STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-1759

SHAN MCGLYNN,
Appellant,

v.

VERMONT DEP'T OF CORRECTIONS
Appellee.

RULING ON THE STATE'S MOTION TO DISMISS

Vermont prisoner and appellant Shan McGlynn seeks 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 "interrupts" his furlough eligibility for at least one year. The State has filed a motion to dismiss, arguing that this appeal was filed in an untimely manner and, regardless, the decision is not subject to review under § 724 because it arises out of a "nontechnical" violation of furlough—a violation amounting to a crime, in this case assault on a police officer and simple assault. Mr. McGlynn claims excusable neglect for the delay in seeking review and otherwise argues that he is entitled to review because his violation of furlough conditions, as actually determined by the hearing officer, expressly was not due to any new crime.

Timeliness of appeal

To properly seek review under § 724, the notice of appeal must be filed within 30 days of the disputed decision. V.R.C.P. 74(b); V.R.A.P. 4(a)(1). In this case, the decision was on April 28, 2021, and the notice of appeal was filed in this court on July 1, 2021, approximately one month late. Mr. McGlynn asks the court to treat his notice as timely filed due to "excusable neglect." V.R.C.P. 6(b)(1)(B).

According to the representations of his attorney, Kelly Green, the delay in this case was attributable to confusion over whether a notice of appeal pursuant to 28 V.S.A. § 724 must await the exhaustion of administration remedies. The current version of § 724 became effective on January 1, 2021. It permits an inmate to immediately appeal from a case-staffing decision in appropriate circumstances. Prior to this version of the statute, the DOC specifically enabled inmates to seek administrative review of case-staffing decisions. DOC Directive 410.02, Procedural Guidelines § 6(g). However, in an "interim memo," signed on December 30, 2020, and effective on January 1, 2021, the DOC deleted § 6(g) from Directive 410.02, presumably to eliminate administrative review now that, at least in some

cases, direct review in court would be available. While the interim memo modifies the substance of Directive 410.02, the face of the directive has not been changed, requiring one to synthesize the two to understand their intended effect.

Attorney Green represents that her office advised Mr. McGlynn to exhaust his administrative remedies before filing a notice of appeal, and he diligently did, causing the delay at issue. The State does not contest these allegations. Nor does it allege that anyone advised Mr. McGlynn in response to his ill-advised grievance that he should have filed a notice of appeal.

While normally ignorance of the law is no excuse, the court believes the circumstances here warrant some accommodation. One might have expected someone at the Department of Corrections at some point to have communicated with the Prisoners' Rights Office in the event of such a significant procedural change on the very day that an important new statutory right was to become effective and could be certain to generate a large amount of litigation, but that apparently never happened. There also is no indication that the DOC did anything else to educate prisoners as to the new procedure, either when it was adopted or when it began receiving unnecessary grievances, which it should have known would delay invocations of appellate rights under § 724. Its apparent inaction in these circumstances is as responsible for the delay as anything else.

On balance, the delay in this case was minimal and causes no prejudice to the State. The court concludes that this is a case of excusable neglect and will treat Mr. McGlynn's notice of appeal as timely.

Whether the violation was nontechnical

The facts are straightforward. While on furlough, Mr. McGlynn engaged in conduct that generated new criminal charges, as described above. He was returned to the facility and administratively charged with violating conditions A, B, C, and F. Condition A relates to criminal conduct. Condition B relates to reporting contact with law enforcement. Condition C relates to "threatening, violent, or assaultive behavior." Condition F relates to alcohol.

Following a contested hearing, the hearing officer expressly found Mr. McGlynn not guilty of violating condition A. He found Mr. McGlynn guilty of violating B, C, and F. To be clear, condition A, as described in the notice of suspension report, reads as follows: "I will not be cited, or charged, or commit any act punishable by law, including city and municipal codes." Condition A would have been violated if Mr. McGlynn had been cited for committing a new crime, charged with committing a new crime, or if he had engaged in conduct that could have been cited or charged as a new crime. By finding that he did not violate the condition, the hearing officer necessarily found that Mr. McGlynn did not engage in any criminal conduct. He found that Mr. McGlynn resisted arrest, and that resisting arrest is violent behavior, but he did not separately say that notwithstanding the determination on condition A that the violation of condition C amounted to a new crime.

As Mr. McGlynn sees it, those facts are determinative of the availability of review under § 724. The State, on the other hand, asks the court to rely instead on the crimes that were committed, even though the hearing officer found that Mr. McGlynn had not engaged

in criminal conduct.

Review under § 724 is available when an inmate is sanctioned with a revocation or a 90-days or longer interrupt of furlough following a "technical" violation of furlough conditions. "'[T]echnical violation' means a violation of conditions of furlough that does not constitute a new crime." 28 V.S.A. § 724(d)(1). The court interprets "violation" to refer to a violation of furlough conditions *as determined at the furlough violation hearing*. There is no crime of violating a furlough condition. Thus, a "violation of conditions of furlough that does not constitute a new crime" must refer to the underlying conduct resulting in the violation.

In this case, Mr. McGlynn may well have committed new crimes while on furlough. The DOC charged him with having done so. Following a hearing, the hearing officer clearly found, however, that no such criminal conduct had occurred. There is no sensible way to interpret the hearing officer's determination of condition A otherwise.

The State's position, in essence that the court should look for any criminal conduct committed on furlough in the available evidence regardless whether the hearing officer found Mr. McGlynn guilty of it, does not comport with the inmate's due process rights, and it improperly involves the court in the furlough violation process, which § 724 does not address. Section 724 deals exclusively with the result of a furlough violation, not its determination. The court is not free to ignore what happened at the furlough violation hearing. Rather, in this proceeding, the court is bound by it.

There is no nontechnical violation for § 724 purposes in this case. Mr. McGlynn's furlough violation was technical (noncriminal) in nature, and his interrupt is 90 days or longer. Section 724 review therefore is available.

Order

For the foregoing reasons, the State's motion to dismiss is denied.

SO ORDERED this 7th day of December, 2021.

Robert A. Mello
Superior Judge