

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-254

NOVEMBER TERM, 2020

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Franklin Unit,
	}	Criminal Division
Joshua J. Bessette	}	
	}	DOCKET NOS. 1798-12-18 Frcr,
		1611-12-17 Frcr, 1608-12-17 Frcr,
		1599-12-17 Frcr, 1165-8-19 Frcr,
		863-8-20 Frcr

Trial Judge: Howard E. VanBenthuisen

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

Defendant Joshua Bessette appeals an August 24, 2020 order holding him without bail pending a merits decision on a violation of probation complaint (VOP). On appeal, defendant argues that the trial court abused its discretion because it failed to acknowledge that it could release him pursuant to 28 V.S.A. § 301. We agree that the trial court should have elaborated on its reasoning for the hold-without-bail order and remand for additional findings.

The record indicates the following. In May 2018, defendant pled guilty in three different dockets—1599-12-17, 1608-12-17, and 1611-12-17—to aggravated assault with a deadly weapon, three counts of violating conditions of release, two counts of violating an abuse prevention order, and resisting arrest. In total, defendant was sentenced to thirty-sixty to ninety-nine months, which was all suspended except eighty-five days to serve. Defendant was placed on probation under standard and special conditions.

On August 24,¹ a VOP was filed against defendant alleging that he violated Condition P, which provides that defendant “shall not drink alcohol beverages to the extent they interfere with [his] employment or the welfare of [his] family, [him]self or any other person.”² The VOP alleged

¹ Between May 2018 and August 2020, three VOPs were filed against defendant and his conditions of release were modified on several occasions. These earlier VOPs are outside the scope of this appeal.

² The transmittal letter from the trial court identified docket number 1798-12-18. In that docket, defendant pled guilty to retail theft in June 2019. Condition P, however, was never imposed in that docket. That docket accordingly has no relevance to the VOP at issue in this appeal.

that on August 23, defendant's mother called 911 and advised that her son had been at the residence drunk and out of control. A state trooper later found defendant passed out in the passenger seat of a car down the street from mother's home smelling strongly of alcohol. Defendant did not have a shirt on and his pants were halfway off. When defendant was awakened, he had no recollection of what happened or how he got there.

At an August 24 hearing, defendant entered a denial on the VOP and pled not guilty to an additional criminal charge. The court decided that defendant would be held without bail on the VOP. When defense counsel asked that defendant be released on a twenty-four-hour curfew at a custodian's home, the court responded that "[r]ight now, he's held without bail." Defendant subsequently appealed the hold without bail order.³

Vermont Rule of Criminal Procedure 32.1 provides that a decision to hold a defendant in custody pending a merits decision on a VOP, "shall be reviewable in the manner provided in 13 V.S.A. §§ 7554 and 7556 for pretrial release." Section 7556 provides that "when conditions of release have been imposed or amended by the judge of the court having original jurisdiction over the offense charged, an appeal may be taken to a single Justice of the Supreme Court." 13 V.S.A. § 7556(b). "Any order so appealed shall be affirmed if it is supported by the proceedings below." *Id.*

On appeal, defendant argues that the trial court abused its discretion because it failed to acknowledge that it could release defendant pursuant to 28 V.S.A. § 301(4). A defendant held in custody pending a merits decision on a VOP has "no right to bail or release, unless the person is on probation for a nonviolent misdemeanor or nonviolent felony." 28 V.S.A. § 301(4); see also *id.* § 301(5)(A) (providing that at arraignment, "the court shall release a probationer who is on probation for a nonviolent misdemeanor or nonviolent felony"). A nonviolent felony "means a felony offense that is not a listed crime as defined in 13 V.S.A. § 5301(7)." *Id.* § 301(5)(B) (emphasis added). Defendant is on probation for two counts of violating an abuse prevention order and one count of aggravated assault, which are both listed crimes. See *id.* § 5301(7)(M), (V). He accordingly has no right to release.

When a defendant has no right to release, "the presumption is switched so that norm is incarceration and not release." *State v. Hardy*, 2008 VT 119, ¶ 10, 184 Vt. 618 (mem.) (quotation omitted). A court may, however, exercise its discretion to release a defendant, 28 V.S.A. 301(4), and its "discretion is extremely broad." *State v. Campbell*, 2014 VT 123, ¶ 6, 198 Vt. 627 (mem.); see also *State v. Breer*, 2016 VT 120, ¶ 7, 203 Vt. 649 (mem.) (recognizing that under § 301(4), a court may release a probation pending a hearing on a VOP). An "abuse of discretion requires a showing that the trial court withheld its discretion entirely or that it was exercised for clearly untenable reasons or to a clearly untenable extent." *State v. Anderson*, 2016 VT 127, ¶ 13, 204 Vt. 17 (quotation omitted).

In *State v. Campbell*, we held that § 304(1), in conjunction with Rule 32.1(a)(3)(A), "expressly requires courts to consider the § 7554(b) factors when determining conditions of release

³ A merits hearing was scheduled for September 23 but never occurred because defendant requested that the trial judge recuse himself. Another merits hearing was scheduled for November 6 but again did not occur because defendant requested that the judge recuse himself.

for probationers.” 2014 VT 123, ¶ 9; see also State v. Hodges, No. 2017-404, 2017 WL 5991784, *2 (Vt. Nov. 22, 2017) (unpub. mem), https://www.vermontjudiciary.org/sites/default/files/documents/eo17-404.bail_.pdf [<https://perma.cc/8DEU-QWAT>] (explaining that a court exercising its discretion under § 301(4) “must consider the factors laid out in 13 V.S.A. § 7554(b)”). Here, the trial court abused its discretion because it did not consider the § 7554 factors in determining whether to release defendant. The court simply stated that defendant would be held without bail for the time being. While defendant has no right to release, and the trial’s court discretion is extremely broad, the court must consider the § 7554(b) factors in exercising that discretion. We accordingly remand for the trial court to consider the § 7554(b) factors and make additional factual findings. See 13 V.S.A. § 7556(b) (providing that if “the order is not supported,” a single justice “may remand the case for a further hearing”).⁴

Remanded for further proceedings consistent with this decision.

FOR THE COURT:

Karen R. Carroll, Associate Justice

⁴ On October 28, defendant filed an ambiguous second notice of appeal. Although the notice says that defendant is appealing the trial court’s August 24 decision to hold him without bail, the notice also references docket numbers 1165-8-19 and 863-8-20. Defendant argues that the trial court erred in not considering his pro se request to have his bail reviewed in those dockets because he was represented by counsel. Neither of these dockets have any relation to the August 24 hold-without-bail-order, which was imposed based on the VOP in docket numbers 1599-12-17, 1608-12-17, and 1611-12-17.

As defendant already appealed the August 24 hold-without-bail order, we interpret the October 28 filing as a notice of appeal in docket numbers 1165-8-19 and 863-8-20. The Vermont Rules of Appellate Procedure provide that to file an appeal, a party must among, other things, designate the judgment or order being appealed. Jackson Gore Inn v. Town of Ludlow, 2020 VT 11, ¶ 25. “An appellant’s failure to take any step other than the timely filing of a notice of appeal does not affect the appeal’s validity, but is ground for the Supreme Court to take any appropriate action, including dismissal.” V.R.A.P. 3(b)(1)(D).

Here, other than referencing docket numbers 1165-8-19 and 863-8-20, defendant does not identify the order he is appealing in those dockets. Pursuant to Rule 3(b)(1)(D), we dismiss defendant’s purported appeal in docket numbers 1165-8-19 and 863-8-20 and do not address any arguments related to those dockets.