

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-317

OCTOBER TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Chittenden Unit,
	}	Criminal Division
Van V. Thomas	}	
	}	DOCKET NOS. 3233-9-16 Cncr &
	}	4115-11-16 Cncr
	}	
		Trial Judge: Nancy J. Waples

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

Defendant Van V. Thomas appeals the Chittenden Superior Court’s order requiring him to post a surety bond or cash in the amount of \$25,001 as a condition of release in these two dockets. The court’s order is affirmed.

The facts and procedural history of this matter are set out in full in State v. Thomas, No. 2017-226, (Vt. Aug. 1, 2017) (unpub. mem.), [https://www.vermontjudiciary.org/sites/default/files/documents/eo17-226.bail\\_\\_0.pdf](https://www.vermontjudiciary.org/sites/default/files/documents/eo17-226.bail__0.pdf). In brief, defendant is charged with six counts of dispensing controlled substances in violation of 18 V.S.A. § 4231(b)(1) and § 4234(b)(1) and three counts of possessing controlled substances in violation of 18 V.S.A. § 4231(a)(3) and § 4234(a)(1).

Immediately following defendant’s arraignment at the end of August 2016, the trial court required defendant to post a surety bond or cash in the amount of \$50,001 as a condition of release. Defendant was unable to do so and remained in custody. Approximately ten months later, defendant’s counsel moved for review of the initial bail determination.

The trial court held a hearing in response to this motion. Both defense counsel and the State’s Attorney presented legal arguments. The trial court then issued an oral decision denying modification of the imposed conditions. This decision did not include an explanation of the reasons for the court’s decision, nor did the court refer to the factual underpinning for the initial determination of defendant’s conditions of release.

Defendant appealed. This Court remanded the trial court’s decision because (1) there was no discernible factual basis for the conditions imposed in the record of either defendant’s initial bail determination or the hearing on defendant’s motion for review of conditions, and (2) the trial court’s oral decision did not include any explanation of its decision to continue the bail and conditions that had been set as required by 13 V.S.A. §7554(d)(1).

On August 7, 2017, the trial court held a second, post-remand, hearing on defendant’s motion to review his conditions of release. Defendant testified at this hearing. The trial court

subsequently issued a written decision modifying defendant's conditions of release and requiring him to post a surety bond or cash in the amount of \$25,001<sup>1</sup> rather than the \$50,001 originally imposed. The court did not disturb most of the original conditions of release but struck the curfew condition. Defendant now appeals.

Defendant argues that requiring him to post a surety bond or cash in the amount of \$25,001 is unjustified for two reasons. First, he argues that he does not present a flight risk because, though he intends to move to Michigan to be with family upon his release, his family will be able to transport him to Vermont for any scheduled court appearances. And second, he argues that he cannot pay the \$25,001 necessary because he has been in jail awaiting trial for over a year and, further, that imposition of a bail amount higher than a defendant's ability to pay is contrary to this Court's decision in State v. Pratt, 2017 VT 9, \_\_ Vt. \_\_, 166 A.3d 600. Finally, defendant also argues that the court abused its discretion when it reviewed defendant's Michigan criminal record in order to determine whether defendant had ever failed to appear for a court appearance.

This Court reviews a trial court's bail determination for abuse of discretion. A trial court's order "shall be affirmed if it is supported by the proceedings below." 13 V.S.A. § 7556(b).

Vermont statute directs a trial court to consider a list of factors when considering conditions of release. These factors include the nature and character of the charged offenses; the strength of the State's evidence; a defendant's "family ties, employment, financial resources, character and mental condition," and the length of his or her residence in his or her community; as well as a defendant's record of convictions and of appearance, or nonappearance, at court proceedings. 13 V.S.A. § 7554(b).

Defendant raised his first two arguments—concerning justification for the amount of bail set by the trial court—in his prior appeal to this Court. As explained in the order issued in that appeal, though Vermont statute does not expressly require the trial court to consider a defendant's ties to his or her Vermont community, but simply asks the court to consider a defendant's ties to his or her community, the only logical reading of the statute is that the court is meant to consider a defendant's community ties within Vermont.

This is implicit in the language of 13 V.S.A. § 7554, which requires a court to order a defendant released on either "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." A court is to consider, among the other factors listed above and found in 13 V.S.A. § 7554(b), the defendant's ties to his or her community in order to determine whether that defendant presents a risk of flight. As explained in this Court's order in response to defendant's first appeal:

The single logical conclusion is that a defendant's ties to Vermont family and community weigh against the risk of nonappearance,

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<sup>1</sup> At the initial determination imposing conditions of release, defendant was ordered to either post a surety bond or cash in the amount of \$50,000 in one of these dockets and \$1 in the other docket. The conditions of release in both of these dockets were appealed in defendant's initial motion for review and all subsequent proceedings. The trial court did not mention the condition that defendant post \$1 in the decision on appeal here. Nonetheless, this omission is harmless and does not affect this Court's decision here.

while, on the other side of the balance, scant ties to family or community within the geographic borders of the state weigh in favor of the risk of nonappearance. To read the statute any other way would make little sense.

Thomas, No. 17-226, at 2. For this reason, the trial court was justified in concluding that defendant's ties to his family and community in Michigan, and his admitted intent to return to Michigan if released, weighed in favor of finding that defendant presented a risk of flight.

Defendant did testify that he had some connections within the State of Vermont. In his testimony, defendant listed three people that he knew in the state. He did not remember the last names of two of these people, and he testified that he had not had contact with two of them since he was held in custody approximately a year before. He was not asked if he had contact with the third since being held in custody. In its written decision, the trial court explained that defendant testified that he had ties to the community in Vermont but that it did not find defendant's testimony credible, largely because defendant could not remember the last names or addresses of the people he knew in the state.

Defendant argues that this conclusion regarding his credibility was unsupported. However, the trial court is entrusted with determining the credibility of witnesses. See Benson v. Hodgdon, 2010 VT 11, ¶ 10-12, 187 Vt. 607, 992 A.2d 1053 (holding trial court is in unique position to assess witness credibility and weight of evidence); V.R.A.P. 9(a) ("The appeal [from conditions of release] will be determined on the record as presented by the parties without the necessity of briefing.").

Defendant next argues that the amount of bail imposed was unjustified under State v. Pratt. This argument was also raised in defendant's earlier appeal to this Court. The order issued in that appeal explained that while the Eighth Amendment of the U.S. Constitution prohibits the imposition of "excessive bail," this does not mean that a trial court is only permitted to impose a bail amount within a defendant's ability to pay.

The touchstone for identifying excessive bail under the Eighth Amendment is not what a defendant can pay but, rather, whether bail is set at "a figure higher than an amount reasonably calculated to fulfill" the purpose of "giving adequate assurance that [the defendant] will stand trial and submit to sentence if found guilty."

Pratt, 2017 VT 9, ¶ 15 (quoting Stack v. Boyle, 342 U.S. 1, 4 (1951)). There is no formula by which a trial court can determine precisely how high bail must be in order to ensure a defendant's appearance. Instead, the determination of the amount of bail is entrusted to the trial court's discretion.

Furthermore, the appellate court's role in reviewing a trial court's determination of conditions of release is limited. This Court may only review the record below and statute directs that an order shall be affirmed if it is supported. See V.R.A.P. 9(a); 13 V.S.A. § 7556(b). Here, the trial court concluded that defendant presented a risk of flight. The court stated as its reasons that "[d]efendant has been charged with eight felonies, while he lacks extensive ties to the

community in Vermont and lacks employment in Vermont.”<sup>2</sup> As discussed above, the record supports the conclusion that defendant lacks ties to the community in Vermont and it is undisputed that defendant does not have employment within the state. Finally, the high number of felonies that defendant is charged with supports a conclusion that he presents a risk of flight.

Defendant argues that this last point—the high number of charged offenses—should weigh in favor of finding that he presents a low risk of flight. In his memorandum to this Court, defendant writes that “[t]he evidence of guilt against Mr. Thomas cannot reasonably be described as great. Defendant has every incentive to appear in court when so required for the purpose of clearing his name.” As with his argument concerning community ties, on this point defendant presents an argument that runs counter to a logical reading of 13 V.S.A. § 7554(b). A trial court is directed to consider the statutory factors, including the number and nature of charged offenses, to determine whether a defendant presents a risk of flight. It is logical to conclude that a higher number of charged offenses, when mixed with the other factors listed in the statute, would support finding that a defendant presented a risk of flight. See State v. Williams, No. 2014-211, 2014 WL 5325712, at \* 1 (Vt. July 28, 2014) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo14-211.bail.pdf>. Despite defendant’s personal statement to the contrary, and apparently sincere desire to clear his name, it was within the court’s discretion to find that defendant presented a risk of flight because of, among other factors, the number of charged offenses.

Finally, defendant argues that the court abused its discretion when it considered his Michigan criminal record in order to determine whether he had ever failed to appear for a court appearance. In a determination on conditions of release, the court is not limited to consideration of only evidence that would be admissible in a trial. State v. Blackmer, 160 Vt. 451, 454-55, 631 A.2d 1134, 1136-37 (noting that even in a weight of evidence hearing under 13 V.S.A. § 7553 State must show that “substantial, admissible evidence of guilt exists” but is not limited to presentation of admissible evidence only). Moreover, the court stated on the record that it was not able to determine whether defendant had ever failed to appear for a court proceeding. Thus, this factor was not an element in the court’s decision.

Affirmed.

FOR THE COURT:

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Karen R. Carroll, Associate Justice

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<sup>2</sup> Defendant is, in fact, charged with five felonies. A trial court is directed to consider the number and nature of charged offenses when determining conditions of release. 13 V.S.A. § 7554(b). There is no indication, however, that the trial court’s decision would have been different if it had correctly counted the offenses charged against defendant. Even with five felonies, the trial court’s decision that defendant presented a flight risk would still be supported by the record below.