STATE OF VERMONT

SUPERIOR COURT
WINDHAM UNIT

CRIMINAL DIVISION
DOCKET NO. 902-8-13 WMCR
DOCKET NO. 451-4-18 WMCR

STATE OF VERMONT)
)
v.)
)
SHAWNDELL COLLINS)

SUPPLEMENTAL MEMO ON CONSOLIDATION AND SCHEDULING ORDER, AND MOTION TO CLARIFY APPLICABLE LEGAL STANDARD

NOW COMES the State of Vermont by and through Windham County Deputy State's Attorney David Gartenstein, submits this supplemental memo objecting to consolidation and the Court's Scheduling Order, replies to Defendant's Response dated April 14, 2020, and moves to clarify the legal standard applicable to these proceedings.

1. Renewed Objection to Consolidation and Scheduling Order

The State renews its objects to consolidation of this matter and the manner in which the State is being allowed to participate in the consolidated hearing.[1] In addition to the arguments discussed in the State's Motion dated April 7, 2020 -- which are incorporated into this objection by reference -- the State relies on the following.[2]

The Court's scheduling order dated April 15, 2020 sets an evidentiary hearing in one matter -- *State v. Frank Sanville*, No. 263-3-18 Wrcr -- and allows all consolidated parties to monitor the hearing and submit supplemental affidavits and/or pleadings after the hearing that

[1] It is unclear to the State whether Defendant's Response, dated April 14, 2020, objects to the present consolidation order. Defendant's Motion appears to argue that Judge Grearson has the authority to consolidate these matters but then argues this matter should be heard by Judge Pacht in Chittenden County. *See* Def. Response at 1, 6. Given that Defendant's Response was filed after the issuance of the Second Consolidation Order providing for this matter to be heard in Windham County before Judge Treadwell, it is unclear whether Defendant is objecting to the Second Consolidation Order or whether this language is a result of Defense counsel using a form response authored by someone else without adapting it to the present case.

[2] As the Scheduling Order on the consolidated matters was not issued until after the State filed its April 7, 2020, Motion, the State has not yet had the opportunity to brief the issues with respect to the manner of consolidation.

are pertinent to the consolidated matters. Every consolidated party, however, will not have a full opportunity to participate in the evidentiary hearings from which findings of facts will be made.

Thus, it appears the Court will hold an evidentiary hearing in one matter, and then intends to make factual findings that will presumably bind this case without provide the parties to this matter an opportunity to participate fully in the evidentiary hearing.[3] The procedure of taking notice of factual evidence from one matter to another, however, is not allowed. See State v. Sarkisian-Kennedy, 2020 VT 6, ¶ 32 n.3, --- A.3d --- ("Although we decline to rule on this issue, we do not condone the trial court's decision to rely on disputed evidence in a separate, undecided case then pending before it"); Jakab v. Jakab, 163 Vt. 575, 579-80 (Vt. 1995) (holding that it was erroneous for a trial court in a divorce proceeding to take notice of findings of facts made at a prior CHINS proceeding); see also V.R.E. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); United States v. Jones, 29 F.3d 1549, 1553 (8th Cir. 1994) (holding that "a court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings" (internal quotation marks omitted) (quoting Liberty Mut. Ins. Co. v. Rotchers Pork Packers, Inc., 969 F.2d 1384, 1388 (2nd Cir. 1992)); Republican Party of Minn. v. White, 536 U.S. 765, 804 (2002) (Ginsburg, J., dissenting) (A court's "mission

[3] The State realizes that the "State of Vermont" is a party to all of the consolidated matters. Each County, however, is represented by an elected official and his or her designees and may not have the identical interests county to county or case to case. In fact, different counties should have different interests which are driven by the people of that county as indicated by their votes. Thus, it cannot be said that the State is a homogeneous party in any matter across the state. Moreover, the different cases are in different procedural postures and Defendant are incarcerated based on different statutes and different fact findings.

is to decide 'individual cases and controversies' on individual records." (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 266, (1995) (Stevens, J., dissenting)).

The State therefore objects to the consolidation of these matters and to the Court's Scheduling Order.

2. Reply to Defendant's Response

Defendant asserts that this Court can and should consider the medical care a defendant would receive at a correctional facility in its determination of whether it should set bail, conditions of release, or hold a defendant without bail. Quotations to the bible aside,[4] *Vermont law* does not provide that medical care a defendant would receive or the conditions of the prison are valid considerations for the Court to consider in a criminal matter when deciding whether to set bail, whether to set conditions of release, or whether to hold without bail. Instead, as implicitly recognized by Defendant's response, the only proper considerations are factors relevant to Defendant's risk of flight and risk to public safety.

Several statutes address pretrial release. *See* 13 V.S.A. §§ 7553, 7553a, 7554, 7575; 28 V.S.A. § 301. Section 7553 and 7553a allow a court to hold a defendant without bail when they are charged with a life offense or a felony offense which includes an element of violence respectively, section 7554 governs the setting of bail and conditions of release in all other criminal offenses, section 7575 governs revocation of the right to bail under certain circumstances, and section 301 governs whether or not a person alleged to have violated

[4] Defendant's quotation of bible verses serves no purpose other that to try to improperly influence this Court on religious grounds. Contrary to Defendant's assertion, the State does not want this Court to "wash its hands" of Defendant. Defendant's health is an important consideration and there are mechanisms in the law to address any alleged shortcoming with respect to the care he is receiving in prison. The State just asks this Court to follow the law and procedures in place and not address this issue in an improper forum.

probation is entitled to release pending resolution. All these statutes have a single theme in common: the only considerations are relevant to the court's exercise of discretion are factors related to a defendant's risk of flight and risk to public safety.[5] See, e.g., State v. Blackmer, 160 Vt. 451, 460 (Vt. 1993) (noting that "[t]he separate treatment of life imprisonment cases in Vermont's constitution [and under 13 V.S.A. § 7553] indicates that such crimes are treated 'as a surrogate for a high risk of flight.'" (quoting State v. Sauve, 159 Vt. 566, 574 (Vt. 1993)); State v. Brillon, 2010 VT 48, ¶ 11, 188 Vt. 537 (mem.) (holding that court properly exercised its discretion to deny bail under section 7553 because the defendant's history raised "serious doubt about whether defendant would obey conditions of release and, by extension, whether the public would be adequately protected"); 13 V.S.A. § 7553a (providing that person can be held without bail pursuant to that section when, among other things, "the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence"); 13 V.S.A. § 7554(a)(1) ("In determining whether the defendant presents a risk of flight from prosecution, the judicial officer shall consider, in addition to any other factors, the seriousness of the offense charged and the number of offenses with which the person is charged"); Bailey, 2017 VT 18, ¶ 8 ("[T]he court may only impose bail to assure the defendant's appearance at future court proceedings -- in other words, the purpose of bail is solely to reduce the defendant's risk of flight"); 13 V.S.A. § 7554(a)(2) ("If

[5] The State recognizes that in the context of setting bail, the only factors that are relevant are those related to risk of flight from prposecution. See State v. Bailey, 2017 VT 18, ¶ 8, 204 Vt. 294. Nevertheless, throughout the rest of this Reply, the State will refer to both risk of flight and risk to the community because it is addressing not only the statutory structure concerned with setting bail but those provisions that are concerned with setting conditions of release or holding a defendant without bail as well. Further, in this case, Defendant is held without bail due to a probation violation on a listed offense. Thus, both risk of flight and risk to the community are relevant. See 28 V.S.A. § 301(5).

the judicial officer determines that conditions of release imposed to mitigate the risk of flight will not reasonably protect the public, the judicial officer may impose in addition the least restrictive of the following conditions or the least restrictive combination of the following conditions that will reasonably ensure protection of the public"); 13 V.S.A. 7575 (noting five circumstances—all related to violating conditions of release or failing to appear—in which the right to bail can be revoked); 28 V.S.A. § 301 ("At arraignment, if the court finds that bail or conditions of release will reasonably ensure the probationer's appearance at future proceedings and conditions of release will reasonably protect the public, the court shall release a probationer who is on probation for a nonviolent misdemeanor or nonviolent felony pursuant to 13 V.S.A. § 7554."). Nowhere in any of these statutes, or the caselaw interpreting them, does it say a Court can consider factors unrelated to risk of flight and protecting the public.

Defendant's Response even recognizes that the Court's discretion under this statutory structure is confined. According to Defendant,

> [t]he plain language of [13 V.S.A. 7554] creates a system where the court has to consider a handful of factors (such as the seriousness of the offense and the accused's financial resources), but makes the list of factors nonexclusive by allowing the Court to consider 'any other factors' *it believes are relevant to a defendant's risk of flight* and the reasonable mitigation of that risk.

Def. Response at 2 (emphasis added). Defendant then takes an illogical leap and says that "[t]he Court, therefore, has the authority to consider a defendant's health and the ability of the Department of Corrections to adequately care for a defendant's health." Id. at 3. Defendant, however, fails to explain how the COVID-19 pandemic and Department of Corrections ability to care for persons in its custody has any relevance to Defendant's risk of flight or the risk he poses to public safety. This is because the conditions inside prison do not have any logical connection

to Defendant's risk of flight or his risk to public safety. Stated otherwise, Defendant fails to explain the connection because there is no connection.

In contrast to the statutes discussed above, one Vermont statute does make clear that a defendant's health needs should be taken into consideration independent of risk of flight. Pursuant to 13 V.S.A. § 7554b, "the status of a defendant who is detained pretrial in a correctional facility for inability to pay bail after bail has been set by the court may be reviewed by the court to determine whether the defendant is appropriate for home detention."[6] 13 V.S.A. § 7554b(b). Under that statute,

> [a]t arraignment or after a hearing, the court may order that the defendant be released to the Home Detention Program, provided that the court finds placing the defendant on home detention will reasonably assure his or her appearance in court when required and the proposed residence is appropriate for home detention. In making such a determination, the court shall consider:
>
> > (1) the nature of the offense with which the defendant is charged;
> >
> > (2) the defendant's prior convictions, history of violence, *medical and mental health needs*, history of supervision, *and risk of flight*; and
> >
> > (3) any risk or undue burden to other persons who reside at the proposed residence or risk to third parties or to public safety that may result from such placement.

Id.

Thus, the legislature explicitly made medical and mental health needs relevant to the home detention determination *apart* from risk of flight. Given that the legislature has only made risk of flight and risk to the community the relevant considerations in the other related statutes, the Court's discretion is confined to factors relating to those two considerations. See Insurance

[6] "A defendant held without bail pursuant to section 7553 or 7553a of this title shall not be eligible for release to the Home Detention Program on or after June 1, 2018." 13 V.S.A. § 7554b(b).

Co. of State of Penn. v. Johnson, 2009 VT 92, ¶ 9, 186 Vt. 435 ("[T]he rules of statutory construction normally demand that we accord significance to variations in legislative language. . . . If anything, therefore, the Legislature's decision to predicate the application of § 941 on the nature of the *coverage* rather than -- as elsewhere in the chapter -- the type of *policy* supports a conclusion that the Legislature fully intended the broad scope that the specific language commands" (emphasis original)); State v. Stell, 2007 VT 106, ¶ 12, 182 Vt. 368 ("We assume the Legislature intended the plain and ordinary meaning of the language it used, and thus, only when the objective of the legislation would be defeated by literal enforcement of statutory provisions can the Court, in construing a particular law, depart from the ordinary and usual meaning of the language used therein"); Wesco, Inc. v. Sorrell, 2004 VT 102, ¶ 14, 177 Vt. 287 ("If the statute is unambiguous and its words have plain meaning, we accept the statute's plain meaning as the intent of the Legislature and our inquiry proceeds no further");

That is not to say -- as Defendant argues -- that a Defendant's health is never a consideration under this statutory structure, cf. State v. Toomey, 126 Vt. 123, 125 (Vt. 1966), but only to the extent that Defendant's health is related to his risk of flight and risk to the community. For example, a defendant who is physically incapacitated after committing an assault may not present a risk to the community or a defendant who requires regular treatment at a hospital for a medical condition may not present a risk of flight. But conditions inside a prison are not connected to a defendant's flight and public safety risk because they are not *individualized* to the defendant. This is clear from a review of the Meyer Affidavit submitted in support of Defendant's position. Not a single sentence of that Affidavit discusses Defendant, his particular situation, or how the conditions in Vermont prisons are related to the risk Defendant

poses to the community and the risk that he will flee from prosecution. Conversely, the Court would not consider in this type of hearing any statistics or anecdotes the State might cite about criminal defendants generally fleeing prosecution or endangering the public while on pretrial release. Rightly so, as general statistics and anecdotes—as opposed to individualized risk assessments, see 13 V.S.A. § 7554c, have no relation to the individualized defendant before the Court.[7] Similarly, Defendant risk of flight and risk to the public are neither increased nor decreased based on how the Department of Corrections addresses the COVID-19 pandemic.

The remainder of Defendant's Response discusses how pretrial detention cuts against constitutional values and argues that the Court must protect citizens form pretrial detention. While it is certainly true that section 7554 creates a presumption against detention, Defendant is being held without bail in relation to a probation violation. As Defendant is on probation for a listed felony offense, he has no right to bail. See 28 V.S.A. § 301(4), (5)(B)(i); 13 V.S.A. § 5301(7)(I). When a defendant has no right to bail, "a presumption in favor of incarceration arises, but 'the court has discretion to decide whether to hold the defendant without bail or, instead, to impose bail and conditions of release.'" State v. Shores, 2017 VT 37, ¶ 16, 204 Vt. 630 (mem.) (quoting State v. Rondeau, 2017 VT 21, ¶ 7, 204 Vt. 625 (mem.)). "This presumption [in favor of incarceration] shifts the burden to the defendant to show that he is

[7] Relatedly, Defendant's arguments that the Court's obligation to impose the least restrictive conditions or combination of conditions somehow broadens the Court's discretion is misplaced. Section 7554 states that when a court determines that a person presents a risk of flight or a risk to the public, the Court should "impose the least restrictive of the following conditions or the least restrictive combination of the following conditions that will reasonably mitigate *the risk of flight*" or "that will reasonably ensure *protection of the public*." 13 V.S.A. § 7554(a)(1) & (2). Thus, this language is also grounded in the two concerns of the statutory structure: risk of flight and public safety.

bailable." State v. Blow, 2015 VT 143, ¶ 12 n.1, 201 Vt. 633 (mem.). Accordingly, in this case, the presumption is that Defendant is in favor of incarceration.

Thus, when considering any type of bail appeal, the Court's discretion is limited to considering factors that relate to risk of flight and risk to the community. The conditions in prison have no connection to these considerations and Defendant Response fails even to argue how the Department of Corrections response to COVID-19 pandemic has any bearing on Defendant's risk of flight or his risk to the community. As such, that issue is not properly before the Court in these proceedings. Rather, as argued in the State's earlier filings, challenges to prison health conditions should be pursued in proceedings under V.R.C.P. 75 and Section 1983.

3. **Conclusion**

For the reasons stated above and the reasons stated in the State's original Motion, the State objects to consolidation and the Court's Scheduling Order, and moves for clarification of the applicable legal standard.

Brattleboro, Vermont
April 17, 2020

STATE OF VERMONT

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