COURT OF APPEALS DECISION DATED AND RELEASED

November 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1370-CR

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROY D. TOWNSEND,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL B. TORPHY, JR., Judge. *Affirmed*.

DEININGER, J.[1] Roy Townsend appeals from a judgment convicting him of two counts of misdemeanor bail jumping.[2] He claims that a condition of release imposed in each of two prior cases, the violation of which

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

[2] Section 946.49(1)(a), STATS., makes it a misdemeanor for one who, "having been released from custody under ch. 969 [on a misdemeanor charge], intentionally fails to comply with the terms of his or her bond."

resulted in the instant convictions, was unreasonable. We disagree and affirm the convictions.

BACKGROUND

On July 13, 1995, Townsend made an initial appearance on a charge of misdemeanor battery. He was released on a $300 cash bond with a condition that he "not be at or around State Street." On July 24, 1995, Townsend made an initial appearance on a new complaint charging one count of disorderly conduct and two counts of bail jumping. On the new case, he was released on a signature bond with the same condition that he "not be at or around State Street."

On the evening of July 31, 1995, while the two bonds were still in effect, a Madison police officer arrested Townsend while he was walking along State Street near the Civic Center. He was charged with three counts of bail jumping for violating the condition that, while released, he not be at or around State Street. Following a bench trial, one count was dismissed and Townsend was convicted on the remaining two counts.[3]

Prior to sentencing, Townsend renewed a motion to dismiss the bail jumping charges on the grounds that the release condition he was found to have violated was unreasonable, and thus impermissible under the Wisconsin Constitution and statutes. The trial court denied the motion, entered judgment and sentenced Townsend to two concurrent four-month terms of incarceration.

ANALYSIS

Townsend concedes that his appeal can succeed only if we conclude that the condition of release that he not be at or around State Street was not reasonable. We conclude that the condition was reasonable. We

[3] The dismissed count was based on a similar condition of release imposed in an earlier case on July 3, 1995.

therefore need not address whether Townsend waived his right to challenge the condition or whether any waiver was impermissibly exchanged for his release from jail.

"Persons released on bail are subject to a number of conditions that are generally left to the trial court's discretion." ***State v. Braun***, 152 Wis.2d 500, 511, 449 N.W.2d 851, 856 (Ct. App. 1989). We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987).

A court's discretion in setting release conditions must be guided by the Wisconsin Constitution's directive that "[a]ll persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses." WIS. CONST. art. I, § 8, cl. (2). This constitutional requirement is codified in § 969.01(1), STATS. Section 969.01(4), STATS., lists a number of "[p]roper considerations" for the court when setting bail and imposing release conditions, including:

> the nature, number and gravity of the offenses and the potential penalty the defendant faces, whether the alleged acts were violent in nature, the defendant's prior criminal record, if any, the character, health, residence and reputation of the defendant, ... whether the defendant is already on bail or subject to other release conditions in other pending cases, ... whether the defendant has in the past forfeited bail or violated a condition of release ... and the policy against unnecessary detention of the defendant's pending trial.

Finally, § 969.02(3), STATS., provides a number of alternatives that may be ordered in lieu of or in addition to cash bail on misdemeanor charges, including the placement of "restrictions on the travel, association or place of abode of the defendant during the period of release."

Townsend argues that the no-State-Street condition is unreasonable because the two court commissioners who imposed it did not state on the record findings adequate to show its necessity in assuring his appearance, protecting community members from serious bodily harm, or preventing the intimidation of victims. We disagree. Bail hearings, if uncontested, are typically not lengthy proceedings. Those afforded Townsend on July 13 and 24, 1995, were no exception. On both occasions, neither he nor his counsel voiced objection to recommendations for the no-State-Street condition. Thus, the court commissioners had no reason to hear evidence or argument, or to make explicit findings on the release condition.

We may still review the trial court's ruling, however. "Where the trial court fails to adequately explain the reasons for its [discretionary] decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's ... ruling." ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

On July 13, 1995, Townsend was before a court commissioner who ten days earlier had released him on a signature bond containing the no-State-Street condition. He was charged with battery, as a repeater. The previous bond was still in effect. The commissioner was thus aware of Townsend's bail status, his history of recent offenses and the nature of the instant offense. The commissioner was also aware that Townsend was an alcoholic and that many of his violent and disorderly acts had occurred on or near State Street. The commissioner, concluding that "[w]hen he's drinking isn't any way he's going to make his court dates or follow any conditions of his release," set $300 cash bail in addition to the no-State-Street condition in an effort to assure Townsend's appearance in court. It was not unreasonable for the commissioner to conclude on the record before him that unless Townsend was restrained from returning to the scene of his past offenses, both his future court appearances and the general public would be in jeopardy.

Similarly, on July 24, 1995, Townsend appeared before a different court commissioner on what was then his third initial appearance on new criminal charges in three weeks. The new charges were disorderly conduct and two counts of bail jumping, as a repeater. This commissioner was thus also aware of the nature and frequency of Townsend's criminal behavior and of his propensity to engage in it on or near State Street. The commissioner expressed his view that the condition was the only reasonable alternative to cash bail in

order to assure Townsend's future appearance. Again, we conclude that the condition was reasonable in light of all of the circumstances known to the commissioner.

Townsend argues that ***State v. Braun***, 152 Wis.2d 500, 511, 449 N.W.2d 851, 856 (Ct. App. 1989), requires us to hold this condition unreasonable.[4] We disagree. We held in ***Braun*** only that the imposition of a content-based restriction on a defendant's right of free speech must pass the "most exacting scrutiny" as to its necessity in serving a compelling state interest. ***Id.*** at 513-15, 449 N.W.2d at 857. We concluded that the condition there did not pass such scrutiny.

Here, Townsend has not referred us to any cases holding that geographic release restrictions not implicating free speech must be subject to the same "most exacting scrutiny," or that geographic release conditions must be drawn with the same "narrow specificity" required for restricting speech as a condition of bond. *See* ***id.***, 152 Wis.2d at 513, 449 N.W.2d at 856. While the no-State-Street condition infringed upon Townsend's right to travel, his recent and repeated conduct had demonstrated that his presence on or near State Street inevitably led to criminal behavior. We cannot conclude the condition was unreasonable under these circumstances.

Townsend also argues that the no-State-Street condition was unreasonable per se because it denied him "access to an area twenty square city-blocks in size." We conclude that the restriction is not geographically unreasonable in a city that encompasses many hundreds, if not thousands, of square blocks.[5]

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[4] Townsend also cites ***Whitty v. State***, 34 Wis.2d 278, 149 N.W.2d 557 (1967) (defendant has right to reasonable cash bail not conditioned upon waiver of preliminary hearing), *cert. denied*, 390 U.S. 959 (1968) and ***State v. Braun***, 100 Wis.2d 77, 301 N.W.2d 180 (1981) (defendant has right to release on bail only prior to sentencing) in support of his argument that the no-State-Street condition was unreasonable. As the State points out, neither case is relevant on these facts.

[5] The no-State-Street condition upon which the dismissed count was based was modified on August 16, 1995, to allow Townsend to travel on State Street by bus, and to be at a certain church during the noon meal hour. Townsend was not on a bus, nor taking a meal at the church, when he was arrested at 9:30 p.m. on July 31, 1995. Townsend does

Because the record reflects that it was reasonable to impose a release condition on Townsend on July 13 and 24, 1995, that he not be at or around State Street, and because the condition was not unreasonable per se, we affirm his convictions for bail jumping.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

(..continued)
not claim, therefore, that enforcement of the condition at that time was an unreasonable interference with legitimate daily activities.