

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-320

JANUARY TERM, 2021

State of Vermont v. Joshua J. Bessette*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 1599-12-17 Frcr, 1608-12-17 Frcr, 1611-12-17 Frcr, 1798-12-18 Frcr, 1165-8-19 Frcr
		Trial Judge: Howard E. Van Benthuyssen

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

Defendant appeals a November 20, 2020 order holding him without bail pending a merits decision on violation-of-probation complaints (VOPs). The two VOPs referenced in the trial court's order were filed on June 17, 2020, and August 24, 2020. Defendant initially appeared before the trial court on the most recent VOP on the day it was filed and the court held him without bail pursuant to 28 V.S.A. § 301. Defendant appealed that order, arguing that the trial court abused its discretion because it failed to acknowledge that it could release him under 28 V.S.A. § 301. This Court agreed, concluding that the trial court had failed to exercise its discretion to consider releasing him on conditions based on the factors in 13 V.S.A. § 7554. State v. Bessette, No. 2020-254, 2020 WL 6798905, at *2 (Vt. Nov. 12, 2020) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo20-254.pdf> [<https://perma.cc/AT8W-4CC9>]. The Court remanded the matter for the trial court to make additional findings. On remand, the trial court considered the § 7554 factors and made additional findings, holding defendant without bail pursuant to 28 V.S.A. § 301.¹ Defendant appeals that order, arguing that the trial court abused its discretion and challenging some of the court's factual assertions.² The trial court's decision to hold defendant without bail in dockets 1611-12-17 and 1599-12-17 Frcr is affirmed. The trial court's decision to hold defendant without bail in dockets 1798-12-18 and 1608-12-17 Frcr is reversed and remanded for the court to set conditions of release under 13 V.S.A. § 7554.

I. Background

The record indicates the following. In May 2018, defendant pled guilty across three different dockets—1599-12-17, 1608-12-17, and 1611-12-17—to aggravated assault with a deadly weapon, three counts of violating conditions of release, two counts of violating an abuse-

¹ As defendant notes in his argument, the trial court order incorrectly cited 13 V.S.A. § 301(4) (codifying offense related to posting utility poles) as the basis for its order holding defendant without bail. The correct citation is 28 V.S.A. § 301(4).

² Defendant appealed this matter pro se and was subsequently assigned counsel for the appeal. During oral argument, defendant's counsel represented that defendant's written arguments are defendant's alone but encouraged this Court to consider them. We address here the arguments that were raised by counsel as well as by defendant in his pro se documents.

prevention order, and resisting arrest. In total, the court sentenced defendant to forty-five to one hundred eleven months, all suspended except eighty-five days to serve, with various conditions of probation. The court imposed Condition P in each of these three dockets, which provided that defendant “shall not drink alcohol [sic] beverages to the extent they interfere with [his] employment or the welfare of [his] family, [him]self or any other person.”

In June 2019, defendant pled guilty in docket 1789-12-18 to retail theft. The court imposed Condition 31, requiring defendant to “attend and participate in Restorative Justice programming and complete the program within 6 month(s).”

In August 2019, defendant was charged with aggravated assault in docket 1165-8-19.³ This charge is pending.

On June 17, 2020, the State filed a VOP against defendant, alleging that he violated Condition P and Condition 31. Regarding Condition P, the State alleged that on May 12, 2020, defendant called 911 for medical assistance due to alcohol withdrawal. When the responding officer arrived, defendant was vomiting, sweating, and initially somewhat incoherent. On this basis, the State argues defendant violated Condition P. Regarding Condition 31, the State alleged that in May 2020, the manager of the Restorative Justice Program stated that defendant had failed to show for intake and to return or reply to emails and calls. On this basis, the State alleged defendant violated Condition 31. Following this initial hearing, the court released defendant on conditions pending a merits hearing on this June VOP.

On August 24, 2020, the State filed another VOP against defendant alleging that he again violated Condition P. Specifically, the State alleged that defendant’s mother called police on August 23, stating that defendant was out of control, intoxicated, and acting violently while at her home. At the initial hearing on the same day, defendant entered a denial on the VOP. The court held defendant without bail pending a VOP merits hearing. Defendant appealed that hold-without-bail order to this Court. On November 12, this Court remanded defendant’s appeal so that the trial court could consider whether to release defendant on conditions applying the § 7554 factors. See Bessette, 2020 WL 6798905, at *3.

In the meantime, the trial court had set merits hearings for the June and August VOPs on September 23 and November 6 but continued the hearings because of defendant’s motions to have the judge disqualified for prejudice or bias. The first of these motions was filed on September 4 and denied on October 8, the second filed on November 5 and denied on November 13. At the time of this appeal, the VOP merits hearings have not been rescheduled.

In our November 12 order to remand, this Court recognized in a footnote that the transmittal letter from the trial court for the initial appeal identified docket 1798-12-18, but that Condition P was never imposed in that docket and thus had no relevance to the August VOP at issue in the appeal. After this matter was remanded, the trial court did not hold any further hearing or accept additional evidence, but rather made findings applying the § 7554 factors based on the record before the court at the time of defendant’s initial appearance in August. In its analysis, the court

³ The trial court’s order on appeal here, holding defendant without bail pending VOP merits hearings, does not purport to address the conditions of release in this docket, so even though defendant has listed this docket in his notice of appeal, there is nothing in this docket for us to address in this appeal. There is, as defendant notes in his pro se brief, a pending motion to dismiss in that case; however, that matter is not before this Court in this appeal of the trial court’s hold-without-bail order.

stated, “[t]he current Violations of Probation are allegations that [defendant] failed to complete the [Restorative Justice P]rogram and consumed alcohol in violation of his conditions,” citing docket numbers 1599-12-17, 1611-12-17, 1608-12-17, and 1798-12-18. The court ultimately ordered that defendant “continue to be held without bail pursuant to [28 V.S.A. § 301] pending violations of probation merits hearings.” The court noted that defendant had seven pending charges, six of which were for alleged violations of conditions of release, and one for aggravated assault. It determined that defendant had demonstrated an inability to conform his conduct to the court’s probation requirements based on his having nine prior violations of probation, violations of conditions of release, two escape convictions, and thirty-three total criminal convictions, as well as his failure to appear for noticed hearings on eight occasions. Further, the court found that defendant’s family had revoked their willingness to act as custodians and that defendant was not employed at the time of his August arraignment. It also noted that defendant had a recent history of alleged violent behavior, considering his pending charge for aggravated assault. The court thus concluded that there were “no conditions of release that would reasonably ensure [defendant]’s appearance at future hearings and proceedings” and that “no combination of conditions of release w[ould] reasonably protect the public.” Defendant appealed.

II. Analysis

We conclude that the trial court did not abuse its discretion in holding defendant without bail in dockets 1611-12-17 and 1599-12-17 after considering the § 7554 factors. The trial court had broad discretion to make this determination, and defendant does not dispute the trial court’s factual findings, except to the extent addressed below. Any error in the court’s factual assertions was harmless. We further conclude that the trial court exceeded its discretion in holding defendant without bail pending VOP merits hearings in dockets 1798-12-18 and 1608-12-17. The charges in these dockets are nonviolent misdemeanors and thus defendant has a statutory right to bail or release pending a VOP merits hearing in these dockets.

The scope of a defendant’s right to bail or release pending a VOP merits decision is governed by 28 V.S.A. § 301(4). Specifically, § 301(4) provides:

Pending arraignment for any charge of violation, the probationer shall be detained at a correctional facility unless issued a citation by a correctional officer. Thereafter, the court may release the probationer pursuant to 13 V.S.A. § 7554. There shall be no right to bail or release, unless the person is on probation for a nonviolent misdemeanor or nonviolent felony.

A nonviolent felony is “a felony offense that is not a listed crime as defined in 13 V.S.A. § 5301(7).” *Id.* § 301(5)(B)(i).

A. Dockets 1611-12-17 & 1599-12-17

Defendant is on probation in dockets 1611-12-17 and 1599-12-17 for one count of aggravated assault and two counts of violating an abuse-prevention order, both of which are listed crimes. See *id.* § 5301(7)(M), (V). The August VOP alleges that defendant violated conditions of probation on these charges. Defendant therefore has no right to release, and we affirm trial court’s order holding him without bail in dockets 1611-12-17 and 1599-12-17.

Defendant, in his pro se brief, is correct in noting that under the U.S. Constitution, “liberty is the norm and detention prior to trial . . . is the carefully limited exception.” See United States v. Salerno, 481 U.S. 739, 755 (1987); see also Vt. Const. ch. 2, § 40 (describing right to bail pror

to trial). However, there is no absolute constitutional right to bail pending revocation of probation. State v. Campbell, 2014 VT 123, ¶ 6, 198 Vt. 627 (mem.) (“A defendant charged with violating probation conditions has no constitutional or statutory right to bail or release if the defendant is on probation for a listed crime”); see also In re Whitney, 421 F.2d 337, 338 (1st Cir. 1970) (explaining why the right to bail does not apply in probation revocation proceedings); LaFave et al., 4 Crim. Proc. § 12.4(f) (4th ed.). In the context of a charge of violating probation conditions, the trial court has broad discretion to hold a defendant without bail.

Similarly, defendant’s reliance on case law involving hold-without-bail orders under 13 V.S.A. § 7553 is misplaced. Defendant is not being held without bail pursuant to 13 V.S.A. § 7553; as noted above, the trial court’s authority to hold him without bail arises from 28 V.S.A. § 301(4) (providing that there is no right to bail or release pending merits hearing on violation of probation charge unless the person is on probation for nonviolent misdemeanor or nonviolent felony). Because the underlying convictions in connection with which defendant is charged with probation violations are violent crimes, he has no statutory right to bail under § 301(4). Thus, the case defendant cites in his brief, State v. Kane, is inapplicable as it relates to dockets 1611-12-17 and 1599-12-17 because the defendant there was entitled by statute to release. See 2016 VT 121, ¶ 11, 203 Vt. 652 (reversing hold-without-bail order where defendant had right to bail because she fit the statutory criteria, being on probation for a nonviolent offense).

However, even where there is no right to bail, “the court has the discretion to grant bail or release to a probationer.” State v. Barrows, 172 Vt. 596, 596 (2001) (mem.). In determining how to exercise such discretion, a trial court must consider the factors in § 7554(b). See Campbell, 2014 VT 123, ¶ 9 (relying on 28 V.S.A. § 301(4) and V.R.Cr.P. 32.1(a)(3)(A) to conclude “[a]ll that is necessary [when determining conditions of release for probationers] is a consideration of the § 7554(b) factors”).⁴ The trial court’s exercise of discretion in considering these factors must be clear from the record. See State v. Passino, 154 Vt. 377, 379 (1990) (remanding where Court was unable to determine how trial court exercised discretion based on record); see also 13 V.S.A. § 7556(b) (providing that “[i]f the order is not supported,” the Court “may remand the case for a further hearing”). Our review is limited to whether the trial court abused its discretion. See Id. ¶ 6. We will affirm the trial court’s order “if it is supported by the proceedings below.” 13 V.S.A. § 7556(b).

On remand, the trial court considered the § 7554 factors, relying on the record available at the time of arraignment. Defendant does not challenge the court’s factual assertions regarding defendant except as follows. First, defendant contends that he has only one conviction for escape rather than the two the trial court noted. Second, defendant argues that he was not unemployed at arraignment but rather that he owns and operates two companies. Third, defendant contends that the trial court erred in relying on the recent aggravated-assault charge against him because the evidence supporting the aggravated-assault charge is not strong; in particular, defendant notes that the State’s only witness—the alleged victim—has died of unrelated causes, and that he has a pending motion to dismiss that charge. Fourth, defendant submits that he did in fact complete the

⁴ In 2018, the Legislature amended § 7554(b) by breaking it into two subsections; § 7554(b)(1) lists the factors a court should consider in setting conditions to reasonably mitigate the risk of defendant’s flight, and § 7554(b)(2) lists the factors the court may consider in setting conditions to protect the public. 2017, No. 164 (Adj. Sess.), § 3. The trial court should consider both risk of flight and danger to the public in exercising its discretion pursuant to 28 V.S.A. § 301(4). See Campbell, 2014 VT 123, ¶ 10 (affirming trial court’s assessment that defendant was not a “flight risk” but posed a “potential risk to the public”). Thus, the court should consider the factors in both § 7554(b)(1) and § 7554(b)(2) in exercising its discretion.

Restorative Justice Program. We address the first three of these challenges as they relate to the hold-without-bail order here and the fourth of these challenges below as it relates to docket 1798-12-18. We conclude that the trial court did not abuse its discretion in applying the § 7554 factors regarding the charges in dockets 1611-12-17 and 1599-12-17, and that any errors in its description of the relevant facts are harmless.

First, even if defendant has only one escape conviction rather than the two the court noted, the error in the court's recitation of defendant's record is harmless. The court referenced the escape convictions in a broader consideration of the § 7554 factors. Specifically, it determined that defendant had a "track record of being unable to conform his conduct to the requirements of Court ordered probation (9 VOP's), conditions of release (2 convictions), and being in the specified place as ordered (2 escape convictions)," and that he had failed to appear in court eight times. It is clear from the court's analysis that the decision to hold defendant without bail did not turn on whether defendant had one versus two escape convictions. If there is any error in the court's stating there were two escape convictions rather than one, it is harmless here. See V.R.Cr.P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Second, even if the trial court's characterization of defendant's employment status failed to capture the nuance of his situation, that error was likewise harmless. Defendant was, at the time of arraignment, under conditions that required him to wear a GPS monitor and prohibited him from being on-location for jobs. Defendant maintains that he still owned those businesses even when he was not able to be physically present and thus was not unemployed. An individual's employment is relevant for this analysis because it can help establish an individual's ties to the area and thus their risk of flight. See State v. Rougeau, 2019 VT 18, ¶ 10, 209 Vt. 535 (recognizing trial court's assessment of defendant's "consistent employment" as a factor mitigating risk of flight). In this case, the court did not find that defendant was likely to flee the jurisdiction; its conclusion as to the risk of defendant's nonappearance at future hearings was based on defendant's track record of past noncompliance with court orders, including multiple failures to appear.

Finally, we reject defendant's argument that the court erred in noting his new aggravated-assault charge because the evidence supporting that charge is weak. In particular, he notes that his motion to dismiss that charge for lack of a prima facie case is pending, and that the alleged victim had died of unrelated causes at the time of arraignment. The court acknowledged that the recent aggravated-assault charge reflects an allegation. In its analysis, the court noted the pending charge along with defendant's record of convictions for aggravated assault. It did not draw any conclusions as to the strength of the evidence supporting the aggravated-assault charge. And the charge is minimally relevant to the court's conclusion that no conditions would reasonably assure defendant's appearance at future proceedings.

The court here considered the § 7554 factors and determined that there were "no conditions of release that would reasonably ensure [defendant]'s appearance at future hearings and proceedings" and further that "no combination of conditions of release w[ould] reasonably protect the public." For the reasons set forth above, any errors in its factual assertions do not significantly affect its conclusion, nor do they affect defendant's substantial rights. See State v. Madigan, 2015 VT 59, ¶ 32, 199 Vt. 211 ("When the admission of evidence, exclusion of evidence, or propriety of argument is objected to in the trial court and raised on appeal, we review for harmless error, determining whether (1) the ruling was erroneous, and (2) if so, whether 'a substantial right' of defendant was affected."). We thus conclude the trial court did not abuse its discretion here. State v. Breer, 2014 VT 132, ¶ 11, 198 Vt. 629 (holding no abuse of discretion where trial court concluded relative to VOP charges that defendant was flight risk and public safety required his detention).

B. Dockets 1798-12-18 & 1608-12-17

Defendant is on probation in docket 1798-12-18 for one count of retail theft and in docket 1608-12-17 for one count of violating conditions of release and one count of resisting arrest. The June 2020 VOP alleged violations of conditions of probation in both of these dockets, and the August 2020 VOP alleged a violation of a condition in docket 1608-12-17. The charges in these two dockets are not listed crimes under § 5301(7). Pursuant to 28 V.S.A. § 301(4), defendant has a right to bail or release pending the VOP merits hearings in these dockets. We thus conclude that the trial court exceeded its discretion in holding defendant without bail pending VOP merits hearings in dockets 1798-12-18 and 1608-12-17.

In the trial court's order after remand, it cited the pending violations-of-probation in dockets 1798-12-18 and 1608-12-17. Specifically, it cited defendant's alleged failure to complete the Restorative Justice Program pursuant to Condition 31 in docket 1798-12-18 and defendant's alleged alcohol consumption in violation of Condition P in docket 1608-12-17. The court determined that defendant had no right to release because he was on probation for listed crimes in dockets 1611-12-17 and 1599-12-17. On appeal, defendant argues that he did in fact complete the restorative program. We conclude this is an argument to be addressed in the VOP merits hearing; however, to the extent that the trial court relied on this VOP allegation to hold defendant without bail, we conclude that the court acted outside its discretion.

As discussed above, we agree that defendant had no right to release in dockets 1611-12-17 and 1599-12-17; however, defendant does have a right to release in dockets 1798-12-18 and 1608-12-17 because the charges there are for nonviolent misdemeanors. See 28 V.S.A. § 301(4) (“There shall be no right to bail or release, unless the person is on probation for a nonviolent misdemeanor or nonviolent felony.” (emphasis added)). In *Kane*, this Court concluded that defendants who fit the statutory criteria of 28 V.S.A. § 301(4) have a right to bail or release and the court must set conditions of release pursuant to the 13 V.S.A. § 7554 factors. 2016 VT 121, ¶ 11. We emphasized that the trial court does not have “discretion to hold these individuals without releasing them under conditions.” *Id.*

We thus reverse the trial court's order holding defendant without bail pending VOP merits hearings in dockets 1798-12-18 and 1608-12-17 and remand for the trial court to set conditions of release under 13 V.S.A. § 7554. Cf. *State v. Orost*, 2017 VT 110, ¶ 12, 206 Vt. 657 (reviewing multi-docket order holding defendant without bail under 13 V.S.A. § 7553, affirming hold in one docket and reversing and remanding for trial court to set bail in remaining three dockets).

Affirmed as to hold-without-bail order in dockets 1611-12-17 and 1599-12-17, and reversed and remanded as to hold-without-bail order in dockets 1798-12-18 and 1608-12-17 for the court to set conditions of release.

FOR THE COURT:

Beth Robinson, Associate Justice