

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-357

NOVEMBER TERM, 2017

State of Vermont v. Brian K. LeClair*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 1688-5-17 Cncr, 1657-5-17 Cncr, 1651-5-17 Cncr

Trial Judge: Nancy J. Waples

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

Defendant Brian LeClair appeals from the Chittenden Superior Court’s imposition of a surety bond or cash of \$75,000 as a condition of release in the above referenced dockets. Because the record lacks sufficient evidence concerning the court’s consideration of 13 V.S.A. § 7554(b) factors in support of bail, we remand for further findings.

On May 24, 2017, defendant was arraigned in Chittenden Superior Court, Judge Crucciti presiding, for misdemeanor possession of cocaine, in violation of 18 V.S.A. § 4231(a)(1); felony possession of heroin, in violation of 18 V.S.A. § 4233(a)(4) (collectively docket number 1657-5-17); and violations of conditions of release in connection with charges for which he had been previously arraigned (docket number 1651-5-17). In determining the appropriate conditions of release to impose on these charges, the court noted that, despite defendant’s lengthy criminal history, he had no previous failures to appear in court and was not a “flight risk.” But the court concluded that, based on his number of pending charges, defendant was in the midst of a “crazy crime spree,” and was a threat to the integrity of the judicial system. On an interim basis, pending a review hearing, the court ordered that defendant be held without bail. The court set a review hearing for the following week.

On May 30, 2017, the court, Judge Kupersmith presiding, held a bail review hearing, at which defendant was also arraigned on new charges of burglary, in violation of 13 V.S.A. § 1201(a), and criminal mischief, in violation of 13 V.S.A. § 3701(b) (docket number 1688-5-17). The court set conditions of release, including \$100,000 bail to run concurrently for the charges of possession of cocaine and heroin, violations of conditions of release, and the most recent charges of burglary and criminal mischief—docket numbers 1657, 1651, and 1688-5-17, respectively. The court explained that it was unpersuaded by defendant’s argument that his previous court attendance demonstrated that he was not a flight risk. It noted that defendant had eight pending felonies and that he faced a potentially lengthy period of incarceration. In the court’s estimation, as the number of charges and potential length of incarceration increased, so too did defendant’s risk of future non-appearance, which justified a high bail amount.

On July 20, 2017, defendant filed a motion for reduction of bail, and the court held a hearing on July 24. Neither the State nor defendant put on evidence during this hearing, and instead relied on legal arguments. Defendant argued that \$100,000 was “an exceedingly high bail” considering that he had previously posted a \$10,000 bail on unrelated charges, and that he had no previous failures to appear—so there was no indication that he was a flight risk—and he would be willing to engage in the GPS home detention program. The State argued that a high bail was appropriate in light of defendant’s record of violations of court and probation orders and his recent spate of criminal charges, which rendered him a flight risk. The court decided to reduce defendant’s bail from \$100,000 to \$75,000 and imposed a twenty-four-hour curfew and other conditions of release. The court noted the number of defendant’s pending charges, including for burglary—which the court characterized as “some of the most serious charges a person can be faced with”—and expressed concerns about whether he posed a risk to public safety. In addition, the court stated that it was concerned about defendant’s possible substance abuse issues, “which may provide the context or the basis for the property offenses.”

On appeal, defendant argues: (1) the bail amount is not supported by the record; (2) the bail amount renders his “right to bail a nullity” due to his inability to meet this cost; (3) the bail is excessive due to a lack of “any individualized or articulated analysis” of why the amount was the least restrictive condition that would assure defendant’s appearance; (4) the bail violated his Fourteenth Amendment guarantee for equal protection and due process because the trial court did not conduct an analysis of his ability to pay; and (5) the bail violated the Eighth Amendment prohibition against excessive bail, as it was set “at a figure higher than an amount reasonably calculated to assure the presence of the accused for trial.” He therefore moves for this Court to reduce his bail from \$75,000 to \$10,000 surety, or a 10% deposit.

The State argues that the trial court “was presented with numerous factors to justify setting bail in this case, not simply the risk of a lengthy jail sentence from the quantity of charges.” And the State contends that the trial court “was not required to set bail in amount an accused can pay” nor was it “required to make such an inquiry.”

This Court reviews a trial court’s bail determination for abuse of discretion and the order “shall be affirmed if it is supported by the proceedings below.” 13 V.S.A. § 7556(b); see also State v. Pratt, 2017 VT 9, ¶ 20, \_\_\_ Vt. \_\_\_.

This case is remanded because the court’s imposition of such a high level of bail was not supported by adequate findings or other evidence that the court considered factors beyond the number and seriousness of the charges. The mere accumulation of charges—even if of a serious nature—cannot be the lone basis for setting bail. To guide the trial court on remand, the Court discusses in more detail the implications for the bail determination of two considerations—the role of defendant’s ability to pay and the role of the risk he may pose to the public.

There is a presumption under the Vermont Constitution that, except in two limited exceptions inapplicable to this case, “[a]ll persons shall beailable by sufficient sureties” and “excessive bail shall not be exacted forailable offenses.” Vt. Const. ch. II § 40. Vermont’s guidelines for imposing bail as a condition of release in noncapital offences are codified in 13 V.S.A. § 7554. Section 7554(a)(1) states that a defendant “shall be 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.” In other words, § 7554 carries the presumption that “pretrial release on personal recognizance or an

unsecured appearance bond” should be the trial court’s position, except in cases where “those conditions will not assure the defendant’s appearance.” Pratt, 2017 VT 4, ¶ 10.

In assessing whether a defendant presents a risk of future nonappearance to a degree that warrants bail as a condition of release, a trial court must consider factors enumerated in § 7554. In determining whether the defendant presents a risk of nonappearance, the court must consider, in addition to any other factors, “the seriousness of the offense charged and the number of offenses with which the person is charged.” § 7554(a)(1). In determining which conditions of release to impose, the court must also consider, based on the information available: (1) the nature and circumstances of the charged offense; (2) the weight of the evidence; (3) the defendant’s family ties; (4) employment; (5) financial resources; (6) character and mental condition; (7) length of residence in the community; (8) record of convictions; and (9) record of appearance or nonappearance at court proceedings. § 7554(b).

Considering this statutory framework, the trial court failed to articulate sufficient findings under § 7554 to support a condition of release requiring \$75,000 bail. The record of the trial court’s consideration of the § 7554 factors is scant. At both the hearing in which the court set bail at \$100,000, and the hearing in which the court reduced bail to \$75,000, it focused almost exclusively on the nature and accumulation of defendant’s charges. Little else was addressed. The court assessed the seriousness of the offense, and the number of charged offenses under § 7554(a)(1), but the record does not reflect that the court considered many of the statutory factors under § 7554(b). See State v. Duff, 151 Vt. 433, 436 (1989) (explaining that, if defendant being charged with serious crime, with corresponding lengthy prison sentence, and without additional evidence of flight risk, is “sufficient to set a high cash bail amount, the constitutional right to bail would be a nullity for all defendants charged with serious crimes”). It is not apparent that either court considered defendant’s family ties, employment, financial resources, character and mental condition, length of residence in the community, or record of appearance or non-appearance at court proceedings.\* Although the court was not required to make express findings on each § 7554(b) factor, and a sub-set of the factors could carry the day, it needed to go further than it did here in light of its imposition of such a high bail requirement. As such, its decision was not “supported by the proceedings below.” 13 V.S.A. § 7556(b).

On remand, to the extent the trial court concludes that a bail requirement is necessary to ensure defendant’s appearance, the court may set bail at a level the court concludes is necessary to ensure defendant’s appearance. Defendant’s suggestion that the court must set bail at a level that he can afford is incorrect. The test for excessive bail under the Eighth Amendment is not what a defendant can afford; instead, excessive bail is any amount over that required to achieve adequate assurance that the defendant will submit to the judicial process. Pratt, 2017 VT 9, ¶ 15. A trial court need not find that a defendant can pay bail “in order for the amount to be supported by the record, and it may impose a bail requirement even when the defendant is indigent, as long as the bail decision is supported by findings that show the defendant presents a risk of nonappearance and that the conditions are the least restrictive means of assuring defendant’s appearance.” Id. ¶ 18.

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\* The trial court gave somewhat more consideration to these factors at the very first of the three hearings described above and concluded that defendant was not a flight risk. The court apparently concluded otherwise in the succeeding hearings, but did not address the considerations that led the trial court to conclude initially that he did not pose a risk of flight.

On the other hand, courts should be particularly circumspect in exercising their discretion to set bail at a level that a defendant cannot meet because “[p]retrial detention necessarily cuts against the presumption of innocence inherent in our criminal jurisprudence.” Duff, 151 Vt. at 440. As noted above, the trial courts’ findings are insufficient to demonstrate the requisite circumspection in this case. On the present record, it is doubtful that the evidence and information provided to the trial court could support the imposition of \$75,000 bail. On remand, the trial court may further develop its findings based on the present record, or may develop the record further with an additional hearing.

Second, on remand the court should bear in mind the purpose of bail. The lone constitutional basis for a monetary condition of release is to assure the presence of the accused. State v. Cardinal, 147 Vt. 461, 464 (1986). Accordingly, a court cannot impose bail to protect the public. See Pratt, 2017 VT 4, ¶ 13 (“[B]ail may be used only to assure the defendant’s appearance in court and cannot be used as a means of punishing the defendant, nor of protecting the public.” (quotation omitted)); State v. Pray, 133 Vt. 537, 541-42 (1975) (same); State v. Roessell, 132 Vt. 634, 636 (1974) (“One of the laudable purposes of the bail act is to avoid the deliberate use of an unattainable bail figure to accomplish a restraint for the protection of the community, since restraint now possible under authorized conditions set out in 13 V.S.A. § 7554.”). To the extent that the trial court considered protection of the public in its bail determination, it strayed beyond the constitutionally permissible purpose of bail.

As there is a lack of evidence concerning the trial court’s consideration of § 7554(b) factors, this case is remanded for further findings on bail as a condition of release.

Remanded for redetermination of bail consistent with this decision.

FOR THE COURT:

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Beth Robinson, Associate Justice