

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-388

OCTOBER TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
Edward Charbonneau	}	
	}	DOCKET NO. 557-5-07 Frcr
	}	
		Trial Judge:

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

On May 7, 2007, defendant Edward Charbonneau was arraigned on one count of simple assault, 13 V.S.A. § 1023(a)(1), one count of domestic assault, 13 V.S.A. § 1042, and one count each of felony and misdemeanor unlawful mischief, 13 V.S.A. §§ 3701(a), (c). At arraignment, pursuant to 13 V.S.A. § 7554, the court imposed a condition of release preventing defendant from having contact with James Shappey, the alleged victim of the simple assault, and Jennifer Charbonneau, defendant’s wife and the alleged victim of the domestic assault. On defendant’s motion, the condition that defendant not contact his wife was modified by the court on June 25, 2007 to allow defendant “to have phone contact with [his wife] to arrange visitation and travel to and from her home to pick up and drop off the children.” On December 4, 2007, defendant was tried and convicted by a jury of the assault charges; the state dismissed the unlawful mischief counts. On that day, the court ordered that defendant be accompanied by a court-approved responsible adult when dropping off or picking up his children.

On January 22, 2008, the court granted defendant’s motion for judgment of acquittal as to the domestic-assault charge. Defendant was sentenced to serve eleven-to-twelve months for the simple assault; the sentence was stayed pending defendant’s timely appeal of the simple-assault conviction to this court.

On August 1, 2008, defendant moved to amend his conditions of release so that he would no longer be prevented from having contact with his wife. In support of his motion, defendant argued that the domestic-assault charges had been dropped, that “there had been no untoward conduct with regard to contact with his wife” since June 25, 2007, that his wife “supports this requested modification for the reason that the separation of the family is adversely effecting her children,” and that defendant “desires to be of more assistance to his family and have the ability for the entire family . . . to do things together for the children’s benefit.” At a hearing on that motion held on September 15, 2008, defendant’s wife testified that she wanted defendant to come home for her sake and for the sake of their children. On cross examination, the State established that defendant’s wife had made, and then recanted, fourteen reports of instances of

domestic abuse to the police over the last ten years. The court relaxed the condition of release in question to allow for couples or family counseling, but otherwise denied defendant's motion. The court's ruling, made in open court, was as follows:

Well, frankly, from my point of view the conditions of release are working very well. I don't see any reason to change them.

I will relax Condition 14, if the Charbonneaus want to engage in couples counseling or family counseling. That might help and we'll see where that goes. Certainly without expert testimony about the effect of the separation on the children, I'm not going to change it, because as far as I know this is beneficial to the children. They don't see . . . the conflict between their parents.

So I think this is working pretty well, but I would encourage the Charbonneaus to become engaged in couples counseling if they really do want to get back together and/or family counseling if they want to improve their children . . . So Condition 14 is modified, to permit that exception to [the] condition.

Defendant filed a timely appeal of the court's ruling pursuant to 13 V.S.A. § 7557(a). On appeal, defendant argues that the no-contact order is no longer appropriate because defendant was acquitted of the domestic-assault charge. The State argues that the court's ruling was appropriate because defendant's wife was a witness against defendant in the simple-assault case, which could come to trial again upon successful appeal, and because "[t]here is a concern that her testimony may be influenced by the defendant." The State also argues that the court's ruling was justified because of the longstanding violent relationship between defendant and his wife, and the fact that "[t]he condition of no contact has kept [defendant's wife] safe."

We review conditions of release under a very narrow standard, and will affirm them if supported by the proceedings below. State v. Parada, 142 Vt. 261, 262 (1982); 13 V.S.A. § 7556(b).

We cannot sustain the trial court's decision because it is unsupported by the record. Defendant has been acquitted of the domestic-assault charge, and defendant's wife testified at the hearing on defendant's motion to modify that she wants him to return home. Moreover, the State has conceded that the likelihood that defendant will succeed in securing a new trial on appeal—at which defendant's wife would likely be a witness—is low. There would therefore appear to be no basis, besides the court's general concern that the defendant and his wife have a troubled marriage, to continue the condition. We respect the court's concern, but find no authority for the court's mediation of their relationship in such a fashion. We therefore strike the no-contact condition as to defendant's wife (condition 14), the effect of which, as both parties agreed at hearing on the appeal, is to strike as moot conditions 33 (allowing defendant to have phone contact with his wife), and 38 (allowing defendant to have contact with his wife for couples and family counseling). As the parties agreed that there is no longer supervised visitation between defendant and his children, we strike as moot condition 32 (approving of third party for child visitation). We note that once the no-contact condition is stricken, this removes the proximity

prohibition found in condition 31 regarding defendant's wife. We make no ruling with regard to the validity of condition 34 (allowing defendant to bring children to and from school).

Reversed.

FOR THE COURT:

Marilyn S. Skoglund, Associate Justice