

ENTRY ORDER

SUPREME COURT DOCKET NO. 21-AP-187

SEPTEMBER TERM, 2021

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Chittenden Unit,
	}	Criminal Division
Graham Cassinell	}	
	}	DOCKET NO. 21-CR-02
	}	
		Trial Judge: Alison Arms

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

Defendant Graham Cassinell appeals the superior court’s order denying his motion to review bail and release him on conditions under 13 V.S.A. § 7554. For the reasons that follow, the court’s order is reversed, and the matter is remanded.

Defendant is charged with two counts of first-degree aggravated domestic assault under 13 V.S.A. § 1043(a)(2), interference with access to emergency services contrary to 13 V.S.A. § 1031, and disturbing the peace using a telephone in violation of 13 V.S.A. § 1027(a). The State has introduced evidence that, on two occasions, defendant threatened to kill complainant (his girlfriend) while brandishing a firearm. There is also evidence that defendant was consuming alcohol and drugs during the incidents, prevented complainant from calling the police, and told complainant that he would kill her, any responding police officers, and complainant’s friends. There is further evidence that defendant’s wife died several years ago, and that defendant made statements to complainant like “I am ready to go see her” and “I am not afraid to die.”

In April 2021, the superior court entered a stipulated hold-without-bail order under 13 V.S.A. § 7553a, which authorizes pretrial detention of a person charged with a violent felony “when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person’s release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence.” Under Chapter II, § 40 of the Vermont Constitution and 13 V.S.A. § 7553b(a), a person so held is entitled to a trial within sixty days after bail is denied. If, through no fault of the defense, the trial does not begin within sixty days, the court must schedule a bail hearing and engage in the analysis outlined in 13 V.S.A. § 7554. State v. Lohr, 2020 VT 41, ¶ 16; see also Vt. Const. ch II, § 40; 13 V.S.A. § 7553b(b).

In May, defendant moved to review bail and proposed conditions of release under § 7554, including a 24-hour curfew and the supervision of a responsible adult. After a June hearing, the

court set bail at \$100,000 but declined to release defendant to the proposed responsible adult. Defendant therefore remained incarcerated.

In July, defendant filed a second motion to review bail, this time offering a new responsible adult to supervise his release. The court rejected the proposal and suggested that it would reconsider release if tied to monitoring by the Department of Corrections (DOC) through the home-detention program. See 13 V.S.A. § 7554b.

Defendant then applied for home detention in the house of a third proposed responsible adult, his friend Lori Genest. DOC personnel visited the home and determined that the residence meets the necessary requirements to allow the Department to supervise defendant on home detention, and accordingly approved home detention there. The officials explained to Ms. Genest what the home-detention program entails and obtained her assurance that there were no weapons, alcohol, or drugs in the home. If released, the report indicates that defendant will be placed on both GPS and SCRAM monitoring. The report further notes that the GPS monitoring system can place exclusion zones around areas that defendant is not allowed to be in. The system, moreover, notifies authorities if defendant violates his geographic restrictions, though it cannot prevent such violations. The report explains that the system can send the authorities alerts if defendant comes within a predetermined proximity to complainant's residence. Finally, the report notes that local law enforcement agencies were "still not operating at normal levels"—seemingly referencing the effects of the COVID-19 pandemic—but that local correctional officers were being redeployed, including after normal business hours, though their response was not instantaneous.

Defendant filed a third motion to review bail and a hearing was held where he presented the court with the home-detention report and Ms. Genest's testimony. Ms. Genest testified that she met defendant when she and defendant's wife were in the hospital together in 2018. Ms. Genest testified that she understood the nature of the allegations against defendant, including evidence that he threatened complainant with a firearm and prevented complainant from calling emergency services. Ms. Genest also testified that she understood that defendant was not to leave her property, and was not to possess firearms, alcohol, or drugs. She explained that she is retired and usually at home and could monitor defendant to ensure he did not leave the house. She further testified that she has observed a police presence in her town.

On cross-examination, Ms. Genest testified that she does not have a criminal history, does not take any medication, and does not keep alcohol or firearms in her home. When the State's attorney asked whether the charges against defendant raised concerns about having him in her home, Ms. Genest testified that they did not, adding, "I feel like it was extenuating circumstances, and I'm still willing to put my reputation behind him." She then testified that she understood that her responsibility would be to make sure that defendant follows the imposed restrictions.

On redirect examination, Ms. Genest testified that her home has a security system that sends an alert to her phone if someone is in the front yard, and that the rest of the perimeter is fenced in. She further testified that she always keeps the key to her car in her purse and would not allow defendant to obtain that key.

The court then asked Ms. Genest questions directly, asking what she understood as her responsibilities if defendant violated a condition of release. Ms. Genest answered that she realized

it was a big responsibility and that she would “immediately pick up the phone and call 911.” Ms. Genest testified that her property encompasses about three-quarters of an acre, and that the fence she described is between six and seven feet high. In response to the court’s attempt to clarify what the witness meant earlier with “extenuating circumstances,” Ms. Genest explained that she had not read the affidavits of probable cause in the case but had learned of the charges through defense counsel. The court asked whether Ms. Genest knew certain particulars of the allegations against defendant. The witness was aware of some of the details but not others. Ms. Genest did indicate, however, that she was aware that the allegations charge defendant with threatening complainant with a weapon.

Before ruling, the court recognized that many aspects about Ms. Genest’s testimony made her an appropriate responsible adult. The court observed that DOC did not have any concerns about her or her home, and the court noted that it did not have those concerns either. The court noted the presence of law enforcement in the area, the security system in the home, Ms. Genest’s retired status, and the limited size of the property. The court observed that “he does seem to be potentially subject to an environment that you can keep close watch of.”

But then the court held that Ms. Genest was not an appropriate responsible adult. It acknowledged that a responsible adult’s job is to supervise the defendant but noted that the allegations against defendant are “significant and severe” and that it was concerned with public safety, and in particular, the complainant’s safety. The court said that it did not “believe that [Ms. Genest] has sufficient ability to really keep [defendant] on her property” and then recited aspects of the home-detention report, including the fact that DOC response was not instantaneous and that the GPS system only notifies the authorities after a violation. The court said that Ms. Genest was not able to “mitigate these very significant concerns,” and stated that the witness did not know the “very significant allegations in this case.” The court concluded by stating: “the court does not find that [Ms. Genest] is able to prevent the very real type of harm that the defendant himself asserted could come to [complainant].”

On appeal, defendant first argues that the superior court refused to approve Ms. Genest as a responsible adult in order to continue defendant’s pretrial detention due to concerns for public safety, which, he continues, is a violation of the sixty-day rule in Section 40 of the Vermont Constitution. Defendant further argues that the court abused its discretion in refusing to approve Ms. Genest as a responsible adult. Finally, defendant contends that the court’s finding that Ms. Genest did not understand the charges was clear error and its reliance on that finding constitutes an abuse of discretion.

Because the trial court indeed abused its discretion in declining to release defendant, the constitutional argument is not considered. See In re M.C., 2018 VT 139, ¶ 9, 209 Vt. 219 (observing that “courts should not decide constitutional questions unnecessarily” (quotation omitted)).

This Court affirms an order addressing a motion to impose conditions of release under 13 V.S.A. § 7554 if the order “is supported by the proceedings below.” 13 V.S.A. § 7556(b). The Court’s review is for abuse of discretion. Lohr, 2020 VT 41, ¶ 18. Although the superior court’s discretion under § 7554 is broad, its decision cannot be arbitrary. Id.

Even though the constitutional argument is not addressed here, the superior court’s analysis under § 7554 following the expiration of the sixty-day period is underpinned by established constitutional principles. This Court has long observed that “ ‘[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,’ ” adding that “[p]retrial detention necessarily cuts against the presumption of innocence inherent in our criminal jurisprudence.” State v. Duff, 151 Vt. 433, 440 (1989) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)). In Lohr, this Court explained that in adopting § 7553a and the sixty-day rule in § 7553b, the people of Vermont and the Legislature sought to establish a balance between liberty and security. 2020 VT 41, ¶ 14. The Court explained that if the trial of a person held under § 7553a cannot occur within sixty days, § 7553b makes the defendant bailable under § 7554, despite a risk to the public. Id.

Under § 7554(a)(2), the court may impose the least restrictive combination of several outlined conditions “that will reasonably ensure protection of the public,” while considering the factors in § 7554(b)(2). See 13 V.S.A. § 7554(a)(2), (b)(2). Section 7554 does not require the court to eliminate all danger to the public. Among the conditions available to reasonably ensure the public’s protection are placing the defendant in the custody of a designated person to supervise him; placing restrictions on the defendant’s travel, association, and residence; requiring the defendant to participate in an alcohol or drug treatment program; and imposing “any other condition found reasonably necessary to protect the public.” Id. § 7554(a)(2)(A)-(D). In short, § 7554 provides the court a diversified toolbox to craft a set of conditions that reasonably protect the public from a risk of danger, while recognizing that the defendant has not been adjudicated guilty and is eligible for release notwithstanding some continued risk to the public.

Here, in concluding that Ms. Genest was not “able to prevent the very real type of harm that the defendant himself asserted could come to [complainant],” the superior court elevated the requirement of public safety beyond what any responsible adult or conditions of release can reasonably accomplish. This conclusion is compelled not only by the court’s choice of words, but by its ultimate decision to deny release in the face of the evidence before it.

The court acknowledged that the role of a responsible adult is to supervise the defendant and notify authorities if the defendant violates the imposed conditions. Ms. Genest testified that she is retired and normally at home and can monitor defendant to ensure he does not leave the house; she does not have a criminal history, does not take any medication, and does not keep alcohol or firearms in her home; her property encompasses about three-quarters of an acre; her home has a security system that sends an alert to her phone if someone is in the front yard; the rest of the perimeter is fenced in by a six- to seven-foot high fence; she always keeps the key to her car in her purse and will not allow defendant to obtain that key; and she has observed a police presence in her town. As to her responsibilities, Ms. Genest testified that she understood that defendant was not to leave her property, and was not to possess firearms, alcohol, or drugs. When the court asked what Ms. Genest understood as her responsibilities if defendant violated a condition of release, Ms. Genest answered that she realized it was a big responsibility and that she would “immediately pick up the phone and call 911.”

The court acknowledged several of these pieces of testimony and noted that “he does seem to be potentially subject to an environment that you can keep close watch of,” but nevertheless

rejected Ms. Genest as a responsible, pointing to the fact that she did not know certain allegations in the case and to DOC's concerns regarding personnel availability and speed of response.

DOC indeed noted in the home-detention report that local law enforcement agencies were "still not operating at normal levels," but that local correctional officers were being redeployed, including after normal business hours, though their response was not instantaneous. But, otherwise, DOC approved the home for home detention and explained that defendant will be placed on both GPS and SCRAM monitoring, which notifies authorities if defendant violates his geographic restrictions. The system can also place exclusion zones around areas that defendant is not allowed to be in, and can alert authorities if defendant comes within a predetermined proximity to complainant's residence.

The evidence shows that Ms. Genest has the willingness and ability to supervise and monitor defendant during the period of release, and that DOC has the technological capacity to act as a second layer of protection.

Moreover, the court's finding that Ms. Genest "did not know the very significant allegations in this case" is not supported by the record. Ms. Genest testified that she was aware of evidence that defendant threatened complainant with a firearm and prevented complainant from calling emergency services. When the court asked whether Ms. Genest knew certain particulars of the allegations against defendant, the witness was aware of some of the details but not others. However, Ms. Genest indicated that she was aware that the allegations charge defendant with threatening complainant with a weapon. Although it would be preferable for a potential responsible adult to know all the allegations in the affidavits of probable cause, ignorance of some details in the allegations does not prevent an otherwise qualified responsible adult from understanding the severity of the charges or fulfilling her obligations to the court. The evidence indicates that Ms. Genest was aware of the serious charges against defendant.

Given the evidence before the court, it was an abuse of discretion to decline to release defendant under the proposed set of conditions. Accordingly, the court's order must be reversed. The matter must also be remanded so the court may re-examine its § 7554 analysis and impose the set of conditions reasonably necessary to protect the public, which on this record includes an analysis under the home-detention statute in § 7554b.

Reversed and remanded; mandate to issue forthwith.

FOR THE COURT:

William D. Cohen, Associate Justice