

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-049

AUGUST TERM, 2002

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 3,
	}	Grand Isle Circuit
v.	}	
	}	
Theodore Judkins	}	DOCKET NO. Theodore Judkins
	}	
	}	Trial Judge: Ben W. Joseph
	}	

In the above-entitled cause, the Clerk will enter:

The Grand Isle District Court revoked defendant's probation for his domestic assault conviction and sentenced him to serve the underlying sentence of nine to twelve months. Defendant claims the court failed to make adequate findings under 28 V.S.A. 303(b) to justify his incarceration even if the court's determination that defendant had violated the terms of his probation was correct. We affirm.

Taking the evidence in the light most favorable to the State, the prevailing party below, State v. Millard, 149 Vt. 384, 384 (1988), the record shows that defendant was convicted of misdemeanor domestic assault on May 17, 2001. He was placed on probation with numerous conditions, including a condition prohibiting him from engaging in threatening, violent or assaultive behavior. On November 29, 2001, defendant's probation officer filed a violation-of-probation complaint against defendant alleging that he had engaged in that prohibited conduct.

The incident that gave rise to the November 29, 2001 complaint involved an altercation between defendant and his wife in early October 2001. Wife testified that while the couple was seated on their bed in their bedroom, she told defendant that she was leaving him. On top of a bureau at the foot of the couple's bed was a knife that defendant kept looking at during the conversation. Defendant and his wife reached for the knife at the same time, but wife was able to get it first. When she did so, defendant grabbed and squeezed wife's arm until she dropped the knife. Defendant picked the knife up, went to the kitchen, and started sharpening it on a can opener. He went back to the bedroom, pulled wife down backwards by the hair so that she was on her back on the bed. Holding her down, he put the knife to her chest and told wife that he was going to kill her. After a few moments, he dropped the knife and went into the living room where he started to throw around some boxes wife had packed previously. Wife left the home and got into her car. Defendant went to the car and shouted at wife to stay, but she backed the car out and went to pick up her children at school, where she called the sheriff.

The court took evidence on the probation violation complaint in January 2002. After hearing from wife, defendant, defendant's probation officer, and a state trooper, the court issued its findings and conclusions on the record. The court stated: "Based on the testimony, I find the testimony from Ms. Judkins that there was threatening behavior to be credible, and for that reason I find there's a violation of probation and probation is revoked." The court invited defendant's counsel to explain what extenuating circumstances existed to justify keeping defendant on probation rather than impose the underlying sentence. The court heard counsel's arguments, but concluded,

The underlying offense here was a domestic assault conviction for throttling a child, I think one of Ms. Judkins' children who live in the home with Mr. Judkins. I'm finding again based on the testimony, the credible testimony of Ms. Judkins

and on the date in question, October 16th, he threatened her with a knife. This to me is a clear violation of the conditions of probation. I'm revoking probation and the underlying sentence is imposed forthwith.

That decision prompted defendant's appeal.

Defendant alleges that the court failed to justify the imposition of defendant's underlying sentence because it made no findings on the criteria set forth in 28 V.S.A. 303(b). The statute provides:

(b) The court shall not revoke probation and order the confinement of the probationer unless the court finds on the basis of the original offense and the intervening conduct of the probationer that:

- (1) Confinement is necessary to protect the community from further criminal activity by the probationer; or
- (2) The probationer is in need of correctional treatment which can most effectively be provided if he is confined; or
- (3) It would unduly depreciate the seriousness of the violation if probation were not revoked.

28 V.S.A. 303(b). We have held that as long as one of 303(b)'s three alternatives supports the court's conclusion to incarcerate the defendant, the "court need not specifically identify which of the alternatives . . . it has employed." Millard, 149 Vt. at 387. In this case, the court clearly explained the basis for its finding that defendant violated his probation - he threatened his wife with a knife. It also noted the reason for defendant's conviction, namely that he engaged in violent behavior with a family member. In light of defendant's domestic assault conviction and his subsequent threatening behavior towards his wife, the court's decision to impose the underlying sentence was supported by 303(b)(1), which allows confinement to protect the community from further criminal activity by the probationer. We recognize that it is better practice for the court to state explicitly on which of the three 303(b) alternatives the court relies to incarcerate a probationer, but we find the record in this case sufficient to conclude that the court did not err here.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

James L. Morse, Associate Justice

Marilyn S. Skoglund, Associate Justice