ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-137

MAY TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Orleans Unit
	}	Criminal Division
	}	
Theodore Farnham	}	DOCKET NOS. 509-10-16 Oscr 508-10-16 Oscr
		Trial Judge: Howard E. Van Benthuysen

In the above-entitled cause, the Clerk will enter:

Defendant appeals the trial court's April 10, 2017 order modifying his bail from a $25,000 surety bond or cash to a secured appearance bond set at ten percent of that amount, but declining to reduce the bail amount to $10,000. We affirm.

On October 20, 2016, the State charged defendant, in two separate dockets, with two felony counts and five misdemeanor counts. Defendant has an extensive criminal record that includes 22 failures to appear, 13 convictions for violations of court orders, 4 felony convictions, and 56 misdemeanor convictions. His last failure to appear was in 2015, and his last felony conviction was in 1996. The court imposed conditions of release in this docket pursuant to 13 V.S.A. § 7554, including $25,000 surety bond or cash.

Defendant filed a pro se motion to review bail on November 4, 2016, requesting that the court amend his conditions of release to permit him to attend a residential treatment program. The court denied defendant's request because it found that defendant posed "an extraordinary risk of nonappearance should he be released to a treatment facility."

In January of 2017, defendant's mother was diagnosed with a life-threatening illness and placed in palliative care. Her doctors anticipated that she would not live for more than six months. Defendant's mother, who lives in Connecticut, cannot travel to visit defendant because of her medical condition.

On March 29, 2017, defendant filed a second motion to review his conditions of release. In that motion, he requested that the court modify his bail in both dockets to a $10,000 secured appearance bond with ten percent down and permit him to leave the State of Vermont to visit his mother "one last time while she is still alive." The court held a hearing on March 30, 2017 and took testimony from defendant's mother about her medical condition and her desire to visit defendant. Defendant also submitted letters from his mother's social worker and care provider,

who confirmed the severity of her condition and the sincerity of her desire to visit with her son. The State opposed defendant's request, largely on the basis of defendant's "atrocious criminal history," which it argued justified maintaining defendant's bail at $25,000 surety bond or cash.

In a written order dated April 10, 2017, the court granted defendant's motion in part. It concluded that reducing his bail to $10,000 with a deposit of ten percent was "wholly inadequate" to ensure defendant's appearance. However, the court also concluded that, "because of the urgency of the situation, and the sympathy it engenders," a reduction in bail was appropriate. The court modified defendant's bail to permit him to post a secured appearance bond for ten percent of the bail amount, $25,000. The court also modified defendant's conditions such that he could, upon the posting of a secured appearance bond, be released into the custody of his sister for the limited purpose of visiting their mother for a four-day period that would include travel to and from Connecticut. The court required defendant to file with the court, prior to visiting his mother, a proposed itinerary, an exact address and telephone number, and signatures from him and his sister confirming their understanding of his conditions of release. Defendant is unable to post $2500 as an unsecured appearance bond and therefore remains incarcerated. He appeals from the court's April 10, 2017 order.

The Vermont Constitution provides that, with two exceptions not applicable here, "[a]ll persons shall be bailable by sufficient sureties." Vt. Const., ch. II, § 40. Additionally, the Vermont Constitution prohibits "[e]xcessive bail" for "bailable offenses." Under the statute that governs pretrial release for bailable offenses, a defendant "shall be ordered released on personal recognizance or upon the execution of an unsecured appearance bond" unless the court "determines that such a release will not reasonably ensure the appearance of the person as required." 13 V.S.A. § 7554(a)(1).

When determining whether a defendant poses a risk of nonappearance, a court "shall consider, in addition to any other factors, the seriousness of the offense and the number of offenses with which the person is charged." 13 V.S.A. § 7554(a)(1). The court must also consider, on the basis of available evidence, the nature and circumstances of the offense charged, the weight of the evidence, the accused's family ties, employment, financial resources, character and mental condition, the length of residence in the community, record of convictions, and record of appearance or nonappearance at court proceedings or of flight to avoid prosecution. 13 V.S.A. § 7554(b). If the court determines that a defendant poses a risk of nonappearance, the court may impose "the least restrictive" set of conditions that will ensure the person's appearance. 13 V.S.A. § 7554(a)(1). Although the court must impose the "least restrictive" conditions possible, 13 V.S.A. § 7554 "does not require a finding that a defendant has the ability to pay a particular amount to support a trial court's bail order." State v. Pratt, 2017 VT 9, ¶ 16, __ Vt. __, __ A.3d __; see also State v. Girouard, 130 Vt. 575, 581 (1972) ("The determination of the amount of bail set is one of judicial discretion, controlled, of course, by certain guidelines. To maintain error, the defendant must show an abuse or withholding of discretion by the court." (citations omitted)). Additionally, we must affirm a trial court's bail decision on appeal "if it is supported by the proceedings below." 13 V.S.A. § 7556(c).

Here, defendant's challenge is limited to the court's decision not to reduce the amount of his bail from $25,000 to defendant's requested amount of $10,000. Specifically, defendant argues that the court abused its discretion in not reducing his bail amount because the court did not consider the underlying reasons for his failure-to-appear convictions and, according to defendant, therefore did not base its decision on evidence of a risk of flight. We disagree. The court based its determination that defendant posed a risk of nonappearance on the statutory factors specified in 13 V.S.A. § 7554(b). The court's written order credited defendant's ties to the community but nevertheless concluded that defendant's lack of employment, number of pending criminal cases in various counties in Vermont, lengthy criminal record, and "established history of being unable to follow conditions of release or abuse prevention orders" made defendant "a clear and likely risk to flee and not reappear unless some cash bail is imposed." Additionally, at the motion hearing defendant acknowledged that he was "throw[ing] himself at the mercy of the [c]ourt," given his "very lengthy record" and history of failing to comply with court orders.

Defendant does not have a right to bail at a level he can afford, so long as the conditions imposed are the least restrictive necessary to ensure his appearance. Pratt, 2017 VT 9, ¶ 16. Accordingly, our review is confined to determining whether the court's bail decision was "supported by the proceedings below." 13 V.S.A. § 7556(c). In light of the fact that the court considered the statutory factors laid out in § 7554(b), and given that defendant is only challenging the amount of his bail, we cannot conclude that the court abused its discretion. Defendant's history of noncompliance with court orders and his lengthy criminal record—both of which defendant acknowledges—support the court's decision to impose bail at $25,000 with the requirement that defendant post a secured appearance bond at ten percent of that amount. The court was cognizant that the amount of bail set was substantial and appropriately linked the amount and kind of bail to the § 7554(b) factors. See Girouard, 130 Vt. at 581 (acknowledging that "amount of bail set is one of judicial discretion" limited by statutory factors).

We conclude that the court's analysis of defendant's flight risk supports its bail determination.

Affirmed.

FOR THE COURT:

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Harold E. Eaton, Jr., Associate Justice