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IN THE
COURT OF APPEALS OF INDIANA

Phillip Beachey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 28, 2021

Court of Appeals Case No.
20A-CR-2121

Appeal from the Elkhart Superior
Court

The Honorable Teresa A. Cataldo,
Judge

Trial Court Cause No.
20D03-2010-F1-14

May, Judge.

- [1] Phillip Beachey appeals the trial court's imposition of bond. He argues the trial court abused its discretion by setting an excessive bond in violation of the Indiana Constitution and by denying his motion to reduce that bond. Because the trial court abused that discretion by failing to utilize the Indiana pretrial risk

assessment system, as required by Indiana Code section 35-33-8-3.8 and Indiana Criminal Rule 26, we need not reach Beachey’s constitutional question. Instead, we vacate and remand.

Facts and Procedural History

[2] On October 6, 2020, the State charged Beachey with three counts of Level 1 felony child molesting,¹ three counts of Level 4 felony child molesting,² three counts of Level 4 felony sexual misconduct with a minor,³ and one count of Level 4 felony attempted sexual misconduct with a minor.⁴ The trial court issued a warrant for Beachey’s arrest and, using the local Elkhart County bond schedule, automatically set a surety bond of \$520,000.00 without utilizing an evidence-based risk assessment. Beachey requested a bond reduction at his initial hearing on October 13, 2020, and the trial court ordered a bond report, which was filed on October 26, 2020. The Bond Report prepared by Probation Officer Jessica Ahlersmeyer revealed:

Phillip James Beachey stated he was born [birthday deleted], in Elkhart, Indiana. He reported residing with his wife and son, at

¹ Ind. Code § 35-42-4-3(a)(1).

² Ind. Code § 35-42-4-3(b).

³ Ind. Code § 35-42-4-9(a)(1).

⁴ Ind. Code § 35-41-5-1.

[address deleted], Middlebury, Indiana, since 2004. Mr. Beachey reported he will return to that address when released.

Mr. Beachey identified his parents as Larry and Paula Beachey. He stated his parents are married and reside in Goshen. He reported he has one full brother and one half brother, who reside in California. He reported he has contact with all of his family.

Mr. Beachey stated he has been married to Carrie (Eckhart) Beachey for 21 years. He reported they have two children: [J.B.] (age 15) and [N.B.] (age 16). He stated [J.B.] is his biological child and [N.B.] was adopted, from Mrs. Beachey's sister, when she was three years old. [N.B.] is the alleged victim in the Instant Offenses. [N.B.] is residing with her maternal grandmother, Wendy Freeland, who was awarded guardianship on May 1, 2020, under Case No. 20D01-2004-GU-000064.

Mr. Beachey reported graduating in 1995 from Elkhart Memorial High School. He reported attending Indiana State University for two years. He stated he attended Indiana University-South Bend for one semester, before transferring to Bethel College, where he received an associate degree in nursing in 2003. Mr. Beachey had a certified nurse aide license from 2002-2004. He had a home health aide license which expired in 2010, then was terminated in 2012 for having been expired too long. He had a registered nurse license from 2003-2015, which was suspended [information deleted].

Mr. Beachey reported self-employment with a hemp business that was selling CBD products online since 2019. He stated he is the owner of Cardinal Labs LLC, which does product testing. The company was created on April 5, 2019, and the address listed is in Fort Wayne. The business is run under Axis Mundi LLC, which is owned only by his wife. He reported prior employment with Made by Hemp in Elkhart for six months, Lowe's for six

months in 2018, and Hedge House Furniture in LaGrange from 2015-2018. He stated he also did night care work for his boss' mother in Goshen, while he was working for Hedge House. Mr. Beachey reported he and his wife are receiving an income from the hemp business. He reported his assets include their residence worth approximately \$200,000.00, a 2010 Subaru Tribeca worth \$8,000.00, a 2007 Toyota Yaris worth \$800.00-\$1,000.00, and a van worth \$250.00 in its current status or \$500.00 if they can get it to run. He stated he also has an office space, but the status of that space is unknown. He stated he has a \$650.00 loan through INOVA Federal Credit Union, which they plan to pay off if [they] receive a second stimulus check due to the COVID-19 outbreak. He stated he also has a \$16,000.00 personal loan with his parents, who are also helping with his legal fees. He reported they have suspended the loan payments until Mrs. Beachey can find employment.

Mr. Beachey reported he has been diagnosed with acute liver failure from a blood clot in his liver, mild pancreatitis, and esophageal varices. He stated he is prescribed Protonix and Coumadin and has to follow a strict diet.

Mr. Beachey reported he began regularly consuming alcohol in college, at the age of 18 or 19. He reported occasional use between the ages of 20-25. [Information deleted]. He stated he last consumed alcohol on October 27, 2019, when he had one drink. Mr. Beachey reported he tried some illegal drugs in college, which made him sick. He stated he began smoking hemp when it became legal and stated he has been using CBD products, with trace amounts of THC, for two years. Regarding treatment, Mr. Beachey reported attending five sessions with a male counselor in Goshen in 2011 and stated he completed treatment through Oaklawn in 2012.

A bond reduction is not recommended.

(Appellant’s App. Vol. II at 16-17.) The trial court denied Beachey’s request for bond modification during the bond review hearing on November 5, 2020, after noting that Beachey had two brothers living in California and that the level and number of his felonies warranted the original bond amount.

Discussion and Decision

[3] The amount and manner of executing bail is a matter within the sound discretion of the trial court and is reviewed only for an abuse of that discretion. *Perry v. State*, 541 N.E.2d 913, 919 (Ind. 1989). 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. *Sneed v. State*, 946 N.E.2d 1255, 1260 (Ind. Ct. App. 2011).

[4] Beachey argues the trial court abused its discretion by not complying with Indiana Code section 35-33-8-3.8,⁵ which requires all Indiana trial courts to

⁵ Indiana Code section 35-33-8-3.8 (2017):

(a) A court shall consider the results of the Indiana pretrial risk assessment system (if available) before setting or modifying bail for an arrestee.

(b) If the court finds, based on the results of the Indiana pretrial risk assessment system (if available) and other relevant factors, that an arrestee does not present a substantial risk of flight or danger to the arrestee or others, the court shall consider releasing the arrestee without money bail or surety, subject to restrictions and conditions as determined by the court, unless one (1) or more of the following apply:

(1) The arrestee is charged with murder or treason.

(2) The arrestee is on pretrial 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.

consider and incorporate the results of the Indiana pretrial risk assessment system⁶ prior to setting or modifying bail for an arrestee. Specifically, the statute directs courts to consider the results of a pretrial risk assessment system in analyzing whether an arrestee poses a substantial flight risk, and if not, requires the arrestee's release without bond. The pretrial risk assessment system is designed to assess the risk of non-appearance during the pretrial period. *See* fn. 6.

[5] Beachey also argues the court failed to meet the requirements of Indiana Criminal Rule 26. Effective January 1, 2020, Indiana Criminal Rule 26 outlines the following regarding pretrial release:

(A) If an arrestee does not present a substantial risk of flight or danger to themselves 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.

The court is not required to administer an assessment before releasing an arrestee if administering the assessment will delay the arrestee's release.

⁶ The Indiana Risk Assessment System (IRAS) consists of six separate instruments to be used at specific points in the criminal justice process to identify an offender's risk to reoffend and criminogenic needs, and to develop individualized case plans. Specifically, the pre-trial tool is used to assess an offender's risk of nonappearance and risk to reoffend while on pre-trial supervision.

<https://www.in.gov/courts/iocs/files/prob-risk-iras-2012.pdf> (Aug. 18, 2021), *archived at* <https://perma.cc/6AQ8-8MKT> (Policy for Indiana Risk Assessment System).

(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. The court is not required to administer an assessment prior to releasing an arrestee if administering the assessment will delay the arrestee's release.

[6] The Indiana pretrial risk assessment system is defined pursuant to Indiana Code section 35-33-8-0.5:

(a) The following definitions apply throughout this chapter:

(1) "Evidence based risk assessment" means an assessment:

(A) that identifies factors relevant to determine whether an arrestee is likely to:

(i) commit a new criminal offense; or

(ii) fail to appear;

if released on bail or pretrial supervision; and

(B) that is based on empirical data derived through validated criminal justice scientific research.

(2) “Indiana pretrial risk assessment system” means the statewide evidence based risk assessment system described in subsection (b).

(b) Before January 1, 2020, the supreme court should adopt rules to establish a statewide evidence based risk assessment system to assist courts in selecting the appropriate level of bail or other pretrial supervision for arrestees eligible for pretrial release. The system must consist of:

- (1) an evidence based risk assessment tool; and
- (2) other rules as adopted by the supreme court.

(c) The Indiana pretrial risk assessment system shall be designed to assist the courts in assessing an arrestee’s likelihood of:

- (1) committing a new criminal offense; or
- (2) failing to appear.

[7] The State bases its analysis primarily on Indiana Code section 35-33-8-3.8, whereas Beachey emphasizes Indiana Criminal Rule 26. Specifically, the aforementioned code section states that “[a] court shall consider the results of the Indiana pretrial risk assessment system **(if available)** before setting or modifying bail for an arrestee.” Ind. Code § 35-33-8-3.8 (2017) (emphasis added). Criminal Rule 26 does not include the words “if available.”

[8] The State argues the trial court was not in fact required to administer a pre-trial risk assessment due to lack of availability, yet fails to acknowledge that the

reason “the results from a pretrial risk assessment were not available to the trial court” (Br. of Appellee at 14) was because the trial court failed to order an assessment in the first place. Instead, the State asserts that the trial court is permitted to consider “other relevant factors” to determine bail amount as provided in Indiana Code section 35-33-8-3.8. However, both the statute and the Rule include the word “and” rather than “or,” with respect to the evidence-based risk assessment. *See* Ind. Crim. R. 26 (“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.”) (emphasis added). The State may not choose one over the other and completely ignore an integral and significant directive. *See In re BJ*, 879 N.E.2d 7, 20 (Ind. Ct. App. 2008) (the words “and” and “or” as used in statutes are not interchangeable, being strictly of a conjunctive and disjunctive nature respectively), *trans. denied*.

[9] Furthermore, to the extent the statute and criminal rule are different, “it is a fundamental rule of Indiana law that when a procedural statute conflicts with a procedural rule adopted by the supreme court, the latter shall take precedence.” *Key v. State*, 48 N.E.3d 333, 339 (Ind. Ct. App. 2015). *See also* Ind. Code § 34-8-1-3 (Indicating our Indiana Supreme Court has the authority to “adopt, amend, and rescind rules of court that govern and control practice and procedure in all the courts of Indiana . . . and thereafter all laws in conflict with the supreme court’s rules have no further force or effect.”)

[10] The bond report ordered by the trial court included only a basic inventory of Beachey’s background information. It did not provide an analysis or an

assessment of Beachey’s risk of flight or any indication whether he posed a danger to the community. Our Indiana Supreme Court explicitly established that, beginning on January 1, 2020, “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.” Crim. R. 26(B). Thus, we reject the State’s assertion that the trial court can avoid the requirement of Criminal Rule 26 by simply not ordering preparation of an evidence-based risk assessment.

[11] As a second argument, the State emphasizes the very last sentence of the Rule, which provides that “the court is not required to administer an assessment prior to releasing an arrestee if administering the assessment will delay the arrestee’s release.” Crim. R. 26. Based on that language, the State concludes “Defendant’s modification hearing would have had to be potentially postponed to await the report.” (Br. of Appellee at 14.) The State’s argument altogether misconstrues the final provision of Criminal Rule 26. Criminal Rule 26 presumes to function as a statutory safeguard against needlessly restraining an arrestee, and thus allows a trial court to forgo a risk assessment in favor of release. Indeed, the Rule explicitly states that an arrestee must be released without money bail or surety if no risk of non-appearance is evidenced. In no logical sense does Criminal Rule 26 explicitly or implicitly provide a loophole allowing a trial court, or the State, to ignore the requirements imposed by the Indiana Supreme Court.

[12] Because both of the State's arguments fail, we hold the trial court abused its discretion when it did not order and utilize the results of a pre-trial risk assessment evaluation as required by Criminal Rule 26.

Conclusion

[13] The trial court abused its discretion in denying Beachey's motion to reduce bail because it failed to order and consider the results of a pre-trial risk assessment report as mandated by Indiana Criminal Rule 26. In light of the trial court's failure to adhere to the pre-risk assessment requirement, we need not address Beachey's constitutional argument. We therefore vacate the trial court's order denying modification of Beachey's bond and remand for proceedings consistent with this opinion.

[14] Vacated and remanded.

Bailey, J., and Robb, J., concur.