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

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

JAN 15 2010

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2009-214

JANUARY TERM, 2010

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| State of Vermont | } | APPEALED FROM: |
| | } | |
| | } | |
| v. | } | District Court of Vermont, Unit No. 2, Bennington Circuit |
| | } | |
| Kyle Winnie | } | DOCKET NOS. 91-1-08, 328-3-08, 585-5-08 & 674-5-08 Bncr |
| | | Trial Judge: John P. Wesley |

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

Defendant appeals the district court's order revoking his probation and imposing the remainder of his original sentence. We affirm.

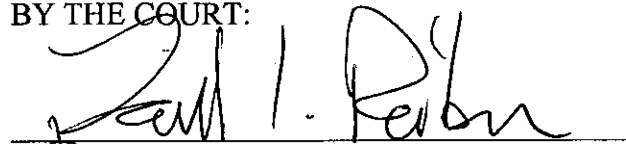
In June 2008, defendant pled guilty to a variety of charges, including simple assault. The district court imposed a sentence of nine-to-twenty-four months, most of which was suspended, and placed defendant on probation with conditions. In September 2008, defendant violated his probation by consuming alcohol and, as a result, was incarcerated for about thirty days. In February 2009, defendant violated his probation by using marijuana, and the following month was sentenced to serve thirteen days in prison. In April 2009, defendant was charged with violating probation by using cocaine and was held without bail. Two months later, he admitted to the violation, and a sentencing hearing was held. At the close of the hearing, the district court revoked probation and imposed the remainder of the underlying sentence. Defendant appeals, arguing that the court withheld its discretion by suggesting to him at the hearing that its decision was preordained.

The decision on whether to revoke probation is a discretionary one "not subject to revision here unless it clearly and affirmatively appears that such discretion has been abused or withheld." State v. Priest, 170 Vt. 576, 576 (1999) (mem.). At the probation-revocation hearing in this case, the court reminded defendant that it had imposed a lenient sentence for the previous marijuana violation, stating that "you had to understand at that point, that there wasn't any other place I could go if you came back." The court explained that this was one of those instances where imposing the remaining sentence was the sensible decision, given the history of the case. The court further stated to defendant that "you knew . . . if you made a miscalculation and thought, 'Well, you know, they'll bargain it down, that's what always happens,' it was a miscalculation." According to defendant, these comments indicate that the court imposed the underlying sentence because it was required, not because it fit within the criteria contained in 28 V.S.A. § 303(b). We disagree. The court's comments suggest that, given defendant's repeated violations, the next logical step was to impose the remainder of the underlying sentence. The comments did not indicate that the decision was preordained, but rather that defendant had

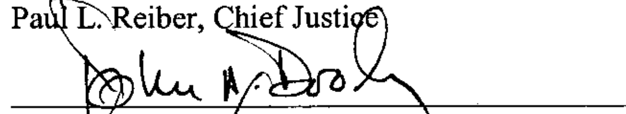
miscalculated what sentence might be imposed upon a further violation, thereby suggesting that defendant had not appreciated the seriousness of the violation. See 28 V.S.A. § 303(b)(3) (stating that a court may consider whether not revoking probation would "unduly depreciate the seriousness of the violation"); see also State v. Millard, 149 Vt. 384, 387 (1988) ("A court need not specifically identify which of the alternatives set forth in § 303(b) it has employed so long as at least one readily supports the court's conclusion.").

Affirmed.

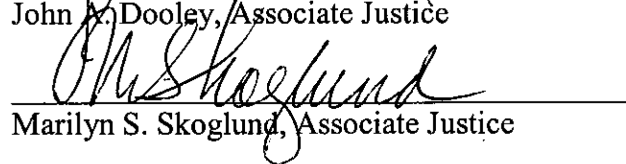
BY THE COURT:



Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice