Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-034

OCTOBER TERM, 2018

State of Vermont v. John D. Justice*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 615-6-16 Frcr
		Trial Judge: A. Gregory Rainville

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

Defendant appeals pro se from the trial court's denial of his motion seeking credit for time served. He argues that he was entitled to credit for the time he was released on conditions pretrial. We affirm.

In June 2016, defendant was charged with one count of assault and robbery and one count of burglary of an occupied dwelling armed with a dangerous or deadly weapon. Defendant was released on conditions into the custody of his parents. He was directed to abide by a 24-hour curfew except for regularly scheduled attorney appointments, scheduled court hearings, scheduled medical appointments and emergency medical care, or when in the custody of his parents or when at work. In June 2017, defendant pled nolo contendre to assault and robbery pursuant to a plea agreement and the second charge was dismissed. Following an August 2017 sentencing hearing, defendant was sentenced to 3-7 years to serve.

In January 2018, defendant filed a motion seeking credit for time served. See 13 V.S.A. § 7031(b) (providing that "court shall give the person [convicted of an offense] credit toward service of his or her sentence for any days spent in custody . . . in connection with the offense" for which sentence was imposed). Defendant asserted that he had served time, pretrial, in the Home Detention Program under 13 V.S.A. § 7554b(d). The court denied the motion. Citing State v. Byam, the court held that defendant was not entitled to credit for time served for time spent on curfew pursuant to conditions of release. 2017 VT 47. This appeal followed.

Defendant was not in fact in the Home Detention Program under 13 V.S.A. § 7554b(d) as he argued below. Defendant now argues on appeal that Byam, which issued after he was released on conditions but before he was sentenced, is not controlling. He asserts that we should instead apply the reasoning of State v. Kenvin, 2013 VT 104, 195 Vt. 166, a case that was overruled by Byam.

We find it unnecessary to decide which case applies because even assuming that Kenvin controls, defendant cannot prevail. In Kenvin, the Court considered whether a defendant was entitled to credit against his sentence for two periods when he was released on conditions pending

completion of his direct appeal. At that time, we engaged in a "case-by-case factual determination as to whether a defendant's conditions of release amount[ed] to custody under § 7031(b)." Kenvin, 2017 VT 104, ¶ 20 (quotation omitted). Initially, the "defendant's conditions of release required him to stay in his home at all times without exception." Id. ¶ 26. At his request, the conditions were modified to allow him to travel to a location to use his cellphone, attend meetings at his attorney's office, attend necessary medical appointments, and walk his dog twice a day for an hour each time.

We concluded that the defendant was entitled to credit for the first period but not the second. As to the first period, we found that the defendant was constrained "to a single place" and he was not allowed "any discretionary movement or travel." Id. "This rigid, twenty-four-hour curfew was sufficiently onerous to invoke the credit provision of § 7031." Id. As to the second period, however, we concluded that the defendant failed to show that his living situation was akin to "institutional confinement." Id. ¶ 23. We emphasized the defendant's freedom of movement as allowed by the conditions above, including "spend[ing] his days as he wished in his home," traveling at his leisure to use his cellphone, walking his dog when he wished, and attending attorney meetings and medical appointments. Id. Additionally, the 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 [the] defendant's movements." Id. Thus, we concluded that he was not entitled to credit for this period.

The Byam court overruled Kenvin in favor of a bright-line rule that "nonstatutory home detention with a condition-of-release curfew is never sufficiently akin to penal incarceration to justify credit." 2017 VT 47, ¶ 1.

Assuming arguendo that Kenvin applies, defendant cannot show that he was "in custody" under § 7031(b) during his pretrial release. As in Kenvin, defendant retained significant freedom of movement. He could attend attorney appointments, court hearings, medical appointments and emergency medical care. He could leave the home for work or when "in the custody of his parents." He did not need to seek prior authorization or account for his actions. Just like the latter period at issue in Kenvin, defendant's conditions of release were not "sufficiently onerous" to be "akin to incarceration in an institutional setting." Kenvin, 2013 VT 104, ¶¶ 25-26. The court did not err in denying defendant's motion for credit for time served.

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