

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2018-017

MARCH TERM, 2019

State of Vermont v. Andrew R. Baird, IV*	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 1242-11-16 Wncr,
		454-4-17 Wncr,
		858-8-17 Wncr

Trial Judge: Howard E. Van Benthuyzen

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

Defendant appeals the court’s sentences of eight-to-fifteen years for driving under the influence (DUI) with injury resulting and zero-to-six months on two violations of conditions of release (VCRs). On appeal, defendant argues (1) that his VCR convictions are invalid because there was no basis to impose the no-alcohol condition that he violated, and (2) that his DUI sentence is invalid because it relied on his VCR convictions. We affirm.

The record reveals the following facts. In November 2016, defendant was charged with DUI with serious injury resulting, leaving the scene of a crash, and reckless endangerment. The charging affidavit alleged that defendant was driving a car with a female passenger, lost control, and got into a rollover crash. The passenger was injured and defendant, assisted by another individual, moved her into a different car and drove her to a residence. At the residence, someone made an anonymous 911 call. The passenger broke all but one of the vertebrae in her neck and her legs were paralyzed. A breath test indicated that defendant’s blood alcohol was above the legal limit. After arraignment, the court released defendant and imposed several conditions, including one stating: “You must NOT buy, have or drink any alcoholic beverages.” Defendant did not object to imposition of the conditions. In April 2017, defendant was charged with violating his conditions of release by consuming alcohol. In August 2017, defendant was again charged with violating his conditions of release by consuming alcohol. After these charges were filed, defendant neither objected to the continuation of the no-alcohol prohibition, nor claimed that he could not abide by it. In October 2017, defendant entered a plea agreement with the State whereby he pled guilty to DUI with injury resulting and the two VCR charges, and the State dismissed the other charges. Under the agreement, the State was capped at arguing for a sentence of eight-to-sixteen years and defendant was free to argue for a lesser sentence.

The court held a contested sentencing hearing. At the hearing, the State argued for eight-to-sixteen years, and defendant argued for a sentence of two-to-ten years. The court explained that

its sentence was aimed at deterrence and punishment, balanced against the need for rehabilitation. The court concluded that some punishment was necessary given that defendant acted intentionally insofar as he decided not to contact emergency services, but instead to move the victim and to hide beer cans. The court explained that a long period of incarceration was important for deterrence purposes, both specific and general, given defendant's intentional, "awful, horrible life-changing decisions that [defendant] made in the immediate aftermath of the crash." Therefore, the court sentenced defendant to eight-to-fifteen years for the DUI-with-serious-injury-resulting charge and to consecutive zero-to-six months on the two VCRs. Defendant appealed.

Defendant first challenges his VCR convictions on the ground that the condition prohibiting him from buying, having, or drinking alcohol was invalid because he was an alcoholic and therefore he was incapable of controlling his drinking. He argues that the court placed great weight on these convictions during sentencing for the DUI. Defendant concedes that he failed to challenge the condition in the trial court and contends that nonetheless imposition of the condition was plain error. The State responds that imposing the condition was not error, let alone plain error, for two reasons: (1) defendant was twenty at the time and therefore the condition merely prohibited illegal conduct, see State v. Putnam, 2015 VT 113, ¶ 56, 200 Vt. 257 ("A condition that forbids criminal conduct is valid."); and (2) the burden of challenging imposition of a no-alcohol condition rests with defendant and defendant failed to meet his burden of introducing evidence to show that he lacked an ability to comply with a no-alcohol condition, see State v. Urban, 2018 VT 25, ¶ 11 (holding that "where a defendant challenges a requested condition prohibiting alcohol use on the basis of being an alcoholic or alcohol abuser" this is essentially a defense that defendant bears the burden of establishing).

We agree that defendant neither timely established, nor attempted to establish, that he was unable to abide by the condition of release prohibiting him from using alcohol. When this condition was imposed, and then when it remained in place after he was charged twice with violating it, defendant did not allege that he was incapable of complying with the condition. On appeal, defendant relies on information found in the presentence investigation report which he submits establishes he is an alcoholic. However, this information was not provided to the court until after the condition was imposed and defendant pled guilty to the charges of violating his conditions of release.

Moreover, we conclude that defendant is barred from challenging the validity of his conditions of release at this stage in the proceedings. "We do not generally allow a person who is under a court order to challenge it by violating it." State v. Crown, 169 Vt. 547, 726 A.2d 493, 495 (1999) (mem.); see also In re Carpenter, 2018 VT 91, ¶ 13 ("Under the collateral bar rule, a person is generally barred from collaterally challenging the validity of a court order in defense to a contempt proceeding for violating the order."). If defendant thought that the no-alcohol condition was invalid, his recourse was to challenge its imposition at the time; he failed to do so either before the trial court or on appeal. See 13 V.S.A. § 7556(b) (allowing person who is released with conditions to appeal to single Justice of Supreme Court). Having violated the condition and pled guilty to doing so, defendant is now barred from attacking the validity of the no-alcohol condition.

Defendant next argues that the court abused its discretion in imposing the eight-to-fifteen-year sentence for DUI with serious injury resulting. "The trial court enjoys broad discretion in

sentencing, and its judgment will be affirmed if the sentence falls within the statutory limits and is not derived from the court's reliance on improper or inaccurate information." State v. Koons, 2011 VT 22, ¶ 10, 189 Vt. 285 (quotation omitted). Defendant's argument is built on his presumption that the VCR convictions are invalid. He claims that the sentencing court considered his failure to abide by his conditions of release, and because those VCRs were improper, this amounted to an abuse of discretion. We conclude that the court acted within its discretion. Given that defendant was barred from challenging the validity of the no-alcohol condition, there was no reason that the court could not consider defendant's violation of the condition at sentencing. The sentencing court based its decision on legitimate factors, including deterrence, general and specific, and punishment and arrived at a sentence within the statutory limit and the parties' plea agreement. Therefore, the court did not abuse its discretion.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice