sentenced defendant to serve the balance of the underlying sentence. This appeal followed.

Defendant first contends the evidence failed to support the court' s finding that defendant failed to complete sexual offender counseling. The record evidence reveals that defendant had been enrolled in a group counseling program and had attended four sessions, but had failed to attend the fifth session, and had further failed to inform the counselor or his probation officer prior to his non-attendance. Defendant was discharged from the program as a result. Defendant claimed that he was unable to attend the evening session because his car headlights had broken. The trial court observed that defendant' s explanation for his nonattendance represented a " pretty incredible story," and noted that defendant had presented no credible excuse for failing to call the counselor prior to the meeting.

In a probation revocation proceeding, the State bears the burden of proving the violation by a preponderance of the evidence. State v. Austin, 165 Vt. 389, 398 (1996). In such a proceeding, the court' s findings of fact fairly and reasonably supported by the evidence must stand. Its legal conclusions will be upheld if reasonably supported by the findings. Id. Here, the court' s finding that defendant had failed without excuse to provide advance notice of, and obtain permission for, his nonattendance at the counseling session was amply supported by the evidence. This finding, in turn, reasonably supports the court' s conclusion that defendant violated probation. Special condition of probation No. 17 provided that counseling included being on time and not missing sessions without the counselor' s permission, and prohibited defendant' s discharge from the program prior to successful completion. Defendant' s discharge from the program for nonattendance without prior notice and approval, therefore, constituted a clear violation of the probation condition.

Defendant further contends the court abused its discretion in revoking his probation and imposing the remainder of the underlying sentence. The claim is premised, in part, on defendant' s assertion that the evidence failed to establish a violation for nonattendance of the sexual behavior program. This argument, as noted, lacks merit. Defendant also asserts that each of the violations was de minimis, and failed to support the court' s decision. Although the court acknowledged that none of the violations, viewed individually, was major, viewed in the aggregate it found that they compelled the decision to revoke probation and impose the balance of the underlying sentence. In this regard, the court noted that defendant had been previously convicted of sexual assault and two violations of probation, had declined sex offender treatment while incarcerated on the current offenses, had been found in the proximity of minors " in violation of his probation " within a few months of his release, and had acknowledged using marijuana in express contravention of another probation condition. In these circumstances, the court reasonably concluded that revocation of probation and imposition of the balance of the sentence were necessary to protect the public and ensure the best chance of defendant' s rehabilitation. Accordingly, we discern no abuse of discretion warranting reversal. See State v. Leggett, 167 Vt. 438, 444 (1997) (absent showing that court withheld or abused discretion, decision revoking probation and imposing original sentence must stand).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned