

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

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2009-352 & 2009-353

JULY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
	}	
William Steve Bostwick	}	DOCKET NOS. 503-4-08 Wmcr & 683-5-08 Wmcr

Trial Judge: Karen R. Carroll

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

Defendant appeals from the district court’s order revoking his probation and imposing the underlying sentence. We affirm.

After pleading guilty to several criminal charges in November 2008, including domestic assault, defendant received a dual sentence whereby he was placed on pre-approved furlough from his sentence “to serve” and also on probation for a portion of his sentence that was suspended. In March 2009, defendant’s probation officer filed a violation-of-probation (VOP) complaint against defendant alleging that he had violated several probation conditions by having unauthorized contact with his girlfriend and their daughter. As the result of the VOP complaint, defendant’s furlough was revoked, and he was incarcerated. In April 2009, defendant’s probation officer filed a second VOP complaint alleging that defendant made further unauthorized contact with his girlfriend by phone from the correctional facility. Defendant admitted the first violation, but contested the second complaint at a merits hearing that was held over two days in July and August 2009, after which the district court revoked defendant’s probation and imposed the underlying sentence.

On appeal, defendant argues that the court erred in revoking his probation because the evidence at the merits hearing demonstrated he did not know that the phone contact from jail was prohibited. “In a probation revocation hearing, the State bears the burden of proving the probation violation by a preponderance of the evidence.” *State v. Austin*, 165 Vt. 389, 398 (1996). If the State meets this initial burden, the burden of persuasion then shifts to the probationer to prove that his failure to comply with the probation conditions was not willful but rather resulted from factors beyond his control or through no fault of his own. *Id.* In this case, the State met its initial burden by demonstrating that defendant’s contact with his girlfriend and daughter violated express probation conditions.

Defendant testified that, once incarcerated, he believed the no-contact condition to be a “street program” requirement no longer applicable after his furlough was revoked. In addition to his own testimony, he also points to the testimony of his correctional facility caseworker and living unit supervisor who permitted the contact because they were unaware of the probation

condition and believed contact was allowed in accordance with his participation in the facility-administered domestic abuse program. The probation officer testified, however, that when defendant's furlough was revoked he was specifically told that he remained subject to the probation conditions and that while in jail he was not to contact his girlfriend.

The trial court found defendant's testimony not to be credible, noting that (1) his probation officer explicitly told him when his furlough was revoked that the probation conditions were still in effect; and (2) defendant engaged in several tactics, such as fake names, to hide his communication with the girlfriend. On cross examination, defendant explained that he concealed the contact not because he thought it was prohibited, but to prevent the facility from unilaterally denying such contact as he believed it did on past occasions. The court was not bound, however, to accept defendant's explanation as true, and defendant acknowledges the issue to be one of credibility assessment. It is the prerogative of the trial court to weigh the evidence and assess the credibility of the witnesses, and if there is any credible evidence to support the trial court's determination, it will be upheld. *Id.* (stating that findings of fact reasonably supported by any credible evidence must stand, and that we will uphold legal conclusions reasonably supported by those findings); *State v. Ives*, 162 Vt. 131, 135 (1994) (stating that trial court, in making findings, determines weight and sufficiency of evidence, including "the credibility of the witnesses and the persuasive effect of their testimony"). Here, there was sufficient, if not ample, evidence for the district court to reject defendant's claim of mistake and to determine that defendant willfully violated the no-contact probation conditions that formed the basis of the second VOP complaint.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice