Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-392

JUNE TERM, 2018

State of Vermont v. Louis M. Cacopardo*	}	APPEALED FROM:
	}	
	}	Superior Court, Caledonia Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 28-1-13 Cacr
		Trial Judge: Kathleen Manley

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

Defendant admitted to violating probation and his probation was revoked. He argues on appeal that his probation conditions were not validly imposed and that the trial court failed to establish a factual basis for his admission. We affirm.

Defendant pled guilty to lewd and lascivious conduct with a child in August 2013 pursuant to a plea agreement, and he was sentenced to 4-15 years to serve. Defendant filed a petition for post-conviction relief (PCR) and in February 2015, defendant's attorney and the State's attorney filed a stipulation and agreement concerning the PCR with the court. The agreement stated that the parties, through counsel, agreed that defendant's sentence would be amended to 4-15 years, all suspended but 4 years to serve, and that defendant's PCR would be dismissed with prejudice and he would be barred from any further challenge to his conviction and sentence. The parties also agreed that "[i]n addition to all standard conditions of probation, [defendant's] probation conditions shall include sex offender conditions of probation," and defendant "shall also be required to complete facility sex offender treatment to the satisfaction of his probation officer prior to his release." The agreement provided that "[f]ailure to successfully complete said treatment shall be grounds for a violation of probation." The attorneys for both parties signed the agreement; defendant did not. The court approved the agreement and issued an amended mittimus and probation order. Defendant signed the probation order in March 2016. He indicated, with his signature, that he understood his conditions of probation and he agreed to follow them.

In October 2016, defendant's probation officer filed a probation violation complaint alleging that defendant violated probation by failing to complete facility sex offender treatment to the satisfaction of his probation officer prior to his release date. The probation officer explained in his affidavit that he had received notice from the Northwest State Correctional Facility that defendant was suspended from the Vermont Treatment Program for Sexual Abusers (VTPSA) for forty-five days. As a result, defendant could not complete sex offender treatment by January 9, 2017, his release date. The probation officer included a copy of VTPSA's October 2016 "Notice of Program Suspension," which detailed the reasons underlying defendant's suspension.

At a February 2017 hearing, defendant admitted to violating probation by failing to complete sex offender treatment as required. He acknowledged that he had been fully apprised of his probation conditions in advance. The court found defendant's admission to be knowing and voluntary. It subsequently revoked defendant's probation. This appeal followed.

Defendant first challenges the court's probation order, issued in February 2015, asserting that his probation conditions were not validly imposed. According to defendant, he was deprived of his right to be present at his sentencing because the court simply imposed a sentence—including probation conditions—without informing him of the conditions in person. Defendant cites Vermont Rule of Criminal Procedure 43(a), which provides that "[t]he defendant shall be present at the arraignment, at any subsequent time at which a plea is offered, at every stage of the trial . . . and at the imposition of sentence, except as otherwise provided by this rule." Defendant asserts that he was not obligated to object to his probation conditions below because he was not put on notice of the substance of the conditions either before he was sentenced or at a sentencing hearing.

We considered a similar argument in State v. Lumumba, 2018 VT 40, in the context of a direct appeal. The defendant there argued that the trial court violated his right to be present during sentencing by imposing standard probation conditions in a written probation order without first announcing them orally at the sentencing hearing. We reviewed the defendant's claim for plain error and found none. See id. ¶¶ 10-12 (requiring preservation, describing various methods in which claim could have been preserved, and concluding that oral pronouncement of probation conditions did not provide defendant "any greater opportunity" to preserve his arguments). As we explained, the requirement that a defendant be present set forth in V.R.Cr.P. 43 "is linked to a defendant's constitutional protections to confront witnesses and to notice." Lumumba, 2018 VT 40, ¶ 17. We concluded that "[f]ailing to announce the conditions orally did not implicate either of these rights" as "[t]here was no witness or evidence to confront and defendant was provided notice of the conditions through the written order." Id. Thus, we found no violation of the defendant's constitutional rights and no plain error. Id.

We reach the same conclusion here. The court's sentence in this case was based on the parties' agreement. There were no witnesses or evidence to confront at a sentencing hearing. Defendant was provided notice of the conditions through the written order. He acknowledged in writing that he understood these conditions and that he had to abide by them. As in Lumumba, there was no constitutional violation and no plain error.

Defendant next argues that his admission to violating probation was not voluntary and knowing. He asserts that there was no factual basis for his admission because the court did not inquire into the facts underlying his suspension from the sex offender treatment program to determine if he had truly violated the condition.

We reject this argument. The court is not required to find a factual basis to support a defendant's admission to a violation of probation. Defendant's reliance on State v. Cavett, 2015 VT 91, 199 Vt. 546, is misplaced as Cavett did not involve an admission by the defendant that he had violated probation. We recently explained that a probationer's waiver of his or her right "to generally contest charges of violation of probation must come from a probationer and must be knowing, voluntary, and intelligent." In re Jankowski, 2016 VT 112, ¶ 18, 203 Vt. 418. We relied on Hersch v. State, 562 A.2d 1254 (Md. Ct. App. 1989) in reaching our conclusion. The Hersch court "acknowledged that admitting a violation of probation is not the 'legal equivalent' of a guilty plea in a criminal case; nevertheless, it noted that the rights surrendered when a probationer admits a violation are 'substantial.' " Jankowski, 2016 VT 112, ¶ 20 (quoting Hersch, 562 A.2d at 1256-57). Thus, to ensure "fundamental fairness" in probation-violation cases, " 'the record must show

that the charge was explained to the probationer in understandable terms and that his responses demonstrated that his actions were knowing and voluntary.' " Id. (quoting Hersch, 562 A.2d at 1258).

This standard was satisfied here. The court described the charge against defendant and explained the rights that defendant would be giving up by admitting to the violation. Defendant expressed his understanding of what had been explained to him and stated that he freely and voluntarily wanted to admit to violating probation. Defendant subsequently admitted that he was aware of his probation conditions in advance and that he had violated the condition requiring him to complete sex offender treatment. The record supports the court's finding that defendant made his admission freely and voluntarily with full knowledge of the consequences and that he voluntarily waived his right to contest the charge.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice