Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-155

SEPTEMBER TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
v.	}	Criminal Division
	}	
	}	
Joseph A. Beaton	}	DOCKET NO. 1276-9-14 Wmcr
		Trial Judge: Katherine A. Hayes
		Motion Judge: Michael R. Kainen

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

Defendant appeals the superior court's denial of his motion to correct sentence, in which he argued that he was entitled to credit for time he spent in his residence under conditions of release. We affirm.

On September 26, 2014, defendant was charged with aggravated assault and burglary while carrying a deadly weapon. He was released on conditions, including condition 11, which imposed a 24-hour curfew, "except for work, medical appointments, meeting with [his] attorney or court appearance, including travelling to and from." On September 3, 2015, the conditions were amended to add condition 35, which stated: "As to condition #11—Defendant may leave his residence on Saturdays between 1-3 PM to grocery shop and attend to other personal needs in Wilmington."

On October 13, 2015, the parties filed a stipulation to amend the conditions of release as follows:

> 35. As to condition #11—Defendant may leave his residence on Saturdays between 1-3 pm to grocery shop and attend other personal needs in Wilmington. Defendant may leave his residence on Fridays between 4:30 p.m. and 6:30 p.m. to grocery shop and attend to other personal needs in Wilmington.

That same day, the court granted the motion in an entry order format, listing the amended condition 35 exactly as stipulated by the parties. Instead of amending condition 35 by adding the second sentence as stipulated and approved by the court, however, the October 13, 2015 amended-conditions-of-release form kept condition 35 the same but replaced condition 11 with the amended condition 35. Thus, condition 11 now became:

> 11. Curfew: Defendant may leave his residence on Saturdays between 1-3 p.m. to grocery shop and attend to other personal needs in Wilmington, Vermont. Defendant may leave his residence on Fridays between 4:30 p.m. and 6:30 p.m. to grocery shop and attend to other personal needs in Wilmington.

In April 2016, "to avoid unintentional violations of any of his conditions," defendant moved to amend condition 11 "to state that curfew does not apply to verifiable employment, medical, legal, and alcohol or drug treatment meetings." On May 31, 2016, the conditions of release with respect to curfew were amended as follows:

> 11. Curfew: 24 Hrs except for medical, atty appoint court and work to and from.
>
> . . . .
>
> 36. Exception to #11—Defendant may leave his residence on Saturdays between 1-3 PM to grocery shop and attend to other personal needs in Wilmington VT. Defendant may leave his residence on Fridays between 4:30 PM and 6:30 PM to grocery shop and attend [to] other personal needs in Wilmington, VT.

On June 20, 2016, the curfew conditions were amended a final time as follows:

> 11. Curfew: 24 Hrs except for medical, atty appoint court and work to and from, and AA meetings on Monday and Saturday from 7 PM to 9 PM.
>
> . . . .
>
> 36. Exception to #11—Defendant is excepted from the curfew between the hours of 8 a.m to 8 p.m. while in the company of his children engaging in safe parental activities. Defendant may leave his residence on Saturdays, between 1 and 3 p.m. to grocery shop and attend to other personal needs in Wilmington, Vermont. Defendant may leave his residence on Fridays between 4:30 and 6:30 p.m. to grocery shop and to attend other personal needs.

Defendant was twice charged with violating the conditions, once in March 2015 and once in May 2015. The State agreed to dismiss the March charge, but was permitted to discuss the violation at sentencing. On November 7, 2016, defendant pleaded no contest to one count of aggravated assault and guilty to one count of burglary while carrying a deadly or dangerous weapon, one count of unlawful mischief, and one count of violating a condition of release. At the February 16, 2017 sentencing hearing, the trial court denied defendant credit for time served during the period he had been released on conditions, which amounted to 874 days.

In April 2017, defendant filed a motion to correct sentence, arguing that the trial court erred in denying him credit for time served while he was released on conditions. Relying on State v.

Kenvin, 2013 VT 104, 195 VT 166, the superior court denied the motion, stating that "[t]he amount of time [defendant] was allowed out, and the discretion he had to make his schedule lead the court to conclude that this was not the functional equivalent of custody."

On appeal, defendant argues that: (1) this Court should not apply to this case our holding in a recent opinion issued during the briefing of this appeal, State v. Byam, 2017 VT 47, ¶ 18, in which we overruled Kenvin to the extent that it "permitted credit for home detention outside the statutory programs for home confinement and electronic monitoring" and instead adopted a "bright-line" rule that "a defendant who is released pretrial under curfew established by conditions of release and who is later sentenced to jail time is not entitled to credit under 13 V.S.A. § 7031(b) for the time spent on curfew under conditions of release"; and (2) the superior court erred in denying his motion to correct his sentence and thus refusing to grant him credit for time he spent while under conditions of release. The State responds that Byam should be applied to this case, but that even if it is not, under the law as set forth in Kenvin, defendant is not entitled to credit for any period of time he spent subject to his conditions of release.

We agree with the State on the latter point. We need not consider whether Byam should be applied here because, even applying the law as set forth in Kenvin, we conclude that defendant is not entitled to credit for any period he spent while living in his residence under the conditions of release set by the trial court. In Kenvin, we concluded that § 7031(b), which requires sentencing courts to give convicted defendants credit for days spent in custody connected with the sentence imposed, "calls for a case-by-case factual determination as to whether a defendant's conditions of release amount to custody under § 7031(b)." 2013 VT 104, ¶ 20, 195 Vt. 166 (quotation and alteration omitted). That determination involves a legal question that we review de novo. Id.

In Kenvin, we determined that the defendant was not eligible for credit pursuant to § 7031 for the period during which he was restricted "to his home but allowed him to travel to a cell-phone-reception area, attend appointments, and walk his dog." Id. ¶ 23. In so concluding, we reasoned as follows:

> Defendant's conditions did not specify a person responsible for his custody and did not dictate the locality of his residence. Defendant was not institutionally confined and failed on this record to show some comparable institutional confinement in his situation living at home . . . He was free to spend his days as he wished in his home, to travel to a location where cell-phone service was available at his leisure, and to walk his dog to any place, whenever he desired, so long at the walks began and ended at his home and did not exceed one hour apiece. The conditions allowed defendant to attend meetings with his attorney as well as medical appointments. Defendant was not accountable to any person for these actions; the court required no prior authorization and no log of the purpose, destination, or duration of defendant's movements.

Id. (citation omitted). We rejected the defendant's argument that the conditions of release were the equivalent of "home detention" under 13 V.S.A. § 7554b, because his "conditions did not have in place enforcement mechanisms such as surveillance and/or electronic monitoring" and "did not

require him to live in a 'preapproved residence continuously, except for authorized absences' as mandated by § 7554b." Id. ¶ 25.

We concluded, however, that the defendant was entitled to credit for another period during which his "conditions of release required him to stay in his home at all times without exception." Id. ¶ 26 (emphasis added). We reasoned that although the conditions during this time "did not require defendant's institutionalization and did not have enforcement mechanisms in place comparable to those in § 7554b(a)," they "mandated defendant's continual residence in his home without exception" and "constrained defendant to a single place and did not allow any discretionary movement or travel by defendant—with or without permission or supervision—as allowed by the amended conditions." Id.

Under the law as set forth in Kenvin, defendant is plainly not entitled to credit for the period between September 26, 2014 and September 3, 2015, when he was free to live at a place of his own choosing with his girlfriend and was free to leave his residence at his discretion for work, medical appointments, meetings with his attorney, and court appearances. This is also true for the periods between September 3-October 13, 2015 and May 31, 2016 until his incarceration when the conditions included even more exceptions to the 24-hour curfew. As in Kenvin, "defendant's conditions allowed substantial freedom in movement at his discretion—rather than judgment of another—which is not contemplated by the home detention program." Id. ¶ 25.

In support of his request for credit, defendant relies heavily upon his claim that Wilmington police regularly checked to make sure he was complying with curfew conditions. In his affidavit, defendant alleges that he received visits "almost every day" from the police until he moved to Dover, Vermont in August 2015, when the visits ended. Defendant's girlfriend, however, stated in her affidavit that the daily visits lasted only for the first month and thereafter occurred "three to four days per week." A Wilmington police officer testified that he took part in one of those checks "maybe two or three" times and that he believed the curfew checks were "[l]ess frequent [than weekly] as in maybe monthly, every two weeks." In any event, these compliance checks, which were not part of the conditions of release, did not amount to the type of surveillance and electronic monitoring required under the home detention program discussed in Kenvin.

A closer question is the period between October 13, 2015 and May 31, 2016, when the conditions allowed defendant to leave his residence only during a couple hours on Friday evening and Saturday afternoon for grocery shopping. As indicated above, the limited exceptions to the 24-hour curfew during this period were the result of an error in amending the conditions-of-release form. The parties stipulated, and the trial court approved, only adding the additional grocery-shopping exceptions, not altering or removing the exceptions already in place. But somehow in the transition from the court order to the amended conditions-of-release form, the original exceptions in condition 11 were not retained. The evidence at the sentencing hearing, however, strongly suggests that defendant continued to work during this period as allowed by the original conditions. Defendant's employer testified that defendant was one of his employees at the time of the February 16, 2017 hearing and had worked for the company for two years, which would have included the period between October 13, 2015 and May 31, 2016. Defendant's girlfriend confirmed in her testimony that defendant had been working for his current employer for two years, leaving home at six-thirty or seven in the morning and returning anywhere between four and five in the evening. Moreover, during this period, defendant was permitted to live in a

residence of his choosing with his girlfriend and her daughter and there was no evidence that he was subject to any curfew checks or compliance monitoring. The conditions certainly did not require any such monitoring. Hence, we conclude that, even applying the law as set forth in Kenvin before it was overruled by Byam, defendant is not entitled to credit for any of the time he spent under conditions of release prior to sentencing.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice