ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-359

NOVEMBER TERM, 2018

State of Vermont v. Robert Bloom*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 987-10-18 Bncr

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

Defendant appeals the trial court's order setting $5000 bail. 13 V.S.A. § 7556(b). He argues that the court erred in imposing bail without sufficient evidence or findings under 13 V.S.A. § 7554, and in setting cash bail without considering his financial means. We agree that the court exceeded its discretion in imposing bail with insufficient evidence and findings concerning defendant's resources as required under § 7554. We accordingly reverse and remand for a hearing on appropriate conditions of release.

Defendant was arrested on charges of first-degree aggravated domestic assault with a weapon, 13 V.S.A. § 1043(a)(2), and simple assault, 13 V.S.A. § 1023(a)(1), on September 28, 2018 after he allegedly chased several people, including his girlfriend, with a knife, threatening to kill them. At that time, the Court set no monetary bail, and released defendant on conditions including having no contact with two individuals; obeying an abuse-prevention order; and appearing in court for his arraignment on October 1, 2018.

At defendant's arraignment, a mental-health professional who screened defendant pursuant to 13 V.S.A. § 7554c testified that defendant had a history of serious mental illness, including hospitalizations in the 1980s and 1990s, that he had managed in the community for decades. Defendant now wished, she said, to go to the Veterans Administration (VA) hospital in Albany, New York for outpatient psychiatric treatment, and had a friend who would pick him up and take him there from Bennington. She stated that in her opinion, defendant was not a danger to himself or others, as he had no plan or intent to do harm, and had no access to weapons. She also said that he did not meet the criteria for involuntary mental-health treatment and emphasized that he was willing to get outpatient treatment, as he had done in the past.

Defendant's attorney represented that defendant could live with a friend in Schenectady, where he would be able to go to the Albany VA hospital, and that he had a friend who could pick him up that day and take him there. The State asked that defendant be held without bail pursuant to 13 V.S.A. § 7553a, and the court ordered defendant held without bail pending a weight-of-the-evidence hearing.

The weight-of-the-evidence hearing commenced on October 12. Defendant stipulated that the evidence of guilt was great. He argued, however, that there was no evidence that his release would pose a substantial risk of physical violence to any person, let alone that no condition or combination of conditions of release would reasonably prevent physical violence.

At the weight-of-the-evidence hearing, defendant introduced testimony by a witness who stated that she lived in Schenectady and wished to have defendant live with her. She testified

that she and the defendant had been dating for the last five years, and that they had lived together before. She stated she was not afraid of defendant in any way, and she would be able to help support him in accessing care at the VA. When asked if she would call the police if she had any disagreements with defendant, she said she would "normally talk things out," but that if that failed, she would feel comfortable calling the police. When asked whether she would call the police if defendant violated conditions of release, such as a requirement that he go to the VA for treatment, she answered "No."

The weight-of-the-evidence hearing concluded on November 1. (Subsequent to the first part of the weight-of-the-evidence hearing, and prior to the second, defendant underwent an evaluation and was found competent to stand trial.) Defendant argued that there was no evidence under § 7553a that he posed a continuing threat, as his only criminal history was a 1986 charge for driving while impaired. He argued that his intent to reside in New York, away from the complainants, weighed in favor of finding that he posed no continuing threat.

The court held that the State had not established that defendant would pose a substantial threat of physical harm to any person. The court acknowledged the circumstances of the alleged offense, including the use of a weapon, but found no evidence that the behavior was potentially continuing. It thus denied the State's request to hold him without bail under § 7553a.

Upon denying the State's motion, the court then stated, "I'm going to have to impose some cash bail . . . because of the lack of ties to Vermont. And he has no place to live in Vermont, and he is—for this fifteen-year maximum sentence, that there is a risk of flight because of his lack of any type of—he doesn't have a place to stay here. He's got no transportation needs back and forth. He does have a place to live in New York." On the basis of this reasoning, the court imposed $5000 bail, cash for surety, and issued conditions of release.

On appeal, defendant first argues that the evidence does not support a finding of risk of flight from prosecution, particularly given that the Legislature amended § 7554 this year. In that amendment, the Legislature changed the statute from requiring the trial court to consider whether the defendant "presents a risk of nonappearance" to whether the defendant "presents a risk of flight from prosecution," defined as "any action or behavior undertaken by a person charged with a criminal offense to avoid court proceedings," 13 V.S.A. § 7576(9). It also amended the statute to require the trial court to impose the least restrictive conditions "that will reasonably mitigate the risk of flight" instead of, as the statute previously said, conditions "which will reasonably assure the appearance of the person." Defendant argues this amendment created a new standard for evaluating risk of flight for the purposes of § 7554. Defendant secondly argues that the trial court failed to consider his financial means before setting cash bail, in violation of § 7554(a)(1).

This Court will affirm the trial court's decision if it "is supported by the proceedings below." 13 V.S.A. § 7556(c). We review the decision for abuse of discretion. State v. Pratt, 2017 VT 9, ¶ 20, 204 Vt. 282. Here, we conclude the trial court exceeded its discretion in failing to make the findings required under § 7554 to impose bail.

Vermont law requires that "[a]ny person charged with an offense, other than a person held without bail under section . . . 7553a of this title, shall at his or her appearance before a judicial officer be ordered released pending trial." 13 V.S.A. § 7554(a). The defendant "shall be ordered released on personal recognizance or upon the execution of an unsecured appearance bond" unless the court finds that doing so would "not reasonably mitigate the risk of flight from prosecution." Id. § 7554(a)(1). In determining a defendant's risk of flight from prosecution, the court must take into account the number and seriousness of the charged offenses. Id. It must

also consider, given the available information, 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. Id. § 7554(b). If the court finds that the defendant does pose a risk of flight, it must impose the least restrictive conditions that would "reasonably mitigate the risk of flight." Id. § 7554(a)(1).

If the court finds that cash bail is the least restrictive condition that would reasonably mitigate risk of flight, it shall set it "[u]pon consideration of the defendant's financial means." Id. § 7554(a)(1)(E). "Consideration of the defendant's financial means" does not mean that the bail must always be an amount defendant can pay, but the bail amount must be no higher than is necessary to ensure that the defendant will stand trial. "[C]ourts should be particularly circumspect in exercising their discretion to set bail at a level that a defendant cannot meet," and it should be a rare instance in which a court sets bail that a defendant cannot afford. Pratt, 2017 VT 9, ¶ 17. Money bail should never be imposed to ensure the defendant's incarceration. Id. ¶ 13; State v. Wood, 157 Vt. 286, 289 (1991) ("[T]he imposition of bail in an amount that cannot be raised by an accused, in order to obtain his incarceration, is precisely what the law forbids.").

The fact that the parties initially understood the weight-of-the-evidence hearing to be solely concerned with whether, under § 7553a, defendant posed a substantial threat of physical violence to any person which no condition or combination of conditions would reasonably prevent, and thus could be held without bail, meant that there was little evidence in the record focused more specifically on the § 7554 factors, and the parties' arguments were not directed at the § 7554 factors, except to the extent that they were also germane to the § 7553a assessment. Based on that limited record, the trial court made sparse findings on the § 7554 factors and did not consider defendant's financial means before setting bail notwithstanding the statutory requirement that it do so. We thus cannot hold that the trial court's decision "is supported by the proceedings below." 13 V.S.A. § 7556(c).

Because the trial court did not make the requisite findings under § 7554, it is not necessary at this time to determine whether and how the 2018 amendment to § 7554(a)(1) changed the "risk of flight" standard. On remand, however, the trial court should consider defendant's risk of flight in light of the standards established in the revised statute.

Reversed and remanded for a new hearing on conditions of release under 13 V.S.A. § 7554.

FOR THE COURT:

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Beth Robinson, Associate Justice