

ENTRY ORDER

SUPREME COURT DOCKET NO. 2021-160

AUGUST TERM, 2021

State of Vermont v. Samantha A. Durham*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit
	}	Criminal Division
	}	
	}	DOCKET NO. 21-CR-05584

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

On July 12, 2021, defendant Samantha Durham was arraigned on charges of aggravated assault with a deadly weapon, unlawful trespass, and a violation of conditions of release. The State moved to hold defendant without bail under 13 V.S.A. § 7553a. The trial court ordered defendant preliminarily held without bail pending a weight-of-the-evidence hearing, scheduled for July 21. Based on defendant’s conduct at the arraignment, the court also ordered a competency evaluation.

At the weight-of-the-evidence hearing on July 21, the State argued that the court should postpone the bail hearing until the competency issue was settled. Defense counsel conceded that the court should postpone the weight-of-the-evidence hearing but argued that defendant should be released on conditions because she would not be able to receive a weight-of-the-evidence hearing within a reasonable amount of time. The court found that reasonable grounds existed to delay the weight-of-the-evidence hearing. The court reasoned that without a finding of competence, the court could not determine whether defendant was able to participate in her defense or assist her attorney. Accordingly, the court postponed the weight-of-the-evidence hearing and ordered defendant to continue to be held without bail. The court ordered that the competency evaluation should be returned in an expedited manner.

Defendant appealed to this Court, seeking review of the trial court’s decisions to continue the weight-of-the-evidence hearing and to deny her request for a bail hearing under 13 V.S.A. § 7556b, which requires that a court hold a bail hearing for a defendant held more than sixty days after bail is denied under § 7553a if the delay is not attributable to the defense.

Defendant argues that her appeal is authorized under 13 V.S.A. §§ 7556(b) and 7556(e). Contrary to defendant’s assertions, there is no order subject to appeal under § 7556(b). That section permits an appeal when a defendant is detained after a court denies a motion to amend or review conditions of release. See 13 V.S.A. § 7554(d), (e); *id.* § 7756(a). Because the court here has not yet made a final decision under § 7553a, the court has not considered whether the facts here warrant holding defendant without bail, and whether nonetheless to release defendant and to impose conditions of release. See *id.* § 7554(a) (providing that if person is not held without bail, court must determine whether to impose conditions of release); *State v. Avgoustov*, 2006 VT 90, ¶ 2 (explaining that even if court concludes that evidence of guilt is great and hold without bail is warranted, court “must exercise its discretion in determining whether or not to impose bail and conditions of release”). Likewise, § 7556(e) does not authorize this appeal. In a § 7553a case, review under § 7556(e) only applies after an appeal has been reviewed by a single Justice under § 7556(d). See V.R.A.P. 9(b)(2). And review under § 7556(d) can only occur after the trial court has made a final decision to hold a defendant without bail under § 7553a. Because the court has

not held a weight-of-the-evidence hearing, and consequently has not made a final decision on the State’s motion to hold defendant without bail, this appeal is premature. See State v. Wade, No. 2021-115, 2021 WL 2311957, at *1 (Vt. June 1, 2021) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo21-115.pdf> [<https://perma.cc/VY88-VP77>] (dismissing appeal as premature where defendant challenged order preliminarily holding him without bail under § 7553a pending further hearing).

Defendant next argues that the court’s decision to delay the bail hearing is effectively a violation of § 7553b, which provides that a defendant, held without bail under § 7553a for more than sixty days where the delay is not attributable to the defense, is entitled to a bail hearing. See State v. Lohr, 2020 VT 41, ¶ 16 (holding that if requirements of § 7553b are satisfied, trial court must hold hearing and conduct analysis under § 7554). Because sixty days have not passed, this assertion is anticipatory and not ripe for review. See Turner v. Shumlin, 2017 VT 2, ¶ 9, 204 Vt. 78 (per curiam) (“A claim is not constitutionally ripe if the claimed injury is conjectural or hypothetical rather than actual or imminent.”).

It is important to note that defendant did not object to postponing the weight-of-the-evidence hearing pending the competency evaluation. At the July 21 hearing, defendant conceded that the weight-of-the-evidence hearing should be postponed until the competency issues were resolved. She did not argue that the court lacked authority to continue the preliminary hold-without-bail order until competency was resolved. To the extent that defendant now contends that the trial court lacked authority to hold defendant pending resolution of the competency question, we do not address this question for the first time on appeal. Progressive Ins. Co. v. Brown, 2008 VT 103, ¶ 8, 184 Vt. 388 (“We have consistently held that we will not consider arguments on appeal that were not preserved in the trial court.”). The criminal statutes provide a process for evaluating a defendant’s mental health and outline the standards for when a defendant may be held pending completion of a mental-health evaluation. See 13 V.S.A. §§ 4815-4817. It is up to the trial court to determine these issues in the first instance.

The appeal is dismissed as premature.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice