

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-2592

STEVEN SMART,
Appellant,

v.

VERMONT DEPT' OF CORRECTIONS
Appellee.

DECISION ON THE MERITS

In this V.R.C.P. 74 appeal, Vermont inmate Steven Smart challenges a Department of Corrections (“DOC”) case-staffing decision pursuant to 28 V.S.A. § 724. The Court received the DOC’s furlough revocation record on September 12, 2021, and a hearing on the merits was held via Webex on December 28, 2021. 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.

Smart is 55 years old and is serving a sentence for a conviction of lewd and lascivious conduct with a child (DOC Record, 1). He has been on supervision in the community four times (once on probation and three times on furlough), and each time he was reincarcerated for violating his release conditions.

After his probation was revoked, DOC released Smart to the community on furlough for the first time on January 14, 2019 (Id., 1, 19-25). He was reincarcerated on September 22, 2019, however, after having been caught soliciting prostitution (she was 21 years old) and using marijuana. He had been on furlough for just 8 months. Smart was given a three-month interrupt for that violation (Id.). Smart was released on furlough a second time on December 30, 2019, but he was returned to the correctional facility again on October 9, 2020, for associating with individuals he was not allowed to associate with, engaging in undisclosed sexual relations, and setting up \$250,000 life insurance policies with local prostitutes as the beneficiaries (Id., 1, 17-18). He had been on furlough for just 10 months and was given a four-month interrupt for that violation (Id.). On both of those furlough violations, Smart had failed to take any responsibility for his behaviors and had engaged in attempts to deceive and evade his furlough supervisors (Id.).

In February of 2021, Smart was released on furlough for the third time. He was given conditions that he had to comply with, including condition SC 16 (no possession of regulated drugs), condition SC 20 (not associate with individuals restricted by his furlough

officer), condition SC 29 (not possess or view pornography or erotica) and condition SC 32 (not possess a cellphone or delete any information from a cellphone without his furlough officer's permission) (Id., 4, 12-16).

Three months later, on May 19, 2021, Smart's furlough officers discovered that Smart had possession of four cellphones, when he had only been allowed to have one, that Smart had used the phones access pornography and erotica, that he had corresponded with and received nude photos from women who were seeking money and who he claimed to believe were adults, that he had solicited sex from females on line using fake names such as "sugardaddydream" and "sirlicksalot" and claiming to be a man of financial stability willing to "take care of a woman who would take care of his hyper sexual needs on a daily basis," that he had deleted all that information and data from his phones to avoid their being discovered by his furlough officers, that he had been associating with a woman whom he had been ordered not to associate with, that he had marijuana at his residence, and that he had attempted to solicit sex from a woman who did massages (Id., 1-3, 7-8). Smart's furlough officer concluded:

Smart has clearly been engaged in high levels of deviant sexual activity on the internet ... going to great lengths to cover it up. He took no responsibility for his actions until presented with actual evidence of it.... He has displayed more effort into concealing deviant behavior than engaging successful reintegration to society.

(Id., 3).

DOC found Smart guilty of having violated his furlough conditions, and his furlough was revoked. Following the revocation, DOC performed a "case staffing" to determine what the consequence should be for Smart's violation. 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 furlough consideration (Id. 3). According to Smart's furlough officer, Smart had "shown zero progress in treatment or actual risk management in the community and is not appropriate for community supervision" (Id., 1).

Smart contends that the two-year interrupt was excessive. Although he acknowledges his clear violations of conditions, he argues that his violations involved "no victims" and "no new crimes." Smart further acknowledges that he needs intensive mental health counseling to help him address his tendency to be untruthful, which, he claims, was how he was "brought up" by his parents, but he argues that such treatment is only available in the community and not in the correctional facility. DOC argues that its two-year interrupt should be affirmed.

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 warrant 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 Smart’s furlough status. This was Smart’s third failure at community supervision furlough. On each of the three occasions, Smart actively engaged in risky conduct in clear violation of his conditions and went to great lengths to hide what he was doing from his furlough supervisors. As a result, he has never been on furlough long enough to complete community sex offender treatment, even though he is a registered sex offender. Indeed, on May 21, 2021, Smart’s community sex offender treatment provider, Effective Counseling Solutions, LLC, suspended him for “no less than one year” for “failing to report a sexual relationship, attempting to solicit a sexual relationship, using substances illegally, ... viewing erotica,” and lying about and concealing his behavior (DOC Record, part 2 of 3, at 8-9).

As noted above, it is not an abuse of discretion for DOC to interrupt furlough 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” or where “the offender poses a danger to others or to the community.” 28 V.S.A. § 724(d)(2). Such was the case here.

For the foregoing reasons, DOC’s two-year interrupt of the Appellant’s community supervision furlough is affirmed.

SO ORDERED this 31ST day of December, 2021.

A handwritten signature in black ink, appearing to read "Robert A. Mello", written over a horizontal line.

Robert A. Mello
Superior Judge