THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 604(h)

No. 130693

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CHRISTIAN MIKOLAITIS, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-23-0791. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 23 CF 2213. Honorable Margaret O'Connell, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT IN SUPPORT OF RULE 604(h) APPEAL

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7/17/2024 10:41 AM
CYNTHIA A. GRANT
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NATURE OF THE CASE

Christian Mikolaitis, Defendant-Appellant, appeals from the written order entered following a hearing held pursuant to the Pretrial Fairness Act. See Pub. Act 101-652, § 10-255; Pub. Act 102-1104, § 70. (C.14) The appellate court affirmed the trial court's decision. *People v. Mikolaitis*, 2024 IL App (3d) 230791. No issue is raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

The Pretrial Fairness Act requires the State to prove three elements to detain a defendant awaiting trial: 1) a great presumption of guilt; 2) a safety threat or flight risk; and 3) that no conditions of release could mitigate that threat. Does the State meet its burden of proof if it fails to present evidence and makes no argument on the third element?

STATUTES INVOLVED

725 ILCS 5/110-5(a)(1-3), (c)

(a) In determining which conditions of pretrial release, if any, will reasonably ensure the appearance of a defendant as required or the safety of any other person or the community and the likelihood of compliance by the defendant with all the conditions of pretrial release, the court shall, on the basis of available information, take into account such matters as:

(1) the nature and circumstances of the offense charged;

(2) the weight of the evidence against the defendant, except that the court may consider the admissibility of any evidence sought to be excluded;

(3) the history and characteristics of the defendant, including:

(A) the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past relating to drug or alcohol abuse, conduct, history criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal law, or the law of this or any other state;

* * *

(c) The court shall impose any conditions that are mandatory under subsection (a) of Section 110-10. The court may impose any conditions that are permissible under subsection (b) of Section 110-10. The conditions of release imposed shall be the least restrictive conditions or combination of conditions necessary to reasonably ensure the appearance of the defendant as required or the safety of any other person or persons or the community.

725 ILCS 5/110-6.1(e)(1-3)

(e) Eligibility: All defendants shall be presumed eligible for pretrial release, and the State shall bear the burden of proving by clear and convincing evidence that:

(1) the proof is evident or the presumption great that the defendant has committed an offense listed in subsection (a), and

(2) for offenses listed in paragraphs (1) through (7) of subsection (a), the defendant poses a real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case, by conduct which may include, but is not limited to, a forcible felony, the obstruction of justice, intimidation, injury, or abuse as defined by paragraph (1) of Section 103 of the

Illinois Domestic Violence Act of 1986, and

(3) no condition or combination of conditions set forth in subsection (b) of Section 110-10 of this Article can mitigate (i) the real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case, for offenses listed in paragraphs (1) through (7) of subsection (a), or (ii) the defendant's willful flight for offenses listed in paragraph (8) . . . .

725 ILCS 5/110-10(b)(0.05-5,8-9)

(b) Additional conditions of release shall be set only when it is determined that they are necessary to ensure the defendant's appearance in court, ensure the defendant does not commit any criminal offense, ensure the defendant complies with all conditions of pretrial release, prevent the defendant's unlawful interference with the orderly administration of justice, or ensure compliance with the rules and procedures of problem solving courts. However, conditions shall include the least restrictive means and be individualized. Conditions shall not mandate rehabilitative services unless directly tied to the risk of pretrial misconduct. Conditions of supervision shall not include punitive measures such as community service work or restitution. Conditions may include the following:

(0.05) Not depart this State without leave of the court;

(1) Report to or appear in person before such person or agency as the court may direct;

(2) Refrain from possessing a firearm or other dangerous weapon;

(3) Refrain from approaching or communicating with particular persons or classes of persons;

(4) Refrain from going to certain described geographic areas or premises;

(5) Be placed under direct supervision of the Pretrial Services Agency, Probation Department or Court Services Department in a pretrial home supervision capacity with or without the use of an approved electronic monitoring device subject to Article 8A of Chapter V of the Unified Code of Corrections;

* * *

(8) Sign a written admonishment requiring that he or she comply with the provisions of Section 110-12 regarding any change in his or her address. The defendant's address shall at all times remain a matter of record with the clerk of the court; and

(9) Such other reasonable conditions as the court may impose, so long as these conditions are the least restrictive means to achieve the goals listed in subsection (b), are individualized, and are in accordance with national best practices as detailed in the Pretrial Supervision Standards of the Supreme Court.

STATEMENT OF FACTS

On December 10, 2023, around 8:30 p.m., police officers went to a gym in Lockport for a report that Alec Geibel had been stabbed multiple times. Geibel stated that Christian Mikolaitis had stabbed him and was driving a gray Hyundai Elantra. At 10:49 p.m., Mikolaitis's mother called 911 and said her son told her that he had stabbed Geibel. (C.12)

At 12:39 a.m., Mikolaitis's girlfriend called 911 and stated that she just met Mikolaitis at a gas station. Mikolaitis told her that he picked up Geibel, who was going to buy Percocet from him, parked the car, pretended to look for his cell phone in the back seat, and then stabbed Geibel multiple times. After that, Geibel left the vehicle and Mikolaitis drove away. Mikolaitis allegedly stated that "he hated the kid." (C.12)

At 1:31 a.m., Mikolaitis was arrested in the Hyundai, and the front passenger seat had knife punctures marks. (C.12) The State charged Mikolaitis with one count of attempted first degree murder and one count of aggravated battery with a deadly weapon. (C.3-4)

On December 12, 2023, the State filed a petition to deny Mikolaitis pretrial release. (C.6-13) On December 18, 2023, the court held a hearing on the State's petition. (R.2-16) The State argued that, if he were released, Mikolaitis would pose a threat to Geibel. (R.8-9) The State asserted that "this is a violent offense and [Mikolaitis's] actions as alleged were violent in nature." (R.9) The State did not argue as to why conditions of release could not mitigate any risk posed by Mikolaitis. (R.8-9)

Counsel argued that Mikolaitis should be released on conditions, including electronic monitoring. (R.10) Mikolaitis was 19 years old and lived in Elwood with his mother and her husband. (R.10) Mikolaitis was not currently working, but had a valid driver's license and transportation to court. (R.10) Counsel also informed the court that Mikolaitis was prescribed antipsychotics for his depression, anxiety, and bipolar disorder. (R.10) The court asked if Mikolaitis was currently taking his antipsychotics, and Mikolaitis responded that he was not. (R.10-11) Counsel stated that the last time Mikolaitis took them was in September. (R.11) Mikolaitis has one prior misdemeanor conviction for a traffic offense. (CI.5)

The trial court found that Mikolaitis was charged with a detainable offense and posed a real and specific threat to Geibel. (R.11-12) The court then stated that it was required to determine whether any conditions could mitigate the real and present threat, and the court said it "quite simply, cannot." (R.13) The trial court explained that it understood "the concept of mental illness," and Mikolaitis was not taking his medicine. (R.13) This caused the court to doubt whether Mikolaitis would abide by conditions of pretrial release. (R.13) The court found that Mikolaitis met "the dangerousness standard," and ordered detention. (R.13)

In the trial court's written order, which was a pre-printed form, the court marked that the dangerousness standard applied. (C.14) Under why less restrictive conditions would not be effective, the court checked the boxes next to the "[n]ature and circumstances of the offense(s) charged," "[i]dentity of the person or persons to whose safety defendant is believed to pose a threat and the nature of the threat," "[a]ny statements made by, or attributed to defendant, together with the

circumstances surrounding them," and "[d]efendant is known to possess or have access to weapons." (C.14-15)

On appeal, Mikolaitis argued that the State failed to prove by clear and convincing evidence that no condition or combination of conditions could mitigate any potential threat he may pose. *People v. Mikolaitis*, 2024 IL App (3d) 230791, ¶ 9. A majority of the appellate court held that the State was not required to "present *argument* as to each one of the potential conditions and why it should not apply to the defendant." *Id.* at ¶ 12 (emphasis in original).

The special concurrence opined that it would be unworkable to require "the State to argue or prove why each condition or combination of conditions set forth in section 110-10(b) cannot mitigate the threat a defendant poses to a particular victim." *Mikolaitis*, 2024 IL App (3d) 230791, ¶ 18 (Brennan, J., specially concurring).

The dissent held that "[o]f course, not every conceivable condition needs to be addressed by the State to meet its burden," but the Act "shows that the legislature contemplated what conditions would arguably be applicable and mandated that the State present evidence and argument on them." *Id.* at ¶ 27 (McDade, J., dissenting). The "State's explicit burden" under the Pretrial Fairness Act required the State to address "at a very minimum the conditions explicitly listed in section 110-10(b)." *Id.* This is analogous "to what transpires every day in criminal court," and thus "the majority has excused the State from having to meet its legislatively mandated burden of [proof]." *Id.* at ¶¶ 23, 28 (McDade, J., dissenting).

This Court granted leave to appeal on June 12, 2024.

ARGUMENT

The Pretrial Fairness Act requires the State to prove three elements to detain a defendant awaiting trial: 1) a great presumption of guilt; 2) a safety threat or flight risk; and 3) that no conditions of release could mitigate that threat. The State failed to meet its burden of proof to detain Christian Mikolaitis because it presented no evidence and made no argument as to the third element.

When the legislature "dismantled and rebuilt Illinois's statutory framework for the pretrial detention and release of criminal defendants," creating the Pretrial Fairness Act (Act), it imposed a new burden on the State to prove that a defendant could not be released pretrial. *Rowe v. Raoul*, 2023 IL 129248, ¶ 4. To detain someone under the old bail statute, the State had to prove only two elements: a great presumption of guilt and a safety threat. 725 ILCS 5/110-4 (eff. Jan. 25, 2013); 725 ILCS 5/110-6.1 (eff. Jan. 1, 2014); *People v. Purcell*, 201 Ill.2d 542, 550 (2002) (the State has the burden to prove that a defendant should be denied their constitutional right to bail). Our legislature maintained those two elements in the new Act, and added a third, one that enforces the Act's pretrial-release presumption that defendants should not be jailed awaiting trial. The State now bears the burden of proving, clearly and convincingly, that no conditions of release could mitigate any safety threat. 725 ILCS 5/110-6.1(e)(3) (eff. Jan. 1, 2023). This third element is, for all intents and purposes, the Act itself.

The State here, however, presented on only the first two elements. The State ignored the third element. Thus this appeal is simple. The State failed to meet the mandates of the plain language of the Act because the State "must prove not one, not two, but all three factors by clear and convincing evidence." *People v. White*, 2024 IL App (1st) 232245, ¶ 18. And having "ignored the third factor,

the State has failed to bear its burden as it must." *Id.* at ¶ 27.

This Court must "give effect to the legislature's intent," which is "best indicated by the plain and ordinary meaning of the statutory language." *People v. Palmer*, 2021 IL 125621, ¶ 53. Questions of statutory interpretation are reviewed *de novo*. *People v. Smith*, 2016 IL 119659, ¶ 15; *White*, 2024 IL App (1st) 232245, ¶ 21.

The important difference between the old bail system and the Act is that defendants are not simply eligible for pretrial release, but are presumed to be released pending trial. 725 ILCS 5/110-2(a). If the State seeks pretrial detention for a detainable offense, it must file a verified petition and prove three statutory elements. 725 ILCS 5/110-6.1(a),(e) (eff. Jan.1, 2023). Section 6.1(e) of the statute requires the State to prove by clear and convincing evidence: 1) a great presumption of guilt; 2) that the defendant poses a real and present safety threat; and 3) no conditions of release could mitigate that threat. *Id.* If the State fails to satisfy its burden of proof on any one of the required elements, the defendant must be released on pretrial conditions. *Id.*[1]

The third element of proof is set out in paragraph (3). This provision directs that the State shall bear the burden of proving by clear and convincing evidence that "no condition or combination of conditions set forth in subsection (b) of Section 110-10 of this Article can mitigate (i) the real and present [safety] threat. . . based on the specific articulable facts of the case. . . ." 725 ILCS 5/110-6.1(e)(3). The

[1] This case involves only the safety threat factor, as opposed to potential "willful flight."

legislature's decision to impose this new burden on the State is well within the scope of its power to legislate pretrial release. See generally *Rowe v. Raoul*, 2023 IL 129248, ¶ 34.

The statute's language is unambiguous. Section 6.1(e)(3) requires the State to present both evidence and argument as to why the conditions of release in section 10(b) cannot mitigate any potential safety threat. The State's "burden of proof" contains two requirements: a burden of production and a burden of persuasion. Black's Law Dictionary (12th ed. 2024). The "burden of production" is the obligation of a party to introduce evidence sufficient to avoid a ruling against them. *Id.* The "burden of persuasion" is the "party's duty to convince the factfinder to view the facts in a way that favors that party." *Id.*

Here, the State needed to introduce evidence and convince the court as to why conditions of pretrial release could not mitigate any potential safety risks. But at Mikolaitis's hearing, the State ignored the third element entirely. The State made no reference, or any argument, either at the detention hearing or in its petition to detain, as to why any of the conditions set forth in section 10(b) could not mitigate any safety threat to the complainant. (R.8-9,C.6-13); 725 ILCS 5/110-10(b).

The release conditions that the State could have addressed, but did not, include: electronic monitoring, prohibiting possession of weapons, no-contact orders, and any "other reasonable conditions," so long as they "are the least restrictive means to achieve the [Act's] goals." See 725 ILCS 5/110-10(b). But the State argued only as to its second burden of proof — that Mikolaitis posed a threat if released. While that may have been enough to detain Mikolaitis prior to the change in the

law, the Act now requires more. The State must satisfy its burden of proof on all three elements, and here, the State made no presentation as to the third. 725 ILCS 5/110-6.1(e).

Other districts of the appellate court recognize that the State must present some argument and evidence as to why the conditions of release would not mitigate any potential safety threat. In *People v. Stock*, for example, the State made a factual proffer and a "conclusory statement that no condition or combination of conditions could mitigate the threat posed by defendant." 2023 IL App (1st) 231753, ¶¶ 1, 5, 17. This was insufficient, however:

> Our analysis of whether the State met its burden of proof on this issue is a simple one because the State presented no evidence on this element. . . . . While the State made a conclusory statement that no condition or combination of conditions could mitigate the threat posed by defendant, it offered no evidence to support that conclusion. Indeed, the State at no point referenced or discussed these conditions or section 110-10(b) of the Code. *Id.* at ¶ 17.

Yet in this case, the State failed to even allege that no conditions of release could be imposed. Instead, the trial court used the State's argument and evidence on the first two elements to make a determination on release conditions. (R.8-9,11-13) In like circumstances, the First District appellate court found that the trial court erred by "(i) coupling its analysis of the third element to the alleged offenses and (ii) overlooking conditions short of detention, which could mitigate any real and present threat [the defendant] posed." *People v. Carter*, 2024 IL App (1st) 240259, ¶ 16.

The same error that occurred here also happened in *People v. White*, 2024 IL App (1st) 232245, ¶ 17. In *White*, the State "parroted the language of the statute,"

and "presented no evidence relevant" to the "third factor and sections 110-10(a) and (b)." *Id.* at ¶¶ 20, 25. On appeal, the State argued that this was all that was needed to satisfy its burden of proof. *Id.* at ¶ 20. The appellate court rejected the State's argument based on the plain language of the statute. *Id.* at ¶ 21. The State "must prove not one, not two, but all three factors by clear and convincing evidence." *Id.* at ¶ 18. "Having effectively ignored the third factor, the State has failed to bear its burden as it must." *Id.* at ¶ 27. Here, the State did less than it did in *White* or *Stock*. It did not bother to parrot the language of the Act, or even make a conclusory statement about conditions, disregarding the third factor entirely. (R.8-9)

The Second District appellate court also holds that the State must present some argument concerning possible conditions of release to carry its burden: "bare allegations that defendant has committed a violent offense are not sufficient to establish he presents a risk that cannot be mitigated." *People v. McGee*, 2024 IL App (2d) 240057-U, ¶ 19, citing *Stock*, 2023 IL App (1st) 231753, ¶ 18; see also *People v. Reamy*, 2024 IL App (2d) 240084-U, ¶¶ 20-23; *People v. Shaffer*, 2024 IL App (4th) 240085-U, ¶ 26-28 (same). These decisions are sound as they hold the State to their burden under the plain language of the Act.

The Third District appellate court, here, allowed the State to satisfy its burden of proof through the first two elements under 725 ILCS 5/110-6.1(e). Instead of looking at the plain language of the Act, the majority opinion read in an exception to the State's burden of proof. *Mikolaitis*, 2024 IL App (3d) 230791, ¶ 12. The majority reasoned that the State "provided argument and evidence regarding the factors set forth in section 110-5," and, therefore, the State met its burden of proof

as these factors "provide the evidentiary corollary to the potential conditions of release." *Id.* at ¶¶ 12-13. Put plainly, because the State argued that Mikolaitis was a safety threat, this was enough, the majority reasoned, to prove that conditions could not mitigate that threat. But this is not enough under the Act. As the other districts recognize, the State must present evidence and argue why conditions of release under section 10(b) cannot mitigate any safety risk. The legislature did not intend for the trial court's considerations under section 5 to be synonymous with section 10(b), nor allow the State's burden of proof to be obviated by the considerations under section 5. 725 ILCS 5/110-5; 725 ILCS 5/110-10(b).

The majority opinion allows the State to circumvent its burden of proof by presenting on only the first two elements. This was the State's burden under the old bail regime. Now, however, the State must also prove why the conditions listed in section 10(b) cannot mitigate any safety threat.

Because the State failed to make any argument as to this third element, either in court or in its petition, defense counsel was the only party to raise potential conditions of release. He asked the court to impose electronic monitoring. (R.10) But it was not Mikolaitis's burden to prove that he should be released on conditions. The State was required to prove why he could not be.

It is not unworkable to require the State to meet its burden of proof. See *Mikolaitis*, 2024 IL App (3d) 230791, ¶ 18 (Brennan, J., specially concurring). The requirement that the State prove this third element under the Act is analogous to what transpires daily in criminal court. *Id.* at ¶ 28 (McDade, J., dissenting). The State has a burden to overcome a variety of presumptions in criminal law.

Id. And critically, if the State fails to satisfy its burden of proof, "the presumption prevails." *Id.*

Of course, not every conceivable condition of pretrial release need be addressed by the State to meet its burden under section 110-6.1(e)(3). And contrary to the special concurrence's position below, Mikolaitis did not ask the appellate court to impose such a requirement, as the State's evidence and argument depends on "the specific articulable facts" of each case. See 725 ILCS 5/110-6.1(e)(3). But the language of section 6.1(e)(3) — which mandates that the State clearly and convincingly prove three elements — shows that the legislature contemplated what conditions could apply and required that the State produce some evidence and argument on them. *Id.*

All arrestees in Illinois, no matter the charges, are presumed eligible for pretrial release unless the State proves otherwise. The Act required the State to prove that no conditions under section 10(b) could mitigate any threat Mikolaitis posed on pretrial release. 725 ILCS 5/110-6.1(e)(3). But the State was silent on this element. (R.8-9,C.6-13) The Pretrial Fairness Act requires more than that to detain someone. This Court should therefore reverse the decision of the appellate court, vacate the trial court's detention order, and remand for a hearing on conditions of release.

CONCLUSION

For the foregoing reasons, Christian Mikolaitis, Defendant-Appellant, respectfully requests that this Court reverse the decision of the appellate court, vacate the trial court's detention order, and remand for a hearing on release conditions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 14 pages.

/s/ Christina M. O'Connor
CHRISTINA M. O'CONNOR
Assistant Appellate Defender

APPENDIX TO THE BRIEF

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Opinion filed April 11, 2024

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2024

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHRISTIAN P. MIKOLAITIS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Appeal No. 3-23-0791 Circuit No. 23-CF-2213 The Honorable Margaret M. O'Connell, Judge, presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.
Justice Brennan specially concurred in the judgment, with opinion.
Presiding Justice McDade dissented, with opinion.

OPINION

¶ 1 The defendant, Christian P. Mikolaitis, appeals from the circuit court of Will County's order denying pretrial release, arguing the State failed to prove by clear and convincing evidence that no condition or combination of conditions could mitigate any threat he posed.

¶ 2 ## I. BACKGROUND

On December 12, 2023, the defendant was charged with attempted first degree murder (Class X) (720 ILCS 5/8-4(a), 9-1(a)(2) (West 2022)) and aggravated battery (*id.* § 12-3.05(f)(1), (h)). The State filed a verified petition to deny pretrial release, alleging defendant was charged

with a forcible felony, and his release posed a real and present threat to the safety of any person, persons, or the community under section 110-6.1(a)(1) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-6.1(a)(1) (West 2022)).

¶ 3 The factual basis provided that on December 10, 2023, at 8:30 p.m. officers responded to Challenge Fitness for a victim, Alec Geibel, who had been stabbed multiple times. Geibel was taken to Silver Cross Hospital and was subsequently transported to Chicago as a trauma transport. He gave a brief statement while at Silver Cross, stating that the defendant stabbed him and was driving a gray Hyundai Elantra with red trim. At 10:49 p.m. the defendant's mother called 911 and stated that the defendant told her he had stabbed Geibel and provided a description of the car. At 12:39 a.m. the defendant's girlfriend called 911 and stated that she had met the defendant at a gas station, and he told her he had stabbed someone and provided details on how he did it. She further stated that the defendant had picked up Geibel, who was going to buy Percocet from the defendant. The defendant parked the car, pretended to look for his phone in the back seat, opened the passenger door, and stabbed Geibel multiple times. He then left Geibel and drove away. The defendant also told his girlfriend that he hated Geibel. The defendant was apprehended at 1:31 a.m. in the vehicle described by Geibel and the defendant's mother. The front passenger seat had knife punctures.

¶ 4 A pretrial risk assessment was completed, but because the defendant declined to participate, it included limited information. The criminal history indicated that the defendant had a pending case for failing to notify of a damaged or unattended vehicle.

¶ 5 A hearing was held on the petition on December 18, 2023. The State discussed some of the factors that applied to the case, including (1) it was a violent offense, (2) Geibel was a specific person to whom the defendant posed a threat, (3) the defendant told people what happened, and

(4) the defendant had access to and possessed a weapon, being a knife. The State argued that if the defendant was released, Geibel's safety would be at risk. Defense counsel asked for the defendant to be placed on electronic monitoring, noting that he was 19 years old and had received mental health treatment for depression, anxiety, and bipolar disorder. The circuit court asked whether the defendant was currently taking his antipsychotic medicine, to which he said no. Defense counsel indicated that the last time the defendant took his medication was in September when he "had an admission for mental health."

¶ 6 The court granted the State's petition, finding that the proof was evident that the defendant committed a detainable offense and that he posed a real and present threat to the safety of Geibel. The court also found that there were no conditions that could mitigate the threat the defendant posed, stating,

> "I understand the concept of mental illness, but it does not appear as if the defendant was taking his medicine which was previously prescribed to him in order to combat his antipsychotic behavior along with his bipolar, so that is a greater concern to me and it certainly poses a question as to whether or not he would be in a position where he could abide by the conditions of pretrial release."

¶ 7 II. ANALYSIS

¶ 8 On appeal, the defendant argues that the State failed to show by clear and convincing evidence that no condition or combination of conditions could mitigate any threat he posed. We review a circuit court's factual findings in pretrial release cases under the manifest weight of the evidence standard, but the court's ultimate decision to grant or deny the State's petition to detain is considered for an abuse of discretion. *People v. Trottier*, 2023 IL App (2d) 230317, ¶ 13. Under either standard, we consider whether the court's determination is arbitrary or unreasonable. *Id.*;

see also *People v. Horne*, 2023 IL App (2d) 230382, ¶ 19. We review issues of statutory construction *de novo*. *People v. Taylor*, 2023 IL 128316, ¶ 45.

¶ 9 Every person charged with an offense is eligible for pretrial release, which may only be denied in certain situations. 725 ILCS 5/110-2(a), 110-6.1 (West 2022). The State must file a verified petition requesting the denial of pretrial release. *Id.* § 110-6.1(a). The State then has the burden of proving by clear and convincing evidence that (1) the proof is evident or presumption great that the defendant committed a detainable offense, (2) the defendant poses a real and present threat to any person, persons, or the community, or has a high likelihood of willful flight to avoid prosecution, and (3) no conditions could mitigate either the defendant's dangerousness or risk of flight. *Id.* § 110-6.1(a), (e).[1] When determining a defendant's dangerousness and the conditions of release, the statute includes a nonexhaustive list of factors the court can consider. *Id.* §§ 110-6.1(g), 110-5. Section 110-10 provides a nonexclusive list of conditions that can be applied to individuals placed on pretrial release. *Id.* § 110-10.

¶ 19 Section 110-6.1(g) indicates that the court, when determining dangerousness, should consider evidence the State presented that applies to a certain set of factors. *Id.* § 110-6.1(g). Likewise, section 110-5(a) states that the court shall consider a set of factors when determining which conditions of pretrial release, if any, would ensure his appearance or mitigate his dangerousness. *Id.* § 110-5(a). The section specifically states that the court shall consider these factors based on the available information, thus indicating that the State shall present evidence supporting these factors. *Id.*

[1] While the dissent says we "misstate the law" of section 110-6.1(e)(2), this statement of law is a clear summary of the State's requirements under the entirety of section 110-6.1, considering both subsections (a) and (e). It is thus the dissent who misconstrues this paragraph.

¶ 10 The dissent's reading of the statute would require the State to present *argument* as to each one of the potential conditions and why it should not apply to the defendant. However, the factors set forth in section 110-5 provide the evidentiary corollary to the potential conditions of release. For example, the State's presentation of evidence that the defendant was on probation, parole, or pretrial release at the time of the offense (*id.* § 110-5(a)(3)(B)) provides the evidentiary support for the court's finding that the defendant could not comply with the conditions that he abide by the law and the orders of the court (*id.* § 110-10(a)(2), (4)). It is unclear what evidence the dissent would require the State to present to meet its burden as to the conditions of release.

¶ 11 Here, the State provided argument and evidence regarding the factors set forth in section 110-5. *Id.* § 110-5. Moreover, defense counsel indicated to the court that the defendant had mental health issues and had been prescribed medication. When the court inquired into the medication, the defendant indicated that he was not taking his prescribed medication and counsel stated that he had not been taking it since he was admitted to a mental health facility in September. The court did not err in finding that the defendant's failure to abide by his doctor's directives indicated that he would not follow the conditions placed on him by the court. Therefore, the court did not abuse its discretion in granting the petition.

¶ 12 III. CONCLUSION

¶ 13 The judgment of the circuit court of Will County is affirmed.

¶ 14 Affirmed.

¶ 15 JUSTICE BRENNAN, specially concurring:

¶ 16 I write to emphasize my disagreement with the dissent's suggestion that the Code obligates the State to argue or prove why each condition or combination of conditions set forth in section 110-10(b) cannot mitigate the threat a defendant poses to a particular victim. Indeed, the

unworkability of such a requirement is laid bare when one considers that the section 110-10(b) conditions are not even an exhaustive list of possible conditions. 725 ILCS 5/110-10(b)(9) (West 2022) (allowing court to also require "such other reasonable conditions as the court may impose[.]").

¶ 17 Section 110-6.1(d)(1) prescribes the contents of the State's petition, requiring that "[t]he petition shall be verified by the State and shall state the grounds upon which it contends the defendant should be denied pretrial release, including the real and present threat to the safety of any person or persons or the community, based on the specific and articulable facts or flight risk, as appropriate." *Id.* § 6.1(d)(1). Conspicuously absent from the required content of the petition is any requirement that the State specifically address a non-exhaustive list of conditions that might arguably be imposed to mitigate a defendant's real and present threat.

¶ 18 Where a defendant's danger is proven by clear and convincing evidence, the Code does, of course, likewise require the State to prove by clear and convincing evidence that no condition or combination of conditions can mitigate the threat. *Id.* § 6.1(e)(3). This burden, however, can be satisfied in a variety of ways: from the presentation of evidence to be sure, but also by common sense consideration of the factors listed in section 110-5(a)(1)-(7), including the nature of the offense, the strength of the case, the defendant's mental condition, the defendant's criminal history, the defendant's compliance with MSR or probation, and several others. The State's burden does not obligate it to specifically address the efficacy of every conceivable condition or combination of conditions. Rather, it is the trial court that must ultimately consider all it has heard and, if ordering detention, make written findings explaining "why less restrictive conditions would not avoid a real and present threat to the safety or any person or persons or the community." *Id.* § 6.1(h).

¶ 19 In the instant case, defendant blindsided the victim with a horrific knife attack because, in the defendant's own words, he "hated" the victim. Defendant refused to cooperate with his pretrial risk assessment. To the extent defendant's mental health issues may have played some role in the attack, this in no way supports that some condition or conditions short of detention would mitigate the threat he poses to the victim. To the contrary, defendant's non-compliance with his psychotropic medication regimen supports the opposite inference. Simply put, the trial court's detention decision was based upon a sufficient quantum of information and was anything but fanciful.

¶ 20 PRESIDING JUSTICE McDADE, dissenting:

¶ 21 By affirming the circuit court's detention decision in this case, the majority has excused the State from having to meet its legislatively mandated burden of proving by clear and convincing evidence that

> "no condition or combination of conditions set forth in subsection (b) of Section 110-10 of this Article can mitigate (i) the real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case, for offenses listed in paragraphs (1) through (7) of subsection (a), or (ii) the defendant's willful flight for offenses listed in paragraph (8) of subsection (a)." 725 ILCS 5/110-6.1(e)(3) (West Supp. 2023).

Accordingly, I dissent from the majority's decision to affirm the circuit court's detention order.

¶ 22 Initially, I note that the majority has misstated the law contained in section 110-6.1(e). The majority maintains that under section 110-6.1(e)(2), the State must prove that "the defendant poses a real and present threat to any person, persons, or the community or had a high likelihood of willful flight to avoid prosecution." *Supra* ¶ 9. However, "willful flight to avoid prosecution" is not a phrase that appears in section 110-6.1(e)(2). 725 ILCS 5/110-6.1(e)(2) (West Supp. 2023).

That section only applies when the State has sought detention for offenses listed in section 110-6.1(a)(1) through (7), *i.e.*, only when the accused allegedly poses a safety risk. *Id.* In addition, the majority inaccurately summarizes the State's burden on the conditions element from section 110-6.1(e)(3). *Supra* ¶ 18. I have quoted that section above and do not need to repeat it here.

¶ 23 Turning to the merits, it is important in this case to differentiate between sections 110-5 and 110-10 of the Code. Section 110-5 provides guidance for the *court* when considering whether conditions exist that would, in part, "reasonably ensure the appearance of a defendant as required or the safety of any other person or the community." 725 ILCS 5/110-5(a) (West Supp. 2023). That section provides a nonexhaustive list of *factors* that are relevant to the court's decision, including "the nature and circumstances of the offense charged" (*id.* § 110-5(a)(1)) and "the history and characteristics of the defendant" (*id.* § 110-5(a)(3)). Section 110-5 also directs the court to take specific actions in certain circumstances. See, *e.g.*, *id.* § 110-5(c) (directing the court, if a defendant is to be admitted to pretrial release, to impose any conditions mandated by section 110-10 of the Code).

¶ 24 In contrast to section 110-5, section 110-10 addresses the actual *conditions* that can be imposed on pretrial release. *Id.* § 110-10. For example, section 110-10(a) addresses conditions that must be imposed if a defendant is admitted to pretrial release. *Id.* § 110-10(a). Section 110-10(b) includes a nonexhaustive list of conditions that can be imposed, such as requiring a defendant to obtain leave of court before departing the State (*id.* § 110-10(b)(0.05)) and prohibiting a defendant from possessing firearms or other dangerous weapons and from going to certain geographic areas or premises (*id.* §§ 110-10(b)(2), (4)).

¶ 25 The distinction between sections 110-5 and 110-10 is important because the State's explicit burden under section 110-6.1(e)(3) of the Code is that it must establish by clear and convincing

evidence, in relevant part, that "no condition or combination of conditions set forth in subsection (b) of section 110-10 can mitigate" either the safety risk the defendant poses or the risk of his or her "willful flight," depending on the basis for the State's detention request. *Id.* It would seem elementary, then, that for the State to meet its legislatively mandated burden under section 110-6.1(e)(3), it would address at a very minimum the conditions explicitly listed in section 110-10(b). See, *e.g.*, *People v. Stock*, 2023 IL App (1st) 231753, ¶¶ 15-19. Of course, not every conceivable condition needs to be addressed by the State to meet its burden under section 110-6.1(e)(3). But the language of that section shows that the legislature contemplated what conditions would arguably be applicable and mandated that the State present evidence and argument on them. The plain language of section 110-6.1(e)(3) makes it clear that the State *cannot* meet its burden under section 110-6.1(e)(3) by merely presenting evidence relevant to the factors the court is required to consider under section 110-5 when reaching its ultimate pretrial release decision. *Id.*

¶ 26 Whether the procedure mandated by section 110-6.1(e) is considered by the special concurrence to be unworkable is irrelevant. It is also a curious position because the procedure is essentially analogous to what transpires every day in criminal court—that is, a criminal defendant is presumed innocent; the State has a mandated burden so it presents evidence to satisfy that burden; if it fails to do so, the presumption prevails. In a pretrial release case such as this one, if the State satisfies its burden, the court can assess all factors available to it; it can fashion a novel or unique condition outside of the nonexhaustive list and still release the defendant on specific terms or it can deny release altogether. But it can only do so if the State first meets its burden of proof. This hardly seems unworkable—unless one just wants to ignore the statute and write his or her own law.

¶ 27 In this case, the State presented no evidence regarding any condition or combination of conditions that could mitigate the safety threat posed by Mikolaitis. Even though it may have presented evidence relevant to the factors the court is required to consider under section 110-5, the State could *not* meet its burden under section 110-6.1(e)(3) by presenting nothing more than that evidence. Because the State failed to present any evidence related to its burden under section 110-6.1(e)(3), it has failed to meet its burden and has essentially conceded that there *are* adequate conditions. Mikolaitis's argument on appeal is meritorious. The statutory presumption favoring pretrial release has not been rebutted and Mikolaitis cannot be detained, despite the horrific nature of the offense and the statutorily defined threat he poses. Accordingly, I would reverse the circuit court's decision and order the defendant's release.

IN THE CIRCUIT COURT OF Will COUNTY
12th JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

-vs-

Christian Mikolaitis,
Defendant-Appellant.

No. 23CF2213

NOTICE OF APPEAL FROM ORDER UNDER PRETRIAL FAIRNESS ACT PURSUANT TO ILLINOIS SUPREME COURT RULE 604(h)
(Defendant as Appellant)

Court from which appeal is taken:

Circuit Court of Will County.

The Judge(s) who entered the order(s) being appealed: Margaret O'Connell

Date(s) of Order(s) Appealed: 12/18/23

Date(s) of Hearing(s) Regarding Pretrial Release: 12/18/23

Court to which appeal is taken:

Appellate Court of Illinois, 3rd Judicial District

Name of Defendant and address to which notices shall be sent (if Defendant has no attorney):

Defendant's Name:
Defendant's Address:
Defendant's E-mail:
Defendant's Phone:

If Defendant is indigent and has no attorney, do they want one appointed? (If Cook County, the Cook County Public Defender will be appointed, in all other Counties, then OSAD will be appointed).

☑ Yes ☐ No

Name of Defendant's attorney on appeal (if any):

Attorney's Name: _____

Attorney's Address: _____

Attorney's E-mail: _____

Attorney's Phone: _____

Name of Defendant's trial attorney (if any):

Attorney's Name: Daniel M. Walsh

Attorney's Address: 58 N. Chicago Street 7th Floor

Attorney's E-mail: dan@attorneydanwalsh.com

Attorney's Phone: 815-409-7357

Is the trial attorney a public defender? ☐ Yes ☑ No

Nature of Order Appealed (check all that apply):

☑ Denying pretrial release

☐ Revoking pretrial release

☐ Imposing conditions of pretrial release

Are there currently pending any other appeals in this matter under the Pretrial Fairness Act? ☐ Yes* ☑ No

***If Yes, list appeal number(s):** _____

Rule 328 Supporting Record* (check all that are attached):

☐ Copy of the order appealed from

☐ Supporting documents or matters of record (please list)

_____

_____

_____

☐ Affidavit of attorney or party (in lieu of clerk certificate of authentication)

***You may attach a supporting record to this notice of appeal. A full supporting record must be filed with the appellate court within 30 days after filing this notice of appeal.**

Relief Requested: Pretrial Release

Grounds for Relief (check all that apply and describe in detail):

Denial or Revocation of Pretrial Release

☐ Defendant was not charged with an offense qualifying for denial or revocation of pretrial release or with a violation of a protective order qualifying for revocation of pretrial release.

☐ The State failed to meet its burden of proving by clear and convincing evidence that the proof is evident or the presumption great that defendant committed the offense(s) charged.

☐ The State failed to meet its burden of proving by clear and convincing evidence that defendant poses a real and present threat to the safety of any person or persons or the community, based on the specific, articulable facts of the case.

☑ The State failed to meet its burden of proving by clear and convincing evidence that no condition or combination of conditions can mitigate the real and present threat to the safety of any person or persons or the community, based on the specific, articulable facts of the case, or defendant's willful flight.

The State did not present any evidence that no condition or combination of conditions can mitigate any threat. Specifically, if defendant was to be placed on electronic monitoring with geographic restrictions and hom confinement, that would mitigate any threat. The State did not prove by clear and convicincing evidence that this would mitigate any threat.

☐ The court erred in its determination that no condition or combination of conditions would reasonably ensure the appearance of defendant for later hearings or prevent defendant from being charged with a subsequent felony or Class A misdemeanor.

☐ Defendant was denied an opportunity for a fair hearing prior to the entry of the order denying or revoking pretrial release.

☐ Other (explain).

Imposing Conditions of Pretrial Release

The State failed to meet its burden of proving by clear and convincing evidence that conditions of pretrial release are necessary.

In determining the conditions of pretrial release, the court failed to take into account the factors set forth in 725 ILCS 5/110-5(a). Specifically, the court failed to consider the following factors (list all that apply):

☐ The conditions of release are not necessary to ensure defendant's appearance in court, ensure that the defendant does not commit any criminal offense, ensure that defendant complies with all conditions of pretrial release, prevent defendant's unlawful interference with the orderly administration of justice, or ensure compliance with the rules and procedures of problem-solving courts.

☐ Other (explain).

I certify that everything in this NOTICE OF APPEAL FROM ORDER UNDER PRETRIAL FAIRNESS ACT PURSUANT TO ILLINOIS SUPREME COURT RULE 604(h) is true and correct. I understand that making a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

Your Signature

Daniel M. Walsh
Printed Name

6284208
Attorney # (if any)

2024 IL App (2d) 240057-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, Second District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Larry MCGEE, IV, Defendant-Appellant.

No. 2-24-0057

|

Order Filed April 5, 2024

Appeal from the Circuit Court of Kane County. No. 23-CF-0193, Honorable Salvatore LoPiccolo, Jr., Judge, Presiding.

ORDER

JUSTICE JORGENSEN delivered the judgment of the court.

***1** ¶ 1 *Held*: Trial court's order detaining defendant lacks adequate findings regarding dangerousness. Further, the court erred in determining that the State met its burden to establish that less-restrictive conditions could not mitigate the alleged real and present threat defendant possessed. Affirmed in part, reversed in part, and remanded.

¶ 2 In this interlocutory appeal under Illinois Supreme Court Rule 604(h) (eff. Oct. 19, 2023), defendant, Larry McGee, IV, timely appeals the order of the circuit court of Kane County granting the State's petition to detain him pursuant to Public Acts 101-652, § 10-255 (eff. Jan. 1, 2023), commonly known as the Pretrial Fairness Act (Act).[1] See also Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023) (amending various provisions of the Act); *Rowe v. Raoul*, 2023 IL 129248, ¶ 52 (lifting stay and setting effective date as September 18, 2023). For the following reasons, we affirm in part, reverse in part, and remand the case.

¶ 3 I. BACKGROUND

¶ 4 According to the report of proceedings, on May 5, 2023, a grand jury returned an indictment charging defendant with nine counts of predatory criminal sexual assault of a victim under 13 years of age (720 ILCS 5/11-1.40(a)(1) (West 2022)) (Class X) and three counts of attempt child pornography (*id.* § 11-20.1(a)(1)) (Class 1).[2] The offenses were alleged to have been committed between January 1, 2017, and December 31, 2020, at victim C.S.'s mother's house in Elgin.

¶ 5 On January 9, 2024, the State filed a verified petition to deny pretrial release, alleging that defendant was charged with detainable offenses and his release posed a real and present threat to the safety of C.S. and the community. The State attached to the petition a police synopsis reflecting that, on November 9, 2022, C.S.'s father filed a police report stating defendant had sexually assaulted C.S. while she was in his care at her mother's house. C.S. was between ages 8 and 11 when the alleged assaults occurred, some of which she alleged defendant had recorded using his cell phone. C.S. was age 14 when the police synopsis was prepared. On November 17, 2022, C.S. was interviewed at the Kane County Child Advocacy Center (CAC), at which time she related that defendant had touched her beneath her underwear, put her hand on top of his private parts over his clothes, and had penetrated her vagina and anus both digitally and with his penis.

¶ 6 The public safety assessment report scored defendant as a one on both the new-criminal-activity and failure-to-appear scales. Defendant has no prior convictions.

¶ 7 On January 9, 2024, the court held a hearing on the State's motion. The State entered into evidence the police synopsis and CAC report, arguing that those documents proved by clear and convincing evidence that the proof was evident and presumption great that defendant committed the alleged offenses. The State acknowledged that defendant has no criminal history, as well as that at least two years had passed since the last reported incident. However, it argued that he was a real and present threat to C.S. and anyone in the community because he was accused of sexually assaulting a minor between ages 8 and 11 and taking advantage of her while he was living in her mother's household. "The fact that he also had easy access to her none the less does pose a threat not just to her but to all of the other minor children[.]" The State did not believe that release conditions could mitigate the real and present threat to the safety of C.S., her family, or the general public.

***2** ¶ 8 Defense counsel noted that, since 2020, defendant has been living in Cook County (specifically, Roselle) with his sister. No minors live in that residence. Counsel further noted that defendant has no criminal history and, outside of this case, there was no evidence presented that he has ever been investigated or accused of inappropriate conduct. Moreover, the State presented no evidence that defendant had any contact with C.S. or her family after he moved in 2020. As such, counsel argued that defendant does not pose a threat to C.S., as he has had no contact with her or her family since 2020 and no longer lives near her. Further, counsel argued, defendant is no risk to anyone else because he has no criminal history and no children live in his current residence. Finally, counsel noted that defendant is unable to work due to his severe health problems, including chronic kidney and heart failure, and he sees a doctor and receives dialysis four times weekly. As his poor health prevents him from doing many things in life, it can also presumably mitigate against any risk he might pose to another individual. Finally, counsel argued, conditions of release, such as no-contact orders and placing him on supervision or terms with court services that require him to check in with them, could mitigate any perceived risk. "There is no indication from his previous behavior that he would violate any of those conditions."

¶ 9 The court granted the State's petition, finding it met its burden of proof that defendant committed detainable offenses and was a threat to C.S. and other minors in the community. As to dangerousness, the court explained,

> "This Court also finds that the State has proven by clear and convincing evidence that the proof is evident and presumption great that the defendant poses a real and present threat to the safety still of the minor C.S. She is 14 years old currently. And that he would also pose a real and present threat to any minor that would be under the age of 17 or any minor under the age of 18 that would be in the community at this stage and I base that on *the facts that were alleged by C.S.* in her statements to the police." (Emphasis added.)

In its written findings, the court noted that C.S. could not, at age 14, protect herself from defendant, and that *the acts she described and for which he has been charged* are forcible felonies. It noted that C.S. and other minors in the community need to be protected from the alleged conduct. "Based *on the conduct of the defendant on C.S.*, the defendant poses a real and present threat to C.S. and all minors under the age of 18 years of age." (Emphasis added.)

¶ 10 Further, the court found that no conditions of release could mitigate the risk. It acknowledged that defendant has serious health problems, does not live with minors, has no criminal history, and presently lives in Cook County. However, the fact that defendant lives in Cook County, the court found, "takes away one of the options that I would have of placing him on EHM or GPS because the sheriff's program for EHM [electronic home monitoring] and GPS is not available to people who live in Cook County." The court continued,

> "So based on the fact that I do not have [EHM] or GPS available to me at this time, I am going to make a finding that there is clear and convincing evidence that the proof is evident and presumption is great that at this time there are no conditions or combination of conditions of pretrial release that can mitigate the real and present threat posed by the defendant to the minor C.S. and that there are no less restrictive conditions that would avoid the real and present threat posed by the defendant at this time."

In its written findings, the court noted that no less-restrictive conditions could protect C.S. and minors in the community because defendant lives in Cook County and, therefore, EHM and GPS are not available from Kane County. Further, conditions of no contact with C.S. or other minors under age 18 will not by themselves assure the safety of C.S. or any minor. Finally, the court ordered that defendant have no contact with C.S. or her parents.

¶ 11 On January 16, 2024, defendant filed a notice of appeal, using the form notice promulgated under Illinois Supreme Court Rule 606(d) (eff. Oct. 19, 2023). On March 6, 2024, defendant filed a Rule 604(h) memorandum. Ill. S. Ct. R. 604(h)(2) (eff. Dec. 7, 2023). On March 25, 2024, the State submitted its memorandum opposing defendant's appeal.

¶ 12 II. ANALYSIS

***3** ¶ 13 In his memorandum, defendant argues first that the State failed to meet its burden to establish that his pretrial release would pose a real and present threat to the safety of any person or persons or the community. 725 ILCS 5/110-6.1(a)(1)-(7), (e)(2) (West 2022). Second, defendant argues that the State failed to meet its burden to establish by clear and convincing evidence that no condition or combination of conditions can mitigate the real and present

threat to the safety of any person or persons, based on the specific, articulable facts of the case. *Id.* § 110-6.1(e)(3).

¶ 14 Pretrial release is governed by article 110 of the Code, as amended by the Act. 725 ILCS 5/110 (West 2022). Under the Code, as amended, all persons charged with an offense are eligible for pretrial release, and a defendant's pretrial release may only be denied in certain statutorily limited situations. *Id.* §§ 110-2(a), 110-6.1(e). As relevant here, upon filing a verified petition requesting denial of pretrial release, the State has the burden to prove by clear and convincing evidence that the proof is evident or the presumption great that the defendant has committed a detainable offense (*id.* § 110-6.1(e)(1)), that the defendant's pretrial release poses a real and present threat to the safety of any person or the community (*id.* §§ 110-6.1(a)(1)-(7), (e)(2)), and that no condition or combination of conditions can mitigate the real and present threat to the safety of any person or the community (*id.* § 110-6.1(e)(3)). "Evidence is clear and convincing if it leaves no reasonable doubt in the mind of the trier of fact as to the truth of the proposition in question." *Chaudhary v. Department of Human Services*, 2023 IL 127712, ¶ 74. Clear and convincing evidence is "more than a preponderance of the evidence and not quite approaching the beyond-a-reasonable-doubt standard necessary to convict a person of a criminal offense." *People v. Craig*, 403 Ill. App. 3d 762, 768 (2010).

¶ 15 We review defendant's arguments under a bifurcated standard of review: the court's factual determinations are reviewed to determine whether they are against the manifest weight of the evidence, and the court's ultimate determination regarding denial of pretrial release is reviewed for an abuse of discretion. *People v. Trottier*, 2023 IL App (2d) 230317, ¶ 13. An abuse of discretion occurs when the court's decision is unreasonable. *Id.* Likewise, a decision is against the manifest weight of the evidence where the court's determination is unreasonable. *People v. Deleon*, 227 Ill. 2d 322, 332 (2008).

¶ 16 We address first defendant's argument the court erred in finding that the State met its burden of establishing that he is a real and present threat to the safety of any person or the community. He notes that, under the Code, as amended, it is presumed that a defendant is entitled to release, and the State must rebut that presumption with more than just the allegations that form the basis of the charges, for he also remains presumed innocent of those charges. "Indeed, the legislature plainly did not believe that the mere accusation of a detainable offense meant that a defendant posed a real and present danger that could not be mitigated." Here, he contends, in arguing that he posed a threat to C.S. and all minors in Illinois, the State simply relied on the facts supporting the charges. Defendant suggests that the reason the State did not present more is because the record does not demonstrate that he poses a threat to anyone. Rather, he (1) has no criminal history; (2) has had no contact with C.S. since 2020; (3) does not live in Elgin, and, rather, lives with his sister and no minors in Roselle; (4) has never been accused of any other inappropriate contact with a minor; and (5) the public safety assessment report scored him as the lowest level of risk on both the failure-to-appear and new-criminal-activity scales. Finally, defendant notes his severe health problems requiring dialysis treatments four times per week undermines the State's contention that he poses a present threat to anyone. Defendant concludes that the court's determination that he poses a real and present threat to anyone's safety is against the manifest weight of the evidence.

***4** ¶ 17 Defendant is correct that the inherent danger presented by the charges themselves is insufficient to rebut the presumption of pretrial release. Indeed, in enacting the Act, "[o]ur legislature has mandated that *all criminal defendants* are eligible for pretrial release." (Emphasis added.) *People v. Stock*, 2023 IL App (1st) 231753, ¶ 18 (citing 725 ILCS 5/110-6.1(e) (West 2022)). Even those charged with violent offenses are presumed eligible for release and, if "the base allegations that make up the *sine qua non* of a violent offense were sufficient on their own to establish this element, then the legislature would have simply deemed those accused of violent offense ineligible for release." *Id.* ¶ 18. Here, the State asserts that the court did not base its dangerousness determination solely on the fact of the underlying offense, it thoroughly explained its reasons for finding defendant a threat, and it specifically rejected defense counsel's arguments regarding defendant's health and residency. We disagree. The court repeatedly referenced C.S.'s allegations, for which defendant was charged, as the basis for its dangerousness finding. And while the allegations against defendant are very serious, the court did not explain how, outside of the allegations that formed the basis of the charges, defendant is a *real and present* threat to the safety of C.S. or other minors, nor, critically, did it *explain* how that risk of dangerousness is not offset by the record evidence, which the State did not dispute, concerning his lack of criminal history, low ratings on the public assessment report, current living arrangement (both in terms of locale and without access to minors), and that he

has had no contact with C.S. in four years.[3] Accordingly, at this juncture, the findings made by the trial court with respect to whether defendant poses a "real and present threat" are insufficiently particularized for proper review, and we remand for a new detention hearing and, if necessary, specific findings regarding dangerousness.

¶ 18 Next, in the interest of efficiency, we also address defendant's argument that the court erred in finding that the State satisfied its burden to show that no conditions short of detention could mitigate defendant's perceived risk to C.S. or minors in the community. Indeed, if the court on remand again finds that the State has presented sufficient evidence establishing a real and present threat, the State must then also provide *evidence* to meet its burden to show that there is no condition or combination of conditions to mitigate that perceived danger. The Code, as amended, instructs that, in determining whether a specific threat could be mitigated through the imposition of conditions of pretrial release, the trial court is to consider various factors, including, (1) the nature and circumstances of the offense charged, (2) the weight of the evidence against the defendant, (3) the history and characteristics of the defendant, (4) the nature and seriousness of the real and present threat to the safety of any person or the community that would be posed by the defendant's release, and (5) the nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process. 725 ILCS 5/110-5(a)(1)-(5) (West 2022). The history and characteristics of the defendant include his or her "character, *physical* and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past relating to drug or alcohol abuse, conduct, *** *criminal history*, and record concerning appearance at court proceedings." (Emphasis added.) *Id.* § 110-5(a)(3)(A)-(B).

¶ 19 Here, the State did not make *any* argument concerning possible conditions of release; rather, it broadly asserted that, given the nature of the charges, there are no conditions that could mitigate the risk. Again, this is insufficient. *Stock*, 2023 IL App (1st) 231753, ¶ 18 ("bare allegations that defendant has committed a violent offense are not sufficient to establish" he presents a risk that cannot be mitigated). Defense counsel, in contrast, suggested specific conditions, including no-contact orders, supervision, and requirements that defendant maintain contact with pretrial services to ensure he follows the court's orders. However, in finding that defendant must be detained, the court did not explain why, given the evidence concerning defendant's health, current living situation, lack of criminal history, and the presumption that defendants are eligible for release with conditions, none of defendant's proffered conditions would suffice. For example, the court did not find, nor does the record presently reflect, that there is evidence that defendant would not likely comply with less-restrictive conditions. Further, the court's findings suggest that it would consider EHM and GPS (again, a condition raised by the court *sua sponte*, as the State did not raise it or explain why that condition would not mitigate defendant's alleged risk), but that type of monitoring is unavailable, due to defendant's residency in Cook County. However, the court's finding that EHM and GPS are unavailable was not based on any evidence presented by the State. Moreover, if the court was taking judicial notice of court resources, it did not so articulate. Indeed, if there exists evidence that there is a mechanism by which the court or pretrial services can, in fact, monitor defendant's movements, that evidence would seemingly be particularly relevant under these facts. As such, the court's finding that the State met its burden to establish that no condition or combinations of conditions could mitigate the possible threat was not supported by the evidence.

***5** ¶ 20 We reverse and remand for a new hearing on the petition for denial of release. If the court again finds that the State has presented clear and convincing evidence (*i.e.*, leaving no reasonable doubt in the court's mind (*Chaudhary*, 2023 IL 127712, ¶ 74)) of both dangerousness and that no condition or combination of conditions can mitigate that risk, more particularized findings on both factors are required.

¶ 21 III. CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part, reversed in part, and remanded for a hearing.

¶ 23 Affirmed in part, reversed in part; cause remanded.

Presiding Justice McLaren and Justice Mullen concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2024 IL App (2d) 240057-U, 2024 WL 1507476

Footnotes

1 The Act is also commonly known as the Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act. Neither name is official, as neither appears in the Illinois Compiled Statutes or public acts.

2 The indictment is not contained in the record on appeal, although a January 26, 2023, arrest warrant is included.

3 The State cites *People v. Johnson*, 2023 IL App (5th) 230714, ¶ 21, for the proposition that it need not "prove" defendant will commit a future violent act to establish dangerousness. We agree, generally, but would note that, defendant does not raise such an argument here and, further, court in *Johnson* affirmed the dangerousness finding where the trial court had "made written findings that included its consideration of the defendant's six prior prison sentences. Three were for violent felonies, and one was for being a felon in possession of a firearm. The circuit court made further written findings about the danger that the defendant's actions posed to the community." *Id.* In contrast, here, defendant has no criminal history and the court's basis for finding a real and present threat is unclear.

2024 IL App (2d) 240084-U

Appellate Court of Illinois, Second District.

The PEOPLE of the State of Illinois, Plaintiff-Appellant,

v.

Joe D. REAMY Jr., Defendant-Appellee.

No. 2-24-0084

|

Order Filed March 26, 2024

Appeal from the Circuit Court of De Kalb County. No. 24-CF-0054, Honorable Joseph C. Pedersen, Judge, Presiding.

ORDER

JUSTICE BIRKETT delivered the judgment of the court.

***1** ¶ 1 *Held*: The State failed to establish that there were no mitigating conditions that could prevent defendant's pretrial release from causing harm to any person or the public at large.

¶ 2 The State appeals the circuit court's order denying the pretrial detention of defendant, Joe D. Reamy Jr., pursuant to Public Acts 101-562 and 102-1104 (eff. Jan. 1, 2023), commonly known as the Pretrial Fairness Act (Act). [1] For the reasons below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 30, 2024, the State charged defendant with eight counts of possessing child pornography (720 ILCS 5/11-20.1(a)(6) (West 2022)) and two counts of disseminating child pornography (720 ILCS 5/11-20.1(a)(2) (West 2022)). On January 31, 2024, the State filed its verified petition to detain pursuant to section 110-6.1 of the Code of Criminal Procedure of 1963 (Code) (720 ILCS 5/110-6.1 (West 2022)). Also on January 31, 2024, the court held a hearing on the State's petition. During the hearing, the State made a proffer describing how, according to a police synopsis, the De Kalb County sheriff's office had received a tip from the National Center for Missing and Exploited Children, leading them to obtain certain "subscriber information" for a Kik Messenger [2] account that had uploaded child pornography—specifically, three videos and two photos. Eventually, after obtaining a subpoena, the sheriff's office determined that the account belonged to defendant. Officers obtained a search warrant for defendant's residence and recovered defendant's cell phone, which was found to have contained three videos of child pornography. Officers further found additional photos and videos elsewhere in the residence. Defendant admitted to officers that he possessed the discovered child pornography, and that he had transmitted to others the two videos forming the basis of his charges for dissemination of child pornography.

¶ 5 After obtaining a search warrant for defendant's Kik account, police found messages purportedly sent by defendant to other Kik users, in which defendant seemingly solicited others to trade child pornography. In other messages, defendant asked another user, "[H]ow hot is your daughter? You play with her? What's stopping you? The longer you wait, the more likely she will tell."

¶ 6 After making its proffer, the State argued that "the defendant poses a real and present threat to the safety of the community at large based on the specific articulable facts of this case." The State further added that "[n]o conditions or combination of conditions can mitigate that threat." Specifically, the State argued that, even if defendant were to be prohibited from accessing the Internet, "he can get to the Internet if he's released from custody."

***2** ¶ 7 The defense, on the other hand, underlined the fact that defendant—a 50-year-old veteran with no criminal history—was "not involved in any type of assaultive or violent behavior," and that he was not alleged to have produced any of the child pornography underlying his charges. Defendant further argued that the minors depicted in the subject pornography had not been identified, suggesting that the State did not establish that they would personally face any threat resulting from defendant's pretrial release. Given defendant's age, his "multiple physical and medical conditions," and the fact that no firearms were recovered from his home, defendant suggested that he posed little threat to the community.

¶ 8 Defendant proposed that, if he were to be released, he would surrender any items he owned that would allow

him to access the Internet, including cell phones. Electronic home monitoring could also be imposed to verify defendant's compliance with this directive, as it would allow the sheriff's department "to go to his residence and to verify his compliance." Defendant further suggested that he be ordered to refrain from contacting any minors.

¶ 9 Following the parties' arguments, the court first found "that the proof [was] evident or the presumption great that *** defendant ha[d] committed [the] qualifying offenses." The court further found by clear and convincing evidence that defendant posed a threat to others, including any minor children "he may come in contact with." Nonetheless, "based on the specific articulable facts of [the] case," the court stated that it was unable to find "that there are no conditions that would mitigate the real and present risk to the community or to any certain individuals." For this reason, the court ordered that defendant would be released on pretrial supervision, "that he [would] be placed on electronic home monitoring, that he [would] have no unsupervised contact with underage minors, [that he] may not reside in a home with any underage minors, and that he be prohibited from accessing the Internet," as well as possessing "any Internet-connected devices, including but not limited to a smartphone, tablet, or laptop." The trial court additionally specified that defendant would only be entitled to leave his home for medical appointments. The court memorialized these findings in a written January 31, 2024, order, and the State timely appeals.

¶ 10 II. ANALYSIS

¶ 11 On appeal, the State argues that the trial court abused its discretion when it ruled that the State failed to prove by clear and convincing evidence that no conditions could mitigate the threat defendant's pretrial release posed to others. The State offers several specific reasons on appeal as to how the trial court abused its discretion, asserting that: (1) the court failed to "properly weigh the fact that the minor subjects of the pornography defendant allegedly possessed and disseminated are victims whether defendant had personal contact with them or not;" (2) "the conditions imposed both fail[ed] to mitigate defendant's threat to the community and cannot be adequately enforced;" and (3) given the nature of defendant's alleged offense, "no conditions of pretrial release are adequate to keep the community safe and prevent a defendant's flight from prosecution."

¶ 12 Pursuant to the Code, pretrial release may be denied only in certain situations. 725 ILCS 5/110-2(a), 110-6.1 (West 2022). In order to successfully establish that a defendant should be detained pending trial, the State bears the burden of proving, by clear and convincing evidence, that: (1) the proof is evident or the presumption great that the defendant has committed a qualifying offense under section 110-6.1 of the Code; and (2) that no condition or combination of conditions could mitigate the threat that defendant's release would pose to any person or the community at large. 725 ILCS 5/110-6.1(a), (f) (West 2022).

***3** ¶ 13 In reviewing whether a trial court erred in detaining a defendant under the Act, our standard of review is two-fold. *People v. Trottier*, 2023 IL App (2d) 230317, ¶ 13. We review the trial court's factual findings—including the court's findings as to whether the State presented clear and convincing evidence that any conditions of release are inadequate to protect others—under the manifest-weight-of-the-evidence standard. *Id.* In analyzing the ultimate decision as to pretrial release, we review for an abuse of discretion. *Id.* An abuse of discretion occurs when a trial court's decision is so arbitrary, fanciful, or unreasonable that no reasonable person would agree with the court's position. *People v. Whitaker*, 2024 IL App (1st) 232009, ¶ 50.

¶ 14 Here, the State's first argument—that the trial court failed to appreciate that the minors depicted in the pornography defendant allegedly possessed were themselves victims—is, without further elaboration, irrelevant. While the children depicted in the materials clearly are victims, there is no evidence that defendant had any contact with them. Again, the trial court denied the State's petition to detain because it found that the State failed to show that no conditions could mitigate the threat to any person or the community. 725 ILCS 5/110-6.1(e)(3)(i) (West 2022). To this point, the State offers no argument as to how the depicted minors' status as victims has any bearing on this determination.

¶ 15 The State's second argument—that the conditions imposed on defendant are inadequate or unenforceable—is also easily dispensed with. In order to rebut the presumption that a defendant is eligible for pretrial release, among other things, the State must show by clear and convincing evidence that "no condition or combination of conditions set forth in subsection (b) of Section 110-10 of [the Code] can mitigate (i) the real and present threat to the safety of any person or persons or the community, based on the specifical articulable

facts of the case." 725 ILCS 5/110-6.1(e)(3) (West 2022). Section 110-10(a) of the Code provides certain mandatory conditions that must be imposed for defendants released prior to trial, while section 110-10(b) provides discretionary conditions that the trial court may impose. 725 ILCS 5/110-10(a), (b) (West 2022); *People v. Stock*, 2023 IL App (1st) 231753, ¶ 16.

¶ 16 Here, as outlined in the State's memorandum, the trial court imposed the following conditions on defendant for his pretrial release: (1) that he be subject to electronic home monitoring, only leaving the house for medical appointments; (2) that he refrain from contacting any minors, no matter where; (3) and that he surrender any Internet capable devices, including cell phones, computers, and tablets. The State argues that "no reasonable person could find that releasing defendant with [these] conditions mitigates the threat that he will cause harm to others," specifically when considering "the nature and circumstances of the offense charged." We disagree.

¶ 17 As established by the State's proffer, here, the conduct underlying defendant's charged offenses was inextricably bound to his use of the Internet. For instance, the State described how defendant purportedly uploaded child pornography to Kik via the Internet, leading to his arrest. Furthermore, given defendant's history of soliciting Kik users to trade for child pornography, as well as the lack of facts in the record suggesting that defendant was *producing* child pornography, it can be reasonably inferred that the pornography defendant had already obtained was also procured from the Internet. Finally, defendant's communications with another Kik user, in which he encouraged the user to abuse another minor, were also made over the Internet. Given the fact that all of this conduct was carried out over the Internet, it is axiomatic that prohibiting defendant from using or accessing the Internet would mitigate any harm stemming from these types of conduct. While the State makes the conclusory argument that these conditions are unenforceable, it overlooks the fact that, as part of defendant's electronic home monitoring, he would be subject to additional searches by the sheriff's department in order to verify his compliance with the imposed conditions. Accordingly, we find that the trial court did not abuse its discretion in determining that conditions existed that could mitigate any threat defendant's release posed.

***4** ¶ 18 Nonetheless, the State further argues that, despite the court's above-referenced conditions, defendant is still "free to continue recruiting others to engage in the unlawful acts he is charged with via text, writing, or in person without proper supervision." Otherwise put, the State seems to argue that, because it is still theoretically *possible* for defendant to engage in harmful conduct while on release, the court's conditions are insufficient and defendant must be detained. We disagree.

¶ 19 Even if it were theoretically true that defendant still may engage in harmful behavior while on release, the relevant issue here is whether the conditions would *mitigate*—not completely prevent—any real risk and present risk defendant posed to individuals or the community. 725 ILCS 5/110-6.1(e)(3) (West 2022). Indeed, if criminal defendants were only entitled to pretrial release in scenarios where it was completely impossible for them to cause any further harm to any other individuals, it is doubtful that any defendants would qualify. Accordingly, we reject the State's argument.

¶ 20 Finally, the State suggests that, given the inherent danger presented by defendant's charges, "no conditions of pretrial release are adequate to keep the community safe." Unfortunately for the State, however, the legislature plainly disagrees. In enacting the Act, "[o]ur legislature has mandated that *all criminal defendants* are eligible for pretrial release." (Emphasis added.) *Stock*, 2023 IL App (1st) 231753, ¶ 18 (citing 725 ILCS 5/110-6.1(e) (West 2022)). For this reason, it is up to the State to justify a defendant's pretrial detention, and this burden requires more than a bare recitation that a defendant has committed a detainable offense. *Stock*, 2023 IL App (1st) 123753, ¶ 18.

¶ 21 For example, in *Stock*, the defendant was charged with aggravated battery before the State petitioned the trial court to deny him pretrial release. *Id.* ¶ 4. The trial court granted the State's petition, and the defendant appealed the detention order. *Id.* ¶ 9. On appeal, the appellate court agreed that the proof was evident or the presumption was great that the defendant committed a detainable offense, and that, based on the specific, articulable facts of the case, the defendant posed a real and present threat to the safety of any person or to the community. *Id.* ¶ 14. However, the First District found that the State failed to carry its burden in showing that "no condition or combination of conditions contained within section 110-10(b) of the Code [could] mitigate the real and

present threat to the safety of any person or the community," as the State had only made the conclusory argument that "no condition or combination of conditions could mitigate the threat posed by [the] defendant" without offering any evidence to support that conclusion. *Id.* ¶ 17.

¶ 22 In rejecting the State's argument, the First District explained:

> "It must also be noted that, logically, the bare allegations that defendant has committed a violent offense are not sufficient to establish this element. Our legislature has mandated that all criminal defendants are eligible for pretrial release. [Citation.] Thus, even those accused of violent offenses are presumed eligible for pretrial release, and it is the State who must justify their pretrial detention. [Citation.] This is not to say that alleged facts stating the basic elements of an offense are not relevant or are not part of the proof that no conditions could mitigate the threat posed by a defendant. But more is required. If the base allegations that make up the *sine qua non* of a violent offense were sufficient on their own to establish this element, then the legislature would have simply deemed those accused of violent offenses ineligible for release. In other words, if alleging that defendant discharged a firearm and struck a person was sufficient to show that no conditions of pretrial release could mitigate any threat, then no defendant charged with aggravated battery/discharge of a firearm would ever be eligible for pretrial release. That is clearly at odds with the statute's presumption of eligibility for all defendants, and the plain language of article 110 of the Code indicates that more is required." *Id.* ¶ 18.

***5** ¶ 23 This line of reasoning underscores the weakness of the State's argument. We certainly agree with the State that, given the " 'intrinsic' relationship between child molestation and child pornography," defendant's charged offenses are inherently dangerous (see *People v. Reyes*, 2020 IL App (2d) 170379, ¶ 119 (Birkett, J., concurring)). Still, through the Act, our legislature has mandated that "*all* criminal defendants are eligible for pretrial release." (Emphasis added.) *Stock*, 2023 IL App (1st) 231753, ¶ 18. Accordingly, the State's argument that any criminal defendant charged with child pornography should *per se* be denied pretrial release runs contrary to the Act. *Id.* Plainly put, if the legislature were convinced that all criminal defendants charged with child pornography presented an unmitigable threat to the community, it would have simply deemed those accused of child pornography ineligible for release. *Id.* However, this is not the case, meaning it is up to the State to justify any criminal defendant's pretrial detention, regardless of the defendant's specific charges. *Id.* Because the State has not carried this burden here, we are left with no choice but to affirm the trial court's denial of the State's petition to detain.

¶ 24 III. CONCLUSION

¶ 25 For all of these reasons, we affirm the judgment of the circuit court of De Kalb County.

¶ 26 Affirmed.

Justices Hutchinson and Schostok concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2024 IL App (2d) 240084-U, 2024 WL 1281545

Footnotes

1 The Act has also been referred to as the Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act or the Pretrial Fairness Act. However, none of these names appear within the Illinois Compiled Statutes or public acts.

2 Kik Messenger, commonly referred to as "Kik," is a mobile application used for anonymous messaging.

2024 IL App (4th) 240085-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).
Appellate Court of Illinois, Fourth District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Rodney G. SHAFFER, Defendant-Appellant.

NO. 4-24-0085
|
Filed March 26, 2024

Appeal from the Circuit Court of Fulton County, No. 24CF4, Honorable Thomas B. Ewing, Judge Presiding.

ORDER

JUSTICE DeARMOND delivered the judgment of the court.

***1** ¶ 1 *Held*: The appellate court reversed, finding the circuit court abused its discretion in denying defendant pretrial release.

¶ 2 Defendant, Rodney G. Shaffer, appeals the circuit court's order denying him pretrial release pursuant to article 110 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/art. 110 (West 2022)), hereinafter as amended by Public Act 101-652, § 10-255 (eff. Jan. 1, 2023), commonly known as the Pretrial Fairness Act (Act). See Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023) (amending various provisions of the Act); *Rowe v. Raoul*, 2023 IL 129248, ¶ 52, 223 N.E.3d 1010 (setting the Act's effective date as September 18, 2023).

¶ 3 On appeal, defendant argues the circuit court "erred by detaining [him] because the State failed to show by clear and convincing evidence that [he] posed a present danger and that no set of conditions could mitigate or lessen and purported danger to a person or the community." We agree and reverse.

¶ 4 I. BACKGROUND

¶ 5 On January 12, 2024, by way of information, the State charged defendant with three counts of child pornography (720 ILCS 5/11-20.1(a)(6) (West 2022)), Class 2 felonies. The State simultaneously filed a verified petition to deny defendant pretrial release under section 110-6.1 of the Code (725 ILCS 5/110-6.1 (West 2022)). The State alleged defendant was charged with a qualifying sex offense under article 11 of the Criminal Code of 2012 (720 ILCS 5/art. 11 (West 2022)), and defendant's pretrial release posed a real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case, pursuant to subsection (a)(5). (725 ILCS 5/110-6.1(a)(5) (West 2022)).

¶ 6 That same day, defendant appeared before the circuit court for a probable cause and detention hearing. The court informed defendant of the charges and the possible penalties. To establish probable cause, the State proffered an investigator with the Illinois Attorney General's Office executed a search warrant for defendant's home on January 11, 2024. The State based the search warrant on "a Cybertip *** from Verizon, that they detected child—what was suspected to be child porn being uploaded to their cloud storage by the defendant." Law enforcement seized defendant's cell phone, a Samsung Galaxy 23 with the corresponding serial number. A preliminary search of the phone revealed three pictures, which the State described in detail. The State further proffered defendant told the investigator he downloaded and saved files to his cell phone or would screen shot web pages, referring "to the children depicted in the child pornography files as 'Littles' " and admitting "he masturbated to them in the past." The State closed its proffer by claiming, "[W]e do anticipate there will be more, many more files." The court found, "Those facts are sufficient for probable cause in this matter."

¶ 7 Before transitioning to the pretrial detention issue, the circuit court inquired as to defendant's finances and appointed the public defender to represent him. The court next asked the State about its verified petition and "if [it] has anything further [it] wants to provide the Court in regard to that petition." The State submitted *People v. Willenborg*, 2023 IL App (5th) 230727, a recent case filed in December 2023, for the court's consideration. It also offered the pretrial report, which assessed defendant's risk factors. Defendant "scored 2 out of 14 on the Revised Virgina Pre-Trial Risk Assessment, which indicates a Low Risk level to not appear at future

appointments with the court and to reoffend." The State said it would use these materials during its argument.

***2** ¶ 8 Turning to the defense, the circuit court confirmed counsel had an opportunity to confer with defendant, review the police reports, and review the State's filings and offerings. Defense counsel called defendant as a witness. Defendant testified he had lived in Vermont, Illinois, for 20 years. He resided in a home with his wife and adult son. He testified he worked for D&D Enterprises as a truck driver. He described his route, going as far as Springfield, Illinois, to the south, Peoria, Illinois, to the north, Colchester, Illinois, to the west, and the Lewiston, Illinois, area to the east. Defendant testified he could continue working his normal job, should he be released from custody. He said he would comply with any conditions imposed upon his release, including wearing a GPS monitor, not having Internet access, not having a smart phone, reporting to a pretrial probation officer, undergoing a mental health evaluation, and submitting to drug testing. Defendant testified he would do "[w]hatever it takes" to be released. On cross-examination, defendant acknowledged his wife and son, whom he lives with, have cell phones.

¶ 9 Even though it was the State's petition, defense counsel argued first, contending defendant was "willing to abide by any and all conditions the Court wishes to impose upon him." Defense counsel distinguished *Willenborg*, where the Fifth District had reversed the lower court's decision granting pretrial release, noting that the defendant had been released and allowed to return to his work where he would interact with minors. Counsel noted the State proffered no evidence suggesting defendant would interact with minors at his job or in the public if released.

¶ 10 The State argued Illinois law defines child pornography as a sex offense, although it acknowledged "the elephant in the room" when it said "[c]learly, there's a difference between actual sexual conduct and possession of child pornography." The State reasoned defendant was a danger to the community because, if convicted, he would have to report as a sex offender. The State pivoted to *Willenborg*, arguing it was instructive on how the circuit court should consider a defendant's risk level. There, "the Appellate Court believed that the circuit court abused its discretion by *** allowing the defendant on pretrial release despite having a 0 threat. I think that goes to show the level of consideration that the Court should give to that risk factor." The State speculated it would find more images on defendant's devices.

¶ 11 Citing *Willenborg* again, it argued defendant should not be released to the same conditions where the alleged crime occurred. The State contended any condition, even GPS monitoring or prohibiting Internet access, "will be putting him right back to, as the court states, 'The conditions in which the alleged crimes occurred.' " The State concluded by arguing, "I don't believe that there are any conditions the court could *** reasonably put on the defendant that he would abide by that would prevent—that would eliminate the risk to the community." Upon questions from the court, the State clarified the risk to the community would be reoffending by again possessing child pornography. The State once more stressed that defendant having to register as a sex offender "alert[s] the community that there is a potential danger, a potential risk to the community."

¶ 12 In rebuttal, defense counsel argued people convicted of these offenses are required to be on mandatory supervised release, where the State imposes conditions limiting their access to the Internet and electronic devices. Counsel reasoned these conditions, therefore, are possible to impose on defendants as conditions for pretrial release. Counsel then noted defendant's wife worked second shift and defendant worked first shift, meaning defendant would not have access to her phone. Counsel reiterated defendant was "willing to abide by any and all conditions the Court wishes to impose, including limiting his ability to anything that accesses the internet, I can't do more than just advise the Court that that's something he said he's willing and able to do."

***3** ¶ 13 In giving its decision, the circuit court noted it read *Willenborg* but explained it was distinguishable because this case did not have identifiable victims and defendant would not be working with minors. The court then ruled:

> "[T]hese charges and the allegations and the offenses created by the general assembly are really significant as set out and the fact that any sentences would be consecutive, and that shows how serious the legislature is concerned about this crime. It, it is not victimless crime. The victims may never actually be specifically identified. I think, though, unless we have something more to show that there's some condition here that will prevent him, other than just his promise not to access the internet, I don't see a condition that would work for his release at this point. I'll consider reviewing this if—at another time, but I'm gonna grant the State's petition."

In a check-the-box-type written order, the court indicated it made all findings necessary under section 110-6.1 of the Code

(725 ILCS 5/110-6.1 (West 2022)). For example, the court marked it found, by clear and convincing evidence:

> "the proof is evident or presumption great under [section] 110-6.1(e)(1) that the defendant has committed a qualifying offense;
>
> the defendant poses a real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case under [section] 110-6.1(e)(2); and
>
> there is no condition or combination of conditions that can mitigate the following (110-6.1(e)(3)) the real and present threat to the safety of any person or persons or the community, based on specific articulable facts of the case, for offenses listed in 725 ILCS 5/110-6.1(a)(1) through (7)."

The court based its findings and the order "upon the nature of the allegations[,] the age of the alleged victims[,] and possible punishments for the defendant, as well as the inability to truly prevent the Defendant from accessing the internet, or monitoring access thereto."

¶ 14 Defendant filed a timely notice of appeal under Illinois Supreme Court Rule 604(h)(2) (eff. Dec. 7, 2023). The notice of appeal is a completed form from the Article VI Forms Appendix to the Illinois Supreme Court Rules (see Ill. S. Ct. R. 606(d) (eff. Dec. 7, 2023)), by which defendant requests pretrial release with conditions. The form lists several possible grounds for appellate relief and directs appellants to "check all that apply and describe in detail." Defendant checked four grounds for relief and typed sentences on the preprinted lines to support all four of his claims. He attacked the State's evidence, arguing the State did not carry its burden of proving by clear and convincing evidence the required statutory elements (*i.e.*, defendant committed a qualifying offense, he posed a real and present threat to the community, and less restrictive conditions would not mitigate the threat defendant posed). Defendant also argued "the court did err in its decision finding there are no conditions or combination thereof to prevent the defendant from being charged with a subsequent case."

¶ 15 The Office of the State Appellate Defender, defendant's appointed counsel on appeal, filed a Rule 604(h) memorandum expounding upon these arguments and laying out the reasons for reversing the circuit court's order.

***4** ¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 The Code creates a presumption "a defendant is entitled to release on personal recognizance on the condition that the defendant attend all required court proceedings and the defendant does not commit any criminal offense, and complies with all terms of pretrial release." 725 ILCS 5/110-2(a) (West 2022). It is the State's burden "to prove by clear and convincing evidence that any condition of release is necessary." 725 ILCS 5/110-2(b) (West 2022).

¶ 19 Before a circuit court can deny pretrial release, the State must prove by clear and convincing evidence (1) "the proof is evident or the presumption great that the defendant has committed an offense listed in subsection (a)"; (2) "the defendant poses a real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case"; and (3) "no condition or combination of conditions set forth in subsection (b) of Section 110-10 of this Article can mitigate (i) the real and present threat to the safety of any person or persons or the community." 725 ILCS 5/110-6.1(e)(1), (2), (3)(i) (West 2022). Here, the State's petition sought to detain defendant based on subsection (a)(5), which means the circuit court could "deny *** defendant pretrial release only if" it found defendant had been charged with an "offense under Article 11 of the Criminal Code of 2012 *and* *** that the defendant's pretrial release poses a real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case." (Emphasis added.) 725 ILCS 5/110-6.1(a)(5) (West 2022).

¶ 20 The determination of whether pretrial release should be granted or denied is reviewed under an abuse-of-discretion standard. See *People v. Jones*, 2023 IL App (4th) 230837, ¶¶ 27, 30. "An abuse of discretion occurs when the circuit court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the position adopted by the [circuit] court." (Internal quotation marks omitted.) *People v. Simmons*, 2019 IL App (1st) 191253, ¶ 9, 143 N.E.3d 833. Under this standard, a reviewing court will not substitute its own judgment for that of the circuit court simply

because it would have analyzed the proper factors differently. *People v. Inman*, 2023 IL App (4th) 230864, ¶ 11.

¶ 21 On appeal, defendant argues the circuit court abused its discretion "by detaining [him] because the State failed to show by clear and convincing evidence that [he] posed a present danger and that no set of conditions could mitigate or lessen any purported danger to a person or the community." We agree and reverse.

¶ 22 When, as here, the State alleges pretrial release should be denied on the basis the defendant presents a danger to the community, the State carries the burden of proving those allegations. 725 ILCS 5/110-2(c) (West 2022). The State, therefore, must prove by clear and convincing evidence "the defendant poses a real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case," and "no condition or combination of conditions set forth in subsection (b) of Section 110-10 of this Article can mitigate (i) the real and present threat to the safety of any person or persons or the community." 725 ILCS 5/110-6.1(e)(2), (3)(i) (West 2022). Factors a circuit court may consider in determining whether a defendant poses a real and present threat include:

> ***5** "(1) The nature and circumstances of any offense charged, including whether the offense is a crime of violence, involving a weapon, or a sex offense.
>
> (2) The history and characteristics of the defendant including:
>
> (A) Any evidence of the defendant's prior criminal history indicative of violent, abusive or assaultive behavior, or lack of such behavior. ***
>
> (B) Any evidence of the defendant's psychological, psychiatric or other similar social history which tends to indicate a violent, abusive, or assaultive nature, or lack of any such history.
>
> (3) The identity of any person or persons to whose safety the defendant is believed to pose a threat, and the nature of the threat.
>
> (4) Any statements made by, or attributed to the defendant, together with the circumstances surrounding them.
>
> (5) The age and physical condition of the defendant.
>
> (6) The age and physical condition of any victim or complaining witness.
>
> (7) Whether the defendant is known to possess or have access to any weapon or weapons.
>
> (8) Whether, at the time of the current offense or any other offense or arrest, the defendant was on probation, parole, aftercare release, mandatory supervised release or other release ***.
>
> (9) Any other factors *** deemed by the court to have a reasonable bearing upon the defendant's propensity or reputation for violent, abusive, or assaultive behavior, or lack of such behavior." 725 ILCS 5/110-6.1(g) (West 2022).

Any decision under section 110-6.1 of the Code, including the dangerousness determination, "must be individualized, and no single factor or standard may be used exclusively to order detention." 725 ILCS 5/110-6.1(f)(7) (West 2022).

¶ 23 In making its proffer for why defendant posed a real and present threat to the community, the State relied solely upon the first section 110-6.1(g) factor—the nature and circumstances of the charged offense. 725 ILCS 5/110-6.1(g)(1) (West 2022). In its argument, the State noted the charged offense constituted a "sex offense," which would require defendant to register as a sex offender if convicted. The State reasoned this made defendant a "[d]anger to the community." Yet it cited few specific or articulable facts from this case to support its reasoning, noting merely how the investigator found three pictures "on [defendant's] phone in his cloud where he would be able to access that anywhere." The State's proffer lacked details like when defendant downloaded the images or how often he accessed them on the cloud or if he shared them. By contrast, the State indulged in speculation, saying, "[W]e have defendant with what will most likely end up being multiple pictures of what will be child pornography on various devices." And rather than emphasizing or analyzing more section 110-6.1(g) factors, the State's argument for detention focused on *Willenborg* and its proposition that a low-risk score, like the one here, should not be given much weight when considering offenses like child pornography.

¶ 24 Given the State's argument, it is unsurprising the circuit court likewise focused heavily on the nature of defendant's

alleged offenses and largely ignored other section 110-6.1(g) factors when making the dangerousness determination. For example, the court found the child pornography charges "really significant" because "any sentences would be consecutive, and that shows how serious the legislature is concerned about this crime." The court briefly commented on defendant's victims, saying child pornography "is not [a] victimless crime," and "[t]he victims may never actually be specifically identified." The court's written order summarized these findings, again noting "the nature of the allegations[,] the age of the alleged victims[,] and possible punishments for defendant." These statements comprise the court's entire dangerousness analysis. See *People v. Hodge*, 2024 IL App (3d) 230543, ¶ 11 (stating that when determining compliance with the directives of the statute, the circuit court's oral findings may be considered in conjunction with the written order).

***6** ¶ 25 Our review of the record strongly suggests the State's proffer and the circuit court's dangerousness analysis omitted any other section 110-6.1(g) factor that would have made the court's decision to detain defendant individualized, like, for example, defendant's history or characteristics, his criminal history, his tendency towards violence or abusive behavior, or his age and physical condition. 725 ILCS 5/110-6.1(g)(2)(A)-(B), (4), (5), (9) (West 2022). For the State, and then in turn the court, it seemed sufficient to detain defendant based on dangerousness simply because defendant was charged with possession of child pornography —a sex offense subject to section 110-6.1(a)(5). 725 ILCS 5/110-6.1(a)(5) (West 2022). To them, the alleged offense alone warranted detention. They reasoned defendant must pose a real and present threat to the community because he would be subject to consecutive sentencing and sex offender registration if convicted. However, such a one-dimensional dangerousness determination, particularly the narrow focus on the nature of the charged offense, fails to comport with section 110-6.1 of the Code, which sets forth a multifactorial approach and is heavily weighted against detention.

¶ 26 Recall, circuit courts are to begin with the presumption that *all* defendants are eligible for pretrial release, no matter the charged offense. 725 ILCS 5/110-6.1(e) (West 2022) ("*All* defendants shall be presumed eligible for pretrial release." (Emphasis added.)); see 725 ILCS 5/110-2(a) (West 2022) ("*All* persons charged with an offense shall be eligible for pretrial release before conviction." (Emphasis added.)). The Code's use of "all" proves significant because it cements the legislature's premise there is no offense so serious or so dangerous to *ipso facto* require detention. Indeed, nowhere does the Code permit a court to conclude a person poses a real and present threat to the community simply because the State charged the person with a detainable offense or even when the proof is evident or the presumption great that the person committed the alleged offense. We echo the First District's rationale when it considered violent offenses: "If the base allegations that make up the *sine qua non* of a [sex] offense were sufficient on their own to establish [dangerousness], then the legislature would have simply deemed those accused of [sex] offenses ineligible for release." *People v. Stock*, 2023 IL App (1st) 231753, ¶ 18. But it did no such thing. See 725 ILCS 5/110-6.1(a)(5) (West 2022) (requiring the State to allege and then prove clearly and convincingly that a person committed a detainable sex offense and poses a real and present threat to a person, persons, or the community). This is why we recently observed, "the fact that a person is charged with a detainable offense is not enough to order detention, nor is it enough that defendant poses a threat to public safety." *People v. Atterberry*, 2023 IL App (4th) 231028, ¶ 18; see *Stock*, 2023 IL App (1st) 231753, ¶ 18 ("It must also be noted that, logically, the bare allegations that defendant has committed a violent offense are not sufficient to establish" dangerousness or that no conditions can mitigate the danger.).

¶ 27 These rules undermine the circuit court's decision and rationale here, namely, its determination defendant posed a real and present threat to the community. The court essentially relied upon the nature of the charged offense, saying the possession of child pornography "charges and the allegations and the offenses created by the general assembly are really significant as set out and the fact that any sentences would be consecutive." The court cited no specific articulable facts from the case, besides the age of the victims, which is also part of the nature of the offense, for finding defendant posed a real and present threat to the community. Considering the plain language of section 110-6.1 of the Code and its presumption for granting pretrial release to all persons charged with any offenses, it does not follow that a court can rely solely upon the seriousness of an offense to justify detaining someone. Here, the court determined defendant posed a real and present threat to the community simply because he had been charged with possessing child pornography. Neither the Code nor the case law permits such a simplistic determination, which renders the circuit court's decision arbitrary and unreasonable.

Simmons, 2019 IL App (1st) 191253, ¶ 9; contrast with *People v. Inman*, 2023 IL App (4th) 230864, ¶ 17 (holding circuit court did not abuse its discretion because it had "complied with the requirements of the Code"). Accordingly, we hold the court abused its discretion in granting the State's verified petition for pretrial detention. *Jones*, 2023 IL App (4th) 230837, ¶¶ 27, 30; *Simmons*, 2019 IL App (1st) 191253, ¶ 9.

***7** ¶ 28 Because we find the circuit court erred in concluding defendant posed a real and present threat to the community and can reverse on that ground alone, we need not address defendant's other argument that the court also erred in finding that no condition or combination of conditions can mitigate the real and present threat defendant poses to the community. Presuming the State still seeks to detain defendant, it will have to prove every element in section 110-6.1(e) again by clear and convincing evidence, including this one. 725 ILCS 5/110-6.1(e)(3) (West 2022).

¶ 29 III. CONCLUSION

¶ 30 For all these reasons, we reverse the circuit court's judgment and remand for further proceedings.

¶ 31 Reversed.

Justices Steigmann and Lannerd concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2024 IL App (4th) 240085-U, 2024 WL 1282464

No. 130693

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CHRISTIAN MIKOLAITIS, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-23-0791. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 23 CF 2213. Honorable Margaret O'Connell, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 17, 2024, the Brief and Argument for Defendant-Appellant in Support of Rule 604(h) Appeal was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument for Defendant-Appellant in Support of Rule 604(h) Appeal to the Clerk of the above Court.

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