VERMONT SUPREME COURT
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Case No. 26-AP-391

ENTRY ORDER

NOVEMBER TERM, 2026

State of Vermont v. Brian Tinker* } APPEALED FROM:
} Superior Court, Windham Unit,
} Criminal Division
} CASE NO. 26-CR-11549

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

Defendant Brian Tinker is charged with two counts of misdemeanor trespass in violation of 13 V.S.A. § 3705(a)(1). He appeals to a single Justice of this Court pursuant to 13 V.S.A. § 7556(b) from the criminal division's imposition of $200 cash bail as a condition of release. Defendant argues the criminal division abused its discretion, first in determining he presented a flight from prosecution, and second by setting bail at an amount he cannot satisfy. Mindful that § 7556(b) requires that "[a]ny order so appealed shall be affirmed if it is supported by the proceeding below," and that the standard of review is for abuse of discretion, I affirm.

Defendant's criminal history dates back to the 1970s and includes five misdemeanor convictions, as well as three felony convictions, two for sexual assault (one perpetrated against a victim under the age of sixteen) and one for lewd and lascivious conduct (also perpetrated against a victim under the age of sixteen).[1] After serving more than twenty-eight years in prison for his last sex offense, defendant was released from the custody of the Department of Corrections (DOC) on October 17, 2026, when the DOC drove him to a shelter in Brattleboro.

According to the first of the two charging affidavits, before defendant's release from DOC custody, he stated to DOC personnel that he did not intend to comply with the registration requirements applicable to sex offenders. Aware of that information and defendant's criminal history, at about 2 p.m. on October 19, Brattleboro Police served defendant with notices against trespass relating to various public locations frequented by children, including the Transportation Center located on Flat Street.

About eight hours later, around 10 p.m., Brattleboro Police encountered defendant "sitting in the corner of a parking space" on the fourth floor of the Transportation Center and arrested him for misdemeanor trespass. Defendant was processed at the police department, issued a citation to appear in court in December, and released. While he was at the police department, defendant claimed he tried calling the sex-offender registry, but the number was

[1] Defendant's criminal history includes prosecutions in the 1970s for escape and for being a fugitive from justice. Neither case resulted in a conviction. There is no indication in the record that these cases played a role in the court's § 7554 analysis, and given the absence of information about them, they also play no role in the outcome of this appeal.

disconnected or not in service. Police verified, however, that the number for the registry was active and in service.

Two days later, during the early evening of October 21, police arrested defendant again for trespassing when they encountered him near a stairwell at the Transportation Center. Defendant stated that he was unaware that the stairwell was part of the center.

After confirming that the State's attorney intended to prosecute defendant, police spoke with a superior court judge who set bail at $200 and ordered other conditions of release. When defendant failed to post bail, he was held overnight and brought to court the next day to be arraigned.

At the arraignment, the court reviewed the previously imposed $200 bail condition. The State urged the court to continue the bail condition. The State recognized the charged offenses were not serious but emphasized the circumstances surrounding defendant's two arrests. The State contended the weight of the evidence was substantial and noted that defendant lacked both employment and financial resources to post bail. The State also argued that defendant had been convicted twice before of sex-offense felonies before his third and last conviction, indicating his repeated interaction with the criminal justice system had failed to deter him from reoffending. The State acknowledged the absence of failures to appear in defendant's criminal history, but relayed defendant's prior statements that he intended not to comply with the sex-offender registration requirements and that he appeared to falsely claim to Brattleboro Police that the registry phone number was not working.

Defendant, on the other hand, emphasized the minor nature of the trespass charges, that he had been in prison since 1998 before his release the week before, his Vermont roots, and his consistent appearances at court despite a long criminal history. Defendant correctly emphasized that the question of bail "is not a public safety determination." See 13 V.S.A. § 7554(a) (permitting imposition of bail only to address risk of flight from prosecution, not dangerousness).

The criminal division continued the $200 bail condition, and summarized its decision as follows:

> In terms of the bail, [defendant], he does have the right to review a bail based on the offense and his circumstances. And in this case, the court will review the factors, the nature, and circumstances of the offense charged. There are two distinct misdemeanors that he's charged with, and they're notice against trespasses committed in sequence after being provided notice of the first offense and then committing a second one.
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> The weight of evidence. The weight of evidence in the case is strong. His employment, he has none. Financial resources, he has none. Character and mental condition, the court takes pause in the fact that he represented that he's not going to comply with the sex offender registry. That demonstrate[s] an unwillingness to abide by court orders and demonstrates a perceived risk of fleeing from prosecution.
>
> Also, the proximity of the offenses gives the court some pause. One would think after such a significant amount of time in jail that he would be more apt to strictly obey the no trespass orders.

> The court weighs his length of residence in the community. In this community, it's recent, but in Vermont, he's a long-term resident. Failing to appear, there's no prior failures to appear.
>
> But the court does agree that the bail as imposed is the statutory maximum that the court is allowed to impose. But the 200 dollars bail is appropriate under circumstances. It is the maximum that the court can impose given the offenses.

Defendant appeals from this order.

As noted above, the standard of review in this appeal is for abuse of discretion, State v. Rougeau, 2019 VT 18, ¶ 14, 209 Vt. 535, and pursuant to legislative direction the criminal division's bail determination "shall be affirmed if it is supported by the proceedings below." 13 V.S.A. § 7556(b).

The Legislature has made clear that, subject to exceptions not applicable to this matter, a criminal defendant "shall be ordered released on personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the judicial officer determines that such a release will not reasonably mitigate the risk of flight from prosecution as required." 13 V.S.A. § 7554(a)(1). The statute further specifies:

> In determining whether the defendant presents a risk of flight from prosecution, the judicial officer shall consider, in addition to any other factors, the seriousness of the offense charged; the number of offenses with which the person is charged; whether, at the time of the current offense or arrest, the defendant was released on conditions or personal recognizance, on probation, furlough, parole, or other release pending trial, sentencing, appeal, or completion of a sentence for an offense under federal or state law; and whether, in connection with a criminal prosecution, the defendant is compliant with court orders or has failed to appear at a court hearing.

Id. If the court determines the defendant presents a risk of flight from prosecution, then § 7554 directs the court to "impose the least restrictive" combination of enumerated conditions "that will reasonably mitigate the risk of flight of the defendant as required." Id. Those conditions include "the execution of a surety bond with sufficient solvent sureties, or the deposit of cash in lieu thereof." 13 V.S.A. § 7554(a)(1)(E).

"In determining which conditions of release to impose," the statute also requires the court to "take into account," "on the basis of available information," the following additional considerations:

> the nature and circumstances of the offense charged; the weight of the evidence against the accused; the accused's employment; financial resources, including the accused's ability to post bail; the accused's character and mental condition; the accused's length of residence in the community; and the accused's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

13 V.S.A. § 7554(b)(1).

On appeal, defendant first contends the court abused its discretion in determining that he presents a risk of flight from prosecution. He is correct that courts must have evidence that a person presents a risk of flight before setting cash bail. Defendant is also correct that the factors listed in § 7554(a)(1) all weigh against such a finding. He is charged with two counts of unlawful trespass, each of which carries a potential penalty of imprisonment of not more than three months or a fine of not more than $500, or both. 13 V.S.A. § 3705(a)(1). In isolation, these counts are not serious criminal offenses. Upon his release from DOC custody, defendant was not on probation, furlough, parole, or other form of supervised release. Despite a criminal history that includes convictions for at least five misdemeanors and three felonies dating back to the 1970s, the record before the criminal division contained no failures to appear.

The statute is clear, however, that the court can consider "any other factors," in addition to those listed in § 7554(a)(1). In reaching its determination regarding whether to impose bail—and, implicitly, whether defendant presented a risk of flight from prosecution that justified bail—the criminal division also considered that defendant had "represented that he's not going to comply with the sex offender registry," and inferred from that an "unwillingness to abide by court orders," and a "risk of fleeing from prosecution." The court also considered the temporal proximity of the charged trespasses to defendant's release from prison and observed that "[o]ne would think after such a significant amount of time in jail that he would be more apt to strictly obey the no trespass orders."

The purpose of the sex-offender registry is "to provide appropriate authorities with information to assist in the investigation and prevention of sex offenses." State v. Gauthier, 2020 VT 66, ¶ 14, 213 Vt. 82 (quotation omitted). To do that, the offender must disclose their address, current employment, and other information. 13 V.S.A. § 5403. An unwillingness to abide by these requirements evidences a desire not to be located by law enforcement which, in turn, signals an intent to avoid responsibility for crimes committed. Accordingly, defendant's declaration of intent not to register as a sex offender supported the criminal division's determination that defendant presented a risk of flight from prosecution.[2]

Defendant also argues that $200 bail is unconstitutionally excessive.

Both the Vermont and United States Constitutions guarantee against the imposition of excessive bail. Vt. Const. ch. II, § 40; U.S. Const. amend. VIII. The Legislature has effectuated

[2] Defendant also suggests the court abused its discretion in relying on the statement attributed to him that he did not intend to register as a sex offender, describing it as "double hearsay from an unknown source at the [DOC]." However, the statute provides that information considered during bail hearings "need not conform to the rules pertaining to the admissibility of evidence in a court of law." 13 V.S.A. § 7554(g). In other words, "in setting conditions of release under § 7554, the court is not constrained by the rules of evidence and may consider hearsay." State v. Winston, Nos. 2011-410, 2011-411, 2011 WL 9367401, at *2 (Vt. Dec. 23, 2011) (unpub. mem.), https://www.vtcourts.gov/sites/default/files/documents/eo11-410.bail.pdf. Defendant also emphasizes that according to the first charging affidavit, he asked Brattleboro Police whether he could "use his arrest to check in for registration," thus suggesting an interest in registering. However, this same record also indicates that defendant falsely told police the registry's phone number was disconnected or not in service, thereby corroborating, to an extent, defendant's intent not to register.

this guaranty by requiring the criminal division to consider the defendant's "financial means," 13 V.S.A. § 7554(a)(1)(E), and to set any bail at an amount that is "the least restrictive way to assure that defendant[] appear[s]" in court proceedings. State v. Pratt, 2017 VT 9, ¶ 16, 204 Vt. 282 (emphasis added). Furthermore, cash bail cannot be used as a means of punishing the defendant or protecting the public. Id. ¶ 13. The court may impose other, nonmonetary conditions of release to protect the public. 13 V.S.A. § 7554(b)(1).

Pratt explained that "neither this Court nor the U.S. Supreme Court has ever held that bail is excessive solely because the defendant cannot raise the necessary funds." 2017 VT 9, ¶ 14. Instead, "[t]he touchstone for identifying excessive bail under the Eighth Amendment is not what a defendant can pay" but "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." Id. ¶ 15 (quotation and brackets omitted). Similarly, while § 7554 requires the court consider the defendant's financial circumstances, it "does not require a finding that a defendant has the ability to pay a particular amount to support a trial court's bail order." Id. ¶ 16. Specifically, the criminal division is not required to find that defendant can meet bail for the amount to be supported by the record. Id. ¶ 18.

The court considered the statutory factors, as well as defendant's recent flurry of alleged criminal activity, its temporal proximity to his release from prison, and his stated intention not to submit to the sex-offender registry requirements. As to the bail amount, "nothing in [§ 7554] suggests that [the factor of] financial resources was intended to be the controlling factor rather than one of several factors that guide the trial court's evaluation of the least restrictive means of ensuring a defendant's appearance." Id. ¶ 16. Furthermore, the Legislature has specified that for misdemeanor trespass prosecutions, "the court may impose bail in a maximum amount of $200.00." 13 V.S.A. § 7551(b)(2). The criminal division's bail determination is thus consistent with the amount reasonably calculated by the Legislature as appropriate to mitigate the risk of flight from prosecution.

As in Pratt, "heavily informed by the applicable standard of review," 2017 VT 9, ¶ 20, I conclude the criminal division's bail determination was supported by the record and within its discretion.

Affirmed.

FOR THE COURT:

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Michael P. Drescher, Associate Justice