2023 IL App (4th) 231028

NO. 4-23-1028

FILED
December 8, 2023
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRANDIN ATTERBERRY, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Livingston County No. 23CF361 Honorable Jennifer H. Bauknecht, Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court, with opinion.
Justices Harris and Doherty concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Brandin Atterberry, appeals an order granting the State's petition to detain him prior to trial pursuant to article 110 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-1 *et seq.* (West 2022)), as amended by Public Act 101-652 (eff. Jan. 1, 2023), commonly known as the Pretrial Fairness Act. For the following reasons, we vacate that order and remand the cause with directions for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 On October 2, 2023, the State charged defendant in a two-count information. Count I alleged that on or about September 29, 2023, defendant committed the offense of traveling to meet a child (720 ILCS 5/11-26(a) (West 2022)) in that he

> "traveled any distance for the purpose of engaging in a sexual offense, aggravated criminal sexual abuse, with a person believed to be a child, after using a computer,

> online service, internet service, or any other device capable of electronic data storage, or transmission, to seduce, solicit, lure, or entice a child."

Count II alleged that on or about September 29, 2023, defendant committed the offense of indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2022)) in that he was 17 years of age or older and, "with the intent that the offense of Aggravated Criminal Sexual Abuse be committed, by means of the internet knowingly solicited a person whom he believed to be a child to perform an act of sexual conduct or penetration." Both charges were Class 3 felonies.

¶ 4 On October 2, 2023, the State filed a petition to detain defendant pursuant to section 110-6.1(a)(5) of the Code. 725 ILCS 5/110-6.1(a)(5) (West 2022) (authorizing detention of a person charged with the offenses at bar if "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").

¶ 5 The pretrial investigation report revealed the following. Defendant is 24 years old and has no criminal history. He resides in Springfield, Illinois, with his sister and her boyfriend. Defendant has a technical degree and has maintained full-time employment in Springfield for the past year. He reported no history of substance abuse or mental health issues. Defendant scored a 0 out of 14 on the Virginia Pretrial Risk Assessment Instrument-Revised, which indicates he is at the lowest risk level for violating conditions of pretrial release.

¶ 6 On October 2, 2023, the trial court held a hearing on the State's detention petition. The prosecutor made the following factual proffer:

> "This defendant was using social media to converse with what he thought was a 14 year old minor and did so with enticement for sexual acts. The evidence substantiated from the report would be that this Defendant was talking with a young

juvenile female. She advised of her age. He then began speaking with her in a sexual manner. He advised he was going to bend her over and have sex with her. He wanted to have sex with her multiple times in various different ways, and he was confronted with her age several times.

He advised the purported minor that he lived in the area near Springfield, Illinois; however, he would come up and meet with her. He then did so as arranged drive up to the area of Fairbury and arrived in a motor vehicle with a phone used for communication with the minor, purported minor[,] as well as a condom."

Based on these facts, the prosecutor requested defendant to be detained before trial. Defense counsel responded that the court should "consider an alternative form of pretrial release," noting defendant's lack of criminal history and score of zero on the risk assessment.

¶ 7 The trial court granted the State's petition for pretrial detention. We quote the court's ruling in full:

"All right. Since its founding, this country has used monetary bonds in conjunction with pretrial conditions as an effective tool for ensuring that a defendant is not a risk of harm to others in the community, does not commit any criminal offenses while out on bond, and that he appears as directed at all future court dates.

However, pursuant to the Pretrial Fairness Act provisions within Public Act 101-652, a 750 page document filed and passed by the legislature in four hours in the middle of the night, approved by the governor and legislature—sorry—approved and signed by the governor and ultimately found to be constitutional by the Illinois Supreme Court, me, as a duly elected Circuit Judge in Livingston

County no longer has the discretion to determine whether the defendant should be released on a monetary bond with pretrial conditions or on his own recognizance. Rather, I am limited to detaining the defendant pending trial or not detaining the defendant and entering a pretrial release order.

However, I would note that if a pretrial release order is entered, the conditions are loosely monitored by requiring the Defendant to report remotely, to my knowledge, to a pretrial officer who has little authority or ability to verify the information that the defendant provides.

This pretrial officer, we have one pretrial officer in Livingston County who works for the Office of Statewide Pretrial Services. This is a brand new department created by the Illinois Supreme Court and funded by the legislature and staffed with over 300 people, including at least five layers of bureaucratic management. The pretrial officer reports to the supervisor who reports to the Deputy Regional Chief who reports to the head of District 8 who reports to the Region 3 Deputy Director who reports to the Director who reports to the Illinois Supreme Court. This should make the community feel much safer.

I would note that although I have not formally incorporated this into my notes, that while the legislature has funded this brand new department with over five layers of bureaucratic management, we continue to see an inordinate amount of people with mental health disorders in our jail awaiting transfer to the Department of Human Services; and I would further note that I am aware of at least one county, that being Sangamon County, that is also concerned that we have individuals who have been found to be unfit by courts sitting in our jails for months

at a time while we have this brand new department with all this money and all of this bureaucratic oversight to deal with people who have been charged with crimes.

So I point out that we have at least one individual in the Livingston County Jail who's been there since June 23rd awaiting transfer to the Department of Human Services for mental health treatment. I have found that person to be unfit for trial and in desperate need of mental health treatment, yet he sits in our jail waiting to be transferred.

I received a letter from DHS today indicating that they have 180 people waiting for admission to a mental health facility and that it will be at least another four to five weeks before this individual will be able to obtain his mental health treatment, yet we have spent not only our time but also our very valuable resources setting up this nice, new Pretrial Fairnesses [*sic*] Act with a brand new department with five layers of bureaucratic oversight.

Here I do find that the proof is evident and the presumption is great that the Defendant has committed a qualifying offense for which he is eligible for detention under the dangerousness standard. I do believe that the State has shown by clear and convincing evidence based upon the nature of the charges and the probable cause statement that the Defendant poses a very real and present threat to the safety of all of the young children under the age of 18 living in Livingston County, and I do find that at present there are no conditions of pretrial release or combination of conditions that could mitigate the real and present threat of safety to the endangered persons in Livingston County.

> I do not believe that pretrial release is appropriate because the Defendant does pose a significant danger to the community, specifically all children under the age of 18. I am concerned that he is unlikely to comply with some or all of the pretrial conditions based upon the nature and circumstances of the probable cause statement contained herein, and I am concerned about the ability of pretrial conditions to adequately mitigate the high risk of safety to the children in this community under the age of 18.
>
> Specifically as I have previously indicated, there really is no way for our pretrial services officer to verify that this Defendant, in fact, is not communicating with any child under the age of 18 in Livingston County or elsewhere in the community for that matter. She does not have the ability, the time, or the training to do that. So I do not think that the community and specifically all children under the age of 18 can, that their safety can be meaningfully achieved with any other conditions of pretrial release.
>
> I recognize that the Defendant has scored a zero on the VPRAI assessment, and I also recognize that the Defendant has no prior record. Unfortunately, I have seen I think close to a hundred cases, Mr. Regnier [(the prosecutor)], unless I'm mistaken, regarding the fictitious accounts that are being run by law enforcement throughout the county? Is that accurate?"

The prosecutor responded, "That's a good estimate. Multiple police agencies in our county are running these accounts." The court continued its ruling:

> "Okay. So I've seen at least a hundred, and I would venture to say that at least half of them have absolutely no prior record. It's really alarming that there are

that many people sitting in our community who are preying upon young children in the community; and so it is not unusual for me to see a zero on the VPRAI; and it is not unusual for me to see a no prior record; and it is nevertheless an alarming situation; and there's a very real danger to the children in our community when somebody is taking advantage of social media to meet with these young children.

As I stated earlier, before the Pretrial Fairnesses [*sic*] Act, I would have given the Defendant a reasonable monetary bond that would have taken into consideration the factors that I have just enumerated here that raise concern about the Defendant having contact with any child under the age of 18 within this community; and I believe that that monetary bond would have taken into consideration his ability to pay. The Defendant may or may not have been able to post that. However, that would have served as a very strong deterrent for the Defendant; and the risk of losing that bond money has historically proven to provide a good incentive for people to not continue to engage in criminal behavior.

And since I do not have that incentive because the legislature, governor and Illinois Supreme Court have taken that discretion away from me and because the Defendant meets the dangerousness standard by clear and convincing evidence, I am ordering that he be detained pending trial."

¶ 8 Defendant filed a timely notice of appeal challenging the detention order.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant argues that the trial court abused its discretion by finding there are no conditions of pretrial release that would mitigate his threat to the community. Defendant asserts that the court improperly focused on its "disdain" for the recent statutory

changes and an "unsupported belief" that pretrial services personnel would be unable to monitor defendant properly if he were released from custody with conditions. Defendant maintains that the court instead should have considered the individualized facts of his case. Defendant further contends that the State failed to show that no conditions could mitigate the risk to the public attendant to his pretrial release. Defendant notes that the court failed to discuss any specific possible conditions for release, including electronic monitoring, ordering defendant to refrain from communicating with minors, ordering him not to go to particular places, or restricting and monitoring his use of the Internet. According to defendant, there is also no support in the record for the court's finding that he is unlikely to comply with some or all conditions of pretrial release. To that end, defendant notes his lack of criminal history and score of zero on the risk assessment. Defendant asks us to vacate the detention order and to "remand for pretrial release or the release with conditions."

¶ 11 The State responds that the trial court properly determined (1) defendant was eligible for pretrial detention based on committing a qualifying offense, (2) defendant posed a real and present threat to the community's safety, and (3) no conditions of release could mitigate that threat. Addressing defendant's arguments about possible conditions that could allow for his pretrial release, the State proposes that the court properly considered its "experience and practicalities of the situation." The State asserts that it is "easy to fathom" how defendant could communicate with minors via social media despite being on electronic monitoring, the existence of a no-contact order, or restrictions on his Internet use.

¶ 12 We review the trial court's detention decision for an abuse of discretion. *People v. Inman*, 2023 IL App (4th) 230864, ¶¶ 10-11. A court abuses its discretion by issuing a decision that is arbitrary, fanciful, or unreasonable—a decision with which no reasonable person would

agree. *Inman*, 2023 IL App (4th) 230864, ¶ 10. In conducting our review, we consider not just whether the ultimate result is within the bounds of reason, but also whether the trial court applied proper criteria to reach that result. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 99 (2006).

¶ 13 Under the recently amended legislation, there is a presumption that all criminal defendants are entitled to pretrial release on personal recognizance, subject to certain universal conditions. 725 ILCS 5/110-2(a), 110-10(a) (West 2022). Not all offenses are detainable. Section 110-6.1(a) of the Code (725 ILCS 5/110-6.1(a) (West 2022)) lists the circumstances under which defendants charged with various offenses may be detained. Relevant here, section 110-6.1(a)(5) of the Code (725 ILCS 5/110-6.1(a)(5) (West 2022)) says that a person charged with the offenses that defendant here faces is subject to pretrial detention where "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."

¶ 14 At the detention hearing, the State bore 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 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 conditions set forth in subsection (b) of Section 110-10 of this Article [(725 ILCS 5/110-10(b) (West 2022))] can mitigate" that threat. 725 ILCS 5/110-6.1(e)(1)-(3) (West 2022). On appeal, defendant challenges only the trial court's analysis of the third element.

¶ 15 Section 110-10(b) of the Code (725 ILCS 5/110-10(b) (West 2022)) authorizes a trial court to impose a nonexhaustive list of conditions on a defendant's pretrial release. Relevant here, possible conditions include that a defendant (1) "[n]ot depart this State without leave of the

court," (2) "[r]efrain from approaching or communicating with particular persons or classes of persons," (3) "[r]efrain from going to certain described geographic areas or premises," and (4) "[b]e 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." 725 ILCS 5/110-10(b)(0.05), (3)-(5) (West 2022). Any conditions imposed must be the least restrictive means

> "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." 725 ILCS 5/110-10(b) (West 2022).

Among the factors a court shall consider when evaluating the propriety of conditions are:

> "(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 [*sic*], 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;

(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 specific articulable facts of the case, that would be posed by the defendant's release, if applicable, as required under paragraph (7.5) of Section 4 of the Rights of Crime Victims and Witnesses Act; [and]

(5) the nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the defendant's release, if applicable." 725 ILCS 5/110-5(a)(1)-(5) (West 2022).

In each case, a court must conduct an "individualized" assessment of the propriety of detaining the defendant versus releasing him or her with conditions. 725 ILCS 5/110-6.1(f)(7) (West 2022). "[N]o single factor or standard may be used exclusively to order detention." 725 ILCS 5/110-6.1(f)(7) (West 2022).

¶ 16 Here, the totality of the trial court's comments compels the conclusion that the court failed to, and refused to, consider and apply the proper statutory criteria in finding that no conditions could mitigate the threat defendant poses to minors. The court included in its ruling a lengthy and biased commentary about the wisdom of Illinois's recent bail reform. The wisdom of legislation is never a concern for the judiciary. See *Rowe v. Raoul*, 2023 IL 129248, ¶ 19 ("Our role is not to judge the wisdom of legislation but only to determine when it offends the constitution."). "Judges must be fair and dispassionate arbitrators above all else." *People v. Fisher*, 2023 IL App (4th) 220717, ¶ 31. The court also detailed its grievances about the unavailability of

resources for people who are unfit to stand trial, which was irrelevant to whether defendant should be subject to pretrial detention.

¶ 17 Furthermore, without any evidentiary basis in the record, the trial court determined that available resources in Livingston County are inadequate to protect minors from defendant, should he be released pending trial. Relying on information outside the record, the court stated that conditions of pretrial release generally are being "loosely monitored." Notably, the court did not discuss whether electronic monitoring would be sufficient to dissuade defendant from traveling to meet a minor, which was part of the conduct alleged in the charging instrument. Instead, the court's specific concern seems to have been that if the court ordered defendant not to communicate with minors on social media as a condition of his release, and if defendant chose to violate that order, such a violation might go undetected.

¶ 18 Again, detention decisions must be "individualized" (725 ILCS 5/110-6.1(f)(7) (West 2022)), and all people charged with crimes are presumptively entitled to pretrial release (725 ILCS 5/110-2(a) (West 2022)). The legislature has included many offenses that are potentially detainable under the "dangerousness" standard. But the fact that a person is charged with a detainable offense is not enough to order detention, nor is it enough that the defendant poses a threat to public safety. Instead, the trial court must determine, based on the specific facts of the case and the defendant's individual background and characteristics, whether any combination of conditions can mitigate the threat and allow the defendant's release. 725 ILCS 5/110-6.1(e)(3) (West 2022). To be sure, one relevant consideration is whether there is reason to believe the defendant is likely to violate the conditions the court might impose. However, a court should not rule out pretrial release for a defendant based on a general perception that conditions of release are loosely monitored.

¶ 19 Here, based on the "nature and circumstances of the probable cause statement" that the prosecutor offered at the detention hearing, the trial court said it was concerned that defendant was "unlikely to comply with some or all of the pretrial conditions." However, there is no indication that the court reached this conclusion by considering defendant's individual case and circumstances. The prosecutor's proffer certainly supported a conclusion that defendant may have engaged in criminal conduct on one occasion. However, this proffer did not in itself provide any basis for the court to determine that defendant would ignore its directives if he were released from custody pending trial. The court seemingly discounted defendant's individual circumstances by saying it was "not unusual" for defendants facing similar charges to have no criminal records and scores of zero on risk assessments. However, even if defendant's background and circumstances are typical of a person charged in a case of this nature, the court never articulated why there is reason to believe *this particular defendant* would not comply with any conditions of release. The court's comments suggest it believed there are no conditions of release other than monetary bail that can mitigate the threat posed by *anyone* who is charged with the offenses at issue. That sentiment contradicts the spirit and purpose of the new laws governing pretrial detention.

¶ 20 Finally, the trial court inappropriately took a "monetary-bail-or-nothing" approach to defendant's detention hearing. The court said it would be willing to release defendant from custody subject to a "reasonable monetary bond." The court then ordered defendant's detention because (1) "the legislature, governor and Illinois Supreme Court" had taken away the court's discretion to impose monetary bail and (2) defendant met "the dangerousness standard by clear and convincing evidence." Thus, after criticizing the wisdom of the new detention laws, the court ultimately ordered defendant's detention because the court could not impose a monetary bail. In

short, the court did not even attempt to apply the proper statutory criteria for detention under the new law. The court's detention order amounted to an abuse of discretion, and we vacate that order.

¶ 21 As part of his request for relief, defendant asks us to "remand for pretrial release or the release with conditions." Given that the trial court did not conduct a proper detention analysis, we will not undertake that analysis in the first instance. The appellate court is not well suited to making fact-finding determinations. *People v. Martin*, 2023 IL App (4th) 230826, ¶ 25. In reviewing a detention order, we must rely "on the trial court conducting a full and fair evaluation of the evidence and showing its work." *Martin*, 2023 IL App (2d) 230826, ¶ 25.

¶ 22 Accordingly, we remand the cause with directions to hold a new detention hearing applying the proper statutory criteria. Specifically, the trial court shall make express findings, based on defendant's individual circumstances, as to whether any condition or combination of conditions allow for defendant's pretrial release. As judges, our role is not to choose the law but to faithfully apply it; that is, in fact, the sole object of our oath. Where a law is passed by the legislature and upheld by our supreme court as constitutional, the role of the judge is to apply the law as it is, not as the judge might wish it to be. On remand, it is the trial court's obligation to give this case the individualized attention it deserves.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we vacate the trial court's judgment and remand the cause for further proceedings consistent with this opinion.

¶ 25 Vacated and remanded.

Decision Under Review:	Appeal from the Circuit Court of Livingston County, No. 23-CF-361; the Hon. Jennifer H. Bauknecht, Judge, presiding.
Attorneys for Appellant:	James E. Chadd and Carolyn R. Klarquist, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Patrick Delfino and David J. Robinson, of State's Attorneys Appellate Prosecutor's Office, of Springfield, for the People.