

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-404

NOVEMBER TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
v.	}	Superior Court, Rutland Unit,
	}	Criminal Division
David Hodges	}	
	}	DOCKET NO. 1544-11-15 Rdcr
	}	
	}	Trial Judge: Thomas A. Zonay

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

Defendant appeals the trial court’s decision to hold him without bail pending the merits hearing on his alleged violation of the conditions of his probation. We hold that the trial court’s October 26, 2017 decision that defendant should be held without bail is supported by the proceedings below, and we therefore affirm.

In February 2017, defendant was convicted of domestic assault, in violation of 13 V.S.A. § 1042, and violation of an abuse prevention order, in violation of 13 V.S.A. § 1030(a). Defendant’s convictions were based on allegations that he had seized his ex-girlfriend, pushed her to the ground, and dragged her by the hair. The trial court deferred defendant’s sentences, and he was released on probation. The conditions of his probation required, among other things, that defendant not “harass, or cause to be harassed the victim, victim’s family or any prosecution witness,” and defendant not “contact the victim or family nor enter the victim’s home, school, or business without the victim’s prior written consent.” The conditions also required that defendant not engage in “[v]iolent or threatening behavior.”

Two weeks later, the victim reported to police that between March 3, 2017, and March 5, 2017, defendant twice arrived uninvited at the victim’s residence; called or texted her more than twenty times; knocked on the door to her residence; knocked on her window; and entered her bedroom without permission and without invitation, demanding to know why she would not return his calls and why her new boyfriend was sleeping in the room with her. Because of these allegations, defendant was arrested and charged with violation of the conditions of his probation. He was also charged with unlawful trespass of an occupied residence, in violation of 13 V.S.A. § 3705(d). The unlawful-trespass charge proceeded in a separate criminal docket.

On March 10, 2017, the court ordered defendant held without bail pending the merits hearing on his violation-of-probation charge. The order was based in part on the allegations underlying defendant’s unlawful-trespass charge. The court emphasized that the convictions underlying his probation included failure to comply with the conditions of a relief-from-abuse order by committing domestic assault; the alleged victim of the violation was the victim in the underlying charges; and the alleged violation occurred less than two weeks after defendant was placed on probation. Defendant moved to review bail, which the court denied in April 2017. He

then applied for home detention, which the court denied in May 2017. The court scheduled the merits and sentencing hearing for the violation-of-probation charge for January 2018.

Defendant requested a trial on the unlawful-trespass charge be held before the court addressed the probation-violation charge. In October 2017, a jury found defendant not guilty of the unlawful-trespass charge. In light of the acquittal, defendant moved to review his hold-without-bail status. After a hearing, the trial court decided to continue to hold defendant without bail pending his merits hearing, despite the acquittal on the unlawful-trespass charge. Defendant timely appealed.

On appeal, defendant argues that the trial court gave insufficient weight to three factors: the victim's reciprocal communications, which indicate she was not afraid of defendant and made her police report in response to defendant's new dating relationship; that defendant had been incarcerated seven months at the time of the bail-review hearing; and the fact that real-time electronic monitoring is now available, making home detention a viable alternative to incarceration. In short, defendant argues that the purpose of holding a defendant without bail is to protect public safety, but in this case—particularly considering the acquittal for the unlawful-trespass charge—imprisonment is not necessary.

A court may exercise its discretion to release a defendant charged with violation of probation pending a merits hearing, but a probationer has no constitutional or statutory right to release if the probationer is on probation for a listed crime as defined in 13 V.S.A. § 5301(7). 28 V.S.A. § 301(4) (“[T]he court may release the probationer pursuant to section 7554 of Title 13. There shall be no right to bail or release”); State v. Barrows, 172 Vt. 596, 596 (2001) (mem.) (“[T]he court has the discretion to grant bail or release to a probationer, [but] it is not required to do so.”).*

Where a probationer has no constitutional or statutory right to bail, “the presumption is switched so that the norm is incarceration and not release.” State v. Campbell, 2014 VT 123, ¶ 6, 198 Vt. 627 (mem.) (quotation omitted). The trial court has broad discretion whether to hold a probationer without bail, and this Court reviews the trial court's decision only for abuse of discretion. Id. We will affirm the trial court's decision “if it is supported by the proceedings below.” Id.; see 13 V.S.A. § 7556(b) (“Any order so appealed shall be affirmed if it is supported by the proceedings below.”); V.R.Cr.P. 32.1(a)(3)(A) (stating that denial of release pending revocation proceeding is reviewable in manner set forth in 13 V.S.A. § 7556(b)).

In exercising its discretion, the court must consider the factors laid out in 13 V.S.A. § 7554(b). See Campbell, 2014 VT 123, ¶ 9 (relying on 13 V.S.A. § 7554, 28 V.S.A. § 301(4), and V.R.Cr.P. 32.1(a)(3)(A) to assert that courts are “require[d] . . . to consider § 7554(b) factors when determining conditions of release for probationers”). These factors are:

* An exception applies for probationers whose underlying offense is a “nonviolent misdemeanor,” meaning a misdemeanor not listed in 13 V.S.A. § 5301(7). 28 V.S.A. § 301(4), (5)(B)(ii). Domestic assault and violation of an abuse prevention order are both listed in 13 V.S.A. § 5301(7); therefore, there is no right to bail for a probationer, such as defendant, whose underlying conviction is domestic assault or violation of an abuse prevention order. Id.; 13 V.S.A. § 5301(7)(C), (V).

the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of residence in the community, record of convictions, and record of appearance at court proceedings

13 V.S.A. § 7554(b). In addition, the court may consider the “history of actual violence or threats of violence . . . as bearing on the character and mental condition of the accused.” *Id.* Further, in evaluating the § 7554(b) factors, the court must demonstrate for the record how it exercised its discretion in its bail determination. See *State v. Passino*, 154 Vt. 377, 379 (1990) (requiring trial court to articulate “on the record” how it “exercised its discretion”).

The trial court's October 26, 2017 decision that defendant should be held without bail is supported by the proceedings below. The trial court considered evidence presented by both the State and defense counsel at defendant's arraignment on March 10, 2017; the bail review hearing on October 26, 2017; and the trial for unlawful trespass. The court also reviewed the May 2017 written decision denying defendant's request for home detention.

The court then thoroughly considered the factors listed in 13 V.S.A. § 7554(b). The court recognized that defendant had family ties in the area, including a minor child; that he would probably be able to obtain employment if he was released; that he had been living in the community for many years and had ties in Vermont; and that he had no record of nonappearances at court proceedings. Given these facts, the court determined that defendant was “not a flight risk.” However, the court determined that defendant's conduct indicated that release was not appropriate.

In making this decision, the court emphasized two points. First, it noted that the acquittal for unlawful trespass did not dispose of the current proceeding. The standard of proof for unlawful trespass at a jury trial is beyond a reasonable doubt, whereas the standard of proof for a violation of probation is preponderance of the evidence. See *State v. Langdell*, 2009 VT 125, ¶ 8, 187 Vt. 576 (2009) (mem.) (requiring evidence that “tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt” to convict defendant for unlawful mischief (quotation omitted)); *State v. Austin*, 165 Vt. 389, 398 (1996) (“In a probation revocation hearing, the State bears the burden of proving the probation violation by a preponderance of the evidence.”). The trespass acquittal represented the jury's view that the evidence did not meet the beyond-a-reasonable-doubt standard. If, however, the State were to show by a preponderance of the evidence that the events underlying the unlawful trespass did occur, defendant could still be found guilty of violating his probation. Assessed by the preponderance-of-the-evidence standard, the court held that the weight of the evidence against the defendant on the violation-of-probation charge was “quite strong.”

Second, the court noted that the alleged unlawful trespass was not the only basis for the alleged violation of probation. Defendant was charged with violating his probation based on prohibited contact with the victim as well as repeatedly calling and texting her. The court found that defendant's conduct was “very persistent, to the point of being obsessive, with trying to contact” the victim.

More significant to the court than defendant's “obsessive” contact, however, was the evidence that defendant had directed the victim to delete his text messages to her “so that he wouldn't get in trouble” for contacting her. The court stated:

[I]t's not a situation of just having contact. The recognition by defendant of the significance of his behavior and the asking the victim to delete it and even indicating he would get another phone number to, as the Court sees it, somehow thwart probation from being able to properly monitor him is, in this Court's assessment, extremely concerning. Extremely concerning.

In other words, the court was concerned not only with defendant's prohibited contact, but with defendant's intention to hide evidence of that contact to "thwart probation." In the court's view, this went "right to the heart of what probation is supposed to do and be able to do," which is "to safely monitor individuals and individuals to follow conditions of probation." Defendant's intention not to comply with his probation conditions, combined with a specific history of violence toward the victim, demonstrated that defendant could not be "safely monitored" or the victim's safety "reasonably assured."

Thus, the court thoroughly considered the factors in 13 V.S.A. § 7554(b) and clearly articulated the basis for its determination, drawing on the March 10, 2017 arraignment; the May 2017 written decision denying home detention; the October 26, 2017 bail review hearing; and the trial on unlawful trespass. The court did consider the victim's reciprocal communication, but in its discretion, it found that defendant's conduct, particularly his intention to "thwart probation," was a stronger indication of whether release was appropriate. The court did not consider how long defendant had been incarcerated or the viability of real-time electronic monitoring, and the court was not required to do so. See Campbell, 2014 VT 123, ¶ 10 (upholding trial court's decision to hold probationer without bail because it was "required only to consider the [§ 7554(b)] factors, which it did"). Nor was the court required to give any particular weight to any § 7554(b) factor. See id. (upholding trial court's decision to hold probationer without bail where court found defendant "was not a flight risk, but [court] ultimately expressed concern over defendant's pattern of conduct and his potential risk to the public"); Barrows, 172 Vt. at 596 (upholding trial court's decision to hold probationer without bail based on contact with victim because "the proceedings below present an adequate factual basis for the district court's decision"). The court considered the § 7554(b) factors and made a decision supported by the proceedings below.

Affirmed.

FOR THE COURT:

Paul L. Reiber, Chief Justice