

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-3377

CHRISTOPHER J. KOSMALSKI,
Appellant,

v.

VERMONT DEPARTMENT OF
CORRECTIONS
Appellee.

DECISION ON THE MERITS

In this V.R.C.P. 74 appeal, Vermont inmate Christopher J. Kosmalski challenges a Department of Corrections (“DOC”) case-staffing decision pursuant to 28 V.S.A. § 724. The Court received the Department of Correction’s (“DOC’s”) furlough revocation record on November 23, 2021, and a hearing on the merits was held via Webex on March 10, 2022. Appellant was present at the hearing and was represented by Kelly Green, Esq. Appellee was represented by Timothy P. Connors, Esq. Based upon a de novo review of the record and the credible evidence admitted at the hearing, the Court makes the following findings, conclusions and orders.

Kosmalski, who is 43 years of age, has been convicted of several very serious offenses, including accessory after the fact to murder, unlawful restraint in the 2d degree, and grand larceny, among other things. (DOC Record, 1, 39-44, 53-55). He also suffers from alcohol and drug use disorders (Id.). As a result of his convictions, His minimum release date was July 13, 2020, and his maximum release date is September 27, 2038 (Id. 55). Kosmalski also suffers from drug use disorder and mental health issues (Id., 1-2, 36).

Kosmalski had been released into the community on parole once before, in July of 2019, but he had to be re-incarcerated six months later for repeatedly violating his parole conditions and engaging in risky behavior (Id., 1, 24-27, 38-39). He struggled with sobriety the during the entire six-month period, testing positive for “BUP, COCAINE, THC, and Fentanyl” on a number of occasions, and he repeatedly failed to follow up on required substance abuse treatment in the community (Id.). He also violated his curfew and picked up new charges (two charges of driving without a license, one of which incidents resulted in an accident, and one charge of leaving the scene of an accident). He was given various graduated sanctions designed to control his behavior, including a six-day stint in jail, but his drug use continued, and in November of 2019, he overdosed and “appeared to be in worse chape [sic] than he ever has” (Id.). Kosmalski was given a 30-day interrupt for that and was released to a bed at Valley Vista, a residential drug treatment facility, but he

absconded and was given a one-year interrupt in January of 2020 (Id.).

On January 25, 2021, DOC released Kosmalski into the community for a second time, this time on community supervision furlough. He was told to reside at the Homeless Prevention Center in Rutland and to work at Denny's (Id., 23). Kosmalski was also given several conditions that he had to comply with while on furlough, including condition C4 ("I will report to my supervising officer, or designee, as required"), condition SC15 ("I will participate in electronic monitoring as directed by my supervising officer, or designee" and "will not tamper with any electronic monitoring equipment...."), condition SC16 ("I will not purchase, possess, or consume illegal drugs and/or regulated drugs, without a prescription...."), condition SC19 ("IU will actively seek employment..."), condition SC23 ("I will continue to reside at an approved residence while on supervision"), condition SC23 ("I will abide by any curfew imposed by my supervising officer...."), and condition SC24 ("I will participate in [substance use treatment] ... to the satisfaction of my supervising officer.") (Id., 8-10).

Shortly after being placed on furlough, Kosmalski was fired from Denny's and he was terminated from the Homeless Prevention Center for repeatedly failing to spend the night there (Id., 23). Kosmalski was given a new residence in a camper in Danby and was ordered to wear a GPS unit so that his furlough officer could monitor his compliance with curfew conditions. Kosmalski also relapsed on cocaine almost immediately after being released on furlough, and, when ordered to get treatment at Evergreen Substance Abuse Services, he failed to attend the required sessions (Id.).

From March 11th to the 24th Kosmalski violated his GPS conditions on several occasions by failing to keep the unit charged and repeatedly using a sharp object to remove it from his leg (Id., 13-15). Then on March 24, 2021, the Vermont State Police were called to the Holiday Inn for a report of a domestic disturbance (Id.). Kosmalski was confirmed to have visited his wife there that afternoon, he and she had gotten into an argument, and he had fled the scene upon learning that the police had been called. Kosmalski was supposed to have been at his camper in Danby, not at the Holiday Inn in Rutland that afternoon, but he had removed his GPS unit so that his furlough officer would not know he was violating his curfew (Id.). By visiting his wife at the Holiday Inn without permission that day, Kosmalski placed her and their children at risk of losing their state-subsidized housing (Id.). He was told by his furlough officer that "his behavior [w]as not acceptable and this significant violation would be placing him close to going to jail should any more violations happen" (Id.).

Kosmalski continued to tamper with his GPS unit, damaging it in the process to such an extent that it had to be replaced with another unit (Id., 15-20). Although his GPS unit, when it was working, had shown Kosmalski visiting numerous places where he was not supposed to be, he failed to participate in his required substance abuse treatment program (Id., 11-12). On April 5, 2021, when Kosmalski missed an appointment with his furlough officer and failed to respond to phone calls from the officer, the officer decided to place Kosmalski on house arrest because of his repeated curfew violations, GPS violations, drug use and program failures (Id. 11-12, 21). The following day, April 6th, Kosmalski missed another appointment with his furlough officer and failed again to respond to her calls, so the officer drove to Danby in the hope of speaking with Kosmalski in person. When the furlough officer arrived at Kosmalski's camper, however, she discovered that he had

removed and damaged his second GPS unit, and she learned from his sister that he had been gone for two days (Id.). Kosmalski was placed on absconder status, and he was picked up by the police on April 12th, after they learned that he had gone to the Rutland Medical Center around 5:40 that morning to seek treatment for a knife wound (Id., 22). His furlough officer concluded that there had been “an altercation at the Holiday Inn that led to [Kosmalski] being stabbed” (Id., 2). Kosmalski was arrested and returned to the correctional facility. He had been on furlough for just 2½ months.

Kosmalski was charged with and found guilty by a hearing officer of absconding from furlough, and his furlough status was revoked (Id., 4-7). Following the revocation, DOC performed a “case staffing” to determine what the consequence should be for Kosmalski’s violations. DOC decided that he should receive “a two-year interrupt,” which meant that he would have to serve another two years in prison before again being eligible for release on furlough (Id., 4).

Kosmalski contends that he is not solely to blame for his failure to succeed on furlough because DOC released him from prison without his prescribed mental health medications and placed him in a residence (the Homeless Prevention Center) where others were actively using drugs, causing him to relapse. Kosmalski further argues that a two-year interrupt is excessive, and should be reduced to a one-year interrupt, because he was out of communication with his furlough officer for only six days and he did not actually abscond from the area. Lastly, Kosmalski points out that he has been in jail now for nearly a year, he is back on his mental health medications, he is back on his medication assisted treatment (“MAT”) program, he is an “open ears” coach at the correctional facility, his mother recently fractured her leg and needs his help, and he can safely be returned to the community now. DOC argues that its determination should be affirmed because Kosmalski relapsed on drugs, failed to engage in community substance abuse treatment, engaged in risky behavior, actively avoided supervision, could no longer be safely controlled in the community, and needs another year in prison before he can be safely released into the community again.

DOC may release an inmate from prison and place him or her on community supervision furlough if the inmate has served his or her minimum sentence and agrees to comply with such conditions as DOC, in its sole discretion, deems appropriate. 28 V.S.A. § 723(a). The inmate’s continuation on furlough is “conditioned on the offender’s commitment to and satisfactory progress in his or her reentry program and on the offender’s compliance with any terms and conditions identified by the Department.” Id. §723(b). If the offender commits a “technical violation” (i.e., “a violation of conditions of furlough that does not constitute a new crime”) that DOC believes warrants an “interruption” of the furlough, then DOC must hold “a Department Central Office case staffing review” to determine the length of the interrupt. Id. §724(b).

An offender whose community supervision furlough is revoked or interrupted for 90 days or longer has a right to appeal DOC’s determination to the Superior Court under V.R.C.P. 74. The appeal must be “based on a de novo review of the record,” the appellant “may offer testimony, and the Court, in its discretion and for good cause shown, “may accept additional evidence to supplement the record.” Id. §724(c). Under the statute, “[t]he appellant shall have the burden of proving by a preponderance of the evidence that the Department abused its discretion in imposing a furlough revocation or interruption for 90

days or longer....” Id. Lastly, the statute provides:

It shall be abuse of the Department’s discretion to revoke furlough or interrupt furlough status for 90 days or longer for a technical violation, unless:

(A). the offender’s risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable; or

(B) the violation or pattern of violations indicate the offender poses a danger to others or to the community or poses a threat to abscond or escape from furlough.

Id. §724(d)(2).

Given the record in this case, the Court cannot conclude that DOC abused its discretion in imposing a two-year interrupt of Kosmalski’s furlough status. Shortly after Kosmalski was placed on furlough he relapsed, failed to engage in substance abuse treatment and began engaging in risky behavior. His furlough officer responded by imposing a series of graduated sanctions, including curfews and electronic monitoring requirements, designed to attempt to control him in the community, but Kosmalski ignored them and actively took steps to evade supervision. In the end, Kosmalski was picked up by the police after presenting himself to the hospital for a knife wound that he had sustained early that morning at the Holiday Inn, a place he had been repeatedly told he could not visit. Moreover, this was Kosmalski’s second failure at supervision in the community, and it had lasted only 2½ months.

Under these circumstances, it was reasonable for DOC to conclude that Kosmalski could no longer be safely supervised in the community, despite its efforts to control him by means of increasing graduated sanctions. As noted earlier, the statute expressly provides that it is not an abuse of discretion for DOC to interrupt furlough status for 90 days or longer if “the offender’s risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable....” 28 V.S.A. § 724(d)(2)(A). Moreover, an inmate’s continuation on furlough “is conditioned on the offender’s commitment to and satisfactory progress in his or her reentry program and on the offender’s compliance with any terms and conditions identified by the Department.” Id. § 723(b). Based upon the record in this case, it is clear that Kosmalski failed to make any progress in his reentry program.

For the foregoing reasons, DOC’s two-year interrupt of the Appellant’s community supervision furlough is affirmed. *See Davis v. Dept of Corrections*, Docket No. 21-CV-3093, Decision on the Merits (February 18, 2022) (affirming a 2-year interrupt for relapsing on drugs, failing to follow up on substance abuse treatment, and engaging in risky behavior); *and Smart v. Dept. of Corrections*, Docket No. 21-CV-2592, Decision on the Merits (December 31, 2021) (affirming a 2-year interrupt for engaging in a pattern or risky behavior and actively concealing his violations from his furlough officers).

SO ORDERED this 16th day of March, 2022.

A handwritten signature in black ink, appearing to read "Robert A. Mello". The signature is written in a cursive style with a horizontal line underneath it.

Robert A. Mello
Superior Judge