MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Jairus D. Allen,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 25, 2022

Court of Appeals Case No. 21A-CR-1352

Appeal from the Daviess Superior Court

The Honorable Dean A. Sobecki, Judge

Trial Court Cause Nos. 14D01-2101-F1-59 14D01-2103-FC-290

Crone, Judge.

Case Summary

[1] Jairus D. Allen appeals the trial court's order effectively denying his motion to reduce his $500,000 cash-only bail. Concluding that the trial court's order constitutes an abuse of discretion, we reverse and remand.

Facts and Procedural History

[2] On January 15, 2021, the State charged Allen with two counts of level 1 felony child molesting, level 4 felony child molesting, three counts of level 4 felony sexual misconduct with a minor, level 4 felony incest, level 5 felony child exploitation, and level 6 felony performing sexual conduct in the presence of a minor in cause number 14D01-2101-F1-59 (Cause 59). After a hearing that same day, the trial court set bail at $500,000 cash. On February 23, 2021, Allen filed a motion for release on his own recognizance or for a reduction in bail. The trial court denied the motion for release but set a bail review hearing for March 31, 2021. Following the hearing, the trial court denied Allen's request to reduce bail.

[3] Meanwhile, on March 25, 2021, the State charged Allen with class C felony child molesting and class D felony child solicitation in cause number 14D01-2103-FC-290 (Cause 290). These charges were based upon crimes alleged to have occurred prior to the crimes charged in Cause 59. The trial court held a bail review hearing in Cause 59 and Cause 290 on April 22, 2021. The trial court took Allen's request for bail reduction under advisement and directed the Daviess County Community Corrections Program to investigate the possibility

of finding an independent company to provide electronic home monitoring services. On May 17, 2021, Allen filed a motion for a favorable ruling on a renewed request for bond reduction in Cause 59. On June 9, 2021, the trial court modified Allen's bond "to work release when it reopens" in both Cause 59 and Cause 290.[1] Appellant's App. Vol. 2 at 90. Allen filed a verified motion for emergency stay and release pending appeal. The trial court denied the motion. Allen then filed an emergency motion for stay with this Court. A majority of our motions panel denied the motion.[2] This appeal ensued.

Discussion and Decision

[4] Allen contends that the trial court erred in denying his request for bail reduction and is violating his constitutional rights in continuing to hold him on a $500,000 cash-only bail. The setting of the amount of bail lies within the discretion of the trial court. *Lopez v. State*, 985 N.E.2d 358, 360 (Ind. Ct. App. 2013). We therefore review a trial court's denial of a defendant's motion to reduce bail for an abuse of that discretion. *Sneed v. State*, 946 N.E.2d 1255, 1257 (Ind. Ct. App. 2011). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id*.

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[1] According to multiple verified documents filed by Allen's counsel, the work release component of community corrections was closed due to the COVID-19 pandemic.

[2] Senior Judge Darden dissented stating that he would remand "the case to the trial court for reconsideration of the bond." *Allen v. State*, Order Denying Motion to Stay, No. 21A-CR-1352 (Ind. Ct. App. Aug. 16, 2021) (Darden, S.J., dissenting).

[5] The Indiana Constitution prohibits excessive bail. Ind. Const. art. 1, § 16. "The object of bail is not to effect punishment in advance of conviction." *Samm v. State*, 893 N.E.2d 761, 766 (Ind. Ct. App. 2008). "Rather, it is to ensure the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect." *Id*. In determining whether bail is excessive, a court must consider: "(1) the object of bail itself, and (2) the financial ability of the accused to provide the required amount of bail." *Id*. Generally, bail is considered excessive if set an amount higher than reasonably calculated to ensure the accused presence in court or to assure the physical safety of another person or the community, if the court finds by clear and convincing evidence that the accused poses a risk to the physical safety of another person or the community. *Id.* at 767. The inability to procure the amount necessary to make bond does not in and of itself render the amount unreasonable. *Mott v. State*, 490 N.E.2d 1125, 1128 (Ind. Ct. App. 1986).

[6] Upon a showing of good cause, the State or the defendant may be granted an alteration or revocation of bail. Ind. Code § 35-33-8-5(a). Motions to reduce bail are authorized by Indiana Code Section 35-33-8-5(c), which provides in pertinent part as follows:

> When the defendant presents additional evidence of substantial mitigating factors, based on the factors [governing the initial setting of bail] set forth in [Indiana Code Section 35-33-8-4(b)], which reasonably suggests that the defendant recognizes the court's authority to bring the defendant to trial, the court may reduce bail. However, the court may not reduce bail if the court

> finds by clear and convincing evidence … that the defendant otherwise poses a risk to the physical safety of another person or the community.

The factors enumerated in Indiana Code Section 35-33-8-4(b) are:

> (1) the length and character of the defendant's residence in the community;
>
> (2) the defendant's employment status and history and the defendant's ability to give bail;
>
> (3) the defendant's family ties and relationships;
>
> (4) the defendant's character, reputation, habits, and mental condition;
>
> (5) the defendant's criminal or juvenile record, insofar as it demonstrates instability and a disdain for the court's authority to bring the defendant to trial;
>
> (6) the defendant's previous record in not responding to court appearances when required or with respect to flight to avoid criminal prosecution;
>
> (7) the nature and gravity of the offense and the potential penalty faced, insofar as these factors are relevant to the risk of nonappearance;
>
> (8) the source of funds or property to be used to post bail or to pay a premium, insofar as it affects the risk of nonappearance;

> (9) that the defendant is a foreign national who is unlawfully present in the United States under federal immigration law; and
>
> (10) any other factors, including any evidence of instability and a disdain for authority, which might indicate that the defendant might not recognize and adhere to the authority of the court to bring the defendant to trial.

A defendant need not show changed circumstances in order for the trial court to reduce bail. *Sneed*, 946 N.E.2d at 1258. Rather, the trial court considers the same statutory factors relevant to the initial setting of bail in exercising its discretion to grant or deny a motion to reduce bail. *Id*.

[7] Based upon the record before us, we have little difficulty determining that Allen's $500,000 cash bail with no surety option is excessive. In other words, there is no question that such amount is "higher than reasonably calculated to ensure [Allen's] presence in court" or to assure the "physical safety of another person or the community," even assuming that the trial court here had found (which it did not) by clear and convincing evidence that Allen poses a risk to the physical safety of another person or the community.[3] *Id.* at 1257. During both the initial hearing and subsequent hearings on Allen's motions to reduce bail, no evidence was presented on any of the statutory factors listed above to

[3] The State presented no evidence that Allen is a flight risk or poses a risk to the physical safety of another person or the community. Although the State waxes poetic in its brief about Allen's occupation as a truck driver being indicative that he is a flight risk, the State did not argue this point to the trial court, nor did the trial court appear to rely on this fact in its bail determination. Regarding danger to others, the record indicates that Allen consented to no-contact orders with both of his alleged victims and the State concedes that Daviess County Community Corrections performed an evidence-based risk assessment that indicated Allen is a low risk to reoffend. *See* Appellant's App. Vol. 2 at 80.

support such an excessive bond. It appears that the only statutory factor even arguably considered by the trial court in support of both the initial setting of bail and the denial of Allen's multiple requests to reduce bail was factor 7 regarding the nature and gravity of Allen's offenses. Still, we cannot agree with the trial court that the nature and gravity of these charges, as troubling as they may be, support bail in the amount of $500,000, much less with no surety option. Indeed, the total absence of evidence suggesting that Allen is a flight risk or a danger to others leads us to conclude that the trial court should have granted his request to alter both the amount and type of bail initially set by the court. By refusing to do so, the trial court, in effect "condemned [Allen] to jail pending trial without explicitly ordering [him] to be held or articulating any reason for doing so." *Winn v. State*, 973 N.E.2d 653, 656 (Ind. Ct. App. 2012) (quoting *Sneed*, 946 N.E.2d at 1260).

[8] Moreover, we agree with Allen that the trial court's final order modifying his bail to "work release when it reopens" is illusory at best because it provides zero relief for his current incarceration. As Allen notes, the trial court's order neither accomplished his conditional release from jail, nor did it provide him with a reduced reasonable bail (or surety option) meaning that the State is "holding [him] on constructively no bail pending his trial." Appellant's Br. at 15. The trial court's order constitutes an abuse of discretion. Again, we must emphasize that "we are dealing with a constitutional right here, and the goal is not to punish in advance of conviction but to assure the defendant's appearance in court." *Lopez*, 985 N.E.2d at 362. Accordingly, we reverse and remand with

instructions for the trial court to reduce and set Allen's bail based upon proper consideration of the relevant statutory factors.[4]

[9] Reversed and remanded.

Tavitas, J., concurs.

Bradford, C.J., dissents with opinion.

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[4] Bail should be established by the trial court and not by this Court on appeal. *Lopez*, 985 N.E.2d at 362; *see also* Ind. Criminal Rule 26(C) ("If the court determines that an arrestee is to be held subject to money bail, the court is authorized to determine the amount of such bail and whether such bail may be satisfied by surety bond and/or cash deposit."). Indiana Criminal Rule 26 further provides, in pertinent part:

> (A) If an arrestee does not present a substantial risk of flight or danger to self or others, the court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court except when:
>
> (1) The arrestee is charged with murder or treason.
>
> (2) The arrestee is on pre-trial release not related to the incident that is the basis for the present arrest.
>
> (3) The arrestee is on probation, parole or other community supervision.
>
> (B) In determining whether an arrestee presents a substantial risk of flight or danger to self or other persons or to the public, the court should utilize the results of an evidence-based risk assessment approved by the Indiana Office of Court Services, and such other information as the court finds relevant.

As already noted, the State concedes that Daviess County Community Corrections performed an evidence-based risk assessment that indicated Allen was a low risk to reoffend. *See* Appellant's App. Vol. 2 at 80.

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Bradford, Chief Judge, dissenting.

[10] Because I disagree with the majority's conclusion that the trial court erred in denying Allen's request for a bail reduction, I respectfully dissent.

[11] It is undisputed that the allegations against Allen are serious in nature as they include numerous acts of child molestation against at least two victims. Allen is the father of one of his two alleged victims, Victim 1. (Appellant's App. Vol. II p. 25) During a 2021 forensic interview, Victim 1 alleged that Allen performed oral, anal, and vaginal sex on her. (Appellant's App. Vol. II p. 25) Victim 1 also reported that Allen masturbated in front of her, forced her to touch his penis, and took nude pictures of her on his cellular phone. (Appellant's App. Vol. II p. 27)

[12] It is also alleged that Allen assaulted a second victim, Victim 2, who is now sixteen years old. (Appellant's App. Vol. II p. 129) During a forensic interview on January 21, 2021, Victim 2 alleged that when she was five years old, over the course of an evening, Allen directed her to look at his penis while she was taking a bath, pressed his penis against her back while in her bedroom, and forced her to touch his penis. (Appellant's App. Vol. II p. 137) The night after that incident, Allen entered Victim 2's bedroom and offered her a tootsie roll in exchange for oral sex. (Appellant's App. Vol. II p. 138) Victim 2 also reported that Allen forced her to watch a pornographic film depicting women performing oral sex, telling her that "she would be good at it," and told her stories about her how her mother would do it. (Appellant's App. Vol. II p. 138). Further, there are allegations that Allen was previously investigated for sexually abusing Victim 2 in 2009, 2010, and 2018. (Appellant's App. Vol. II pp. 129-30)

[13] On January 15, 2021, the State charged Allen with two counts of Level 1 felony child molesting, Level 4 felony child molesting, three counts of Level 4 felony sexual misconduct with a minor, Level 4 felony incest, Level 5 felony child exploitation, and Level 6 felony performing sexual conduct in the presence of a minor in cause number 14D01-2101-F1-59 ("Cause 59"). On March 25, 2021, the State charged Allen Class C felony child molesting and Class D felony child solicitation in cause number 13D01-2103-FC-290

("Cause 290") for crimes which occurred in the past.[5] Ultimately, the trial court set bail at $500,000.00 cash and, despite requests by Allen, refused to reduce it.

[14] Setting the amount of bail is within the sound discretion of the trial court and we will reverse only for an abuse of discretion. *Cole v. State*, 997 N.E.2d 1143, 1145 (Ind. Ct. App. 2013). We may affirm the trial court's ruling "if it is sustainable on any legal basis in the record, even though it was not the reason enunciated by the trial court." *Robey v. State*, 7 N.E.3d 371, 379 (Ind. Ct. App. 2014). Indiana Code section 35-33-8-4 provides a non-exhaustive list of facts that a trial court may consider in setting bail:

> (1) the length and character of the defendant's residence in the community;
>
> (2) the defendant's employment status and history and the defendant's ability to give bail;
>
> (3*) the defendant's family ties and relationships*;
>
> (4) the defendant's character, reputation, habits, and mental condition;
>
> (5) the defendant's criminal or juvenile record, insofar as it demonstrates instability and a disdain for the court's authority to bring the defendant to trial;

[5] The alleged crimes in Cause 290 occurred approximately eleven years ago and so, under the charging classifications in effect at the time the alleged acts were performed, the actions qualified as Class C and D felonies rather than as a Level 4 felony and Level 6 felony respectively.

> (6) the defendant's previous record in not responding to court appearances when required or with respect to flight to avoid criminal prosecution;
>
> (7) *the nature and gravity of the offense and the potential penalty faced*, insofar as these factors are relevant to the risk of nonappearance;
>
> (8) the source of funds or property to be used to post bail or to pay a premium, insofar as it affects the risk of nonappearance;
>
> (9) that the defendant is a foreign national who is unlawfully present in the United States under federal immigration law; and
>
> (10) *any other factors*, including any evidence of instability and a disdain for authority, which might indicate that the defendant might not recognize and adhere to the authority of the court to bring the defendant to trial.

(Emphasis added).

[15] In view of the serious nature of the allegations against Allen and other relevant circumstances, the trial court did not abuse its discretion in setting his bail. It is alleged that Allen solicited and forced two minor victims, one of which was his daughter, to engage in sexual conduct in 2009, 2010, and 2021. These crimes included, among many other things, oral, anal, and vaginal sex on a minor victim and solicitation. Allen was also employed as a long-haul trucker and faced a sentence potentially exceeding 100 years, which the State believed made him a "flight risk." Tr. p. 22. "Moreover, a court '*may not* reduce bail if the court finds by clear and convincing evidence ... that the defendant otherwise poses a risk to the physical safety of another person or the community.' I.C. § 35-33-8-5(c)." *Johnson v. State*, 114 N.E.3d 908, 911 (Ind. Ct. App. 2018). Although there is some evidence in the record that Allen was not a high risk to

reoffend under the evidence-based risk assessment tool, the trial court was within the law to consider "other information as the court finds relevant," when determining if Allen was a danger to others. Ind. R. Crim. Proc. 26. The allegations, that Allen molested multiple victims over more than a decade, are more than enough for the trial court to conclude that Allen was capable of repeating his crime. Further, it appears that the trial court did in fact consider Allen a threat, describing the charges as "severe," tr. p. 23, and stating that, rather than lowering the bail to $400,000.00, the court was "interested more in what options I may have to make sure that everybody's protected in this matter[.]" Tr. p. 25. The nature of Allen's crimes is extremely severe, there were several factors which contributed to his risk for flight, and the trial court considered him a threat to the community. For those reasons, I must dissent.