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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-156

DECEMBER TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
	}	
Allen W. Rheaume	}	DOCKET NO. 245-3-04 Frcr
		Trial Judge: Ben W. Joseph
		Michael S. Kupersmith

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

Defendant appeals the revocation of probation and imposition of his underlying sentence. We affirm.

In June 2004, defendant pled guilty to charges of lewd and lascivious conduct and being a habitual offender. Pursuant to the plea agreement, he was sentenced to fifty-five days to life imprisonment, all suspended except for fifty-five days to five years (later amended to fifty-five days to two years). Defendant admitted probation violations in August 2006 and May 2007, after which he served portions of his sentence before being released again on probation. In August 2007, two months after his most recent release from prison, defendant's probation officer filed another information citing probation violations. Following a hearing that was delayed to obtain a competency report, the trial court found defendant guilty of violating two probation conditions—that he not use non-prescription drugs (in this case, marijuana) and that he participate in counseling as directed by his probation officer. Concluding that probation was not working for defendant, the court imposed the underlying sentence with the understanding that defendant would be considered for furlough and conditional release. On appeal to this Court, defendant argues, through counsel, that the trial court abused its discretion by revoking his sentence and imposing the underlying sentence. Defendant has also filed a supplemental pro se brief arguing that his probation officer committed perjury at the probation revocation hearing.

Defendant does not contend that the prosecution failed to establish a violation of probation conditions. When a probation violation is found, "the trial court has the discretion to revoke probation and require the original sentence to be served." State v. Peck, 149 Vt. 617, 621 (1988). Accordingly, "[a]bsent a showing that the trial court abused its discretion, the enforcement of the original sentence after a finding of violation of probation is without error." Id. In making a revocation decision, the trial court must consider how best to successfully treat the offender while protecting society. Id. (citing 28 V.S.A. § 303(b), which provides that court shall not revoke probation unless it finds that: (1) confinement is necessary "to protect the community from further criminal activity" by probationer; or (2) probationer is in need of treatment that can best be provided during confinement; or (3) revocation is required so as not to unduly depreciate the seriousness of the violations). The trial court need not specifically recite

the statutory factors upon which it relies, as long as one or more of those factors support its revocation decision. State v. Millard, 149 Vt. 384, 387 (1984).

According to defendant, given the testimony of his probation officer that an earlier positive urinalysis would not have been a concern because of his ongoing treatment and that missed appointments were not a concern because she intended to find a new counselor for him and should have given him more formal notice of the prior appointments, it makes no sense to revoke his probation since his marijuana problem could be addressed in treatment following a more formal directive for him to participate in treatment with a new counselor. He also argues that treatment would be unavailable in prison and that no evidence indicated he posed a threat to society. We find these arguments unavailing. As noted, defendant has not challenged the court's conclusion that there were violations, and no evidence suggests that defendant missed his appointments because the probation officer provided him with informal notice of those appointments. Further, the evidence indicates that the probation officer was seeking a new counselor for defendant, not because she was unconcerned about his prior missed appointments, but because the original counselor refused to work with defendant anymore due to his failure to participate. Moreover, while no substance abuse counseling would be available to defendant while he was incarcerated, the trial court explicitly stated that it was imposing the underlying sentence with the expectation that defendant would be immediately eligible for furlough into the community, where substance abuse treatment under stricter conditions would be available. Finally, the evidence demonstrated that defendant would continue his "criminal activity" unless probation was revoked, and that this criminal activity affected his ability to participate in sex offender programming to address the underlying offense. In short, the evidence supports the trial court's conclusion that probation had failed and was no longer a viable option.

As for defendant's arguments in his supplemental brief, those claims attacking the credibility of the probation officer were not raised at trial and are within the province of the trial court. See State v. Dixon, 2008 VT 112, ¶ 34, 185 Vt. 92 (noting that defendant's contentions amount to challenges to factfinder's assessment of witness's credibility and weight to be given to evidence, both within province of trial court). We find no basis for reversal with respect to these claims.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice