2024 IL App (4th) 240254-U

NO. 4-24-0254

FILED
April 17, 2024
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McDonough County
CHRISTOPHER A. FUGATE,	)	No. 24CF15
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi A. Benson,
	)	Judge Presiding.

JUSTICE DOHERTY delivered the judgment of the court.
Justices Lannerd and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's decision to detain defendant was not an abuse of discretion.

¶ 2 Defendant Christopher A. Fugate appeals from the circuit court's February 9, 2024, order denying his pretrial release pursuant to the Code of Criminal Procedure of 2012 (Code) (725 ILCS 5/110-1 *et seq.*) (West 2022)), hereinafter as amended by Public Act 101-652 (eff. Jan. 1, 2023), commonly referred to as the Pretrial Fairness Act (Act). Defendant argues the State failed to carry its burden in proving he was dangerous and thereby posed a threat. Alternatively, defendant argues the State failed to show that no condition or combination of conditions could be imposed to mitigate the threat he posed and allow for pretrial release.

¶ 3 For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 On February 8, 2024, the State charged defendant with 14 counts of child pornography involving "a child whom defendant reasonably should have known to be under the age of 13 years" in violation of section 11-20(a)(6) of the Code (720 ILCS 5/11-20 (West 2022)). Five counts involved Class X felonies and nine counts involved Class 2 felonies. That same day the State filed its verified petition for denial of pretrial release pursuant to section 110-6.1(a)(5) of the Code (725 ILCS 5/110-6.1(a)(5) (West 2022)) alleging defendant posed "a real and present threat to the physical safety of any person, persons, or the community," and seeking his detention pretrial.

¶ 6 A. Probable Cause and Detention Hearing

¶ 7 At the February 9 hearing, the State first requested a probable cause finding. At that time the State recited the charges and proffered the results of the High Tech High Crimes Bureau of the Office of Attorney General investigation, wherein child pornography involving children under the age of 13 years was found in defendant's residence and on the computer that he used.

¶ 8 According to the State, the lead investigator Amanda Wimmersberg had discovered that child pornography was being shared over the BitTorrent network, "which is a peer-to-peer way to trade digital files over the internet." The BitTorrent network allowed for the "downloading of torrents which directs users—or directs the computer to download files from other people that are hosting the files in a peer-to-peer network." Wimmersberg's investigation discovered an Internet protocol (IP) address that appeared to be uploading and downloading child pornography. After executing a search warrant to Comcast, it was confirmed the IP address was connected to a subscriber named Jamie Fugate in Macomb, Illinois. It was later determined that his brother's ex-wife and her two minor children, one of whom was a 10-year-old female, also resided at the

location. A search warrant was executed, and child pornography was discovered on the computer used by defendant.

¶ 9 Following the circuit court's finding of probable cause, the State proffered the same information and the pretrial bond report in support of its petition to detain. Defendant proffered that if the court released him, he could stay with his parents in Macomb, who stated that they would allow defendant to reside with them during the pendency of the case.

¶ 10 B. Arguments of Counsel

¶ 11 The State argued defendant was a threat to the community based on the nature and the number of charges and that it was unaware of what conditions could be imposed to prevent defendant from using the Internet or accessing children in the community. The State argued:

> "I don't know what can be done to prevent him from being around children at all times other than detention, and that's why I'm asking for him to be detained. And, also, I think given that he is facing I would say at least a minimum of 30 years if convicted of Counts I through V, it's a pretty good reason to not come back to court as well."

Defendant argued:

> "[W]e do have potential conditions that can be imposed that would minimize any potential risk to the community as well as I'm sure his appearance. We have the ability for the Court to utilize home detention, whether that be electronically monitored or not; the no-contact provisions with anyone under the age of 18. Though, I would indicate that it would be preferable just for arrangements if that was not any individuals under the 18 that are not related to him."

¶ 12 Defendant argued that the pretrial report indicated he had a risk level of zero. "He has *** absolutely no criminal history outside of petty traffic tickets with the most recent of those being approximately five years ago." Relying on *People v. Stock*, 2023 IL App (1st) 231753, he also argued that the State was required to proffer more than just the nature of the offense charged in support of its claim that defendant was a threat and that no conditions could mitigate that threat. "If the fact that an individual simply possessed child pornography or disseminated child pornography, in and of itself, was grounds to say that they pose a risk to individuals, that the legislature would have made that offense not eligible for release." He added, "I don't think merely the fact that an individual is charged with nonprobationable offenses is an indication that they pose a flight risk or would not appear in court."

¶ 13 The State responded that:

> "Access to the internet these days [is] so easy that, I mean, literally, you can do it from your phone. I don't know how we actually prevent him from getting on the internet and continuing to—well, be a participant in the victimization of children that are being raped on video. That being said, I don't know why he's looking at these things. I don't know what proclivities he has outside of looking at these videos and pictures, and I think the only way that we protect any children within the community is by keeping him locked up."

¶ 14 C. The Circuit Court's Ruling on the Detention Petition

¶ 15 Following arguments, the circuit court found the charge was a detainable offense and concluded that defendant posed a threat to the community. On the issue of whether defendant constituted a threat, the court explained:

"The Court finds in this case that the something more is the sheer volume of counts. This isn't a one off. This *** is a systematic viewing and sharing of multiple rapes of little children. The Court does find by clear and convincing evidence that because it is so many that the persons in danger in the community are the children but also the persons to whom he's disseminating this vile material.

The Court also finds by clear and convincing evidence that when we—when we look at the dissemination of child pornography and the obligation that someone is disseminating it, that the child who is depicted being raped—who is being raped in the videos really is being victimized every time someone is viewing that degradation and is certainly being revictimized every time that video is being shared."

¶ 16 On the question of whether any condition or combination of conditions could mitigate the threat, the circuit court stated that returning defendant to his former home where minors were present was a "horrible idea," and then commented:

"Would it possibly be appropriate for him to reside with his mother and stepfather maybe on some type of house arrest deprived of the ability to access the internet? The Court considered that but I believe what [the State] said is correct. That the internet is ubiquitous and I don't know how the Court can enforce a Faraday box around the Defendant without having that be in a secure detention facility. And, again, this is an allegation of systemic viewing and systemic sharing, not just a once or twice situation. And the Court finds by clear and convincing evidence that it cannot protect the public and, specifically, the children with any—with any conditions. So the Court is going to order the Defendant to be detained."

¶ 17 A written order was entered on that same day, with the court stating in writing that pretrial detention was necessary and "cannot be avoided because due to the sheer number of views shared/possessed children at risk including children within purview of others he shares with; victims re-victimized every time viewed; no way to prevent access to Internet."

¶ 18 Defendant filed his notice of appeal pursuant to Illinois Supreme Court Rule 604(h) (eff. Dec. 7, 2023) on February 13, 2024, and filed a memorandum with this court.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal defendant argues that the State failed to prove that he posed a threat to the community or, if he did pose a threat, failed to prove by clear and convincing evidence that no condition or combination of conditions could mitigate it or ensure his return to court for future hearings.

¶ 22 In reviewing a circuit court's decision to deny pretrial release, we apply an abuse of discretion standard of review. *People v. Morgan*, 2024 IL App (4th) 240103, ¶ 35; *People v. Inman*, 2023 IL App (4th) 230864, ¶ 11. "[I]n reviewing the circuit court's ruling for an abuse of discretion, we will not substitute our judgment for that of the circuit court, merely because we would have balanced the appropriate factors differently." (Internal quotation marks omitted.) *Inman*, 2023 IL App (4th) 230864, ¶ 11.

¶ 23 A. Pretrial Release Under the Act

¶ 24 The Code abolishes traditional monetary bail and provides defendants with a presumption in favor of pretrial release. 725 ILCS 5/110-1.5, 110-2(a) (West 2022). To detain a defendant pretrial, the State has the burden of proving by clear and convincing evidence that (1) "proof is evident or presumption great" that the defendant committed a detainable

offense, (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 thereof can mitigate the threat the defendant poses. *Id*. § 110-6.1(e)(1)-(3).

¶ 25 Preliminarily, we note that it is useful to provide appropriate context in understanding the "threat" which might be posed in the context of crimes relating to child pornography. The " 'State undoubtedly has a legitimate reason to ban the creation of child pornography,' as it 'is often associated with child abuse and exploitation, resulting in physical and psychological harm to the child.' " *People v. Hollins*, 2012 IL 112754, ¶ 21 (quoting *State v. Senters*, 699 N.W. 2d 810, 817 *** (Neb. 2005)). As our supreme court has stated:

> "The United States Supreme Court recognized child pornography as 'a category of material outside the protection of the First Amendment' in *New York v. Ferber*, 458 U.S. 747, 763 *** (1982). The reason underlying this holding is that the crime of child pornography is an offense against the child and causes harm 'to the physiological, emotional, and mental health' of the child. *Ferber*, 458 U.S. at 758 ***. These harms result from 'the trespass against the dignity of the child.' *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir.1987), citing *Ferber*, 458 U.S. at 758 ***. 'Human dignity is offended by the pornographer. American law does not protect all human dignity; legally, an adult can consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing.' *Wiegand*, 812 F.2d at 1245. Child pornography is particularly harmful because the child's actions are reduced to a recording which could haunt the child in future

years, especially in light of the mass distribution system for child pornography. See *Ferber*, 458 U.S. at 759." *People v. Lamborn*, 185 Ill. 2d 585, 588-89 (1999).

¶ 26 At their core, then, laws which criminalize the possession, distribution, or creation of child pornography are concerned with the welfare of the child victim depicted. We are mindful that the criminal law in this area is not focused on punishing a defendant for the depraved nature of his prurient interest; indeed, the United States Supreme Court has held that virtually created child pornography cannot be criminally punished because there is no child victim affected. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250-254 (2002). The dissemination of child pornography, however, is viewed as potentially further victimizing the child depicted. It is for this reason that not just the creation of child pornography, but its distribution, may result in severe criminal consequences. It has been noted that there is a developing consensus that a relationship exists between even the possession of child pornography and its creation, as the former may stimulate the latter. See *People v. Reyes*, 2020 IL App (2d) 170379, ¶ 143 (Birkett, J., specially concurring).

¶ 27 In the context of pretrial detention decisions for defendants charged with dissemination of child pornography, it is appropriate for circuit courts to focus on the question of the defendant's potential dangerousness from this perspective. This is also the relevant perspective in assessing what conditions might adequately guard against the threat presented.

¶ 28 B. Whether Defendant Constituted a Threat

¶ 29 Though not argued in defendant's memorandum, defendant's notice of appeal asserted that the State failed to meet its burden of proving by clear and convincing evidence that he posed a real and present threat to the safety of any person or the community, based on the specific, articulable facts of the case. Defendant argues that the State relied only on its proffer of

a factual basis and "provided no additional evidence other than the nature of the charged offense." According to defendant's notice of appeal, this violated the holding of *Stock* and *People v. Castillo*, 2024 IL App (1st) 232315B. Defendant, however, did not elaborate further on this point in his supporting memorandum.

¶ 30 First, we find *Stock* and *Castillo* are inapplicable to the issue of whether defendant constituted a threat. The holding in both cases dealt exclusively with the issue of whether *less restrictive conditions* would fail to mitigate any threat posed by the defendant's release; in neither case did the court apply its analysis to the issue of whether defendant constituted a threat. Indeed, *Castillo* seems to have acknowledged as much when it found the factual basis for the charged offense supported not just the charge lodged against the defendant, but also the conclusion that she posed a risk of harm to the community or a member thereof. *Castillo*, 2024 IL App (1st) 232315B, ¶ 33.

¶ 31 Second, we find the circuit court's oral pronouncements made at the detention hearing were adequate to support its finding, and, therefore, did not constitute an abuse of discretion. In concluding that defendant was dangerous, the court stated, defendant "has argued no one's in danger because there's no accusation that [defendant] manufactured the pornography himself. Although, not explicit, I think the implicit argument was he was watching and sending it out over the internet but that it had been made by someone else." Additionally, the court commented: "The Court does find by clear and convincing evidence that because it is so many that the persons in danger in the community are the children but also the persons to whom he's disseminating this vile material." It further stated,

> "[W]hen we look at the dissemination of child pornography and the obligation that someone is disseminating it, that the child who is depicted being raped—who is

being raped in the videos really is being victimized every time someone is viewing that degradation and is certainly being revictimized every time that video is being shared."

¶ 32 We conclude that the circuit court did not abuse its discretion in finding that defendant constituted a threat.

¶ 33 C. Conditions of Release

¶ 34 Having found the circuit court did not abuse its discretion in finding defendant posed a real and present threat to the community, we next address defendant's alternative argument that the court erred in finding that there was no less restrictive alternative to pretrial detention and that no conditions would reasonably ensure the appearance of defendant for later hearings or prevent him from being charged with a subsequent felony. On the first contention, defendant argued that the State presented no evidence—other than its proffer of facts relating to the charged offense—to show how the proposed conditions such as no contact with any minor, pretrial monitoring, no access to the Internet, and home detention, would not mitigate the threat, especially since defendant had no prior non-traffic related criminal history and had scored a zero on his pretrial risk assessment. On the second contention, he argued that the court had only addressed the fact that it was unsure how to effectively impose a "no access to the Internet" condition and did not address any other factors.

¶ 35 When ordering pretrial detention, a circuit court is required to summarize its "reasons for concluding that the defendant should be denied pretrial release, including why less restrictive conditions would not avoid 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." 725 ILCS 5/1106.1(h)(1) (West 2022). The court must consider the specific facts of the case including

defendant's background and characteristics, whether any conditions or combination of conditions can mitigate the threat posed and allow for release. *People v. Atterberry*, 2023 IL App (4th) 231028, ¶ 18. A relevant consideration in determining if conditions are viable "is whether there is reason to believe the defendant is likely to violate the conditions the court might impose." *Id.* Simply because a person is charged with a detainable offense or that the defendant poses a threat to public safety is insufficient standing alone to order detention. *Id.*

¶ 36 Defendant relies on *Stock*, arguing that the circuit court based its decision solely on the nature of the charges against defendant. In *Stock*, the defendant was charged with aggravated battery and discharge of a firearm. The State filed its petition to deny pretrial release, and at the hearing made a factual proffer detailing the events of the incident. In granting the petition and detaining the defendant, the court found there were no conditions to mitigate the defendant's threat. *Stock*, 2023 IL App (1st) 231753, ¶ 18. On appeal, the court held that the State's factual proffer was insufficient to show that no conditions could mitigate the threat posed by the defendant. *Id*. In so finding, the *Stock* court stated, "If the base allegations that make up the *sine qua non* of a violent offense were sufficient on their own to establish [that no conditions could mitigate the threat posed], then the legislature would have simply deemed those accused of violent offenses ineligible for release." *Id*.

¶ 37 Relying on its prior decision in *Stock*, the appellate court in *Castillo* held that the circuit court had abused its discretion by not explaining why less restrictive conditions would not mitigate the defendant's threat to the victims or her willful flight in its oral statements or written order. At the pretrial release hearing, the court stated that no combination of conditions would provide for the safety of the victims, but it did not provide further explanation as to why no conditions would provide for the victims' safety. *Castillo*, 2024 IL App (1st) 232315, ¶ 32. Instead,

the court highlighted aspects of the crime itself, including how it was committed and the assertion that the defendant fled the location of the attack and was apprehended by police. The *Castillo* court explained, "While these factors *** are certainly reasons why defendant is being charged and poses a risk of harm to a person or community, they do not indicate why lesser restrictions would not mitigate the danger or Castillo's willful flight." *Id.* ¶ 33. The defendant had "zero criminal convictions, and the charges related to her prior domestic battery arrests were dropped." *Id*. Moreover, pretrial services had scored the defendant at one for new criminal activity and for failure to appear; she had also participated in treatment programs while detained. *Id*. Accordingly, the *Castillo* court reversed the pretrial detention order and remanded the case for further proceedings to consider alternatives to detention.

¶ 38 We decline to accept any reading of *Stock* and its progeny that would conclusively prohibit a court, under the right circumstances, from relying solely on the nature of the charges to conclude that conditions of release would be inadequate to mitigate the threat posed by a defendant. For our purposes, however, we conclude that the circuit court's thoughtful and thorough considerations of the effectiveness of conditions of release is sufficient to distinguish this case from *Stock* and *Castillo.*

¶ 39 On the question of whether any condition(s) could mitigate the threat, the circuit court first stated that returning defendant to his former home, where minors were present, was a "horrible idea." It then commented:

> "Would it possibly be appropriate for him to reside with his mother and stepfather maybe on some type of house arrest deprived of the ability to access the internet? The Court considered that but I believe what [the State] said is correct. That the internet is ubiquitous and I don't know how the Court can enforce a Faraday box

around the Defendant without having that be in a secure detention facility. And, again, this is an allegation of systemic viewing and systemic sharing, not just a once or twice situation."

¶ 40 We believe that the circuit court properly included consideration of the core criminality involved in child pornography: the risk of future revictimization of the child depicted. The volume of defendant's activity gave the court concern about its ability to fashion conditions which would be able to prevent further circulation and revictimization. The court found by clear and convincing evidence that it could not protect the public and, specifically, children, by imposing any conditions of release. Although defendant may disagree with the court's findings, the court clearly considered factors beyond the nature of the offenses charged, including the difficulties in keeping defendant from accessing the Internet. Because dissemination of child pornography via the Internet is a key part of defendant's alleged criminal behavior, any situation that would not curtail his potential access to the Internet leaves a threat in place. This concern clearly exemplifies the continuing nature of the threat and implicates the ability to deter defendant from repeating his alleged criminal conduct, both of which are crucial parts of the section 110-6.1(h)(1) analysis.

¶ 41 We emphasize, however, that the inquiry into a defendant's potential compliance with conditions of release must always be individualized. See 725 ILCS 110-10(b) (West 2022). The State's argument that access to the Internet is easy "these days" and the circuit court's statement that the Internet is "ubiquitous" could apply to any defendant in any case; a defendant in another case may well comply with a condition prohibiting access to the Internet or a smartphone even in the absence of a Faraday box or secure detention facility. Nevertheless, it is clear from the context that the State and the court were focused on the potential lack of compliance by this

particular defendant based on his prior use of the Internet, as opposed to merely a "typical" defendant. See *Atterberry*, 2023 IL App (4th) 231028, ¶ 19.

¶ 42 Accordingly, we conclude that the circuit court did not abuse its discretion.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the circuit court's denial of pretrial release.

¶ 45 Affirmed.