

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-402

MAY TERM, 2003

	}	APPEALED FROM:
	}	
	}	District Court of Vermont, Unit No. 2,
State of Vermont	}	Chittenden Circuit
	}	
v.	}	DOCKET No. 4274/4275-7-00 Cncr
	}	
Jeremiah P. Louko	}	Trial Judge: Hon. David A. Jenkins &
	}	Hon. Michael S. Kupersmith
	}	

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

Defendant appeals from an order of the Chittenden District Court revoking his probation for violating a probation condition that he successfully complete sex offender counseling. We affirm.

In October 2001, defendant entered a guilty plea to one count of lewd and lascivious conduct and one count of contributing to a minor's delinquency. The court sentenced defendant to an aggregate term of three to seven years, all suspended except forty-one days. Defendant was placed on probation with numerous conditions, including a condition that he complete sex offender counseling as his probation officer directed.

In May 2002, defendant's probation officer filed a notice of violation, alleging that defendant had violated the sex offender counseling condition of his probation. The court, Judge Jenkins presiding, held a hearing on the State's complaint in July 2002. Following the hearing, the court found that defendant had violated his probation by denying he touched the victim with criminal intent, a necessary prerequisite to entering sex offender counseling. The court continued sentencing to give defendant an opportunity to weigh his options and meet with his counselor in the meantime.

On August 23, 2002, Judge Kupersmith sentenced defendant to serve the underlying sentence of three to five years on the conviction for lewd and lascivious conduct. Defendant timely appealed to this Court, claiming that the evidence does not support the court's findings. On appeal, we will not disturb the trial court's findings unless they are clearly erroneous or unsupported by the evidence. State v. Zaccaro, 154 Vt. 83, 86 (1990). A preponderance of the evidence that defendant violated a condition of his probation is enough to revoke probation and impose the underlying sentence. State v. Bushey, 149 Vt. 378, 382 (1988).

In this case, the court heard testimony from defendant's probation officer, defendant's counselor, and defendant. The probation officer testified that she explained to defendant the terms of his probation in a meeting they had approximately two weeks after he entered his guilty plea. One of the terms they discussed was the sex offender counseling requirement. Defendant testified that he understood that he had to successfully complete counseling to satisfy his probation conditions, and that doing so required him to admit to the elements of the lewd and lascivious conduct offense.

Defendant's counselor, Gary Allen, testified that he believed defendant's denial was "rigid" after their first brief session together. At the beginning of their second session, Allen testified, defendant continued to assert that he did not

touch the victim with sexual intent, but, rather, he touched her accidentally. By the end of the session, defendant admitted that he touched the victim with unlawful intent. Allen suggested that defendant participate in group counseling, a suggestion to which defendant was amenable. Allen thereafter asked defendant to write a letter explaining his responsibility for the lewd and lascivious offense. Although defendant wrote the letter, he reasserted that he touched the victim by accident. Allen testified that in thirteen years, he has never had a client with defendant's level of denial, and he could not be certain if he could make progress with defendant.

As the above recitation shows, the trial court had a preponderance of the evidence before it that defendant violated his probation by refusing to take the first step defendant knew was necessary to complete sex offender counseling: admitting that he touched the victim with sexual intent. Therefore, we find no error in the trial court's findings or its decision to revoke defendant's probation.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned