

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-1337

WAYNE MORRILL,
Appellant,

v.

JAMES BAKER, COMMISSIONER,
VERMONT DEPT' OF CORRECTIONS
Appellee.

RULING ON THE STATE'S MOTION TO DISMISS

Vermont prisoner and appellant Wayne Morrill filed this action seeking Rule 74 review of a Department of Corrections case-staffing decision pursuant to 28 V.S.A. § 724, which permits limited review of certain decisions following a furlough violation. The decision at issue would ensure that Mr. Morrill is not eligible for furlough for an extended time. The State has filed a motion to dismiss, arguing (among other things) that the decision is not subject to review under § 724 because it follows from a “nontechnical” violation of furlough—a violation amounting to a crime.¹ Mr. Morrill does not dispute that the violation amounts to a crime, but he opposes dismissal, arguing that review under § 724 is available for both technical and nontechnical violations of furlough.

Section 724, in its entirety, reads as follows:

(a) Authority of the Department. The Department shall identify in the terms and conditions of community supervision furlough those programs necessary to reduce the offender's risk of reoffense and to promote the offender's accountability for progress in the reintegration process. The Department shall make all determinations of violations of conditions of community supervision furlough pursuant to this subchapter and any resulting change in status or termination of community supervision furlough status.

(b) 90-day interruption or revocation. Any interruption of an offender's community supervision furlough after the Department has found a technical violation of furlough conditions shall trigger a Department Central Office

¹ The State characterizes its motion as seeking dismissal for failure to state a claim pursuant to Rule 12(b)(6). Mr. Morrill, however, has not attempted to assert any “claim.” Rather, he has appealed an agency decision pursuant to 28 V.S.A. § 724. The State's argument is that review of that decision is not available under § 724. In other words, the State argues that this court lacks statutory jurisdiction to hear this appeal. That is how the parties have treated the State's motion and how the court understands it.

case staffing review and Department notification to the Office of the Defender General if the interruption will be 90 days or longer.

(c) Appeal. An offender whose furlough status is revoked or interrupted for 90 days or longer shall have the right to appeal the Department's determination to the Civil Division of the Superior Court in accordance with Rule 74 of the Vermont Rules of Civil Procedure. The appeal shall be based on a de novo review of the record. The appellant may offer testimony, and, in its discretion for good cause shown, the court may accept additional evidence to supplement the record. The 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 pursuant to subsection (d) of this section.

(d) Technical violations.

(1) As used in this section, "technical violation" means a violation of conditions of furlough that does not constitute a new crime.

(2) 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.

28 V.S.A. § 724. Mr. Morrill focuses exclusively on the first sentence of § 724(c) to argue that it expansively permits review in any case in which "furlough status is revoked or interrupted for 90 days or longer."

The sentence that Mr. Morrill focuses on has to be viewed in isolation to support his argument. "The words of a statute are not to be read in isolation, however, but rather in the context and structure of the statute as a whole." *In re Vermont Verde Antique Intern., Inc.*, 174 Vt. 208, 211–12 (2002). In context, review clearly is available only for "technical" violations, violations of furlough conditions that do not amount to new crimes.

Section 724(c) specifically says that, on appeal, the appellant has the burden of proving that the DOC "abused its discretion in imposing a furlough revocation or interruption for 90 days or longer pursuant to subsection (d) of this section." (Emphasis added.) Subsection (d), in turn, defines a technical violation, and it expresses the standards by which to measure abuses of discretion regarding technical violations. It is thus clear that, in appealing, the appellant has the burden of proving an abuse of discretion regarding a technical violation. There are no similar provisions applicable to nontechnical violations. With no statutory standards for measuring abuses of discretion regarding nontechnical violations, the court would have no way to meaningfully provide the review that § 724 contemplates. The review available under § 724(c) extends to technical violations only.

Section 724(b) also requires the DOC to notify the Office of the Defender General of any revocations or 90-day or greater interruptions following technical violations only. This presumably is intended to ensure that the Prisoners' Rights Office has notice of cases in which review is available. If review also were available in the case of nontechnical violations, one would think notice to the Prisoners' Rights Office would be every bit as warranted. The court presumes that the legislature made this distinction for a reason, namely, that review is simply not available in the case of nontechnical violations.

Finally, Mr. Morrill argues that the DOC took the opposite position in a Windsor County case, implying that it should be estopped from claiming otherwise here. The materials from the Windsor case presented here do not clearly show that the DOC squarely took the position in that case that § 724 review is available for non-technical furlough violations. In any event, even if that case presented that issue, the State took that position, and the court decided it, it would not bind the State in this case. The doctrine of offensive, non-mutual collateral estoppel typically should not be applied against the State, and the court sees no basis for applying it here. See *Fleming-Pancione v. Menard*, No. 38-1-16 Wncv, 2016 WL 2770655, at *6 n.5 (Vt. Super. Ct. May 6, 2016).

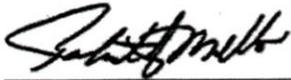
Review is available under § 724 for case-staffings following statutorily defined technical violations only.

It is unnecessary to address other issues raised by the parties.

Order

For the foregoing reasons, the State's motion to dismiss is granted. The State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 6th day of December, 2021.



Robert A. Mello
Superior Judge