THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0637

State of New Hampshire

v.

Christina A. Hill

Appeal Pursuant to Rule 7 from Judgment
of the Cheshire County Superior Court

BRIEF FOR THE DEFENDANT

David M. Rothstein
Deputy Director
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(Fifteen-minute oral argument)

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QUESTION PRESENTED

RSA 597:2, IV allows for preventive detention without bail if the defendant is dangerous.

The question presented is whether a court may set cash bail in an amount it knows will detain the defendant, where the court found that the defendant was not dangerous.

Issue preserved by argument and ruling. T 10-19; App.*

* Citations to the record are as follows:
"App." refers to the appendix to this brief;
"T" refers to the transcript of the bail hearing.

STATEMENT OF THE CASE AND FACTS

On November 9, 2018, the court (Ruoff, J.) arraigned Christina A. Hill in Cheshire County Superior Court on possession of heroin, possession of crack cocaine, and sale of crack cocaine. T 3. The State argued Hill was a danger to the community and should be preventively detained without bail. T 5; see RSA 597:2, IV(a) ("If a person is charged with any criminal offense . . . the court may order preventive detention without bail, or, in the alternative, may order restrictive conditions including but not limited to electronic monitoring and supervision, only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public."). The State cited Hill's record, a recent arrest in Massachusetts, and an open deferred prison sentence. T 6-10.

Defense counsel argued that Hill should be released on her own recognizance with conditions. T 10. He cited her ties to the community, potential for employment, willingness to participate in treatment, and the fact that the charge underlying the Massachusetts arrest had been resolved. T 11-14.

The court rejected the State's argument that Hill was dangerous. T 17. It found that she posed a "risk of flight," had not been complying with conditions of bail in another case and had a deferred sentence that may be imposed. T 17

The court set bail at twenty-five thousand dollars cash, and said, "[i]f by some chance you do come up with the 25,000 dollars, which I doubt, there's going to have to be a source of funds hearing." T 17.[1]

Defense counsel objected, arguing that under RSA 597:2, III(b)(1) (effective September 1, 2018) ("the new bail statute"), the court cannot set cash bail in an amount that will result in the defendant's detention due to her inability to post bail. T 18. Counsel stated Hill could post three-hundred dollars and asked the court to set bail in that amount. T 18.

The court replied:

> I know there's some disagreement about the language of the new bail statute, but I think that that provision requiring me to set bail in a cash amount that she can post is unless I find that the condition of that bail amount won't satisfy her appearance or her ability to comply with conditions that I set.
>
> So I think that the law allows me to set an amount regardless of her ability to post it if I make sufficient findings by preponderance of the evidence that just a bail that she can post alone is not sufficient. So that's my interpretation of the bail statute.

[1] The court's written order set bail at ten-thousand dollars. App. at A3-A4. Based on defense counsel's representations about Ms. Hill's financial status, there is no reason to believe she could have posted bail in that amount.

> At some point, I may be wrong. But I think this is one of those situations where I don't think there's clear and convincing evidence that she's dangerous. I mean, habitual offenders generally aren't. I know she has a DWI from more than a decade ago, but this is one where if I let her out, I just think it will continue.
>
> And that worked its way into the statute in my ability and the unique circumstance to find, okay, there's enough here for me to warrant setting a bail, an amount that she may not be able to post. Or I can make a finding that that alone might keep her incarcerated. That's my read of the statute.

T 18-19.

Hill filed a notice of appeal. The Court directed the parties to file memoranda. App. 5. Shortly after undersigned counsel filed Hill's memorandum, she entered a negotiated plea. The parties asked the Court to address the bail issue though Hill is no longer being detained on that order. The Court agreed and ordered briefing and oral argument. App. 6-7.

SUMMARY OF THE ARGUMENT

The lower court erred when it set bail in an amount it knew would result in Hill's detention pending trial. Under the new bail statute, the court may preventively detain a defendant only if she is a danger. In all other circumstances, including where the defendant's release poses a flight risk, the court must set bail in an amount that the defendant can post. This conclusion is supported by the new bail statute's language, structure, and legislative history.

Though Hill is no longer detained under the court's order, judges, bail commissioners, prosecutors, and defense counsel need guidance on the intended operation of the new bail statute. This Court should hold that a judge may not set a bail in an amount the defendant cannot post if her release poses a risk of flight, but she is not a danger.

I. UNDER THE NEW BAIL STATUTE, THE COURT MAY NOT SET CASH BAIL IN AN AMOUNT IT KNOWS WILL DETAIN THE DEFENDANT UNLESS IT FINDS THE DEFENDANT IS DANGEROUS.

The lower court found that: (1) the defendant is not dangerous; (2) she posed a flight risk if released; and (3) it was necessary, and permissible under the new bail statute, to set cash bail in an amount she could not post. Under the former bail statute, this commonly occurred. One of the lead purposes of the new statute was to change this practice.

The issue is whether the court can set cash bail in an amount higher than the defendant can post if the defendant is not dangerous. The statute's language, structure, and intent support the conclusion that it cannot.

This brief addresses the issue in three sections. First, the brief establishes that the lower court's order preventively detained Hill. Second, the brief argues that the new bail statute allows preventive detention only if the defendant is dangerous – which Hill is not. Third, the brief argues that if the defendant is not dangerous, but poses a risk of flight, the court may set cash bail in accord with RSA 597:2, III(b). In this case, however, the court lacked authority to detain Hill by setting bail in an amount she could not post.

A. An order setting bail in an amount the defendant cannot post results in her indefinite detention.

Because the court did not find Hill dangerous, it did not order "preventive detention without bail." RSA 597:2, IV(a). However, the court set cash bail, T 17, in an amount far exceeding the three-hundred dollars Hill could post. T 18-19. Neither the court nor the State challenged counsel's characterization of Hill's financial circumstances.

Had the court set no bail, Hill could not have secured her pretrial release. By setting bail at ten-thousand dollars cash, the court achieved the same result. A defendant who can only post three-hundred dollars will not be able to post more than thirty times that amount in the few months before her trial. See, e.g., United States v. Salerno, 481 U.S. 739, 760 (1987) (Marshall, J., dissenting) ("If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether."); In re Christie, 112 Cal. Rptr. 2d 495, 498 (Cal. App. 2001) (court may neither deny bail nor set it in a sum that is the functional equivalent of no bail, where the statute does not allow for preventive detention); Alvarez v. Crowder, 645 So. 2d 63, 64 (Fla. Dist. Ct. App. 1994) ("Depending upon the financial circumstances of the defendant, excessive bail is tantamount to no bail."). The court's order was tantamount to a no-bail hold.

B. The new bail statute allows preventive detention without bail only if the defendant is dangerous.

To determine whether that order was lawful under the new bail statute, this Court must consider the statute's language, structure, and policy. "When interpreting a statute, we first look to the language of the statute itself, and if possible, construe that language according to its plain and ordinary meaning." State v. Labrie, __ N.H. __ (decided November 6, 2018). "We interpret statutory provisions in the context of the overall statutory scheme, . . ., and construe all parts of a statute together to effectuate its overall purpose and avoid absurd or unjust results." State v. Keenan, __ N.H. __ (decided December 7, 2018).

Preventive detention is addressed in RSA 597:2, III(a) and IV. Under RSA 597:2, III(a), "[a] person who the court determines to be a danger to the safety of that person or the public shall be governed by the provisions of paragraph IV," which states, "[i]f a person is charged with any criminal offense . . . the court may order preventive detention without bail. . . ." The court could have detained Hill had it found her dangerous, but it did not. The court's bail order was thus not authorized by the statute's plain language.

Had the legislature intended to permit the court to preventively detain non-dangerous defendants, it would have made that intention clear. RSA 597:2, III(a) states that the

defendant shall be released on bail "unless the court determines by a preponderance of the evidence that such release will not reasonably assure the appearance of the person as required." However, the statute does not provide that if the circumstance exists, the defendant can be detained in lieu of a bail she cannot post. Nor does it state that preventive detention is possible where the defendant is either dangerous or a flight risk. Cf. 18 U.S.C. § 3142(e) (discussed infra, at Section C). If the legislature chose not to make detention possible absent a finding of dangerousness, the lower court did not have that option. See State v. Proctor, __ N.H. __ (decided February 8, 2018) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

C. If the defendant is a flight risk, the court may set cash bail in accord with RSA 597:2, III(b).

The court may set cash bail under the new statute if it finds the defendant is a flight risk. It may, however, do so only if that bail is tailored to the defendant's financial circumstances. The court here disagreed that it was required to set bail in an amount Hill would be able to post.

Two considerations support the conclusion that the court must set bail in an amount consistent with a flight-risk defendant's financial ability to post it. First, the statute's

structure dictates that result. RSA 597:2, III(a) covers release on personal recognizance bail, an unsecured bond, and cash or surety bail, including where the defendant is a flight risk. To set cash or surety bail, the court must follow RSA 597:2, III(b)(1)-(3), which relate to the defendant's subjective financial circumstances. If the defendant is a danger, however, the court follows "the provisions of paragraph IV. . . ." Only where the defendant is a danger can the court set bail without considering the defendant's financial circumstances. The court may enter a no-bail order whether the dangerous person is a pauper or a millionaire.

Second, the statute's language dictates that cash or surety bail be tailored to the defendant's financial circumstances. "When construing a statute, [the Court] must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words." Winnacunnet Coop. Sch. Dist. v. Town of Seabrook, 148 N.H. 519, 525-26 (2002). Under paragraph III(b)(1), the court "[s]hall not impose a financial condition that will result in the pretrial detention of a person solely as a result of that financial condition." That provision applies to the setting of cash or surety bail, including where there is a concern of risk of flight. It does not apply is where the defendant is a danger.

If the statute is ambiguous with respect to whether the court can detain non-dangerous defendants, the Court should

consider legislative intent. "[The Court] will consider a statutory provision to be ambiguous, and, therefore, consult its legislative history, only when there is more than one *reasonable* interpretation of the provision." State v. Surrell, 171 N.H. 82, 87 (2018) (emphasis in original). Under the former bail statute, the court could set a bail on a flight-risk defendant that would detain her until her trial. The new statute addressed this practice. Its sponsor, Senator Dan Feltes, testified that bail reform was necessary to address the problem of non-dangerous, low-income defendants being held pending trial because they could not afford to post cash or surety bail. Comments of Senator Dan Feltes on SB 556, the "Criminal Justice Reform and Economic Fairness Act of 2018" (available at http://www.gencourt.state.nh.us/bill_Status/BillStatus_Media.aspx?lsr=2977&sy=2018&sortoption=&txtsessionyear=2018&txtbillnumber=sb556) (testimony on bail statute ending approximately 4:26 into the hearing). As discussed above, that intent is manifest in the statute's language and structure: if the court sets cash or surety bail, it cannot disregard the defendant's financial circumstances unless she is a danger.

Other testimony supported the conclusion that only dangerous defendants can be preventively detained. Albert Scherr, a law professor, former public defender, and board

member of the New Hampshire branch of the American Civil Liberties Union, headed a study of bail practices in New Hampshire which was an impetus for the new statute. Comments of Professor Scherr on SB 556 (available at the link included above) (commencing approximately 17:52 into the public hearing). Professor Scherr testified that the intent of the new statute was to treat separately three categories of prospective defendants. In the first category, the judge has no concern about flight or danger, and she sets personal recognizance bail. In the second, the judge has a concern about the defendant appearing for court, potentially because of the nature of the crime, or because she had previously failed to appear in another case. There, the judge may set cash bail, but that bail must be tailored to that defendant's financial circumstances as set forth in RSA 597:2, III(b). Only if defendants fall into the third category of dangerous defendants may the judge exercise the option of preventive detention, which means the defendant may be held irrespective of her wealth or poverty. In this manner, Professor Scherr stated, the statute makes flight risk defendants – but not dangerous defendants – eligible for a bail they can afford to post.

In interpreting state statutes, this Court will also look to similar statutes in other jurisdictions. See Censabella v. Hillsborough County, __ N.H. __ (decided October 17, 2018)

(Court looks to federal interpretations of FOIA); State v. Carpentino, 166 N.H. 9. 118 (2014) (Court looks to savings clause statutes from other jurisdictions); Estate of Gordon-Couture v. Brown, 152 N.H. 265, 275 (2005) (Court relies on other similar statutes and model act in construing New Hampshire statute). Senator Feltes stated that the new bail statute is modeled in part after the federal statute. See Senator Feltes's Comments, supra. In that statute, 18 U.S.C. § 3142(e) governs pretrial detention. It mandates the detention of defendants whose release poses a flight risk and danger. 18 U.S.C. § 3142(e)(1) ("If . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, the judicial officer shall enter an order of detention of the person before trial.") (Emphasis added).

The legislature could have adopted this language. Instead, the new statute allows preventive detention for only those defendants who are dangerous. Given the legislature's decision to reject the language employed in the federal bail statute, this Court cannot hold that a lower court may detain a flight-risk defendant in lieu of a cash bail she cannot post. "Of course, if the legislature disagrees with [the Court's] statutory interpretation, it is free, subject to constitutional

limitations, to amend [the new bail statute] as it sees fit." Proctor, __ N.H. __.

If the defendant is a flight risk, the court does not have to release her on personal recognizance bail or an unsecured bond. The court can set cash or surety bail in accord with RSA 597:2, III(b). Here, the application of that provision would have led the court to conclude that Hill could have posted three-hundred dollars. Had she done so, she would have been released. Had she failed to abide by the conditions of bail, the State could have filed a motion alleging a violation, which could have resulted in the revocation of bail. RSA 597:7-a, II-III. She also could have been charged with contempt or bail jumping. RSA 597:7-a, II, IV; RSA 642:8. If Hill failed to appear for court, she or her guarantor may have forfeited the three-hundred dollars that was posted. RSA 597:31.[2] Given Hill's modest means, that is a significant consequence, and thus, a significant inducement to appear.

Under these circumstances, the bail statute addresses the economic inequity associated with cash or surety bail, while allowing the court to set cash bail in appropriate cases and providing criteria to avoid the unnecessary pretrial detention of non-dangerous defendants. While the statute authorizes detention for, potentially, any offense – which, as

[2] The court may have ordered forfeiture of the bail if Hill violated bail conditions. Petition of Second Chance Bail Bonds (State v. James Castine), __ N.H. __ (decided February 13, 2019).

Senator Feltes and Professor Scherr stated, expands the court's preventive detention power – it does not allow the court to detain non-dangerous defendants on bail they cannot post. The lower court's order in this case, which detained a non-dangerous defendant, was improper. Though that order is no longer in effect, this Court should rule that, where the defendant is a flight risk, but not a danger, the lower court must set bail in accord with RSA 597:2, III(b).

CONCLUSION

WHEREFORE, Ms. Hill requests that this Court hold that under the new bail statute, only a defendant whose release on bail poses a danger may be preventively detained.

Undersigned counsel requests fifteen minutes of oral argument.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains 3090 words.

Respectfully submitted,

By /s/ David M. Rothstein____
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New Hampshire Public Defender
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief shall be served on the State of New Hampshire and Senior Assistant Attorney General, Lisa L. Wolford, through the New Hampshire Supreme Court's electronic filing system.

/s/ David M. Rothstein_____
David M. Rothstein

DATED: March 6, 2019

A P P E N D I X

APPENDIX – TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Cheshire Superior Court

Case Name: State of New Hampshire v. Christina A. Hill

Case Number: 213-2018-CR-4123

SUPERIOR COURT BAIL ORDER

Police Agency: Keene Police Agency Case Number: 18-1808-OF

Date of Felony Offense: 09/20/2018

You are required to appear for a hearing/arraignment on 11/09/2018 (Date) at 1PM (Time)

☐ The parties waive hearing and agree as follows:

☑ After hearing, the court determines and orders as follows:

It is hereby ordered that the defendant shall:

A. ☐ Be released on personal recognizance.

B. ☐ Be released on an unsecured appearance bond in the amount of $ ______

C. ☐ Be detained for not more than 72 hours to allow for filing of a probation violation.

D. ☒ Be released on $ ~~[illegible]~~ 10,000 (cash) or ~~corporate surety~~ bail. The Court finds that this financial condition will not be the cause for continued detention, unless:

(1) ☒ A hearing to determine the source of funds for bail is required before posting bail, **OR**

(2) ☒ The court finds by a *preponderance of the evidence* the conditions set forth above will not reasonably assure the appearance of defendant for the following reasons:

☒ See record of hearing.

Defendant was out on bail when these offenses were allegedly committed. She complied w/ none of the conditions of that bail order.
Defendant also has a deferred State prison sentence that required treatment.

E. ☒ Be placed in preventive detention pursuant to RSA 597:2, IV(a). This order for detention is not based solely on evidence of drug or alcohol addiction or homelessness. In ordering preventive detention, the court finds *by clear and convincing evidence* release will endanger the safety of the defendant or the public for the following reasons:

☒ See record of hearing.

Case Name: State of New Hampshire v. Christina A. Hill

Case Number: 213-2018-CR-412

BAIL ORDER

The defendant's release is subject to the following additional conditions:

Defendant shall not commit a federal, state or local crime while on release, must appear at all court proceedings as ordered and must advise the court in writing of all changes of address within 24 hours.

1. ☐ Shall have no contact, direct or indirect, or through a third party with _____.
2. ☒ Shall live at: address provided to Court.
3. ☒ Shall not travel outside of New Hampshire.
4. ☒ Shall not possess a firearm, destructive device, dangerous weapon, or ammunition.
5. ☒ Shall not consume ~~an excessive~~ any amount of alcohol, or use any narcotic drug or controlled substance as defined in RSA 318-B. unless prescribed.
6. ☐ Comply with the following curfew: _____.
7. ☐ Sign a waiver of extradition before release on bail.
8. ☐ Shall follow all terms and conditions of probation and/or parole. The defendant shall report to probation no later than _____.
9. ☐ Shall apply to _____ for an intake assessment within ____ days of release.
10. ☐ Shall meaningfully participate in and continue in treatment at _____. If the defendant leaves the program for any reason other than successful completion of the program, bail automatically converts to _____.
11. ☐ The Criminal Bail Protective Order issued on _____ remains in full force and effect.
12. ☐ Other: _____

Defendant Information

Name Christina Hill DOB 02/26/1986

Physical address 9 Thayer Ave., Troy, NH 03465

Mailing address (if different) _____

Home phone # _____ cell phone # _____ email _____

So Ordered. _____ Defendant Signature

_____ _____ BC Fee _____

Date Bail Commissioner Signature and printed name

For Court Use Only:

☐ Adopted ☐ Adopted as modified ☐ See Supplemental Bail Order

So Ordered. 1-9-18 _____

Date Presiding Judge

☐ County Attorney/AGs Office ☐ Sheriff's Department ☐ ~~Defendant~~ Ruoff, Presiding Justice

☐ Defense Counsel ☐ NH Department of Corrections ☐ Surety

☒ House of Correction ☐ Other

JAN 09 2019

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2018-0637, State of New Hampshire v. Christina A. Hill, the clerk of court on January 9, 2019, issued the following order:

Transcript of the bail hearing having been filed in the clerk's office, the defendant shall file a memorandum on the bail issue on or before January 16, 2019; the State shall file a memorandum on the bail issue on or before January 23, 2019.

This order is entered pursuant to Rule 21(8).

Eileen Fox,
Clerk

Distribution:
Appellate Defender
Attorney General
File

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2018-0637, State of New Hampshire v. Christina A. Hill, the court on February 4, 2019, issued the following order:

The State's assented-to motion to permit briefing, or to extend the deadline by which the State must file its responsive memorandum, is granted as to prayer A. The January 9, 2019 order for the filing of memoranda is therefore vacated.

The defendant's brief must be filed on or before March 6, 2019. The State's brief must be filed on or before April 5, 2019.

If a brief is not e-filed, a party is requested, but is not required, to submit an electronic copy of the party's brief on a computer-readable compact disk (CD). The electronic copy should be in Portable Document Format (PDF). The electronic copy should contain the entire brief, but need not contain documents that are not computer-generated by the party. The label of the CD should include the case name and the case number, and should identify the brief being filed (e.g., plaintiff's opening brief, defendant's opposing brief, petitioner's reply brief).

NOTE: Your brief must not exceed 9,500 words. See Rule 16(11). If you are the appealing party, you must attach a copy of the decision(s) being appealed at the end of your brief. See Rule 16(3)(i). If you are not the appealing party and you choose to file a memorandum in lieu of a brief, it must not exceed 4,000 words.

An appealing party is responsible for providing the court with the necessary record to decide the appeal. Failure to do so may result in dismissal of the appeal. For information about how to provide the court with the record, review Rule 13 carefully. If you intend to file an appendix to your brief, review Rule 17.

Lynn, C.J., and Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
David M. Rothstein, Esq.
Appellate Defender
Attorney General
Lisa L. Wolford, Esq.
File