Vermont Superior Court
Filed 12/06/21
Washington Unit

STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-2445
MARC GERO, Appellant, v. VERMONT DEP'T OF CORRECTIONS Appellee.	

DECISION ON THE MERITS

In this V.R.C.P. 74 appeal, Vermont inmate Marc Gero 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 August 24, 2021, and a hearing on the merits was held via Webex on November 30, 2021. Appellant was present at the hearing and was represented by Jill P. Martin, 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.

Gero is 54 years old and is serving a sentence for aggravated assault with a weapon. His minimum release date was February 9, 2020, and his maximum release date is August 10, 2028 (DOC Record, pp. 14, 20-23). He also has another aggravated assault conviction, nine simple assault convictions, a conviction for assault on a law enforcement officer, a domestic assault conviction, and a conviction of violating an abuse prevention order (Id.). In addition, Gero has significant mental health diagnoses, including PTSD, for which he takes medication.

On December 17, 2020, DOC placed Gero on community supervision furlough and assigned him a residence in Newport, Vermont, where he was told to reside with a roommate during his furlough (Id,, 15). Gero was given a number of conditions that he had to comply with while on furlough, including condition C3 ("I will not engage in threatening, violent or assaultive behavior.") and condition SC#22 ("I will continue to reside at an approved residence while under supervision.") (Id., 10-13).

Gero repeatedly struggled with maintaining his residence and staying out of trouble with his roommates during the six months that he was on furlough. For example, in February of 2021, just two months after being placed on furlough, Gero lost his approved housing in Newport due to a conflict with his partner that resulted in the Newport police being called (Id., 15). As an interim, emergency measure, Gero was allowed to stay with his daughter in Lyndonville until a more suitable housing arrangement could be found. While

there, however, Gero violated his electronic monitoring agreement with DOC by leaving the residence after curfew hours, and eventually the landlord of that residence refused to allow Gero to continue residing there because he had reportedly scared other residents (Id.).

On February 28th, DOC placed Gero at the Judd North House, a transitional house in Newport run by Northeast Kingdom Community Action, Inc. ("NEKCA"), but Gero was removed from that house after he got into an altercation with another resident there (Id.). Gerow was then given the opportunity to resided in the Judd Apartments on Coventry Street in Newport. Over the three or four months that he lived there, Gero was found to have alcohol in the residence, he disappeared and was not seen or heard from for two days in mid-April, he violated electronic monitoring conditions by leaving the residence without permission on multiple occasions in April and May, and in early June he used the "N" word with another resident. Gero was given graduated sanctions for each of these furlough violations, including a warning letter for the incident in early June (Id.).

Lastly, on June 26, 2021, Gero got into an argument with his roommate, Eric Polite, when Polite returned to the residence at 2:00 a.m. to find Gero going through his personal belongings (Id., 7). Polite told DOC that, when he confronted Gero about why he was "ransacking" his personal belongings, Gero picked up a piece of furniture and threatened to hit Polite with it. Gero denied threatening Polite with a piece of furniture, and he claimed that he had only been packing up Polite's belongings after learning that Polite would be moving out shortly. Nevertheless, the following day NEKCA's case manager sent a letter to DOC stating, that Gero had been "dismissed" from the Judd House for "[a]buse ... towards another resident," his "on-going behavior at the apartment," and "for causing damage to the apartment" (Id., 7-8). Gero was arrested and returned to the correctional facility on June 28th (Id.).

On July 2nd DOC found Gero guilty of having violated conditions C3 and SC#22 of his furlough conditions, and his furlough was revoked (Id., 2-5). Following the revocation, DOC performed a "case staffing" to determine what the consequence should be for Gero's violation. DOC decided that he should receive "a one-year interrupt," which meant that he would have to serve another year in prison before again being eligible for furlough consideration (Id. 14-17). DOC based its decision on Gero's "behavior directly threatening an identifiable individual and a pattern of risk related behavior where previous interventions have failed to mitigate the risk" (Id. at 17).

Gero contends that the one-year interrupt was excessive. He claims that his struggles on furlough were due to his having stopped taking his PTSD medication, and he argues that there is no reason to believe he cannot be safely supervised on furlough in the community. DOC argues that its one-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 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 one-year interrupt of Gero's furlough status. Gero violated two of his furlough conditions, the condition that he "not engage in threatening, violent or assaultive behaviors" and the condition that he "continue to reside in an approved residence while under supervision." Moreover, he violated each of those conditions multiple times. As a result, he lost his approved housing four times in six months, each time on account of his behavior towards others at the residences, which they considered to be threatening. Moreover, DOC tried repeatedly to work with Gero by using a series of graduated sanctions in an effort to help Gero retain his housing and relationships in the community. But DOC eventually came to the reasonable conclusion that, despite its interventions, Gero's risk to others in community could no longer be mitigated on furlough. As noted above, a furlough interrupt of 90 days or longer is not an abuse of discretion if "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." 29 V.S.A. § 724(d)(2)(B).

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

SO ORDERED this 6th day of December, 2021.

Robert A. Mello, Superior Judge