ENTRY ORDER

2020 VT 81

SUPREME COURT DOCKET NO. 2020-213

AUGUST TERM, 2020

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Windsor Unit,
	}	Criminal Division
	}	
Larry L. Labrecque	}	DOCKET NO. 689-7-18 Wrcr
		Trial Judge: John R. Treadwell

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

¶ 1. Defendant Larry L. Labrecque appeals the trial court's denial of his motion to reconsider its decision to continue holding him without bail prior to trial, despite the delay in hearing his case. He argues that the length of his pretrial detention offends due-process rights protected under the Fifth and Fourteenth Amendments of the United States Constitution and Article 10 of the Vermont Constitution, requiring his immediate release on conditions. We affirm.

I. Procedural History

¶ 2. Given the nature of defendant's claim, we recount this case's procedural history in some detail. He has been held without bail, pursuant to 13 V.S.A. § 7553, since his July 23, 2018 arraignment on charges of sexual assault of a minor stepchild, 13 V.S.A. § 3252(d); aggravated sexual assault, 13 V.S.A. § 3253(a)(9); and aggravated sexual assault of a child under sixteen, 13 V.S.A. § 3253a(a)(8). The charges arose from a report by his stepdaughter, A.J., then seventeen years old. She alleged that defendant had been sexually assaulting her over the course of two years.

¶ 3. All three charged offenses are punishable by a maximum sentence of life imprisonment; thus, defendant could be held without bail if the court found that the evidence of his guilt was great as to any one of them. 13 V.S.A. § 7553. On the basis of the court's probable-cause findings, defendant was temporarily held without bail at arraignment. See State v. Passino, 154 Vt. 377, 383, 577 A.2d 281, 285 (1990) (holding that based on initial probable-cause determination at arraignment, "the court can hold a defendant charged with an offense punishable by life imprisonment without bail for such time as is necessary to enable the parties to prepare for a full bail hearing"). At defendant's request, the court held a weight-of-the-evidence hearing on November 14, 2018. The State offered into evidence a recording of a sworn interview with A.J. in which she alleged that defendant had sexually assaulted her on multiple occasions.

¶ 4. After considering A.J.'s statement, the court issued an on-the-record ruling. It concluded that, viewed in the light most favorable to the State, the evidence of defendant's guilt as to all three charged offenses was great. Taking up defendant's subsequent oral motion for bail review, the court first explained that although the presumption in favor of release had switched based on the weight-of-the-evidence finding, the relevant facts had not changed since its initial bail determination at arraignment, which it therefore incorporated into the ruling.[1] The court further explained that—based on defendant's history of multiple failures to appear, simple assault on a law-enforcement officer, violation of come-to-court orders, an attempt to elude law enforcement, and probation revocation—it was not confident in his ability to abide by conditions of release intended to mitigate the risk of flight from prosecution and protect A.J. Therefore, the court continued the hold-without-bail order; defendant did not appeal.

¶ 5. Defendant's case was initially assigned a trial-ready date in May 2019, which was pushed back to November 2019 by agreement of the parties. Then, on September 30, 2019, defendant's counsel moved to withdraw from the case, citing an unresolvable conflict. Her motion was granted, and present counsel assigned, in October of that year. The parties filed an amended discovery stipulation which provided for trial readiness in March 2020. A jury draw was scheduled for April 2020.

¶ 6. On March 13, 2020, defendant filed a motion for bail review under 13 V.S.A. § 7554(d), arguing that the delay in bringing his case to trial caused by his attorney's withdrawal represented a material change in circumstances, and asking that the court exercise its discretion to release him on conditions. Then, on March 16, this Court issued Administrative Order 49, suspending all non-emergency trials and hearings until at least April 15 due to the COVID-19 pandemic. One day later, defendant supplemented his bail-review motion, arguing that the court should also find a change in circumstances based on the scheduling uncertainties caused by the pandemic. He submitted a doctor's affidavit alleging that the Department of Corrections (DOC) failed to respond appropriately to the ongoing public health crisis and argued that the court should exercise its discretion to release him on this basis.

¶ 7. The trial court held a hearing on defendant's request for bail review the following day. Defendant conceded that the evidence of his guilt remained great, but asked that the court revisit its decision not to grant discretionary release. He proposed to stay at his wife's residence—a one-bedroom apartment she shares with her son—subject to a twenty-four-hour curfew. He noted that A.J. no longer resided there, did not visit, and was rarely in touch with her mother. Defense counsel also offered the following arguments in support of the request: defendant had lived in Hartford for a significant period of time and had longstanding ties to its community, including coaching football and being "involved with his kids' lives in the church"; defendant qualified for public-defender services at arraignment, and his family's financial circumstances had not improved during the twenty months he had been incarcerated thus far; defendant's criminal history involved only misdemeanor charges resulting from actions occurring almost two decades prior to the allegations at issue in this case; since entering DOC custody in 2018, defendant had

[1] No record of the trial court's original ruling has been filed before this Court on appeal, although the court orally "incorporate[d] its original ruling with regard to the hold-without-bail" order.

incurred only one minor disciplinary report; and defendant was experiencing neuropathic mobility issues which had yet to be treated, and as a result "he has a hard time moving off the couch."

¶ 8. The court denied defendant's motion, indicating that a judge had already performed, in 2018, "a full consideration . . . as to whether or not there were a condition or a set of conditions that could be set that would reasonably assure the return of [defendant] and a protection of public safety." It found "no indication that those factors" had "changed in any way since the original determination was made." The court acknowledged defendant's argument that alleged mobility challenges mitigated the risk of his flight, but did not see this as "a significant change at this point." It did not find the argument that his lack of means decreased his risk of flight persuasive. And with respect to the risk to public safety, and specifically A.J.'s safety, the court found no change at all—A.J. was not living at the residence when defendant had originally proposed his conditional release there As a result, the court found, the only remaining reason to set conditions "would be a determination that the COVID-19 factors warrant such a change." It concluded that the doctor's affidavit was stale and did not support a conclusion that the DOC was not fulfilling its obligation to safely house those in its custody. In short, although the trial delay occasioned by the pandemic was "a substantial concern to the court," it could not overcome the court's concerns regarding danger to the community or risk of flight that had supported the hold-without-bail order throughout the proceeding's pendency. The court concluded by noting that defendant was "at the top of the trial list" and indicated it would do everything possible to move the proceeding forward promptly.

¶ 9. Defendant filed a motion to reconsider this determination on April 1, along with an updated affidavit from the same doctor. By order of the Chief Superior Judge, his motion to reconsider was consolidated with several other pending bail motions that also asked the court to consider the effect of the COVID-19 outbreak on continued incarceration or detention. On April 2, the trial court issued an order delaying the scheduled April jury draw, observing that even if the Governor's Stay-Home order and the Court's restrictions on access to Judiciary buildings were not extended beyond April 15, the need for social distancing would remain critical to public safety. The courthouse was "not of a sufficient size to accommodate the number of jurors required for jury selection while maintaining social distancing."

¶ 10. At a status conference on May 12, defendant indicated he was not seeking an evidentiary hearing on his motion to reconsider. He argued that given the Judiciary's inability to "provide any security in when a trial would take place," continuation of the hold-without-bail order would amount to punitive incarceration in violation of his due process rights, and the court should exercise its discretion to release him. He filed a supplemental memorandum in support of this argument on May 18.

¶ 11. A lengthy joint evidentiary hearing was held in one of the consolidated matters at which the court took evidence on the DOC's response to the COVID-19 outbreak. These findings were incorporated into its order on the motion to reconsider.

¶ 12. In that order, the court concluded that changes to defendant's conditions of confinement arising from COVID-19 were unrelated to his risk of flight, and "[t]o the extent that it is possible to construct an argument that the conditions in a facility may impact a defendant's mental condition it is attenuated and would not be entitled to significant weight." Turning to

defendant's due-process argument, the court found that the conditions of his confinement were not imposed "with the express intention to punish" and his continuing detention did not violate due process, given that it was grounded in the court's lack of confidence that he could abide by conditions of release. Defendant appealed this ruling. 13 V.S.A. § 7556(e).

¶ 13. On the date of oral argument before this Court, defendant had been held pending trial for 767 days, or two years, one month, and five days. He noted ongoing uncertainty about when jury trials may recommence and alleges that he is fifth in line for a jury trial in Windsor County.

II. Analysis

¶ 14. On appeal, defendant argues that the length of his pretrial detention violates due process rights protected under the Fifth Amendment of the United States Constitution, as applied to the state through the Fourteenth Amendment, as well as Article 10 of the Vermont Constitution. He contends that the appropriate remedy for such a violation is his immediate release on conditions. But although defendant invokes Article 10, he offers no substantive analysis of how the state provision may differ from its federal analogue. State v. Lizotte, 2018 VT 92, ¶ 16 n.4, 208 Vt. 240, 197 A.3d 362 (declining to address state constitutional argument where defendant failed to "provide any argument or rationale to distinguish the analysis" from that applied under its federal counterpart). In the absence of a sufficiently raised and adequately briefed argument under the Vermont Constitution, we analyze defendant's claim only under the Due Process Clause of the Fifth Amendment. State v. Gleason, 154 Vt. 205, 212, 576 A.2d 1246, 1250 (1990) (describing advocate's "duty to diligently develop and plausibly maintain" state constitutional challenges). And because we conclude that there is no Fifth Amendment violation here, we do not reach the question of remedy.

¶ 15. The Due Process Clause of the Fifth Amendment protects an individual's substantive due process right to be free of government action which "shocks the conscience or interferes with rights implicit in the concept of ordered liberty." United States v. Salerno, 481 U.S. 739, 746 (1987) (quotations omitted). Punishment of pretrial detainees "prior to an adjudication of guilt in accordance with due process of law" violates this right. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979); see also State v. Blackmer, 160 Vt. 451, 459, 631 A.2d 1134, 1140 (1993) (observing that due process requires that bail not "be denied in order to inflict pretrial punishment"). Thus, pretrial detention satisfies substantive due process only where "its purpose is regulatory rather than punitive." United States v. Briggs, 697 F.3d 98, 101 (2d Cir. 2012).

¶ 16. But even where a valid regulatory purpose supports detention, "when detention becomes excessively prolonged, it may no longer be reasonable in relation to the regulatory goals of detention, in which event a violation of due process occurs." United States v. Millan, 4 F.3d 1038, 1043 (2d Cir. 1993) (quotation omitted); Blackmer, 160 Vt. at 459-60, 631 A.2d at 1140 (observing that pretrial detention which is not intended to punish "cannot be excessive in relation to the regulatory goal" and "the interests served by the detention must be legitimate and compelling"). In other words, where a regulatory detention is excessive in relation to the underlying goal, it assumes a punitive character and is forbidden by the Due Process Clause. Because the trial court found no intent to punish, its task was to determine whether the detention

was regulatory in nature and, if so, whether the length of the detention was excessive in light of that regulatory purpose.

¶ 17. The Second Circuit explains that "due process places no bright-line limit on the length of pretrial detention"; rather, courts must assess such challenges "on a case-by-case basis." Briggs, 697 F.3d at 101 (quotation omitted). The parties agree that the applicable test was articulated by the Second Circuit in United States v. Briggs:

> In making such an assessment, we consider the strength of the evidence justifying detention, the government's responsibility for the delay in proceeding to trial, and the length of the detention itself. The longer the detention, and the larger the prosecution's part in prolonging it, the stronger the evidence justifying detention must be if it is to be deemed sufficient to justify the detention's continuance.

Id. (footnote and citations omitted).[2] Whether a period of "detention is punitive rather than regulatory generally turns on 'whether a[] [nonpunitive] purpose to which [the detention] may rationally be connected is assignable for it, and whether it appears excessive in relation to the [nonpunitive] purpose.' " United States v. El-Hage, 213 F.3d 74, 79 (2d Cir. 2000) (third alteration in original) (quoting Wolfish, 441 U.S. at 538).

¶ 18. We review the trial court's underlying bail determination for an abuse of discretion. State v. Ford, 2015 VT 127, ¶ 8, 200 Vt. 650, 130 A.3d 862 (mem.). However, we take up the larger question of whether a due process violation has occurred de novo. See In re MVP Health Ins. Co., 2016 VT 111, ¶ 10, 203 Vt. 274, 155 A.3d 1207 (observing constitutional questions are subject to de novo review); Millan, 4 F.3d at 1043 (collecting cases for proposition that broader standard of review applies in determining extent to which trial court's findings regarding risk of flight and public safety " 'have significance on the constitutional issue of whether continued detention violates due process limitations' " (quoting United State v. Gonzales Claudio, 806 F.2d 334, 343 (2d Cir. 1986)). With this standard of review in mind, we turn to the first portion of the three-part Briggs test.

¶ 19. Defendant's primary challenge on appeal is to the strength of the evidence supporting the charges against him. However, both defendant and the State misapprehend the

[2] In setting forth this test, the Second Circuit acknowledged that it had "sometimes described the standard as a four-part test" including consideration of "the gravity of the charges," but found that because the federal statute required consideration of the " 'nature and circumstances of the offense charged' as part of their inquiry into the strength of the evidence justifying detention," "no substance is lost, and some clarity is gained, by stating the standard in three parts." Briggs, 697 F.3d at 101 n.1 (citing 18 U.S.C. § 3142(g)(1)). Vermont law suggests, but does not mandate, consideration of the "nature and circumstances of the offense charged" where a defendant is held without bail under § 7553. See 13 V.S.A. § 7554(b); State v. Auclair, 2020 VT 26, ¶ 6, ___ Vt. ___, 229 A.3d 1019 (mem.) (observing that in exercising its discretion to release defendant, "court may look to the factors listed in § 7554" (quotation omitted)). Because the court did so here, the three-part formulation is likewise appropriately applied.

analysis called for by the Second Circuit. Defendant proffers mitigating evidence directed at A.J.'s credibility, and the State proffers DNA evidence unavailable at the time of the 2018 weight-of-the-evidence hearing.[3] But this Briggs factor is not directed at the strength of the State's case-in-chief, and does not require a trial within a trial. Rather, it calls on courts to analyze the strength of the evidence underlying the specific decision to detain defendant prior to trial. See Briggs, 697 F.3d at 101 (analyzing strength of evidence with reference to risks of nonappearance and to public safety); El-Hage, 213 F.3d at 80 (analyzing strength of evidence with reference to risk of flight); United States v. El-Gabrowny, 35 F.3d 63, 65 (2d Cir. 1994) (describing strength-of-evidence factor as "the strength of evidence upon which detention was based, i.e., the evidence concerning the risk of flight and danger to the safety of others"); Millan, 4 F.3d at 1043 (explaining that "the strength of the evidence upon which the detention was based" means "the evidence concerning risk of flight and danger to the safety of any other person or the community" (quotation omitted)). Accordingly, we look to the evidence supporting the court's decision to detain defendant prior to trial.

¶ 20. Defendant does not contest the trial court's finding that substantial, admissible evidence—taken in the light most favorable to the State and excluding modifying evidence—can fairly and reasonably show that he is guilty beyond a reasonable doubt. Auclair, 2020 VT 26, ¶¶ 3, 6 (citing Ford, 2015 VT 127, ¶¶ 5, 11, 206 Vt. 657, 179 A.3d 763 (mem.)). As a result, a presumption of pretrial detention arose, which he bore the burden to overcome. Id.; see also Vt. Const. ch. II, § 40; 13 V.S.A. § 7553. In exercising its discretion to release such a defendant, the court may look to the factors listed in 13 V.S.A. § 7554(b) to guide its decision. Ford, 2015 VT 127, ¶ 10. The court's discretion is broad, although its decision cannot be arbitrary. Id.

¶ 21. Here, the court's decision was based on its continued lack of confidence that defendant would abide by conditions of release intended to mitigate the risk of flight or protect the public, including A.J. Preventing danger to the community and ensuring a defendant's presence at trial are permissible regulatory purposes for pretrial detention. Briggs, 697 F.3d at 101 (first citing Salerno, 481 U.S. at 747; then citing Wolfish, 441 U.S. at 536-37). We have long recognized that "[w]hen the need for conditions is viewed in light of the possible punishment of life imprisonment, it is entirely appropriate for the court to deny bail unless it is fully convinced that the defendant will abide by the conditions [it would impose] if defendant were released." Blackmer, 160 Vt. at 459, 631 A.2d at 1139 (holding decision to deny bail for this purpose was not punitive and did not violate defendant's substantive due process rights).

¶ 22. Although defendant suggests that the evidence that he will not abide by conditions is weak, given that the criminal history the trial court looked to is remote in time, he bore the burden of overcoming the presumption in favor of detention, and he affirmatively declined an evidentiary hearing on this issue. Auclair, 2020 VT 26, ¶ 6. In ruling on the matter, the court therefore looked to the evidence underlying the prior bail decisions during the case. And although each of these decisions built on the foundation laid in the trial court's initial bail determination—incorporated by reference in the November 2018 ruling—defendant failed to order a transcript of

[3] Because we conclude that these assertions fail to address the question of whether the evidence underlying defendant's pretrial detention is sufficiently strong, we express no opinion as to the parties' shared assumption that a court may rely on proffers in resolving this type of challenge.

this initial hearing, and the court's order is not memorialized in writing. See V.R.A.P. 10(b)(1) ("By failing to order a transcript, the appellant waives the right to raise any issue for which a transcript is necessary for informed appellate review.").

¶ 23. In the order on appeal, the court referred to its prior assessment of the risks of flight and to the public, where it found no change in circumstances following the initial denial of release, and further noted that defendant was charged with extremely serious offenses, including one—aggravated sexual assault of a child—which carries the longest unsuspendable statutory mandatory minimum sentence under Vermont law for a non-homicide offense. Blackmer, 160 Vt. at 460, 631 A.2d at 1140 (explaining connection between potential life imprisonment and high risk of flight). Although defendant challenges the trial court's determination that he could not abide by conditions, he has failed to provide a sufficient record of a prior court hearing and order relied upon by the trial court that are necessary to review that discretionary decision. Therefore, we cannot conclude that the trial court erred when it found that protection of the public and ensuring defendant's appearance at trial—both permissible regulatory goals—offered "substantial" support for the decision to hold him prior to trial.

¶ 24. We now turn to the second factor, the government's responsibility for the delay in proceeding to trial. Our analysis on this point is twofold, as the delay was occasioned by the unfortunate confluence of two events: defense counsel's withdrawal and the COVID-19 pandemic.

¶ 25. The trial court found that the delay caused by defense counsel's withdrawal was not attributable to the government. The United States Supreme Court has recognized that, at least in the context of a federal speedy-trial claim under the Sixth Amendment, delay caused by the actions of a public defender is attributed to the defendant, not the state. Vermont v. Brillon, 556 U.S. 81, 90-91 (2009) (concluding that because a publicly assigned attorney is defendant's "agent when acting, or failing to act, in furtherance of the litigation, delay cause by the defendant's counsel is also charged against the defendant" (quotation omitted)). We find the Sixth-Amendment analysis is appropriately applied here as well. Thus, to the extent defendant challenges this attribution on appeal—and in the absence of any record as to the specific reason for the withdrawal—we affirm the trial court's attribution of this delay to the defendant.

¶ 26. Looking to the delay in proceeding to trial caused by the COVID-19 pandemic and court scheduling issues, defendant argues the trial court correctly found that the government is responsible for this delay. The State contends that although defendant himself is not responsible, neither can responsibility be laid at the feet of the government. We conclude that defendant and the trial court are correct on this point. Although no malfeasance or neglect underlies the delay at issue here, the government bears the responsibility of bringing defendant to trial, even when it is delayed in the exercise of that responsibility by a public health emergency.

¶ 27. We must be clear, however, about the evidence underlying the determination that the delay after March 2020—as well as any prospective delay caused by the same circumstances—is the government's responsibility. Through Administrative Order 49, this Court has suspended all jury trials until September 1, 2020, at the earliest. A.O. 49(3) (as amended 8/20/2020), https://www.vermontjudiciary.org/sites/default/files/documents/AO%2049%20-%20Declaration%20of%20Judicial%20Emergency%20and%20Changes%20to%20Court%20Procedures%20with%20amendments%20through%208-20-20_0.pdf [https://perma.cc/HNS6-N234]. Vermont

courts may appropriately take notice of Administrative Order 49. See V.R.Cr.P. 26.1(b); Reporter's Notes,V.R.E. 201. However, defendant also requests that we take judicial notice that the federal government's response to the pandemic was inadequate and has inhibited Vermont's ability to resume jury trials. Courts may take judicial notice only of facts "not subject to reasonable dispute." V.R.E. 201(b). As the State's rebuttal to this suggestion at oral argument made clear, the effect of the federal government's response on the particular situation faced by Vermont courts is both reasonably disputed and heavily fact-dependent. It is wholly inappropriate as a subject of judicial notice, and we may not consider it.

¶ 28. We agree with the State that cases discussing speedy-trial issues under the Sixth Amendment are helpful to our analysis on this factor, but do not find the State's argument that the delay should not be attributed to the government persuasive. Indeed, chief among those Sixth-Amendment cases is Barker v. Wingo, in which the United States Supreme Court explained that while a "more neutral" reason for delay, such as "overcrowded courts[,] should be weighted less heavily" it is nonetheless attributed to the government, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. 514, 531 (1972); Brillon, 556 U.S. at 91 (observing that for purposes of speedy-trial analysis, the court is considered a state actor). Here, too, it was the government's responsibility to bring defendant to trial. It was delayed in carrying out that responsibility by the logistical challenges presented by COVID-19. As the explanatory note to Administrative Order 49 indicates, although the "suspension of jury trials implicates fundamental constitutional rights, most acutely in cases in which a criminal defendant is in custody pending trial,"

> [i]n light of the course of the public-health crisis, the fact that jury draws and jury trials require that many people operate in close physical proximity, and the strains on the Judiciary arising from the COVID-19 pandemic, it is virtually impossible that jury draws or jury trials would be consistent with public health, as well as the health and safety of parties, their lawyers, and Judiciary staff

before the time specified for their resumption. Explanatory Note—April 6, 2020 Amendment, A.O. 49, p. 12-13. As a result, we conclude that although a portion of the delay is attributable to the government, as in Briggs, the delay was neither "intentional" nor "unwarranted," and defendant, too, bears some responsibility. 697 F.3d at 102 (quotation omitted). As a result, "this fact[or] also weighs against finding a due process violation." Id.

¶ 29. Finally, then, we consider the length of defendant's pretrial detention, which now exceeds twenty-five months. Although defendant's case will be prioritized for scheduling, he is not the only person detained prior to trial in Windsor County, and he represents that four other defendants' cases are older and will be tried first. We assume this is true, and therefore also assume that there will be additional delay prior to defendant's trial which will likewise be attributable to the government. But while a factor in the Briggs analysis, "the length of detention alone is not dispositive and will rarely by itself offend due process." El-Hage, 213 F.3d at 76-77, 79 (quotation omitted) (holding contemplated thirty to thirty-three months of pretrial detention, though "extraordinary," "justified" by other factors under due-process analysis); El-Gabrowny, 35 F.3d at 65 (holding that although length of pretrial detention projected to be as long as twenty-seven

months, "[n]o particular time period marks the constitutional limit of pretrial detention; each case must be examined on its own facts").

¶ 30. We find that the trial court weighed the relevant considerations correctly in determining that there was no due process violation. Because defendant's pretrial detention is rationally connected to two compelling regulatory purposes—protection of the public, including A.J., and assuring defendant's presence at trial—the dispositive question here is whether the length of his detention "appears excessive in relation to [that] purpose." See El-Hage, 213 F.3d at 79 (quotation omitted). That portion of the delay in bringing defendant to trial which may be attributed to the government is not the result of malfeasance or neglect. Rather, it is a function of the government's efforts to respond to a novel health crisis by establishing procedures which would serve to mitigate the resulting health risk to those who must gather in close physical proximity in order to conduct such a trial—including defendant himself.

¶ 31. Although the length of defendant's pretrial detention is not routine, neither is it excessive when viewed in light of the other Briggs factors. The trial court correctly concluded that defendant's pretrial detention was not rendered punitive by its length, and therefore, that defendant's rights under the Due Process Clause of the Fifth Amendment were not violated.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice