

STATE OF VERMONT

SUPERIOR COURT
Franklin Unit

CRIMINAL DIVISION
Docket No. 562-5-09 Frcr

State of Vermont

v.

Bernard E. Robtoy,
Defendant

DECISION ON MOTION

Motion to Dismiss VOP under Rule 48(b) and Motion to Review Hold without Bail
Introduction

The Defendant Bernard Robtoy seeks dismissal of a pending violation of probation (hereafter VOP) that he resolved, but got reversed on a post-conviction relief (hereafter PCR) filing in September of 2019. *See, In re Bernard Robtoy*, 386-10-18 Frcv. In these matters, and at all relevant times, he has been/ is represented by Attorney Annie Manhardt of the Vermont Prisoner's Rights office. The State is represented by Chief Franklin County Deputy States Attorney Diane Wheeler.

On March 18th, 2020 Mr. Robtoy filed a Motion to dismiss his pending violation of probation under Rule 48(b) of the Vermont Rules of Criminal Procedure¹. In that Motion he also sought, in the alternative, a bail review as he is currently being held without bail, awaiting a VOP merits hearing, under 28 V.S.A. section 301(4).

Hearing was held on 3/20/20 on Mr. Robtoy's Motion under the emergency A.O. 49. Mr. Robtoy appeared in the courtroom on a video conference on screen from the Northwest State Correctional Facility. He was able to hear the proceeding and was heard during the hearing. His attorney, Ms. Manhardt, appeared personally in the courtroom and the State and its witness appeared by phone. There were no objections made to this manner and mode of proceeding. During the hearing Mr. Robtoy presented only argument while the State presented the sworn testimony of Franklin Probation Officer Chris Billado, and also argued against the Motion.

In response to the Court's inquiry, the State indicated it was ready to proceed on a trial of the merits on the VOP. Through Ms. Manhardt, Mr. Robtoy indicated that he was NOT ready to proceed to VOP merits due to unsatisfied discovery requests for Mr. Robtoy's probation files going back to 2009, which requests were made directly to the Department of Corrections (hereafter DOC) two weeks before the instant hearing.

¹ Unlike other, similar, requests for dismissal of criminal cases or seeking release from confinement based on alleged danger from the Covid-19 pandemic, Mr. Robtoy does not invoke the 8th Amendment in his pleadings. *See, State v. Lowery, Mayberry and Fournier*, 697-12-18 Cacr, 76-12-19 Excr, and 59-9-19 Excr.

Findings of Fact

Mr. Robtoy is on probation for convictions on three counts of sexual assault on a vulnerable person under 13 V.S.A. §1379(b)(2). Each count carried a potential sentence of up to 20 years in prison and/or a fine of up to \$10,000 or both. After pleading guilty pursuant to a plea agreement, on 2/24/10 he was sentenced to three consecutive suspended sentences of 10-20 years on the first count, and two 0-20 year suspended sentences on the second and third. This created an aggregate sentence of 10-60 years all suspended. Four other counts were dismissed as part of the plea agreement.

Among many other conditions of probation, Mr. Robtoy agreed to and had conditions restricting his contact with females. He was ordered as follows: “ No. 33: You shall not initiate or maintain contact with vulnerable female persons or attempt to do so.”, and, No. 36: You shall not initiate or maintain contact with females under the age of 16 years or attempt to do so unless approved in advance by your probation officer...” These conditions seem reasonably related to the underlying factual bases of his convictions and designed to facilitate and promote his rehabilitation.

On 4/16/15 Mr. Robtoy was charged with violating those conditions of his probation. On 4/28/15, at his initial appearance, he resolved the VOP's by admitting, and negotiated continued probation with additional conditions not relevant to the instant case. On 5/16/16 he was again charged with a VOP and again negotiated for additional conditions-this time in return for a dismissal of the VOP. A third VOP was arraigned on 6/7/17 and VOP merits held on 7/5/17.

On 7/5/17 Mr. Robtoy agreed to admit the violations. The allegations were that he was seen at the June Dairy Days festival walking, hand in hand, with a thirteen year old girl, and was also in the company of a mentally handicapped female. The State alleged it had pictures of his contact with these females, and its witnesses were both DOC employees who saw him with the girls at the fair. Faced with this evidence, and in exchange for his admission, Mr. Robtoy was re-sentenced by the Court to the same overall sentence structure, all suspended except 18 months to serve. It is this VOP that is currently pending after the remand on his successful PCR

This sentence was overturned by the Civil Division on 12/16/19 in the aforementioned PCR proceeding. Mr. Robtoy was remanded to the correctional facility and the case returned to the Criminal Division a day or two later. Ms. Manhardt filed her notice of appearance in the Criminal Division case on 12/20/19 and the Clerk promptly set his case for a status conference on 1/2/20. Before the matter could be set for a contested merits hearing, the Covid-19 pandemic soon intruded, and Ms. Manhardt filed the Motion to Dismiss on 3/18/20.

These Motions were scheduled and heard as emergencies under A.O. 49 since part of the Motion was a bail review request. While Mr. Robtoy did not present any witnesses or offer any exhibits during the hearing on his Motions held on 3/20/20, he argues that the DOC is not prepared to protect inmates and detentioners from the Covid-19 virus. Relying on the affidavit

of Dr. Jaimie Meyer, an assistant professor of Medicine at Yale², he argues that DOC (a) is not doing enough to protect inmates from the virus, and (b) jails and prisons are inherently unsafe during viral epidemics because of the nature of close confinement. Dr. Meyer did not testify at the hearing and it is unclear if she has ever been inside a Vermont correctional facility. Nevertheless, she concludes that the DOC's screening protocols as she understood them to be, before 3/12/20 the latest information she had when she authored her affidavit itself dated 3/15/20, were insufficient to prevent the entry of Covid-19 into the facility. Probation Officer Billado testified on 3/20/20, however that staff and newly admitted inmates or detentioners were being screened using the CDC recommended questions, their temperatures taken, and any staff showing symptoms being sent home. Mr. Billado testified, and the Court so-finds, that any inmate or detentioner showing symptoms of Covid-19 would be quickly tested as DOC apparently has test kits reserved for that purpose. In addition, DOC has masks, gowns, gloves and hand sanitizer in the facility, and has increased its cleaning of the interior. Mr. Robtoy is being held in a cell with another inmate.

Mr. Robtoy now claims to have a heart condition. He is 62 years old and has diabetes. DOC was aware of his diabetes and a back problem, but was not aware of his claimed heart condition. Mr. Robtoy did not present any medical documentation of a heart condition during the hearing on 3/20/20. Simply having diabetes and being over age 60, though, are factors exposing Mr. Robtoy to increased risk if he contracts Covid-19. Mr. Robtoy represented through Counsel that he has a place to stay if released. The location of this place and the name of the owners were not disclosed during the hearing, but Mr. Billado testified that it may be the same camper-trailer that Mr. Robtoy offered earlier in the proceedings as a possible residence. This trailer was apparently inspected by DOC before and lacks plumbing, running water, insulation or heat. Mr. Billado testified, and the Court so-finds, that DOC refused to approve it at an earlier date as it was deemed unsuitable, in part due to Mr. Robtoy's health conditions.

Mr. Billado testified, and the Court so-finds, that no inmate or staff person at the Northwest State Correctional Facility has tested positive for Covid-19.

Mr. Robtoy asks the Court to dismiss the VOP on Rule 48(b) grounds. In the alternative, he asks to be released to the aforementioned camper pending VOP merits, pointing out that he has been continuously incarcerated for almost the last three years.

Analysis and Opinion

Rule 48(b) request Mr. Robtoy argues that the Vermont DOC has not taken adequate steps to protect him should he remain in jail. He posits, through the affidavit of Dr. Meyer³, that DOC's preparation for dealing with a Covid-19 outbreak within the facility are dangerously insufficient. Yet, the Court concludes that he has not met his burden to show that DOC's preparations are so inadequate and so faulty that they outweigh the State's interest in seeing his VOP litigated on the merits and to a final decision.

² Prepared at the request of Vermont Prisoner's Rights.

³ Dr. Meyer's affidavit was written based on a review of emails between March 10th and 12th and provided to her by Counsel for Mr. Robtoy. One, an email from DOC Commissioner Baker to the DOC in general, and the others e-mail exchanges between an attorney for Prisoner's Rights and DOC's Direction of Nursing, Ms. Fox.

Given the speed of developments involving this pandemic both in and outside of Vermont, Dr. Meyer's affidavit may already be outdated and therefore inaccurate. From only a few days ago when Vermont had two cases, today as of 3/23/20, there are now 52 confirmed cases. Mr. Billado testified to the enhanced steps DOC is taking to screen and therefore protect inmates and staff within the correctional facilities. Screening is in place, tests are staged for DOC's exclusive use, and while Mr. Robtoy is within a vulnerable group (over 60 and with health problems), it cannot be said- and was not proven- that he is less safe inside the facility than he would be outside in the community. Absent more compelling and timely evidence, the Court cannot find that DOC's preparations are insufficient to protect Mr. Robtoy.

The leading Vermont case on Rule 48(b)(2) remains *State v. Sauve*, 164 Vt. 139 (1995). *Sauve* sets forth a series of factors the Court should consider before using its 48(b) power. These include the seriousness of the offense, the harm resulting therefrom, the evidence of guilt and its availability, the likelihood of new evidence at trial, the Defendant's history, the length of any incarceration for the offense, the purpose and effect of a sentence, the impact of a dismissal on public confidence in the justice system, misconduct of law enforcement, prejudice to the defendant due to the passage of time, the attitude of the complainant, and any other relevant fact. *Sauve* at 140-41. The Court in *Sauve* cautioned that such dismissals should issue only under compelling circumstances. This is because of the respect that each branch should afford the other, and so under a theory of separation of powers, a 48(b) dismissal should only be granted in "extraordinary" circumstances. *State v. Gillard*, 2013 VT 108, ¶ 27, 195 Vt. 259, 269-70.

It is indeed only the extraordinary case that justifies the use of the Court's 48(b) power. This case, though, does not come within that classification. The underlying offenses involved multiple counts for sexually assaulting a vulnerable person who was incapable of consent. Mr. Robtoy plead guilty to three counts and four more were dismissed. These charges are serious felonies carrying up to 20 years in prison each; indeed, that is that maximum sentence imposed upon him for the three convictions on counts 1, 2 and 3. Thus the Court finds that the convictions were for very serious offenses. The VOP adjudication, coming after a plea agreement, had a very serious basis, that is, Mr. Robtoy's deliberate contact with an underage female and a vulnerable female. The State remains ready to try the VOP on this basis, and informed the Court that their witnesses were available on short notice. The evidence on the VOP appears substantial, perhaps great, in that DOC alleges that they have contemporaneous photographs of Mr. Robtoy engaging in the violation(s) and their own employees are available eyewitnesses.

Mr. Robtoy's Counsel, who has been involved in his case for the last three years, advised the Court that she and Mr. Robtoy are not yet ready for a VOP merits hearing. She indicated that she needs additional discovery, but she did not represent that new or undiscovered evidence bearing on the VOP was likely. Rather she claimed that she needed to view Mr. Robtoy's probation file dating back to 2009. Thus the Court concludes that it is unlikely that further discovery will result in new evidence bearing on the VOP allegations.

Nor would dismissal under Rule 48(b) promote public confidence in the justice system. To the contrary, it is more likely to undermine such confidence as the spectre of a convicted sex

offender having sustained public contact with both a mentally handicapped female and an underaged girl, and then having the Court dismiss the case without a merits hearing over the objection of the public prosecutor, would be difficult to either explain or justify. In any event, merits resolutions are preferred over technical dismissals. Nor has the passage of time, primarily attributable to Mr. Robtoy's PCR filing, reduced the availability of witnesses for either Party. There is no law enforcement misconduct alleged to be connected to the VOP, and so dismissal would not promote the goal of reforming such misconduct. Finally, under the *Sauve* prong "any other relevant fact" would come the blossoming Covid-19 pandemic⁴. As noted above, the Movant did not present persuasive or compelling evidence that Mr. Robtoy's desire to be released and his risk of infection within the DOC facility outweighs his, the public's, and the State's right to a speedy hearing on the merits of the alleged VOP.

In short, this is not a case in which the extraordinary remedy of a Court dismissal over the objections of the Executive Branch prosecutor would be fair or appropriate. The Motion to Dismiss is DENIED.

Review of the hold without bail order Presently Mr. Robtoy is held without bail under 28 V.S.A. section 301(4). This section creates a presumption against release when the underlying offense is a felony and is a listed offense under 13 V.S.A. §5301(7)⁵. Here Mr. Robtoy's underlying convictions for sexual assault on a vulnerable person, not capable of consent, are listed felonies. See, §5301(7)(BB). The State requests that he continue to be held pending VOP merits while Mr. Robtoy suggests a -possible- less restrictive placement.

Mr. Robtoy asks that he be released to a camper trailer on the land of a friend. He was not prepared to provide the Court with the name of the friend, the exact location of the camper, nor whether the friend would agree to act as a supervisor or custodian for him upon release. DOC believes, and Ms. Manhardt did not contradict the testimony of Mr. Billado on this point, that the camper-trailer in question is an old camper previously proposed by Mr. Robtoy at an earlier stage of his cases. Mr. Billado testified that if it is the same one, it is not presently suitable for human habitation, particularly in the colder weather, and would be unsafe for Mr. Robtoy given his diabetes.

Mr. Robtoy is presumed held without bail pending a VOP merits hearing. Given the nature of his underlying offenses, releasing him to an unknown location owned by unidentified persons seems inappropriate and could potentially jeopardize public safety. While his counsel characterizes his alleged violations as technical, the State reasonably views them as striking at the heart of his supervision as it relates to his rehabilitation and safety on community release. In this contention the Court agrees with the State. Mr. Robtoy's underlying convictions were for sexual assault on a vulnerable person incapable of consent. For him to be in the company of an under-aged female – who cannot consent- and a mentally handicapped female, who also cannot consent, is precisely the scenario that his probation was designed to help him avoid. It cannot be said that this conduct is harmless or merely a technical fault.

⁴ Mr. Robtoy's presentation failed to prove that he would be more at risk within the facility than outside in the community.

⁵ This is not, therefore, a situation analogous to *State v. Kane*, 2016 VT 121, 203 Vt 652 because Mr. Robtoy's offenses are in fact violent listed offenses.

Counsel for Mr. Robtoy points out, correctly, that he has been held for almost three years awaiting a VOP merits. However, even assuming, arguendo, the lawfulness of the 18 month minimum, the time he has spent is consumed largely by his own post conviction relief filing and proceedings. These culminated in a decision in his favor on 12/16/19, the entry of an appearance in the renewed VOP in criminal Division by Ms. Manhardt on 12/20/19, and a status conference on 1/2/20.

Given the passage of time, though, it seems only fair to set Mr. Robtoy's VOP merits with reasonable promptitude. A decision favorable to him on the VOP could result in his immediate release back into the community on probation. Accordingly, the Court rules that his VOP merits comes within the ambit of those sorts of hearings which, under the spirit of A.O. 49, should be treated as emergent and heard promptly. While Counsel argued that she was not ready and needed to see his entire DOC file since 2009, it is unclear whether or why that isn't already in her possession from the PCR that she or her office litigated (successfully) for him since October of 2018.

The request for release on conditions is DENIED. The Defendant shall continue to be held without bail. However, the Clerk shall please set this matter for a VOP merits, two hours allowed, forthwith. If the current emergency has not been resolved, Counsel and witnesses may apply to appear by telephone given the Covid-19 emergency Order, A.O. 49. A Party who objects to a particular witness appearing by phone shall file that objection, in writing, at least three days before the scheduled VOP merits hearing.

So Ordered at St. Albans, Franklin County, Vermont and Electronically signed on March 23, 2020 at 02:21 PM pursuant to V.R.E.F. 7(d).


Howard E. VanBenthuyzen
Superior Court Judge

Notifications: Parties