

ENTRY ORDER

2021 VT 58

SUPREME COURT DOCKET NO. 2021-137

JULY TERM, 2021

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Windsor Unit,
	}	Criminal Division
	}	
Larry L. Labrecque	}	DOCKET NO. 689-7-18 Wrcr

Trial Judge: Elizabeth D. Mann

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

¶ 1. Defendant Larry Labrecque appeals the trial court’s June 10, 2021 decision declining to release him on bail pending trial. He argues that the trial court abused its discretion in not holding an evidentiary hearing on his proposal for twenty-four-hour electronic monitoring. In addition, he contends that the trial court failed to consider how the electronic-monitoring proposal affected his claim that continued pretrial detention would be excessive in violation of his due process rights. We conclude that the trial court abused its discretion in not holding an evidentiary hearing and erred in not considering whether the electronic-monitoring proposal affected the due process analysis.

¶ 2. The record indicates the following. On July 23, 2018, defendant was arraigned on three charges, all punishable by a maximum sentence of life imprisonment: one count of sexual assault of a minor stepchild, 13 V.S.A. § 3252(d), one count of aggravated sexual assault, 13 V.S.A. § 3253(a)(9), and one count of aggravated sexual assault on a child under sixteen, 13 V.S.A. § 3253a(a)(8). The affidavit of probable cause alleged that defendant had repeatedly sexually assaulted his stepdaughter, A.J., over the previous two years. At arraignment, the court found that the evidence of guilt was great, which it explained created a presumption that defendant would be held without bail pending a weight-of-the-evidence hearing. *State v. Passino*, 154 Vt. 377, 383, 577 A.2d 281, 285 (1990) (holding that based on initial probable-cause determination at arraignment, “the court can hold defendant charged with an offense punishable by life imprisonment without bail for such time as is necessary to enable the parties to prepare for a full bail hearing”). Although the court acknowledged that it had discretion to release defendant, it declined to do so, explaining that, based on defendant’s criminal history—which included a history of violations of conditions, an attempt to elude police, and simple assault on a police officer—the court was “not confident” that defendant would follow any conditions it imposed to protect the public and A.J. from potential harm. At the weight-of-the-evidence hearing in November 2018,

the court again found that the evidence of guilt was great and continued the hold-without-bail order.

¶ 3. A trial-ready date was initially set for May 2019, which was first delayed until November 2019 by agreement of the parties, and then until March 2020 after defendant's counsel withdrew. State v. Labrecque, 2020 VT 81, ¶ 5, ___ Vt. ___, 249 A.3d 671 (mem.). In March 2020, defendant filed a motion for bail review under 13 V.S.A. § 7554(d), asking the court to exercise its discretion to release him because his counsel's withdrawal constituted a material change in circumstances. Id. ¶ 6. A few days later, however, this Court issued Administrative Order 49, which suspended all nonemergency trials and hearings due to the COVID-19 pandemic. Defendant supplemented his bail-review motion, arguing that the court should exercise its discretion to release him because the Department of Corrections (DOC) was failing to adequately respond to the pandemic.

¶ 4. The trial court denied the motion, explaining in part that although it was concerned about the trial delay caused by the pandemic, that consideration "could not overcome the court's concerns regarding danger to the community or risk of flight that had supported the hold-without-bail order throughout the proceeding's pendency." Id. ¶ 8. Defendant filed a motion for reconsideration, which was consolidated with several other pending bail motions that also asked the court to consider the effect of COVID-19 on continued pretrial incarceration. Id. ¶ 9. At a status conference on May 12, and in later-filed supplemental briefing, defendant argued that because the Judiciary could not provide a clear trial date, continuing the hold-without-bail order would amount to punitive incarceration, thereby violating his due process rights. Id. ¶ 10.

¶ 5. Following a lengthy evidentiary hearing, the trial court rejected defendant's due process argument, reasoning that defendant's continued pretrial incarceration did not violate due process because the conditions were not imposed to punish defendant; rather, the hold-without-bail order was grounded in the court's lack of confidence that defendant could abide by his conditions of release. Defendant appealed.

¶ 6. On appeal, we explained that "pretrial detention satisfies substantive due process only where its purpose is regulatory rather than punitive" and when the detention is not "excessively prolonged." Id. ¶¶ 15, 16 (quotations omitted). The relevant test, we continued, was that outlined by the Second Circuit in United States v. Briggs:

In making such an assessment, we consider the strength of the evidence justifying detention, the government's responsibility for the delay in proceeding to trial, and the length of the detention itself. The longer the detention, and the larger the prosecution's part in prolonging it, the stronger the evidence justifying detention must be if it is to be deemed sufficient to justify the detention's continuance.

Id. ¶ 17 (quoting United States v. Briggs, 697 F.3d 98, 101 (2d Cir. 2012)). Applying the Briggs test, we concluded that continued pretrial incarceration did not violate defendant's due process rights and summarized our holding as follows:

We find that the trial court weighed the relevant considerations correctly in determining that there was no due process violation. Because defendant’s pretrial detention is rationally connected to two compelling regulatory purposes—protection of the public, including A.J., and assuring defendant’s presence at trial—the dispositive question here is whether the length of his detention “appears excessive in relation to that purpose.” That portion of the delay in bringing defendant to trial which may be attributed to the government is not the result of malfeasance or neglect. Rather, it is a function of the government’s efforts to respond to a novel health crisis by establishing procedures which would serve to mitigate the resulting health risk to those who must gather in close physical proximity in order to conduct such a trial—including defendant himself.

Although the length of defendant’s pretrial detention is not routine, neither is it excessive when viewed in light of the other Briggs factors.

Id. ¶¶ 30-31 (alteration omitted) (quoting United States v. El-Hage, 213 F.3d 74, 79 (2d Cir. 2000)).

¶ 7. In October 2020, defendant filed a motion to dismiss arguing that the State’s delay in holding a trial violated his right to a speedy trial under both the U.S. and Vermont Constitutions. Applying the balancing test outlined in Barker v. Wingo, 407 U.S. 514, 530-33 (1972), the court denied the motion. It explained that the length of delay—twenty-eight months—was not sufficient to trigger a speedy-trial violation when defendant had not demonstrated he had been prejudiced by the delay and the government’s delay in bringing defendant to trial was due to the COVID-19 pandemic, which was a “more neutral reason for delay” that was neither intentional nor unwarranted.

¶ 8. On March 5, 2021, defendant filed another motion for bail review, again arguing that continued pretrial incarceration would violate his due process rights. Considering the length of pretrial detention—956 days—the uncertainty regarding when a jury trial could be held, and the strength of evidence justifying detention, defendant argued that continued pretrial detention would be excessive. Focusing on the strength of evidence justifying detention, defendant argued that his prior criminal history dated back over sixteen years and that the circumstances surrounding the present charges indicated that he was not a risk of flight. Defendant accordingly requested that the court exercise its discretion under 13 V.S.A. § 7554(b) and release him on conditions.

¶ 9. A hearing was held on defendant’s motion on May 6. Tanya Dudley, defendant’s wife, testified that she would be willing to serve as a custodian for defendant and could ensure that he would abide by any conditions of release, in part, by providing defendant with a phone and using her phone to track his phone’s location. Following the parties’ arguments, the court explained that there was a presumption of pretrial detention because the evidence of guilt was previously determined to be great. The court noted that it had previously declined to exercise its discretion to release defendant because it concluded that he posed a risk of flight and danger to

community that could not be adequately addressed by conditions of release. The thrust of defendant's argument, the court summarized, was that he did not pose a risk of flight given his longstanding connections to Vermont and the age of his prior criminal history.

¶ 10. After considering the various § 7554(b) factors, the court denied defendant's motion. The court acknowledged, on one hand, that defendant has family ties to Vermont and regularly maintained employment prior to his incarceration, which made it clear that he would seek employment if released. On the other hand, however, the court emphasized that the present charges alleged a "history of serious violent conduct with a minor child" and the criminal history, although dated, was concerning because the nature of the charges showed "a disrespect for authority and conditions." Nevertheless, the court explained that its "final decision" rested on Ms. Dudley's testimony because the "ability to monitor and ensure compliance with conditions in the community is a more important factor than in the average case because of the nature of the charges." The court was unpersuaded, however, that Ms. Dudley's proposal to track defendant's location using her cell phone was sufficient to mitigate the risk of flight and protect the community. Because Ms. Dudley testified that she works approximately fifty hours a week in a retail setting, the court found that she would not be able to regularly and consistently monitor defendant's location.

¶ 11. The court further concluded that continued pretrial detention would not violate defendant's due process rights. Reiterating its prior analysis, the court explained that the portion of the delay in bringing defendant to trial that was attributable to the government was not the result of "bad faith, neglect, or other malfeasance"; rather, it was the result of the "government's effort to respond to [a] novel health crisis by establishing procedures that will serve to mitigate the resulting risk to those who must gather in close proximity in order to conduct trials." After considering the Briggs factors, the court concluded that the length of pretrial detention was not excessive.

¶ 12. On May 26, almost three weeks later, defendant filed another motion for bail review, explaining that given the "lengthy nature of the procedural posture of [his] bail status and somewhat complex legal situation given the due process concerns raised by the delay in jury trials caused by the pandemic," he was incorporating the prior motion for bail review by reference. Referring to the court's May 6 decision denying bail—and its concerns about the supervision of defendant if he were released on a twenty-four-hour curfew and other conditions—defendant proposed a condition that he be subjected to twenty-four-hour electronic monitoring by Eastern Bail Bonds. This condition, defendant argued, would address the court's concerns because through electronic monitoring, Eastern Bail Bonds could track defendant's movements and could contact law enforcement within seconds if he left a designated area or the signal is lost. Defendant requested an evidentiary hearing on Eastern Bail Bonds' monitoring capacity and that he be released on electronic monitoring and any other conditions the court imposed.

¶ 13. In an entry order issued on June 10, the court summarily denied defendant's motion without a hearing. It concluded that electronic monitoring would not fully address the risk of flight and public-safety concerns discussed in its May 6 decision. Defendant subsequently appealed pursuant to 13 V.S.A. § 7556(e) ("A person held without bail prior to trial shall be entitled to review of that determination by a panel of three Supreme Court Justices within seven business days after bail is denied.").

¶ 14. “A person charged with an offense punishable by life imprisonment may be held without bail prior to trial when the evidence of guilt is great.” State v. Blodgett, 2021 VT 47, ¶ 18, ___ Vt. ___, ___ A.3d __ (mem.) (citing 13 V.S.A. § 7553); see also State v. Hardy, 2008 VT 119, ¶ 10, 184 Vt. 618, 965 A.2d 478 (mem.) (explaining that § 7553 “supplements Chapter II, § 40(1) of the Vermont Constitution, which authorizes the court to hold a person without bail under [the same] circumstances”). In such cases, “the presumption is switched so that the norm is incarceration and not release.” State v. Blackmer, 160 Vt. 451, 458, 631 A.2d 1134, 1139 (1993). Nevertheless, “[a] trial judge has the discretion to allow bail even where, pursuant to 13 V.S.A. § 7553, a defendant is not entitled to it.” State v. Falzo, 2009 VT 22, ¶ 6, 185 Vt. 616, 969 A.2d 694 (mem.). “So long as its decision is not arbitrary, the trial court’s discretion” is broad, which means our review is “narrow and strictly confined to whether an abuse of discretion has occurred.” State v. Boyer, 2021 VT 19, ¶ 12, ___ Vt. ___, ___ A.3d __ (mem.). In exercising its discretion, the trial court is required to consider whether conditions of release can be imposed that mitigate the risk of flight and ensure the public will be protected. State v. Auclair, 2020 VT 26, ¶ 3, ___ Vt. ___, 229 A.3d 1019 (mem.). The Due Process Clause of the Fifth Amendment, however, limits a trial court’s discretionary authority to hold a defendant prior to trial under § 7553 if pretrial detention is either punitive or excessive. Labrecque, 2020 VT 81, ¶¶ 15-16. While “we review the trial court’s underlying bail determination for an abuse of discretion,” we review “whether a due process violation has occurred de novo.” Id. ¶ 18.

¶ 15. On appeal, defendant raises two related arguments. First, he argues that the trial court abused its discretion in failing to hold an evidentiary hearing on his electronic-monitoring proposal. Second, in denying his May 26 motion for bail review, he argues that the trial court failed to consider how his proposal for electronic monitoring affected the court’s May 6 due process analysis. Given the trial court’s stated reasons for denying defendant’s March 5 motion for bail review, we conclude that the court abused its discretion in denying defendant’s request for an evidentiary hearing on the electronic-monitoring proposal. In addition, we conclude that the trial court should have considered whether defendant’s request for electronic monitoring affected its analysis of the Briggs factors. We accordingly remand for the trial court to conduct an evidentiary hearing on the electronic-monitoring proposal and consider whether the electronic-monitoring proposal affects its analysis of the Briggs factors. We address each argument in turn.

I. Hearing

¶ 16. Defendant argues that the trial court abused its discretion in denying his request for an evidentiary hearing on the electronic monitoring proposal. The court summarily denied defendant’s motion for an evidentiary hearing, explaining that “[w]hile [GPS] monitoring with reporting to law enforcement in the event of a detected range violation or removal of the device would in some measure mitigate the risk of flight concerns, it [would] not fully address those concerns and it [would] provide[] even less mitigation as to the public safety concerns reviewed with the parties on May 6.” “‘A hearing on a motion is not required unless the motion papers indicate a real dispute for one or more relevant facts.’” State v. Tongue, 170 Vt. 409, 413, 753 A.2d 356, 359 (2000) (quoting State v. Senecal, 145 Vt. 554, 560-61, 497 A.2d 349, 352 (1985)). We review a decision denying a motion for an evidentiary hearing for an abuse of discretion. State v. Grenier, 2014 VT 121, ¶ 12, 198 Vt. 55, 110 A.3d 291. Given the trial court’s reasons for denying defendant’s March 5 motion for bail review, we conclude that the court abused its discretion in denying an evidentiary hearing on the electronic-monitoring proposal.

¶ 17. In denying defendant’s March 5 motion on May 6, the trial court emphasized that the present charges alleged a “history of serious violent conduct with a minor child” and the criminal history, although dated, was concerning because the nature of the charges showed a “disrespect for authority and conditions.” Nevertheless, the court explained that its “final decision” rested on Ms. Dudley’s testimony because the “ability to monitor and ensure compliance with conditions in the community is a more important factor than in the average case because of the nature of the charges.” The court was unpersuaded, however, that Ms. Dudley’s proposal to track defendant’s location using her cell phone was sufficient to mitigate the risk of flight and protect the community. Because Ms. Dudley testified that she works approximately fifty hours a week in a retail setting, the court found that she would not be able to regularly and consistently monitor defendant’s location.

¶ 18. In the subsequent motion filed on May 26, defendant proposed an additional condition aimed at addressing the court’s concern about regular and consistent supervision—twenty-four-hour electronic monitoring by Eastern Bail Bonds—and specifically requested an evidentiary hearing to permit questioning on Eastern Bail Bonds’ monitoring capability. At oral argument before the Court, defendant explained that at a hearing, he would present evidence regarding the company’s experience in providing the service, including its experience working in Vermont, how the equipment works, and the particulars about how the company contacts law enforcement. While the court summarily denied the motion, defendant’s motion raised a key factual question, which is whether twenty-four-hour electronic monitoring by a particular private entity could provide the regular and consistent supervision the trial court found that Ms. Dudley could not provide. The trial court accordingly abused its discretion in not holding an evidentiary hearing regarding the capabilities of Eastern Bail Bonds’ electronic monitoring.

¶ 19. In sum, because the trial court’s May 6 decision rested in part on a finding that Ms. Dudley could not provide regular and consistent supervision—and defendant’s subsequent electronic-monitoring proposal raised a factual question that was directly responsive to that concern—it was an abuse of discretion to not hold an evidentiary hearing on the electronic monitoring proposal. We accordingly remand for the trial court to conduct an evidentiary hearing and make findings on the capabilities of Eastern Bail Bonds’ electronic monitoring.

II. Due Process

¶ 20. Defendant also argues that the court erred in not considering whether the electronic monitoring proposal affected his due process claim. “The Due Process Clause of the Fifth Amendment protects an individual’s substantive due process right to be free of government action which shocks the conscience or interferes with rights implicit in the concept of ordered liberty.” Labrecque, 2020 VT 81, ¶ 15 (quotation omitted). “[P]retrial detention satisfies substantive due process only where its purpose is regulatory rather than punitive.” Id. (quotation omitted). “But even where a valid regulatory process supports detention, when detention becomes excessively prolonged, it may no longer be reasonable in relation to the regulatory goals of detention, in which even a violation of due process occurs.” Id. ¶ 16 (quotation omitted). To determine whether detention is excessive, we consider the Briggs factors, which include “the strength of the evidence justifying detention, the government’s responsibility for the delay in proceeding to trial, and the length of the detention itself.” Id. ¶ 17 (quotation omitted).

¶ 21. In its May 6 decision, the court concluded that continued pretrial detention would not violate defendant’s due process rights. It explained that the portion of the delay in bringing defendant to trial that was attributable to the government was not the result of “bad faith, neglect, or other malfeasance”; rather, it was the result of the “government’s effort to respond to [a] novel health crisis by establishing procedures that will serve to mitigate the resulting risk to those who must gather in close proximity in order to conduct trials.” The court accordingly concluded that although the length of pretrial detention was not routine, it was still not excessive. The court did not engage in a due process analysis in its June 10 entry order.

¶ 22. Defendant argues that the trial court erred because, although it considered the § 7554 factors in its June 10 order, it failed to consider how his request for electronic monitoring affected his due process claim. As a threshold matter, however, the State argues that defendant’s May 26 motion did not raise a due process claim and therefore the issue is not preserved for our review. “[T]his Court will not address issues that were not raised with specificity and clarity in the proceeding below.” State v. Campbell, 2015 VT 50, ¶ 21, 199 Vt. 78, 120 A.3d 1148. “The purpose of the preservation rule is to ensure that the original forum is given an opportunity to rule on an issue prior to our review.” State v. Kandzior, 2020 VT 37, ¶ 16, __ Vt. __, 236 A.3d 181 (quotation omitted).

¶ 23. It is certainly true that defendant’s May 26 motion for bail review did not expressly raise a due process claim, focusing instead on whether electronic monitoring would address the court’s concerns regarding risk of flight and public safety. However, when the May 26 motion is viewed in the larger context of this case—specifically defendant’s March 5 motion for bail review—it is clear that defendant was asking the court to reassess the due process analysis outlined in its May 6 decision. While defendant’s May 26 motion could have made this request clearer—and by far the better practice would have been to do so—we conclude that his May 26 motion preserved his due process claim.

¶ 24. In the March 5 motion for bail review, defendant argued that due process required the court to exercise its discretion and release him pursuant to § 7554. Focusing on the first Briggs factor, defendant argued that the original decision to hold without bail, which was based on the finding that he posed a risk of flight, was “weak and attenuated” because the prior criminal history underlying that finding occurred almost two decades earlier. In addition, defendant argued that the other two factors—the length of delay and the government’s responsibility for the delay—weighed in his favor because he had been detained pretrial for 956 days due to the government’s response to the COVID-19 emergency. The May 26 motion incorporated the March 5 motion by reference, and specifically noted the “due process concerns raised by the delay in jury trials caused by the pandemic.” Defendant specifically argued in the May 26 motion that electronic monitoring would “sufficiently assure the safety of the public and [his] appearance at trial.” Viewed in this context, the May 26 motion reiterated and updated the due process claim outlined in the March 5 motion based on the court’s May 6 decision, arguing that the court should reconsider its analysis of the first Briggs factor in light of his new electronic-monitoring proposal.

¶ 25. We reiterate that the better practice would have been for defendant to expressly make this argument in his May 26 motion, rather than merely reference the March 5 motion. Nevertheless, given that over the past year, defendant has repeatedly raised due process concerns; defendant expressly raised a due process claim in the March 5 motion, which asked the court to

assess risk of flight in its analysis of the first Briggs factor; and the May 26 motion both referenced the March 5 motion and addressed the risk-of-flight issue, we conclude that defendant has preserved the due process claim for our review.

¶ 26. Moving to the merits, defendant argues that the first Briggs factor—the strength of the evidence justifying detention—requires a court to look at the evidence concerning flight risk and public safety. The electronic-monitoring proposal, defendant asserts, minimizes the trial court’s risk-of-flight concern, and given that the two other Briggs factors weigh in his favor, the court was required to consider whether the electronic monitoring proposal “tips the balance.” As we have recently explained, the first Briggs factor—the strength of the evidence justifying detention—“calls on courts to analyze the strength of the evidence underlying the specific decision to detain [a] defendant prior to trial.” Labrecque, 2020 VT 81, ¶ 19. As the length of pretrial detention increases, “[t]he stronger the evidence justifying detention must be if it is to be deemed sufficient to justify the detention’s continuance.” Id. ¶ 17 (quoting Briggs, 697 F.3d at 101).

¶ 27. In the May 6 decision, the court declined to exercise its discretion to release defendant under § 7554, citing both his criminal history, which demonstrated a “disrespect for authority and conditions,” and Ms. Dudley’s lack of ability to provide regular and consistent supervision. The court also conducted a separate due process analysis, concluding that continued pretrial detention did not violate due process because the portion of the delay in bringing defendant to trial that was attributable to the government was the result of the “government’s effort to respond to [a] novel health crisis.” Defendant’s May 26 motion, considered in the context of the March 5 motion, asked the court to consider whether the electronic-monitoring proposal addressed the risk-of-flight concerns to the extent that it tipped the first Briggs factor in his favor. In other words, whether the strength of the evidence underlying the court’s decision not to release defendant under § 7554 could justify continued pretrial detention given the extra assurances provided by electronic monitoring and the length of pretrial detention. We accordingly remand for the trial court to hold an evidentiary hearing and to conduct this analysis. In so doing, we express no opinion on the merits of defendant’s due process argument or his request for release under § 7554.

Reversed and remanded for further proceedings consistent with this order.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice