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. 2018-119

MARCH TERM, 2019

State of Vermont v. William E. Nelson*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 3554-9-15 Cncr, 4508-12-16 Cncr, and 512-2-17 Cncr
		Trial Judge: Kevin W. Griffin

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

Defendant appeals an order denying his motion to correct his sentence to give him additional credit for time when he was under a twenty-four-hour curfew. On appeal, he argues that the trial court erred in applying a case that issued after the time he was under curfew and that, under the applicable case law, he was effectively in custody during the relevant period and therefore entitled to credit. We affirm.

In December 2017, defendant entered a plea agreement, pleading guilty to three charges in exchange for the State dismissing six charges. Under the agreement, defendant received a sentence of eighteen months to eight years to serve with credit for time served. Following receipt of the sentence calculation from the Department of Corrections, defendant filed a motion to correct, reduce, or modify his sentence on several grounds. Relevant to this appeal, defendant argued that he was entitled to 394 days of credit for time served between October 19, 2015 and November 16, 2016 under strict conditions of release.

Following a hearing, the court found the following relevant facts. On October 19, 2015, when defendant was arraigned, he was released under conditions including a twenty-four-hour curfew. There were several exceptions to the curfew, including for court and attorney appointments, medical appointments, medical emergencies, and counseling. In November 2015, the court granted defendant's motion to modify his conditions, releasing defendant into the custody of a responsible adult and adding exceptions to the curfew for work, if accompanied by the responsible adult or that person's wife. The court added other exceptions to the curfew, including to attend vocational rehabilitation and to appear for general assistance. On November 16, 2016, defendant was accepted into treatment court, the requirement that he be accompanied by a responsible adult was removed, and his curfew was modified to 7:30 p.m. to 7 a.m.

Defendant argued that he was entitled to time served for the period he was under a twenty-four-hour curfew. Under 13 V.S.A. § 7031(b), the court is directed to give "credit toward service of his or her sentence for any days spent in custody." Defendant, relying on State v. Kenvin, 2013 VT 104, 195 Vt. 166, argued that his time under twenty-four-hour curfew amounted to "custody"

under the statute. In Kenvin, this Court held that the defendant was entitled to credit for time spent on a twenty-four-hour curfew that included no exceptions because the conditions were "sufficiently onerous" as to be akin to incarceration. Id. ¶ 26.

The trial court rejected defendant's claim for credit for the time he was released on the twenty-four-hour curfew. The court relied on State v. Byam, 2017 VT 47, ¶ 18, 205 Vt. 173, which 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 a 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." Applying Byam, the court concluded that because defendant was not participating in either statutory program, he was not entitled to credit.

On appeal, defendant argues that retrospective application of Byam to his case violates the Due Process Clause of the U.S. Constitution because applying Byam would effectively increase his punishment. The State responds that even if Byam is not applied, under Kenvin, defendant is not entitled to credit for the periods he was on a twenty-four-hour curfew.*

We agree with the State. We need not consider whether the holding of Byam applies here because, even under Kenvin, defendant is not entitled to credit for the period in question. 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 (quotation and alteration omitted). That determination involves a legal question that we review de novo. Id.

In Kenvin, the defendant was not eligible for credit under § 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. We explained:

> 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 as 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

* The State argues that in the trial court defendant did not argue that Byam could not be applied retroactively and therefore failed to preserve this question for appeal. Because we conclude that defendant is not entitled to credit under the Kenvin standard, we do not reach the preservation issue.

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. 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.

Here, defendant is not entitled to credit for the period he was on a twenty-four-hour curfew. As in Kenvin, "defendant's conditions allowed substantial freedom in movement at his discretion—rather than judgment of another." Id. ¶ 25. Even under the strictest conditions that defendant had, defendant could, at his own discretion, leave the house for court and attorney appointments, medical appointments, medical emergencies, and counseling. Like the defendant in Kenvin, defendant was not required to gain authorization prior to leaving the house for these purposes. Id. ¶ 23. Although, as defendant emphasizes, he was released to a responsible adult for much of the time period that he was on twenty-four-hour curfew, the responsible adult was not required to monitor defendant during times that he left the house for excepted activities. Therefore, defendant was not under conditions akin to incarceration and the trial court properly denied his request for credit.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice