



ENTRY ORDER

SEPTEMBER TERM, 2023

State of Vermont v. Roger Peay*	}	APPEALED FROM:
	}	Superior Court, Chittenden Unit,
	}	Criminal Division
	}	CASE NO. 23-CR-08059
		Trial Judge: A. Gregory Rainville

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

Defendant Roger Peay appeals the superior court's denial of his request to add a requirement on the mittimus that the Department of Corrections (DOC) allow him to make phone calls for the purpose of intake at substance-abuse treatment centers. We dismiss for lack of jurisdiction.

Defendant is charged with aggravated assault in violation of 13 V.S.A. § 1024(a)(1). The State's affidavit of probable cause alleges the following. On August 14, 2023, defendant and a companion entered an Uber that had been called by another individual. After driver arrived at the address requested by the other individual, defendant and his companion offered to pay driver to go to their destination, but driver refused. During the ensuing argument, defendant pulled a gun, pointed it at driver, and stated that he was going to kill him. Defendant fled the scene before police arrived. Police eventually located and arrested defendant on August 18, 2023.

Defendant was arraigned on August 21, 2023. The trial court determined that defendant's future appearance could not reasonably be assured by his release on personal recognizance or execution of an unsecured appearance bond, and that his release would constitute a danger to the public. The court therefore imposed the following conditions of release: (1) defendant must submit a bond of \$2500; (2) defendant must come to court when told; (3) defendant must give his attorney and the court clerk his address and phone number and update them with any changes; (4) defendant must adhere to a twenty-four-hour curfew at a court-approved address; and (5) defendant must not approach, abuse, harass, or have contact with the alleged victim of the crime. Defendant does not challenge these conditions of release.

On August 23, 2023, defendant moved for an emergency hearing to approve his Philadelphia, Pennsylvania home as a curfew residence. However, at the hearing, defendant withdrew the request based on the State's opposition. Instead, defendant requested only that the court add an instruction in the mittimus that the DOC permit him to make phone calls to substance-abuse treatment centers for the purpose of intake. The court denied this request,

finding that because no lockdown residential treatment facilities exist that would sufficiently mitigate the flight risk posed by defendant, allowing the phone calls would be a fruitless endeavor.

On appeal, defendant challenges the court's denial of the request to order the DOC to allow him to make phone calls as an abuse of discretion. Defendant argues that the court concluded that he was a risk of flight without making specific factual findings and that the denial of his request therefore arbitrarily restricts his pretrial liberty. Defendant cites 13 V.S.A. § 7554(a)(2), which requires courts to impose only the "least restrictive combination" of a list of conditions to ensure protection of the public. He argues that denying him the right to make phone calls to treatment centers imposes conditions of release that are more restrictive than necessary.

The State responds that this Court lacks jurisdiction over defendant's appeal, that the appeal is moot because defendant has been indicted in federal court, and that the trial court's decision was adequately supported by the record. We agree that we do not have jurisdiction over defendant's appeal and therefore do not reach the latter arguments.

The basis of defendant's appeal to this Court is 13 V.S.A. § 7556(b), which provides jurisdiction over appeals from conditions of release in two circumstances: (1) when a person is detained after a court denies a motion to review or amend conditions under § 7556(a); and (2) when conditions of release have been imposed or amended by the trial court. Defendant acknowledged during oral argument that he did not make an earlier motion for review or amendment of conditions of release under § 7554(d) or (e)—an essential prerequisite for a § 7556(a) motion. Therefore, this Court only has jurisdiction over the case if "conditions of release have been imposed or amended by the judge of the court having original jurisdiction over the offense charged." *Id.* § 7556(b).

"Issues of statutory interpretation are subject to de novo review." *State v. Gurung*, 2020 VT 108, ¶ 23, 214 Vt. 17 (quotation omitted). "The touchstone of this inquiry is legislative intent." *State v. A.P.*, 2021 VT 90, ¶ 12, 216 Vt. 76. "If the intent of the Legislature is apparent on the face of the statute because the plain language of the statute is clear and unambiguous, we implement the statute according to that plain language." *Id.* (quotation omitted).

We conclude that this Court does not have jurisdiction over this appeal because defendant is not challenging the imposition or amendment of his conditions of release. Instead, he is challenging the denial of his request to permit special conditions while he is incarcerated. While the trial court has the power to grant this request, the denial of such a request is not appealable under the conditions-of-release statute. Section 7556(b) "operates in derogation of the rule codified at 4 V.S.A. § 2 that the Supreme Court as a whole has 'exclusive jurisdiction' of all appeals from judgments, rulings and orders of the state's trial courts 'unless otherwise provided by law.'" *State v. Ely*, 168 Vt. 614, 615 (1998) (mem.) (quoting 4 V.S.A. § 2). "[W]hen the legislature creates an exception to a statutory scheme, no other exceptions will be implied, in the absence of evidence of a contrary legislative intent." *Id.* (quotation omitted).

Defendant's request that he be permitted to make phone calls while he remains incarcerated pending identification of a suitable curfew residence cannot be construed as a condition of release. Conditions of release are conditions that a court may impose on a defendant's release from custody for the purposes of mitigating the defendant's risk of flight and

protecting the public. See 13 V.S.A. § 7554(a). Defendant’s request is fundamentally different from a condition of release in that it does not impose any condition on the defendant as part of his release. The request would instead impose a condition on the DOC and would only apply while defendant is incarcerated.

The request differs in kind from recognized conditions of release. Section 7554(a) lists several specific conditions of release, including supervision by a designated person, restrictions on travel, required participation in an alcohol or drug treatment program, and payment of a secured bond or surety. With the exception of the supervision condition—which imposes obligations on a willing third party in addition to the defendant—all of the listed conditions of release are obligations placed solely on the defendant to do or not do something. The same is true of all the conditions of release actually imposed by the trial court here: they all obligate defendant to take, or avoid taking, specific actions. Unlike these conditions of release, defendant’s request would impose a requirement solely on the DOC. Similarly, a violation of defendant’s request would have different consequences than the violation of a typical condition of release. As stated in the court’s order setting out defendant’s conditions of release, the violation of a condition of release is considered a crime, for which defendant could be returned to jail or charged with new crimes. In contrast, a violation of defendant’s request to make phone calls would have no such consequences for defendant.

Defendant argues that his request should be considered a condition of release because it relates to the statutory condition of requiring participation in a drug-treatment program. See *id.* § 7554(a)(1)(C). However, the court here did not impose any requirement that defendant participate in a drug-treatment program. Indeed, such a requirement would be incompatible with the twenty-four-hour curfew condition that the court did impose. And even if the court did impose such a condition, the fact remains that the phone calls are not themselves conditions being placed on defendant in order to secure his release.

Even if defendant’s request had been approved, the conditions that he has to meet to be released would remain the same. The barrier to defendant’s release remains the need to find a court-approved address. As § 7556(b) dictates, this Court only has jurisdiction to hear appeals when “conditions of release have been imposed or amended.” Defendant is not challenging the initial imposition of his conditions of release. And the denial of his request did not impose any new conditions or amend any existing conditions of release. Therefore, this Court has no jurisdiction to hear the appeal and we decline to reach the merits of defendant’s argument.

Dismissed.

FOR THE COURT:

Paul L. Reiber, Chief Justice