STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-2886
THEODORE SMITH, JR., Appellant, v. VERMONT DEPARTMENT OF CORRECTIONS Appellee.	

DECISION ON THE MERITS

In this V.R.C.P. 74 appeal, Vermont inmate Theodore Smith, Jr. challenges a Department of Corrections ("DOC") case-staffing decision pursuant to 28 V.S.A. § 724. The Court received DOC's furlough revocation record on October 23, 2021, and a hearing on the merits was held via Webex on January 24, 2022. Appellant was present at the hearing and was represented by Emily Tredeau, Esq. Appellee was represented by Lauri A Fisher, 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.

Smith, who is 33 years of age, has a long criminal record, including convictions for aggravated assault with a weapon, burglary, burglary into an occupied dwelling, and escape from furlough, among other things (DOC Record, 1, 6-7, 105-113). Smith also has a significant substance use disorder for which DOC has determined he needs residential treatment followed by a long-term structured sober living arrangement (Id.).

Smith also has a poor prior community supervision history. According to the officer who supervised Smith during his previous releases on furlough: "[Smith] has not been able to remain in the community longer than six months at a time. [Smith] has always reverted back to theft or burglaries in order to maintain his addiction.... He has been given options to participate in inpatient and outpatient treatment and programming options. During the last five years that I have supervised [Smith], he has not completed any treatment or programming...." (Id., 1-2).

Smith's most recent release on furlough lasted much longer than any of the earlier releases had, but it did not go smoothly. DOC released Smith back into the community on March 2, 2020, and he was given several conditions that he had to comply with while on furlough, including conditions that he reside at a residence approved by his supervising officer, comply with an 8 pm to 6 am curfew, participate in electronic monitoring as directed, report to his supervising officer as required, keep his supervising officer informed

of changes in his contact information, remain accessible to his supervising officer by phone, not purchase, possess or consume any illegal drugs, and participate in any recommended substance abuse and mental health treatment to the satisfaction of his supervising officer (Id., 22-26).

Smith's first assigned residence was an apartment unit rented by a Dorothy Brooker in Rutland, but on March 24, 2020, just three weeks after Smith was placed on furlough, Brooker called Smith's supervising officer and asked that Smith be removed from her residence for allegedly not paying his rent, drinking on the premises, bringing large quantities of marijuana into the house and possibly selling it there, and being very disrespectful towards her and her friends (Id. 64). Therefore, another residence had to be found for Smith. Eventually his father agreed to allow Smith to reside with him at his home on Wetherby Way in Fair Haven.

Smith was instructed to participate in the medicated assisted treatment ("MAT") program offered by Bradford Psychiatric Associates. In late July of 2020, however, Bradford Psychiatric Associates terminated Smith from its MAT program for allegedly failing to follow through with group expectations (Id. 51). Smith avoided being sanctioned by his furlough officer for this infraction by promptly setting up an intake appointment with Forensic Consultation and Counselling Services ("FCCS") (Id.). On January 8, 2021, however, Smith was terminated from FCCS for not complying with his required weekly check-ins, group sessions and urine drug screenings (Id. 40). Moreover, his last urine screens at FCCS had tested positive for alcohol, cocaine and Ritalin (Id.). Smith's furlough officer ordered him to contact the Evergreen Substance Abuse Center for an intensive outpatient substance abuse assessment by not later than January 20th (Id.). The officer also ordered Smith to wear a GPS unit for failing to report to the officer as required and for having missed three appointments with his furlough officer (Id.).

Smith did not contact the Evergreen Substance Abuse Center by the January 20th deadline, so the furlough officer again ordered him to do so by March 18th (Id., 33). Smith did an intake interview at Evergreen on March 2nd, at which he acknowledged that he had relapsed on cocaine. On April 9th, however, when his furlough officer called Evergreen, she learned that Smith had never followed up with them to begin treatment services there, despite having been instructed to do so (Id.). The furlough officer ordered Smith to call Evergreen and start substance abuse treatment by April 14th (Id., 31). On April 25th, the furlough officer again called Evergreen and was again told that Smith had not yet contacted them (Id.). In response, the officer placed Smith on house arrest, which meant that Smith could not leave his father's home except to go to substance abuse treatment, court, work or the probation and parole office (Id),

Smith finally went to Evergreen and began receiving substance abuse treatment, but on June 7, 2021, in a telephone call with the Director at Evergreen, the furlough officer learned that Smith had been terminated from Evergreen on May 17th for not engaging in treatment (Id., 27-28). Evergreen's Director explained that Evergreen had "lost all contact" with Smith, that Smith had "stopped showing up for group," and that Smith would have to "attend and complete residential treatment before being allowed to return to their program" (Id.).

Two days later, on June 9th, the furlough officer received two calls from Smith's

father, who informed the officer that Smith "had not returned home and has not been at his approved residence since Friday, 6/4" (Id., 3, 8). The father further stated that he would no longer allow Smith to live with him "due to the arguments and [Smith] not staying there often" (Id.). The father concluded that "he cannot continue to try to help him [Smith] any longer," that Smith had "blocked him from calling or contacting him," and that "he is worried about his [Smith's] drug use" (Id.).

The furlough officer tried calling Smith on June 9th by dialing his cell phone number, but she got an automated message stating that the person she was calling had "calling restrictions," which she understood to mean that Smith had blocked her from calling him (Id., 3). Nonetheless, later that day Smith returned her call from a blocked phone number (Id.). During their brief conversation, Smith denied having left his father's home, where he had been instructed to live (Id.). The officer instructed Smith to report to her office in person at 11:30 am on June 10th; in response, Smith said "yup" and hung up (Id.). Smith failed to report to the probation and parole office for his scheduled June 10th appointment, so the furlough officer issued a request for an arrest warrant (Id.).

On July 1st law enforcement officers found Smith at what his furlough officer describes as "a known drug house in Rutland City" (Id., 2). Smith fled and tried to hide from the officers, but his efforts to avoid arrest were unsuccessful and he was returned to the correctional facility (Id.). He had been missing, and his whereabout had been unknown for a little less than a month.

DOC found Smith guilty of having violated his furlough conditions by absconding, and his furlough was revoked (Id., 14-14). Following the revocation, DOC performed a "case staffing" to determine what the consequence should be for Smith'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 release on furlough (Id.). Smith contends that the one-year interrupt is excessive because he had been successfully on furlough for 15 months, he had committed no new crimes, he had called two residential treatment facilities (Valley Vista and Serenity House) about taking him in and was just waiting for a bed to became available, and he had only absconded for a short period of time, and he had not gone very far (he claims he moved in with an aunt in Rutland just around the corner from the probation and parole office), DOC contends that its decision 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 Smith's furlough status. This was Smith's second time absconding from furlough (the first time had been in 2017, when he was convicted of escape from furlough (Id., 105-107)). In addition, he had relapsed on cocaine but had repeatedly failed to follow through on the substance abuse treatment that his furlough officer determined he needed in order to safely remain in the community; indeed, he had been terminated from all three of his assigned treatment programs (MAT, FCCS, and Evergreen). Moreover, Smith's claim, that he had contacted two residential treatment facilities and was just waiting for a bed when he was arrested, is not credible. The record demonstrates that Smith relapsed on cocaine shortly after being placed on furlough but never engaged in substance abuse treatment, despite the efforts of his furlough officer for 15 months to get him to do that. Given his earlier history of reverting to "theft or burglaries in order to maintain his addiction" when out on furlough (Id., 1-2), it was not an abuse of discretion for DOC to conclude that a one-year interrupt was needed.

As noted earlier, 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." 28 V.S.A. § 723(b). Smith clearly failed in his substance abuse reentry program.

Moreover, 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...." Id. §724(d)(2)(A). Based upon the record in this case, it was reasonable for DOC to conclude that Smith's risk to reoffend could no longer be controlled in the community, despite DOC's efforts to help him succeed in the community.

This outcome is consistent with rulings this Court has made in other similar cases. *See, for example,* Sparks v. Dept. of Corrections, Docket No. 21-CV-2989, Decision on the

Merits (December 30, 2021) (reversing a two-year interrupt and imposing a one-year interrupt for absconding for the second time for three months, relapsing on drugs, and failing at treatment and supervision); Beaupre v. Dept. of Corrections, Docket No. 21-CV-2091, Decision on the Merits (December 6, 2021) (affirming a one-year interrupt for relapsing on drugs and alcohol, absconding from assigned housing, and non-compliance with substance abuse treatment program); *and* Aspen v. Dept. of Corrections, Docket No. 21-CV-2302, Decision on the Merits (November 29, 2021) (affirming a one-year interrupt for absconding for the second time for more than 7 weeks).

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

SO ORDERED this 27th day of January, 2022.

Robert A. Mello
Superior Judge