

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-371

OCTOBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Bennington Circuit
Kevin Hoyt	}	
	}	DOCKET NO. 963-8-07

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

The State of Vermont appeals from the conditions of release imposed by the district court on defendant, charged with L&L Conduct With Child in violation of 13 V.S.A. § 2602, following a bail hearing on September 7, 2007. At issue in this appeal are two conditions governing the amount of contact defendant may have with minors:

- 31. Defendant shall not have contact with minors under age 16 except his own children.
- 32. Condition 31 amended to allow contact with children under age 16 as long as such child's parent/guardian is informed of the pending charges and conditions of release and parent/guardian approves the contact.

The State appealed on the ground that these conditions were insufficient to protect the children in the community, arguing that Condition 32 was unenforceable and that parents should not be allowed to consent to any contact between their children and defendant. The State further argued that the trial court's recognition of incidental contact allowed under Condition 31—specifically defendant's potential contact with children when he picked up his children at their bus stop—also impermissibly endangered the welfare of local children.

On appeal, we accord deference to the conditions of release set by the trial court, affirming if the conditions are “supported by the proceedings below.” 13 V.S.A. § 7556(c). See also State v. Patch, 145 Vt. 344, 353 (1985) (“To support a claim of error there must be a showing that the court...exercised it[s discretion] for reasons clearly untenable or to an extent clearly unreasonable.”).

Vermont's statutory framework for bail establishes a presumption that a defendant will be ordered released pending trial, but the trial court is permitted to impose conditions on defendant's

release for two reasons: to ensure that defendant appears at required court proceedings or to “protect the public.” 13 V.S.A. § 7554. At issue here is the second reason. Vermont law further requires that any conditions crafted to “protect the public” must be the “least restrictive” conditions which will “reasonably assure protection of the public,” § 7554(a)(2), and that “physically restrictive” conditions “may only be imposed in extraordinary circumstances.” § 7554(a)(2)(D). The trial court may consider a variety of factors when setting conditions of release, including “the nature and circumstances of the offense...accused’s family ties, employment, [and]..length of residence in the community,” among others. See § 7554(b).

Considering the statutory scheme governing this appeal, and the deferential standard with which we must review the trial court’s order, we cannot find that the trial court’s decision here is not supported by the record. While it may be that the same record could support a more restrictive condition, that is not the question before this Court. See Dyer v. Lalor, 94 Vt. 103, 116 (1920) (observing that a different court could “have reached a different result, ...[but] difference in judicial opinion is not synonymous with abuse of judicial discretion.”). Here, the trial court weighed the evidence and proffers describing defendant’s living situation, the commitment of his cohabitant to ensuring the supervision of her children when in defendant’s presence, and nature of defendant’s work guiding hunting trips for ill children in the company of their parents or guardians with the seriousness of the charge and potential danger to children in the community. Condition 32 reflects the trial court’s balance of these § 7554(b) factors while minimizing the restraint on defendant’s liberty. While the State argues for more restrictive conditions, they presented no evidence during the hearing of “extraordinary circumstances” necessarily compelling further restraint on defendant’s actions. 13 V.S.A. § 7554(a)(2)(D).

With regard to the State’s objection to the potential scope of defendant’s incidental contact with children—primarily that defendant will be allowed contact with minors while picking up his own children at their bus stop—we also find no error in the trial court’s order. We discussed the issue of an offender’s “incidental proximity” to children in State v. Rivers, and rejected the view that a prohibition on contact similar to the one at issue here barred the probationer’s presence at a state fair where children were incidentally present. 2005 VT 65, 178 Vt. 180. Here, in the absence of particular evidence justifying extraordinary restriction, we also decline to so broadly read the prohibition set forth in Condition 31 to proscribe merely incidental contact. While Conditions 31 and 32 make clear that defendant may not seek out contact with children under 16 without parental consent, regardless of the location of those children, they do not prevent defendant from frequenting public places where children may be present—such as “grocery stores, movie theaters, libraries, [and] fast-food restaurants”—or from picking up his children at a public bus stop. Id. at ¶ 13.

The State also argued that Condition 32 was unenforceable. It may be true that violations of Condition 32, as written, would not be immediately apparent to police, but the fact that more investigation may be required to justify an arrest does not render the condition unenforceable. Much of the state’s concern in this regard should nevertheless be alleviated by the additional conditions of release stipulated to by defendant at the hearing below and reiterated in this appeal: (1) that he not have contact with minors under age 16, with the exception of his own children, unless another adult is physically and immediately present, (2) that he will provide to parents written notice of the pending charges and conditions of release, (3) that he will file with the State, prior to contact with

children, the parent's written consent to such contact, and (4) that he will remain in his vehicle while waiting to pick up his children at the bus stop.

Pursuant to that stipulation, this court modifies the conditions of release accordingly; to be signed by defendant at the Bennington District Court forthwith.

FOR THE COURT:

Brian L. Burgess, Associate Justice