2024 IL App (5th) 240236-U

NO. 5-24-0236

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Champaign County.
	)	
v.	)	No. 24-CF-152
	)	
CONTERRIO A. BROWN,	)	Honorable
	)	Brett N. Olmstead,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE VAUGHAN delivered the judgment of the court.
Justices McHaney and Sholar concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting the State's petition to deny pretrial release is affirmed where the trial court's findings were not against the manifest weight of the evidence and the order denying pretrial release was not an abuse of discretion.

¶ 2 Defendant appeals the trial court's order denying his pretrial release pursuant to Public Act 101-652, § 10-255 (eff. Jan. 1, 2023), commonly known as the Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act (Act). See Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023); *Rowe v. Raoul*, 2023 IL 129248, ¶ 52 (lifting stay and setting effective date as September 18, 2023). For the following reasons we affirm the trial court's order.[1]

[1]Pursuant to Illinois Supreme Court Rule 604(h)(5) (eff. Dec. 7, 2023), our decision in this case was due on or before May 1, 2024, absent a finding of good cause for extending the deadline. Based on the high volume of appeals under the Act currently under the court's consideration, as well as the complexity of issues and the lack of precedential authority, we find there to be good cause for extending the deadline.

¶ 3 I. BACKGROUND

¶ 4 Defendant was arrested on February 3, 2024, and an order finding probable cause to detain him was issued by the court the same day. On February 5, 2024, defendant was charged, by information, with unlawful possession of a weapon by a felon based on the prior conviction in case No. 03-CF-1125 in violation of section 24-1.1(a) of the Criminal Code of 2012 (720 ILCS 5/24-1.1(a) (West 2022)), a Class 2 felony. He was also charged with unlawful possession with intent to deliver a controlled substance (more than 15 grams but less than 100 grams of a substance containing cocaine) in violation of section 401(a)(2)(A) of the Illinois Controlled Substances Act (720 ILCS 570/401(a)(2)(A) (West 2022)), a Class X felony.

¶ 5 A pretrial investigation report was filed on February 5, 2024. The report indicated that defendant was 41 years old, lived in Champaign, Illinois, for 20 years, and was the father of eight children ranging in age from 8 months to 24 years old. He was currently residing with his son and reported having reliable transportation to appear for court appearances. He was employed by Kraft Heinz, working the second shift as a line technician. Additional sources of income included employment with Advance Auto Parts and the University of Illinois STEAM Genius program. Defendant's medical issues included high blood pressure, asthma, and allergies. He reported no history of drug abuse.

¶ 6 Defendant's criminal history included a pending charge for driving on a suspended license. It also included five driving on a revoked license convictions, a manufacture and delivery of cocaine conviction for which he was sentenced to eight years in the Illinois Department of Corrections (IDOC), and an aggravated unlawful use of weapon/vehicle conviction.

¶ 7 On February 5, 2024, the State filed a verified petition requesting denial of defendant's pretrial release. The petition alleged that the proof was evident and the presumption great that

defendant committed an offense listed in section 110-6.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-6.1(a) (West 2022)) and was charged with an offense under section 110-6.1(a)(1), (1.5), or (3) through (7) of the Code (*id.* § 110-6.1(a)(1), (1.5), (3)-(7)). The petition further alleged that defendant posed a real and present threat to the safety of any person(s) or the community.

¶ 8 A hearing on the State's petition was held on February 6, 2024. The State and defense counsel had no corrections to the pretrial investigation report. The State proffered that a search warrant was executed by the Street Crimes Task Force at defendant's residence on February 2, 2024. During the search, detectives located a stocking cap in the bedroom closet that contained a bag of white powder weighing approximately 45.6 grams that field-tested positive for cocaine. Detectives also located a handgun box containing a Smith and Wesson SD40 VE semiautomatic handgun with one round in the chamber and 11 additional live rounds in the magazine.

¶ 9 The State's proffer also indicated that after being read his *Miranda* rights, defendant confirmed he lived in the apartment alone and that was his bedroom where the substance was found. Defendant further stated that he had been selling drugs there because his child support took all of his money, and he could make a couple thousand dollars a month selling drugs. Defendant stated that the gun belonged to his mother, and he was just keeping it for her. He admitted handling the gun. The State's proffer also incorporated the convictions listed in the pretrial investigation report.

¶ 10 Defense counsel proffered that the firearm was registered to defendant's mother. She was in court that day and confirmed what defendant told police. She was going to visit someone in Danville at a correctional facility, had the gun in her car, and left the firearm in defendant's home. She did not understand that defendant could not be in possession of the weapon because defendant

had taken steps to expunge some of his convictions and, based on that, she was unaware of his inability to have a firearm.

¶ 11 Defense counsel further proffered that defendant had three jobs and several minor children. He worked full time at Kraft and part time at Advanced Auto. He was also a mentor for children at the STEAM Genius program at University of Illinois. He had eight children aged 8 months to 24 years and lived in Champaign for 20 years. Counsel noted that other than driving on revoked or suspended license convictions, he had only one prior drug conviction from 2007 and an aggravated unlawful use of a weapon conviction in 2004. He only had one failure to appear and that was in 2007. Counsel stated defendant was cooperative with the police and was not on parole when the incident occurred. He also worked with the Boys and Girls Club mentoring children.

¶ 12 Defense counsel stated defendant also had a granddaughter who was five years old. Defendant's father died recently as a result of gun violence. His mother just had surgery and he was helping her. His mother further advised counsel that defendant volunteered with the Stop the Violence program, car shows, and worked with children on go-carts. He handed out backpacks, personal hygiene bags, socks, gloves, hats, and food for the homeless. He also handed out scholarships that would assist children with the costs of college.

¶ 13 Defense counsel proffered that defense counsel's significant other was also in court, and she advised counsel that she had been in a relationship with defendant for seven years and they recently had a child together. He was the sole provider for the family and also took care of nine other people including his granddaughter. He tried hard to support his family and paid all the bills in the household.

¶ 14 The State argued that defendant was an armed drug dealer who was found with 45.6 grams of cocaine, which was not an amount for recreational use. This was evidence of dangerousness to

the community. Further looking at defendant's history he had a 2003 aggravated unlawful use of weapon conviction, prior felony convictions for weapons offenses, and a 2007 conviction for delivery of a controlled substance for which he was sentenced to IDOC. The State argued that defendant was familiar with drug dealing—as evidenced by his prior conviction and sentence for that crime—and there were no conditions that would protect the community from defendant. As for the weapon, while defendant claimed it was his mother's gun, he knew, that as a felon, he could not have that gun under any circumstances, so detention was appropriate.

¶ 15 Defense counsel argued that the State would have the court believe that defendant possessed the weapon for an extended period of time which was not true. His mother was in court and could testify that she only gave him the weapon that day because she was going to meet with someone at the correctional center. There was evidence that defendant was employed and provided for his family. While there was an extensive amount of drugs found, there was no indication of selling or distributing. There was no reference to finding scales or baggies. There was a bag in a hat. Defense counsel argued that conditions of release could be imposed because defendant was involved in the community and had three jobs.

¶ 16 The court found there was clear and convincing evidence that defendant committed a detainable offense based on the factual presentation that defendant lived alone and 45 grams worth of a white powdery substance field-tested as cocaine was found in his bedroom. The court also noted defendant's statements after he was Mirandized that acknowledged he was selling drugs to pay his child support. While his mother may or may not have been aware that defendant could not possess the firearm, defendant was aware having been previously convicted of a felony offense, including aggravated unlawful use of a weapon. Therefore, the court found the State proved by

clear and convincing evidence that the proof was evident and the presumption great that defendant committed a detainable offense.

¶ 17 As to whether defendant was dangerous, the court found defendant was a threat based on the amount of the controlled substance found and his having a firearm. It was dangerous to the community, and to the children that he cared for in his home or elsewhere, noting it was not safe to have that much of any substance, let alone cocaine, and a firearm with rounds available. The court found, based on defendant's prior convictions, although they were older convictions, they were quite serious and that no condition or set of conditions could mitigate the real and present threat posed by defendant. Thereafter, the court granted the State's petition to deny.

¶ 18 Following the hearing, the trial court issued an order finding defendant committed a detainable offense. In support, the order stated,

> "Unlawful use of a weapon by a felon is a detainable offense, and defendant has prior felony convictions for aggravated unlawful use of a weapon in 2004 and manufacturing/delivery of cocaine in 2007. The defendant lives alone and had a box with a gun in it underneath his bed. The gun is registered to the defendant's mother, and she brought the gun to his house in her car before going to visit someone held in a correctional facility. The defendant admitted handling the firearm, and his prior convictions prohibit him from possessing a firearm."

The trial court's order also found defendant posed a real and present threat and no condition, or combination of conditions, could mitigate defendant's dangerousness. In support, the order stated,

> "Defendant has a prior felony conviction for which he was sentenced to the department of corrections. He is not allowed to possess a firearm, and here there is evidence that he possessed both a firearm and more than 45 grams of cocaine. The gun had a round in the

chamber and other live rounds of ammunition. Defendant has a history of manufacturing/delivery of cocaine. He currently has a pending charge for driving on a suspended license. The defendant admitted to selling drugs to pay for child support. He has two other jobs and numerous volunteer activities in the community, including many in which he mentors and interacts with children. He has very young children of his own who he poses a danger to by virtue of possessing a firearm under his bed along with 45 grams of cocaine in a stocking cap in his closet."

Defendant timely appealed. Ill. S. Ct. R. 604(h)(2) (eff. Dec. 7, 2023).

¶ 19 II. ANALYSIS

¶ 20 Pretrial release—including the conditions related thereto—is governed by statute. See Pub. Act 101-652, § 10-255 (eff. Jan. 1, 2023); Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023). A defendant's pretrial release may be denied only in certain statutorily limited situations. 725 ILCS 5/110-6.1 (West 2022). In order to detain a defendant, the State has the burden to prove by clear and convincing evidence that (1) the proof is evident or the presumption great that the defendant has committed a qualifying offense, (2) the defendant's pretrial release poses a real and present threat to the safety of any person or the community or a flight risk, and (3) less restrictive conditions would not avoid a real and present threat to the safety of any person or the community and/or prevent the defendant's willful flight from prosecution. *Id.* § 110-6.1(e).

¶ 21 In considering whether the defendant poses a real and present threat to the safety of any person or the community, *i.e.*, making a determination of "dangerousness," the trial court may consider evidence or testimony concerning factors that include, but are not limited to, (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; (3) the

identity of any person to whom 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 the statements; (5) the age and physical condition of the defendant; (6) the age and physical condition of the victim or complaining witness; (7) whether the defendant is known to possess or have access to a weapon; (8) whether at the time of the current offense or any other offense, the defendant was on probation, parole, or supervised release from custody; and (9) any other factors including those listed in section 110-5 of the Code (*id.* § 110-5). *Id.* § 110-6.1(g).

¶ 22 To set appropriate conditions of pretrial release, the trial court must determine, by clear and convincing evidence, what pretrial release conditions, "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." *Id.* § 110-5(a). In reaching its determination, the trial court must consider (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; (4) the nature and seriousness of the specific, real, and present threat to any person that would be posed by the person's release; and (5) the nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process. *Id.* The statute lists no singular factor as dispositive. See *id.*

¶ 23 Our standard of review of pretrial release determinations is twofold. The trial court's factual findings are reviewed under the manifest weight of the evidence standard. *People v. Swan*, 2023 IL App (5th) 230766, ¶ 12. " 'A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented.' " *Id.* (quoting *People v. Deleon*, 227 Ill. 2d 322, 332 (2008)). We review the trial court's ultimate determination regarding the denial of pretrial release for an

abuse of discretion. *Id.* ¶ 11. "An abuse of discretion occurs when the decision of the circuit court is arbitrary, fanciful, or unreasonable, or when no reasonable person would agree with the position adopted by the trial court." *Id.*; see also *People v. Heineman*, 2023 IL 127854, ¶ 59. "[I]n reviewing the circuit court's ruling for 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.' " *People v. Simmons*, 2019 IL App (1st) 191253, ¶ 15 (quoting *People v. Cox*, 82 Ill. 2d 268, 280 (1980)).

¶ 24 Defendant's notice of appeal requests reversal of the trial court's order denying him pretrial release. The notice of appeal provided additional language under each of the eight potential issues that could be raised in the standard notice of appeal form.[2] Of those eight, two contained "checked" boxes next to the issue. The "checked" issues included: (1) whether the State failed to meet its burden of proving that no condition or combination of conditions could mitigate defendant's dangerousness; and (2) whether the court erred in determining that no condition, or combination of conditions, would reasonably ensure defendant's appearance for later hearing or prevent defendant from being charged with a subsequent felony or Class A misdemeanor.

¶ 25 On March 21, 2024, defendant's counsel on appeal, the Office of the State Appellate Defender (OSAD), filed a Rule 604(h) memorandum. The memorandum clarified that defendant only raised the two issues checked in his notice of appeal. OSAD's memorandum further clarified that it was addressing only one of the issues raised by defendant in his notice of appeal but was also addressing whether the State proved by clear and convincing evidence that defendant posed a danger to any person(s) or the community.

[2]This court previously addressed this situation. See *People v. Davis*, 2024 IL App (5th) 240120, ¶¶ 18-26. We again remind trial counsel of the ethical obligations regarding frivolous appeals and the failure to properly delineate the issues for consideration on appeal.

¶ 26 The State filed a Rule 604(h) memorandum on April 11, 2024. Therein, the State ignores our standard of review (see *People v. Burke*, 2024 IL App (5th) 231167, ¶ 20) and instead claims our review is solely limited to determining whether the trial court's order denying pretrial release was an abuse of discretion. As such, the memorandum is largely irrelevant. The memorandum is equally deficient in failing to address the issues raised in OSAD's memorandum.

¶ 27 As noted above, defendant's notice of appeal contained two issues for consideration, but OSAD's Rule 604(h)(2) memorandum only addressed one of those issues. In *Forthenberry*, this court held that when a supporting Rule 604(h) memorandum is filed, it becomes "the controlling document for issues or claims on appeal" and the notice of appeal would not be used to "seek out further arguments not raised in the memorandum" unless jurisdiction was raised as an issue. *People v. Forthenberry*, 2024 IL App (5th) 231002, ¶ 42. Other appellate districts have also adopted this holding. See *People v. Rollins*, 2024 IL App (2d) 230372, ¶ 22; *People v. Martin*, 2024 IL App (4th) 231512-U, ¶ 59. Here, OSAD's memorandum contains no argument for the second issue raised by defendant in his notice of appeal. Accordingly, we hold that the second issue, initially raised by defendant in his notice of appeal, was abandoned by his appellate counsel. *Forthenberry*, 2024 IL App (5th) 231002, ¶¶ 42-44. As such this court is left with two issues to consider: (1) whether the State proved, by clear and convincing evidence, that defendant posed a real and present threat to the safety of any person(s) or the community; and (2) whether the State proved, by clear and convincing evidence, that no condition, or combination of conditions, could mitigate defendant's real and present threat to the safety of any person(s) or the community.

¶ 28 OSAD argues that the State failed to prove that defendant posed a danger to any person(s) or the community beyond relying on defendant's current charges for which defendant is presumed innocent. OSAD cites *People v. Drew*, 2024 IL App (2d) 230606-U, and contends *Drew* is "on

point and informative" because the defendant in *Drew* was also charged with a similar crime and the appellate court reversed the trial court's pretrial detention order after finding that the general notion that selling drugs harms society was insufficient to make a finding of dangerousness. *Id.* ¶¶ 17-20.

¶ 29 While we agree *Drew* is "informative," each decision must be based on its own articulable facts especially when the issue raised is one of evidentiary sufficiency. Typically, when considering the sufficiency of the evidence, "the reviewing court must view the evidence 'in the light most favorable to the prosecution.' " *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "This means the reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *Id.* In this case, the question becomes, " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found' " (emphasis in original) (*id.* at 278 (quoting *Jackson*, 443 U.S. at 319)) that the State proved by clear and convincing evidence that defendant posed a real and present threat to any person(s) or the community.

¶ 30 As noted above, the statute provides factors for the trial court's consideration in determining dangerousness. Included in those factors are the "nature and circumstances of any offense charged, including whether the offense is a crime of violence, involving a weapon, or a sex offense." 725 ILCS 5/110-6.1(g)(1) (West 2022). Here, it is undisputed that one of the offenses charged involved a weapon. The second factor involves defendant's history and characteristics. *Id.* § 110-6.1(g)(2). This includes defendant's prior criminal and social history that may reveal a potential of violence. Here, the trial court noted defendant's prior criminal history included a conviction for manufacture and delivery of cocaine for which he was sentenced to eight years in IDOC and an aggravated unlawful use of weapon conviction. While the trial court noted the

convictions were old, it found them "quite serious." The court further noted that defendant's young children would be in the home which would be dangerous for them as well as the community as defendant was selling the drugs from his home. Under these articulable facts, we find *Drew* easily distinguishable and that the State proved, by clear and convincing evidence, that defendant posed a danger to any person(s) or the community. Accordingly, we hold that the trial court's finding of dangerousness was not against the manifest weight of the evidence.

¶ 31 OSAD's second issue involves the element that no condition, or combination of conditions, would mitigate defendant's dangerousness. It first argues that the State failed to prove, by clear and convincing evidence, that no condition, or combination of conditions, would mitigate defendant's dangerousness. Citing *People v. White*, 2024 IL App (1st) 232245, ¶ 26, OSAD argues that the "State never argued that available conditions of release were insufficient" and contends the State was required to provide proffered facts or other competent evidence on the issue.

¶ 32 Again, the issue raised is one of evidentiary sufficiency. When considering the sufficiency of the evidence, "the reviewing court must view the evidence 'in the light most favorable to the prosecution.' " *Cunningham*, 212 Ill. 2d at 280 (quoting *Jackson*, 443 U.S. at 319). In this case, the question becomes, " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found' " (emphasis in original) (*id.* at 278 (quoting *Jackson*, 443 U.S. at 319)) that the State proved by clear and convincing evidence that no condition, or combination of conditions, would mitigate defendant's dangerousness.

¶ 33 As stated above, in determining which conditions of pretrial release, if any, would reasonably ensure the appearance of the defendant, the safety of persons and the community, and the likelihood of defendant's compliance with terms of pretrial release, the statute provides factors for the trial court's consideration. See 725 ILCS 5/110-5(a) (West 2022). These include, *inter alia*,

(1) the nature and circumstances of the offense charged, (2) the weight of the evidence against defendant, (3) the history and characteristics of the defendant, and (4) the nature and seriousness of the real and present threat to the safety of any person or persons or the community based on the articulable facts of the case that would be posed by the defendant's release. *Id.* Many of these are similar to those listed in section 110-6.1(g) that address a defendant's dangerousness. See *id.* § 110-6.1(g). As such, contrary to OSAD's claim, there is no legal basis to minimize or ignore either the State's argument, or the trial court's reliance on, the dangerousness factors when either arguing, or issuing a decision addressing, whether conditions exist that would mitigate defendant's dangerousness.

¶ 34 Here, the State's proffer contended that no condition, or combination of conditions, existed that would mitigate defendant's dangerousness. This statement was presented immediately after the State addressed the current charges, defendant's prior criminal history that included a charge similar to that currently pending, and his inability to comply with previously issued restrictions, notably his possession of a firearm despite his status as a felon. The conditions of release found in section 110-10 of the Code (*id.* § 110-10) are based on a defendant's compliance with court-ordered conditions. Given that defendant's history reveals an admitted failure to comply with statutory conditions related to firearm possession, we cannot find that the State failed to prove, by clear and convincing evidence, that no condition, or combination of conditions, would mitigate defendant's dangerousness.

¶ 35 OSAD further argues, citing *People v. Stock*, 2023 IL App (1st) 231753, ¶ 20, that the trial court's written order failed to sufficiently provide a summary explaining why less restrictive conditions would not avoid a real and present threat to the safety of any person or the community. In *Stock*, the appellate court held that the trial court's finding that no condition, or combination of

conditions, existed that would mitigate defendant's dangerousness based solely on the current pending charges was insufficient. *Id.* ¶¶ 18-21.

¶ 36 Here, there was ample evidence before the court to reasonably infer, based on both the proffer and argument presented by the State, that no conditions, or combination of conditions, would mitigate defendant's dangerousness for both his own children and the community. The court could reasonably infer that defendant would not refrain from possessing a firearm or other dangerous weapon when defendant's history and the current charges confirmed that he previously ignored, and continued to ignore, said prohibition. The court could also reasonably infer that pretrial home supervision, with or without the use of GPS, would not protect defendant's children or grandchild if they were in his home and found a loaded weapon under defendant's bed. The court could also reasonably infer that pretrial home supervision provided no protection to defendant's children or grandchild if they found a bag of cocaine in defendant's closet. Finally, the trial court could have reasonably inferred that pretrial home supervision, with or without GPS, would not protect the community, when defendant admitted that he was selling drugs from his home, and therefore such transactions could reoccur. Indeed, the trial court's order addressed these issues as well as the fact that in addition to the charges here, defendant also had a pending charge for driving on a suspended license—despite five prior convictions for driving on a revoked license conviction—which is further evidence of defendant's refusal to comply with statutory requirements.

¶ 37 Given the trial court's oral and written statements, we find this case easily distinguishable from both *White* and *Stock* that were based either on legal conclusions with no consideration of the factual situation or solely on the pending charges. As noted in *Stock*, "more is required" than stating the basic elements of a detainable offense. *Stock*, 2023 IL App (1st) 231753, ¶ 18. Here,

more was provided. The evidence included more than just allegations of the current crime. Defendant admitted that he was selling drugs and further admitted that he handled the firearm that he knew he was prohibited from possessing. Defendant's criminal history, although containing older convictions, included serious crimes, as well as other pending charges. Further, the proffer by defendant's own counsel revealed that defendant was devoted to his family and was acting as "a father figure to the granddaughter as well." Such language is consistent with an inference that defendant was spending time with his children, and his grandchild.

¶ 38 Given defendant's admission to the current charges, it is clear that neither his prior incarcerations nor the prohibitions stemming therefrom dissuaded him from continuing to participate in activities that could result in further incarceration. Accordingly, we cannot find that the State's proffer failed to provide clear and convincing evidence that no condition, or combination of conditions, would mitigate defendant's dangerousness. Nor can we hold that the trial court's finding that no conditions would mitigate defendant's dangerousness was against the manifest weight of the evidence. Therefore, we hold that the trial court's ultimate disposition, denying pretrial release, was not an abuse of discretion.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated herein, the trial court findings were not against the manifest weight of the evidence and its ultimate disposition was not an abuse of discretion. Therefore, we affirm the trial court's order.

¶ 41 Affirmed.