

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARCUS JAMES,	§	
	§	No. 154, 2007
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0509027229
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: September 5, 2007

Decided: October 18, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

ORDER

This 18th day of October 2007, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Marcus James (“James”), the defendant-below appellant, appeals from the Superior Court’s revocation of his probation, and imposition of a sentence and additional probation conditions. We find no merit to his claim and, therefore, affirm.

2. On January 12, 2006, James pled guilty in Superior Court to three charges: failure to re-register as a sex offender (felony), criminal impersonation (misdemeanor) and possession of marijuana (misdemeanor). James was sentenced to a total of three years and six months at Level V incarceration, suspended after

time served for eighteen months at Level III probation. As part of a previous sentence, James was also required to comply with various sex offender conditions, including participation in sex offender group counseling and having no contact with anyone under the age of eighteen except his six biological children.

3. Thereafter, James twice violated the terms of his probation. On June 8, 2006, after a Safe Streets hearing, James was found in violation of his probation but was nevertheless continued on probation. In December 2006, James was arrested on charges of driving without a license and operating a vehicle with after-manufacture window tinting. At the time of his arrest, James admitted to having had consensual relations with an adult woman. The woman, who was “sort of a relative,” was not able to remember if anything had happened, and James was not charged with anything relating to this event. James pled guilty to driving without a license, and was sentenced by the Court of Common Pleas. A *nolle prosequi* was entered for operating a vehicle with after-manufacture window tinting.

4. Following his conviction, a violation of probation (“VOP”) hearing was held in the Superior Court on February 28, 2007. At the hearing, defense counsel agreed that James had admitted missing one of his appointments and that he had pled guilty to the driving without a license charge. The probation officer voiced his concern that James had been involved in a sexual relationship while attending

sex offender treatment.¹ Defense counsel argued that it was not illegal for James to maintain a relationship with an adult female, because the probation conditions required only that James have no contact with anyone under the age of eighteen except his six biological children. Defense counsel pointed out that there had been no charges with respect to the alleged sexual misconduct and urged the Court to impose a lighter sentence than that being recommended by the probation officer. The trial court responded that “[t]he Court [is] not troubled by [the alleged sexual misconduct]” because James has “a felony record that goes back almost ten years.”

5. Ultimately, the Superior Court revoked James’ probation and sentenced him to two years at Level V incarceration, suspended after time served for two years at Level V work release, suspended in turn after nine months for the balance at Level III probation. Adding to the previous probation conditions, the trial court also required that James: (1) not be present in a vehicle with after-market window tinting; (2) not possess a motor vehicle ignition key or be in the operator’s seat of a

¹ At trial, the probation officer stated that: “We’re trying to get some boundaries set up, as his past behavior has resulted in him having multiple partners. He’s fathered at least six children with four different women. And this latest behavior displays basically we’re not making much progress in that treatment.”

motor vehicle unless properly licensed and insured; and (3) not be alone, after dark, with a female other than his grandmother.² This appeal followed.

6. James claims that the Superior Court's revocation of his probation, and the imposition of a sentence and additional probation conditions, were constitutionally impermissible.

7. This Court reviews a revocation of probation for abuse of discretion.³ On appeal, James contends that the Superior Court relied on impermissible factors both in determining whether he had violated the terms of his probation and in crafting the sentencing order. Specifically, James contends that the Superior Court should not have relied on the alleged sexual misconduct because his relationship with an adult female was constitutionally protected and did not violate the conditions of his probation, which only prevented James from contacting persons under eighteen years, not adults.

8. In a VOP hearing the rules of evidence do not apply.⁴ Moreover, "[i]n VOP proceedings, the probationer is not afforded the full panoply of rights

² With respect to the third condition, the Superior Court observed that it was "not going to prevent all the problems that Mr. James could get himself into, but it might cut down on things a little bit." The trial judge also noted that "the Court has never run into someone like Mr. James before. Close, but he actually has taken it to a level that the Court has not seen before. And the Court has imposed conditions in the past that have interfered with a sex offender's ability to socialize.... I think he's done enough socializing for one man."

³ *Collins v. State*, 897 A.2d 159, 160 (Del. 2006).

⁴ See D.R.E. 1101(b)(3).

afforded an accused in a criminal trial. Among other things, the State need only prove by a preponderance of the evidence that a VOP occurred.”⁵ The evidence need only be “such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.”⁶ In this case, James admitted to missing one of his appointments and to pleading guilty of driving without a license while on probation. Based on James’ admission that he violated his probation, the trial judge’s VOP determination was not against the preponderance of the evidence, or an abuse of discretion.⁷

9. At the VOP hearing, defense counsel expressed his concern about the sexual misconduct allegation at issue. The trial judge responded that he was “not troubled by that,” and referred to James’ “felony record that goes back almost ten years.” In *Mayes v. State*, we held that if “[t]he [trial] court expressly stated that it would not take such [incriminating] allegations into consideration ... we must assume that it did not.”⁸ James speculates that his “social and sexual relationship with adult females” is the factor upon which the Superior Court relied in finding that he had violated the terms of probation. But, nowhere does the trial record

⁵ *Jackson v. State*, 2006 WL 585560, at *2 (Del. Supr.).

⁶ *Brown v. State*, 249 A.2d 269, 272 (Del. 1968).

⁷ *See Sewell v. State*, 2002 WL 651271, at *2 (Del. Supr.).

⁸ 604 A.2d 839, 843 (Del. 1992).

reveal whether, if at all, the Superior Court took into account James' relationship with an adult female as a determining factor in its probation decision. Given the Superior Court's explicit statements, reinforced by James' admission of a probation violation, there is no basis to conclude that the Superior Court considered James' relationship with an adult female significant in reaching its VOP decision.

10. Alternatively, James contends that imposing a condition of probation that prohibits him from being alone with a female after dark (other than his grandmother), was not related to or furthered the purpose of probation. Therefore, James urges, that condition violated his constitutional right to socialize and procreate. We disagree. A court may impose as a condition of any sentence that the offender "refrain from engaging in a specified act or acts, as deemed necessary by the court to ensure the public peace, the safety of the victim or the public, the rehabilitation of the offender, the satisfaction of the offender's restitution obligation to the victim or the offender's financial obligations to the State, or for any other purpose consistent with the interests of justice."⁹ As the United States Court of Appeals for the Ninth Circuit has held, "[p]robation conditions may seek to prevent reversion into a former crime-inducing lifestyle by barring contact with

⁹ 11 *Del. C.* § 4204 (m).

old haunts and associates, even though the [barred] activities may be legal.”¹⁰ Given James’ history of sexual relationships with underage girls, his nighttime arrest at a strip club, and his prior conviction for being in a park after dark, that condition was reasonably designed to protect potential future victims. Thus, the Superior Court’s imposition of a special condition prohibiting James from being alone with a female (other than his grandmother) after dark, was reasonably related to James’ history and characteristics and to the need to protect the public from further crimes.

11. A trial judge “has broad discretion in setting probation conditions, including restricting fundamental rights.”¹¹ James was not precluded from fathering children or from being alone with adult females during daylight hours. The probation condition imposed by the Superior Court may have constricted the exercise of James’ constitutional right to procreate, but it did not constitute a denial of that right.¹² James’ fundamental right remains unfettered, and the court-appointed condition does not prevent James from associating or socializing with adult females, in the company of another.

¹⁰ *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991) (quoting *Malone v. United States*, 502 F.2d 554, 556-57 (9th Cir. 1974)).

¹¹ *Id.*

¹² *See Krebs v. Schwarz*, 568 N.W.2d 26 (Wis. App. 1997).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice