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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2002-399

JULY TERM, 2003

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| State of Vermont<br><br>v.<br><br>Dennis E. Laplant | } | APPEALED FROM:<br><br>District Court of Vermont, Unit No. 3, Franklin Circuit<br><br>DOCKET NO. 176-2-92 Frcr<br><br>Trial Judge: James R. Crucitti |

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

Defendant appeals the district court' s determination that he violated two probation conditions. We affirm.

In August 1992, pursuant to a plea agreement, defendant pled no contest to two counts of sexual assault. The agreement provided that defendant was to have " no unsupervised contact w/ women under 16 without permission of [his] probation officer." Under the agreement, defendant received a seven-to-ten-year sentence to serve on the first count, and a consecutive four-to-twelve-year suspended sentence on the second count. At the sentencing hearing, defendant was placed on probation with respect to the second count, with standard and special probation conditions imposed. Special condition 16 required that defendant " not initiate, establish, or maintain contact with any minor child nor attempt to do so, nor reside in the same residence with minor children without permission of [his] probation officer." Apparently, the court mistakenly assumed that this condition, which was recommended in the pre-sentence investigation report, was the same as the one in the plea agreement. Among the standard conditions was that defendant not engage in any threatening, violent, or assaultive behavior. In September 1998, defendant signed a probation order that included the same special condition 16 imposed on him at sentencing. The district court amended that condition in December 2001 to prohibit defendant from having contact with minor females rather than minor children. That amendment was later vacated, however, because defendant had failed to serve the State with his motion to modify. Hence, the previous language was reinstated, along with the additional condition that defendant not have any contact with minors unless allowed by his probation officer in writing.

In June 2002, a violation-of-probation (VOP) complaint was filed against defendant, alleging that he had initiated contact with minor children and had engaged in threatening behavior. The gist of the complaint was that defendant had had contact with the minor children of people he knew through work who were not fully aware of his background or his probation conditions, and that he had threatened those people after they complained about his contact with their children. In July 2002, defendant filed a motion to enforce, in which he requested that the district court either correct special condition 16 to restrict his contact only with minor females or allow him to withdraw his plea. At the ensuing hearing, defendant moved to dismiss the VOP complaint because special condition 16 was more restrictive on his liberty than the condition he accepted as part of the plea agreement. The district court determined that although the condition imposed by the sentencing court was more restrictive than the one the parties agreed to in the plea agreement, defendant had ratified the more restrictive condition by acquiescing to it over time and signing the probation order. Hence, the court first analyzed the VOP complaint against the more restrictive condition and concluded that defendant had violated that condition. The court further determined, however, that even if the condition in the plea agreement applied, defendant was still in violation of his probation because he had had unsupervised contact with minor females without obtaining permission from his probation officer. The court also determined that defendant violated the condition that he not engage in threatening behavior. Accordingly, the court revoked defendant' s probation, but granted his motion to

enforce, substituting the condition in the plea agreement for the more restrictive language of special condition 16.

On appeal, defendant argues that because he was sentenced to a more restrictive condition than the one set forth in the plea agreement, the district court was required to allow him to withdraw his plea. We disagree. As we noted in State v. Coleman, 160 Vt. 638, 640 (1993) (mem.), " [i]n Santobello v. New York, 404 U.S. 257 (1971), the United States Supreme Court ruled that where the prosecution violates a plea agreement, state courts have the discretion of deciding whether to enforce the plea agreement or to allow the defendant to withdraw his plea." Here, in his motion to enforce, defendant explicitly asked the district court either to correct the probation order to reflect the language in the plea agreement or to allow him to withdraw his plea. The court acted well within its discretion in choosing to do the former.

Defendant argues, however, that the court did not provide a " true" remedy because it amended the probation condition prospectively. According to defendant, the court's prospective amendment meant that he suffered the consequences of having the more restrictive condition unlawfully imposed upon him. We find this argument unpersuasive. Defendant was not prejudiced by the existence of the more restrictive condition because the court found that his conduct leading to the VOP complaint also violated the original condition in the plea agreement that he have no unsupervised contact with minor females without getting permission from his probation officer.

Defendant responds that the record does not support the district court' s finding that he had unsupervised contact with minor females. He also contends that the word " unsupervised" is too vague for him to have known what conduct was prohibited. Once again, these arguments are unpersuasive. There was ample evidence in the record to support the court' s findings that defendant had had contact with the female and male children of people he worked with, and that the manner of that contact raised the distinct possibility that he was " grooming" them for later abuse. We agree with the district court that defendant' s contact with the children in the presence of adults who were not fully aware of his background and the extent of his probation conditions could not possibly be construed as supervised contact. Further, we fail to see the logic in defendant' s argument that if the original probation condition had been imposed at sentencing, he might have been able to conform his conduct to that condition. The original condition as well as the more restrictive condition gave defendant sufficient notice of what conduct was prohibited. Cf. Manon v. State, 740 So. 2d 1253, 1254-55 (Fla. Dist. Ct. App. 1999) (rejecting defendant' s argument on appeal from revocation of probation that special probation condition forbidding unsupervised contact with minors was vague and overbroad). Defendant violated the plain mandate of both conditions by engaging in unsupervised contact with minor children, including minor females.

Defendant also argues that the district court erred in determining that he engaged in threatening behavior because the statements he made that formed the basis for the VOP complaint were constitutionally protected speech rather than " true" threats. We find no error. The district court found that when defendant learned that the wife and the girlfriend of two work acquaintances had complained to the probation department about his contact with their children, he stated to the fiancee of one of the women something to the effect that you can beat an old dog only so many times before it turns and bites you, and that if he went to jail because of their complaints, when he got out, they had better watch themselves. In the court' s view, defendant knew that these comments would be conveyed to the women, and that they were the type of comments that would cause reasonable persons to fear for their safety. See Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622-24 (8th Cir. 2002) (true threats of physical violence are not protected by First Amendment; in determining whether true threat exists, courts examine speech in light of entire factual context and consider several factors, including whether objectively reasonable person would view message as threat expressing intent to harm). We agree.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned