

VERMONT SUPREME COURT  
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Case No. 22-AP-075

## **ENTRY ORDER**

APRIL TERM, 2022

State of Vermont v. Mark A. Boutwell*	}	APPEALED FROM:
	}	Superior Court, Caledonia Unit; Caledonia
	}	Unit, Criminal Division
	}	CASE NO. 424-10-20 Cacr; 604-12-20 Cacr
	}	Trial Judge: Justin Jiron

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

Defendant appeals a February 15, 2022, order holding him without bail pending a merits decision on a violation-of-probation complaint (VOP). The trial court's order is affirmed.

On September 15, 2021, defendant pled guilty in two separate dockets—424-10-20 and 604-12-20—to several charges: driving under the influence, simple assault, unlawful mischief, and domestic assault. Defendant was sentenced to six-to-eighteen months, all suspended, with two years' probation. The trial court set various conditions of probation.

On January 25, 2022, the State filed a VOP against defendant, alleging he violated probation conditions prohibiting him from engaging in criminal behavior, possessing and excessively drinking alcohol, and contacting, abusing, or harassing the complainant in his assault convictions. The VOP alleged the following. In the early morning on January 25, officers responded to an incident at the residence of the complainant from defendant's convictions for which he was on probation. The complainant told officers that defendant showed up drunk and refused to leave. Defendant took the complainant's phone and attempted to reset it to delete its contents. When the complainant tried to get the phone back, defendant got on top of her, held her down, hit her on the head, and choked her to the point where she could not breathe. Once defendant got off her, he slammed the phone into the ground and stepped on it, then left her residence. The officers left the complainant's residence and located defendant. After the officers arrested him, defendant provided a preliminary breath test which indicated he had a BAC of 0.08%. For this same alleged conduct, defendant faces several new charges in a separate docket.

Defendant was arraigned the same day on both the VOP and new charges. The State moved to hold defendant without bail on his new charges under 13 V.S.A. § 7553a or in the

alternative on his VOP under 28 V.S.A. § 301(4). The trial court held defendant without bail on the probation violation pursuant to 28 V.S.A. § 301(4), reasoning that the probation conditions set in September could not prevent defendant from engaging in the conduct underlying the VOP and therefore no set of conditions could reasonably protect complainant's safety. On the new charges, the court imposed a condition prohibiting defendant from having contact with the complainant.

On February 2, defendant moved to review the hold-without-bail order, requesting the court exercise its discretion under 28 V.S.A. § 301(4) to release him pursuant to the 13 V.S.A. § 7554 factors. In this motion, defendant proposed several conditions of release. The trial court held a hearing on defendant's motion on February 15. At the hearing, defendant argued that the conditions of release proposed were different from the probation conditions in place when the conduct underlying the VOP occurred. He pointed to the condition requiring defendant to live with his mother, who would serve as his supervising responsible adult, and told the court that she was available to testify at the hearing. He proposed that a condition requiring him to live with his mother as a supervising adult combined with a condition imposing GPS monitoring would reasonably assure the complainant's safety. Defendant did not call his mother to the stand and the court did not take testimony from defendant's mother. The State opposed defendant's motion, arguing that the complainant was fearful of defendant and GPS monitoring would not be possible at this time because it was not included in the original conditions of probation. The complainant did not testify.

The court decided on the record at the hearing to deny defendant's motion and continue to hold him without bail pursuant to 28 V.S.A. § 301(4). It explained that its decision hinged on the threat defendant posed to the complainant since he was alleged to have assaulted her a second time and the allegation was supported by strong evidence. It therefore concluded that it would continue to hold defendant without bail in the interest of public safety. Defendant appealed.

On appeal, defendant argues that the record is insufficient to support a hold-without-bail order under 28 V.S.A. § 301(4) because the trial court did not properly consider defendant's release proposal and the 13 V.S.A. § 7554(b) factors. The State argues that the trial court was not required to consider all the § 7554(b) factors in exercising its discretion and that the trial court considered many of the § 7554(b) factors most relevant to the case. It therefore proposes that the record supports the trial court's decision to deny defendant's motion.

Under 28 V.S.A. § 301(4), a probationer shall be held pending arraignment for a VOP charge, and after arraignment, "a court may release a probationer on bail pending the revocation hearing." State v. Breer, 2016 VT 120, ¶ 7, 203 Vt. 649 (mem.). In this scheme, a defendant convicted of a violent felony and charged with VOP has no constitutional or statutory right to bail or release pending a hearing. 28 V.S.A. § 301(4); *id.* § 301(5)(B). Accordingly, "the norm is incarceration and not release." State v. Hardy, 2008 VT 119, ¶ 10, 184 Vt. 618 (mem.) (quotation omitted). However, a court may nevertheless exercise its discretion to release a defendant. 28 V.S.A. § 301(4); State v. Barrows, 172 Vt. 596 (2001) (mem.). Because the trial court has discretion to release a defendant, we review its determination for an abuse of discretion. State v. Campbell, 2014 VT 123, ¶ 6, 198 Vt. 627 (mem.). A single Justice of the Supreme Court will affirm the trial court's decision if it is "supported by the proceedings below." 13 V.S.A. § 7556(b); see V.R.Cr.P. 32.1(a)(3)(A) ("Any denial of or change in the terms of

release shall be reviewable in the manner provided in 13 V.S.A. §§ 7554 and 7556 for pretrial release.”).

In exercising its discretion, both the statute and the Vermont Rules of Criminal Procedure direct the trial court to 13 V.S.A. § 7554(b). See 28 V.S.A. § 301(4) (explaining court “may release” defendant pursuant to § 7554); V.R.Cr.P. 32.1(a)(3)(A) (stating that court “shall consider the factors set forth” in § 7554(b)). Further, this Court has held that Vermont Rule of Criminal Procedure 32.1 “expressly requires courts to consider the § 7554(b) factors when determining conditions of release for probationers.” Campbell, 2014 VT 123, ¶ 9. Section 7554(b) provides that conditions of release may be imposed that “mitigate the risk of flight” and “reasonably protect the public.” Because the public’s and the complainant’s safety are central to the trial court’s decision in this case, the factors to be considered for formulating conditions protecting the public include:

the nature and circumstances of the offense charged; the weight of the evidence against the accused; and the accused's family ties, employment, character and mental condition, length of residence in the community, record of convictions, and record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

13 V.S.A. § 7554(b)(2). In addition, “[r]ecent history of actual violence or threats of violence may be considered by the judicial officer as bearing on the character and mental condition of the accused.” Id. In evaluating the § 7554(b) factors, the trial court must articulate “on the record” how it “exercised its discretion.” State v. Passino, 154 Vt. 377, 379 (1990).

Review of the record below supports that the trial court adequately considered the factors under 13 V.S.A. § 7554(b). Because neither party contends that risk of flight is relevant to this case, the trial court appropriately proceeded to evaluate the factors relevant to discern whether conditions of release could “reasonably protect the public.” In doing so, the trial court considered the nature and circumstances of the offense, focusing in particular on the fact that the incident involved the same complainant and conditions of probation were in place prohibiting defendant’s contact with the complainant at the time of the alleged conduct. It also weighed the evidence of the alleged violation and concluded that it was “fairly strong.” It further considered defendant’s character and mental condition when it contemplated whether any conditions could reasonably keep the complainant safe from defendant in light of his recent alleged violent behavior with her. At the hearing, the court also heard that defendant had family ties in the general area and resided in the community where he was convicted. The court indicated that it was aware of defendant’s criminal record as it explained it would not consider alleged assaults not charged. In summary, the transcript shows an analysis of various relevant § 7554(b) factors on the record at the February 15 hearing.

Defendant contends that the trial court failed to make adequate findings regarding defendant’s mother’s suitability as a supervising responsible adult and therefore did not adequately consider his proposal that he be released into the custody of his mother. He asserts that the trial court did not receive testimony from defendant’s mother and therefore could not adequately consider whether she would be an appropriate responsible adult that could reasonably

protect the public. He also contends that, although the trial court is not obliged to explicitly consider all the § 7554(b) factors, the trial court should have given this relevant proposal more consideration on the record.

First, it is defendant's duty to make his case, especially where he has the burden of proving release on conditions is appropriate. See 28 V.S.A. § 301(4). The trial court is not obliged to ensure that defendant puts on a witness that defendant has not actually called and only stated was available if the court would like to hear testimony. See State v. Vialet, 2021 VT 62, ¶ 10 (mem.) (stating that even where State failed to put on evidence related to § 7554(b) factors, it was still "defendant's burden to persuade the court to exercise its discretion to release him on bail or conditions"). Moreover, even if the trial court should have followed up on whether defendant's mother would testify at the hearing, its decision not to do so was harmless, because its ultimate conclusion to hold defendant without bail was not based on defendant's mother's individual suitability but on any responsible adult's inability to reasonably protect the public from defendant. See State v. Madigan, 2015 VT 59, ¶ 32, 199 Vt. 211 (explaining that admission or exclusion of evidence is harmless where alleged errors do not impact conclusion or defendant's substantive rights).

Second, it is within the trial court's discretion to determine whether any condition or combination of conditions could reasonably protect the public. See State v. Auclair, 2020 VT 26, ¶ 24, 211 Vt. 651 (mem.) (affirming where defendant had burden of proof and did not offer sufficient evidence to persuade court that conditions of release would reasonably protect public). In exercising this discretion, a trial court may determine, based on adequate findings, that no responsible adult, no matter how well-intentioned, could ensure the public's safety. See State v. Breer, 2014 VT 132, ¶ 11, 198 Vt. 629 (mem.) ("Where the statute creates no right to bail in the first instance, it cannot be said that the court's decision was clearly untenable or unreasonable." (quotation omitted)). In this case, the trial court noted that the role of a responsible adult is not to physically restrain a defendant from going places but to report violations when they occur. It expressed concern that even with a responsible adult reporting, because defendant resided in a rural area, these conditions would still not be enough to reasonably protect the public, specifically the complainant. Therefore, contrary to defendant's assertions, the trial court did consider defendant's family ties and his mother's availability to act as a responsible adult—it simply concluded that despite these things and in light of the other factors considered, it could not release defendant on conditions that would reasonably assure the public's safety at this time.

Further, the case on which defendant relies for its assertion that the trial court's consideration on this point was insufficient, State v. Cassinell, No. 21-AP-187, 2021 WL 4101704 (Vt. Sept. 3, 2021) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo21-187.pdf> [<https://perma.cc/9FS9-WALD>], is both non-precedential and distinguishable. In Cassinell, the defendant was held without bail prior to trial and was presumptively entitled to release on bail or conditions when the court reviewed the 13 V.S.A. § 7554(b) factors. Also, in that case, the defendant put on ample evidence regarding the suitability of the proposed supervising responsible adult and presented the trial court with a home monitoring report on the availability of GPS and SCRAM monitoring and law enforcement response times in the responsible adult's area. Both the procedural posture and the underlying findings of that case are vastly different from those presented to the trial court in this case. Here, defendant is not entitled to release, and the trial court considered the relevant § 7554(b) factors,

including family ties, before concluding that no set of conditions could reasonably protect the public based on the evidence presented. This is enough to support the trial court's conclusion. For these reasons, the trial court did not abuse its discretion. See Breer, 2016 VT 120, ¶ 7 (explaining that trial court "had wide discretion in denying bail for VOPs" and its decision will be affirmed if supported by the evidence).

In summary, the trial court adequately considered the § 7554(b) factors and the record supports its conclusion to deny defendant's motion for bail review and continue to hold him without bail pursuant to 28 V.S.A. § 301(4).

Affirmed.

FOR THE COURT:

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Harold E. Eaton, Jr., Associate Justice