

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

**ENTRY ORDER**

VERMONT SUPREME COURT  
SUPREME COURT DOCKET NO. 2009-065 FILED IN CLERK'S OFFICE

OCTOBER TERM, 2009

**OCT 8 2009**

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
David Chicoine	}	DOCKET NO. 210-1-05 Cncr

Trial Judge: Linda Levitt

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

Defendant appeals from the trial court's order finding him in violation of probation. He argues that there was insufficient evidence to support the court's decision. We affirm.

Defendant was convicted of sexually assaulting his minor daughter and sentenced to five to fifteen years, all suspended. Under the terms of his probation order, defendant was to have "[n]o contact with minors under the age of 16, except for incidental contact in public places." Defendant signed an additional form indicating that he read and understood a more specific definition of "no contact with minors." This definition provided, among other things, that incidental contact meant the presence of minors "in your immediate area," and that if defendant was in a private area and a minor was present, defendant needed to leave the area immediately. On the day that defendant was released from prison (after serving time for other crimes), a community member contacted police to report that defendant had contact with a minor. Defendant's probation officer contacted defendant, who eventually admitted that he had gone to his brother's residence to retrieve some personal belongings and that his thirteen-year-old nephew was there at the time.

A probation violation complaint was filed, and following a hearing, the court found that defendant violated the terms of his probation. The court explained that defendant had been provided with a copy of the conditions of his probation on two separate occasions, and his probation officer went over the conditions with him each time. Defendant knew that he was not to have contact with minors under age sixteen except for incidental contact in public places. Defendant told his probation officer that he had been at his brother's house, where his nephew resides, but he had been reluctant to admit that his nephew was there. Defendant admitted this fact only after the probation officer informed him that she had received a report of contact. Defendant indicated that he was at the home for about an hour. He did not tell his probation officer that he left the premises as soon as he discovered that his nephew was home. Instead, defendant stated that his nephew was there and that the nephew's mother arrived afterward. While defendant and his brother testified at the hearing that defendant left several minutes after seeing the child, the trial court did not find defendant's testimony or that of his brother to be particularly credible. The court found that defendant was at his brother's home, defendant's nephew was there, the nephew was under sixteen, and this constituted contact in violation of the conditions of his probation. The court ultimately revised defendant's sentence to a one- to fifteen-year sentence and revoked his probation, finding that he posed a threat to the

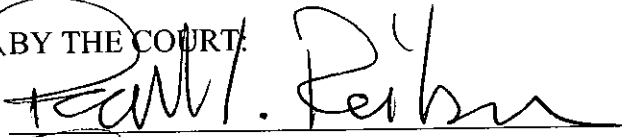
community and that his attitude demonstrated that he was not dedicated to following the letter of the law. This appeal followed.

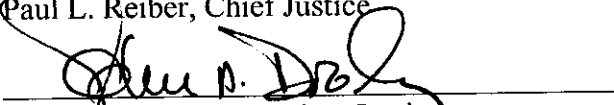
Defendant argues that there is insufficient evidence to support the court's decision. He maintains that his contact with his nephew was unintentional, short-lived, and inadvertent.

We find no error. The court's findings are supported by the record, and they support the court's conclusion that defendant violated probation. State v. Austin, 165 Vt. 389, 398 (1996) (in probation proceeding, we will uphold trial court's factual findings if they are "fairly and reasonably supported by any credible evidence," and we will uphold legal conclusions "if reasonably supported" by the trial court's findings).

The State must establish that a probation violation has occurred by a preponderance of the evidence. State v. Gleason, 154 Vt. 205, 216 (1990). It makes a prima facie case "by showing that there has been a violation of a probation condition whose requirements were known to the probationer." State v. Coyle, 2005 VT 58, ¶ 8, 178 Vt. 580 (mem.). In this case, the State established its prima facie case by showing that defendant knew the conditions of his probation, that he went to his brother's house where he knew a minor resided, and that he failed to leave immediately when he saw his nephew. The testimony of defendant's probation officer supports a finding that defendant did not leave the home immediately as required by the terms of his probation. Because the State established a prima facie case, "the probationer must show that his violation was not willful, but instead resulted from factors beyond his control and through no fault of his own. The intent element in no-contact cases safeguards a defendant's constitutional right to due process by ensuring that a defendant's probation is not violated because of accidental or inadvertent conduct." Id. (citations omitted). Defendant failed to persuade the court that this contact occurred "through no fault of his own." Id. Defendant intentionally went to his brother's house where he knew the minor lived. It was early on a Sunday morning. While defendant alleged that his brother called to see if anyone was home, defendant did not ask his brother to check the house before they entered to make sure the minor was not present. He did not leave immediately upon seeing the child. Under these circumstances, the court reasonably concluded that defendant was responsible for the contact at issue here. We find no basis to disturb the court's decision.

Affirmed.

BY THE COURT:  
  
Paul L. Reiber, Chief Justice

  
John A. Dooley, Associate Justice

  
Denise R. Johnson, Associate Justice