



**ENTRY ORDER**

FEBRUARY TERM, 2022

State of Vermont v. Kareem Johnson\*            } APPEALED FROM:  
  } Superior Court, Chittenden Unit,  
  } Criminal Division  
  } CASE NO. 21-CR-10108

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

Defendant Kareem Johnson appeals the superior court’s order denying his motions to amend conditions of release under 13 V.S.A. § 7554. I affirm.

Defendant is charged with one count of second-degree aggravated domestic assault under 13 V.S.A. § 1044(a)(2)(B), and one count of violating conditions of release under 13 V.S.A. § 7559(e). The charges arise from an incident in which defendant allegedly struck a woman (complainant) on a street in downtown Burlington on November 25, 2021. At the time of the incident, defendant was subject to conditions of release, including a twenty-four-hour curfew, in a different docket.

Defendant was arraigned on November 29, 2021. The trial court imposed conditions of release including Condition 4, requiring release into the custody of a responsible adult, and Condition 11, the imposition of a twenty-four hour curfew at a court-approved address. Defendant objected to Condition 4 because he could not produce a responsible adult. The State did not seek cash bail.

On December 29, 2021, defendant filed a motion to strike Condition 4 and Condition 11, or in the alternative, approve a twenty-four-hour curfew at his home address. At a hearing on January 7, 2022, the State opposed the motion. It represented that defendant had a history of previous releases into the community under curfew conditions, had been on arrest warrant status during the incident, and had previously not answered the door at home to law enforcement seeking to locate him. Defendant countered that he could not find a responsible adult, he had just spent many weeks in jail in his forties, and the allegations against him were not serious enough to warrant the responsible-adult condition. He further explained that he did not want to be around the people with whom he had been having issues, and that he “just want[ed] to keep his nose to the grindstone.”

The court denied defendant’s motion, pointing to defendant’s pending charges. The court noted that defendant has pending felony charges in other dockets, including two other second-degree aggravated domestic assault charges, and a charge of interference with access to emergency services under 13 V.S.A. § 1031. Defendant notified the court he would file an application for home detention and the court suggested this was a “good plan.”

On January 16, 2022, defendant filed his home-detention application with the court, and the court forwarded the application to the Department of Corrections (DOC) to prepare a report. On January 27, 2022, DOC completed the report indicating that defendant did not meet the requirements for home detention because zero bail had been imposed, and that defendant's proposed residence was "too precarious" because it was only a "short-term solution." Moreover, the report found that complainant resided at the proposed residence, defendant's release conditions prevented contact with complainant, and given defendant's recent history, proceedings had been set in motion that would cause defendant to lose the residence by April 2022. However, the report noted that the trial court is ultimately responsible for determining defendant's appropriateness for home detention.

On February 2, 2022, the court held a hearing on defendant's request for home detention. At the beginning of the hearing, defendant requested the court to approve a responsible adult he had located, if it was not going to approve home detention. The State agreed to proceed on both requests. The court heard testimony from defendant's proposed responsible adult and from a DOC representative regarding its home-detention report. After a recess, the court denied both motions on the record.

The court denied defendant's request for home detention because it had not set bail in the case, and the statute governing home detention—13 V.S.A. § 7554b(b)—applies only when the court has set bail. The court denied defendant's responsible adult candidate because the court was not convinced she could report potential violations of release conditions "in all instances." Defendant's pending charge of interfering with access to emergency services in a different docket gave the court pause. The court noted that the candidate suffers from several health-related issues and lives with her twenty-nine-year-old daughter. Given all these factors, combined with defendant's criminal history and the severity of other pending charges, the court concluded that she was not a suitable responsible adult. The court did, however, leave open the possibility for another candidate should defendant produce one.

On appeal defendant makes three arguments. First, he contends, in effect, that the trial court's decision not to strike Condition 4 was an abuse of discretion. Second, he argues that the court's denial of his responsible adult candidate was an abuse of discretion because the court could not appropriately consider whether a responsible adult can "be overpowered." Third, defendant further argues that the trial court erred by denying defendant's home-detention request after it sent the application to DOC. He maintains that in so doing, the court in effect made a ruling approving the applicability of the statute, and that the court subsequently failed to engage in the requisite analysis required by the home-detention statute, 13 V.S.A. § 7554b(b)(1)-(3).

This Court "shall" affirm orders addressing motions to amend or strike conditions of release under 13 V.S.A. § 7554, if the orders are "supported by the proceedings below." 13 V.S.A. § 7556(b); State v. Pratt, 2017 VT 9, ¶ 20, 204 Vt. 282. Trial courts have broad discretion in setting release conditions. See State v. Bailey, 2017 VT 18, ¶ 9, 204 Vt. 294. We review the trial court's decisions regarding release conditions for an abuse of discretion. State v. Rougeau, 2019 VT 18, ¶ 14, 209 Vt. 535.

To the extent defendant expressly makes the argument on appeal,<sup>1</sup> the trial court's denial of his motion to strike Condition 4 was not an abuse of discretion. Defendant objected to Condition 4

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<sup>1</sup> Defendant cites the January 7 order denying his motion to strike this condition as one of three decisions he is appealing. However, he does not develop this argument in his brief, and briefly addressed it at oral argument without citing any legal authority to support his position.

for essentially two reasons. First, he argued that Condition 4 was unnecessary given his age, his desire to avoid the people with whom he had been having trouble, and his apartment where he could reside if released under a curfew condition. Second, defendant could not, prior to February 2, 2022, produce a potential responsible adult.

The court imposed the condition at arraignment because defendant had “eight failures to appear, [and] lots of violations of court orders.” At the January 7 hearing, the court considered defendant’s two other pending second-degree aggravated domestic assault charges, an unlawful restraint charge, an identity-theft charge, and a charge of interfering with access to emergency services, which the court found “problematic.” Further, the State opposed striking the responsible-adult condition in part because defendant had previously been released on a twenty-four-hour curfew condition, and violated this condition while committing the current offenses. The trial court’s decision not to strike Condition 4 given this context is therefore “supported by the proceedings.” Pratt, 2017 VT 9, ¶ 20.

Next, defendant argues that the trial court’s denial of his motion to approve an identified person as a responsible adult was an abuse of discretion. He cites a recent single-Justice entry order from this Court for the proposition that trial courts may not elevate the public-safety requirement in 13 V.S.A. § 7554(a)(1), beyond “what any responsible adult or conditions of release can reasonably accomplish.” State v. Cassinell, No. 21-AP-187, 2021 WL 4101704, \*3 (Vt. Sept. 3, 2021) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo21-187.pdf> [<https://perma.cc/9WA9-N473>]. He suggests that the court otherwise “found the proposed [responsible adult] appropriate in all respects.” His argument fails for several reasons.

First, the trial court did not find the proposed responsible adult appropriate in all respects. As noted above, the court expressed concern that the candidate suffered from significant health concerns which rendered her potentially unable to report violations of release conditions. The court heard testimony from the candidate that she is disabled, suffers from COPD, and requires supplemental oxygen. Though she indicated that she understood her responsibilities, the candidate also testified that she had a criminal history and admitted to being charged with violating conditions of release. The court noted defendant’s pending charge in another docket where he allegedly took the complainant’s cell phone as she attempted to call for emergency services. Furthermore, the court expressed concern about the candidate’s twenty-nine-year-old daughter who resided at the apartment, given defendant’s criminal history and pending domestic assault charges against other women with whom he lived.

Second, this case is not like Cassinell. There, the defendant identified a responsible adult and DOC determined the responsible adult’s residence was appropriate for home detention when combined with the use of GPS monitoring. The responsible adult did not have a criminal history, did not take any medication, was retired, lived far from the complainant, and had a home-security system. The trial court found that she was an appropriate candidate but nevertheless denied the motion because she did not have the ability to prevent the defendant from harming members of the public, including the complaining witness. Justice Cohen reversed, concluding that the trial court impermissibly elevated public safety “beyond what any responsible adult or conditions of release can reasonably accomplish.” Cassinell, 2021 WL 4101704, \*3. Justice Cohen noted that the trial court’s conclusion denying the responsible adult was incorrect because it denied “release in the face of the evidence before it.” Id. The trial court here did not deny release in the face of evidence pointing toward release. The candidate differed significantly from the responsible adult in Cassinell, and home detention at the candidate’s residence, though briefly contemplated by the trial court, did not appear to be an option given DOC had not investigated the residence.

Finally, defendant argues that the trial court erred by not granting his request for release to home detention. He maintains that, in effect, the trial court approved his request and acknowledged the statute applied to him when it forwarded the application to DOC such that the court was subsequently required to analyze whether home detention would reasonably assure his appearance in court. See 13 V.S.A. § 7554b(b)(1)-(3).

“Issues of statutory interpretation are subject to de novo review.” State v. Gurung, 2020 VT 108, ¶ 23 (quotation omitted). “If the intent of the Legislature is apparent on the face of the statute because the plain language of the statute is clear and unambiguous, we implement the statute according to that plain language.” State v. A.P., 2021 VT 90, ¶ 12 (quotation omitted).

Defendant’s argument is squarely addressed by the home-detention program statute, 13 V.S.A. § 7554b. Under § 7554b(b), persons who are “detained pretrial . . . for an inability to pay bail after bail has been set by the court may be . . . appropriate for home detention.” Id. § 7554b(b). The statute’s language is clear—before considering a person for the home-detention program, the court must have set bail and the defendant must not be able to pay bail. Subsection (b) contains no other provision allowing pretrial detainees to be released into the home-detention program without first meeting this threshold.

No bail has been set in this case. At the February 2 hearing, the court indicated that it did not intend to set bail. Thus, however defendant wishes to characterize the trial court’s forwarding of his application to DOC, the trial court was correct to deny the request given this reality.

Defendant argues that State v. Whiteway, 2014 VT 34, 196 Vt. 629 (mem.), stands for the proposition that § 7554b(b) implicitly applies to persons “who cannot meet the conditions of release imposed by the court.” In Whiteway, we held that a prior version of § 7554b(b) also applied to persons who have no right to bail. Id. ¶ 16; see also 13 V.S.A. § 7553 (“A person charged with an offense punishable by life imprisonment when the evidence of guilt is great may be held without bail.”). The operative language in that version of § 7554b(b) included the language “lack of bail.”<sup>2</sup> After Whiteway, the Legislature amended the statute, removing “lack of bail,” and expressly excluding persons charged under § 7553 and § 7553a, the statutes governing bail in life-imprisonment and violent felony cases. See 2017, No. 164 (Adj. Sess.), § 7. If the Legislature wished to amend the statute to apply to persons who cannot meet conditions of release under 13 V.S.A. § 7554, it would have done so. Whiteway does not suggest otherwise.

Affirmed.

FOR THE COURT:

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Karen R. Carroll, Associate Justice

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<sup>2</sup> The statute provided that “the status of a defendant who is detained pretrial in a correctional facility for lack of bail may be reviewed by the court to determine whether the defendant is appropriate for home detention.” See 2017, No. 164 (Adj. Sess.), § 7.