ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-010

JANUARY TERM, 2018

State of Vermont v. Russell Hulst*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 771-6-17 Rdcr, 890-7-17 Rdcr, 891-7-17 Rdcr, 1400-10-17 Rdcr, 1406-10-17 Rdcr, 1532-11-17 Rdcr, and 1533-11-17 Rdcr

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

Under 13 V.S.A. § 7556(b), Defendant appeals the trial court's order increasing bail to $100,000, arguing that the amount was excessive and that there were less restrictive alternatives to ensure defendant's appearance. We affirm.

In June 2017, defendant was arraigned on two felonies—first-degree aggravated domestic assault under 13 V.S.A. § 1043(a)(1) and second-degree aggravated assault under 13 V.S.A. § 1044(a)(2)(b) (Docket No. 771-6-17 Rdcr). The State sought to hold him without bail under 13 V.S.A. § 7553a, which allows a court to hold an individual without bail "when the evidence of guilt is great and the court finds . . . that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence." After the weight-of-the-evidence hearings held on July 3 and 17, 2017, the trial court found that the evidence of guilt was not great for the first-degree aggravated domestic assault charge. For the second-degree aggravated assault charge, the trial court determined that the evidence of guilt was great, but that defendant did not pose a substantial threat of physical violence to any person. The trial court concluded that $10,000 bail was appropriate together with conditions of release. The court based its decision, in part, on defendant's flight risk due to his flight from the courthouse during his arraignment in Addison County, which resulted in an escape charge under 13 V.S.A. § 1501(a)(2) (Docket No. 890-7-17 Rdcr).

Defendant was charged with the following additional crimes: one count of disorderly conduct under 13 V.S.A. § 1026(a)(1) (Docket No. 891-7-17 Rdcr); two counts of violating conditions of release for contacting the complaining witness under 13 V.S.A. § 7559(e) and one count of obstruction of justice under 13 V.S.A. § 3015 (Docket No. 1400-10-17 Rdcr); DUI#2 under 23 V.S.A. § 1201(a)(3) (Docket No. 1406-10-17 Rdcr); twelve counts of violating conditions of release under 13 V.S.A. § 7559(e) (Docket No. 1532-11-17 Rdcr); and sixteen counts of violating conditions of release under 13 V.S.A. § 7559(e) (Docket No. 1533-11-17 Rdcr). At the arraignment for the latter two dockets, the court considered the factors outlined by 13 V.S.A. § 7554(b) and set bail at $25,000 to assure defendant's appearance.

On December 4, 2017, the State filed a motion to increase bail in all pending dockets to $100,000, pursuant to the court's authority to amend bail orders under 13 V.S.A. § 7554(e). The State attached an affidavit from an intelligence officer for the Department of Corrections describing two different phone calls, from which, the State argued, one could infer that defendant

was planning to post bail and leave the state. Based on this affidavit, the State argued that defendant posed a significant risk of nonappearance at future proceedings and thus, an imposition of greater bail was required.

At a hearing the following day, the trial court considered various 13 V.S.A. § 7554(b) factors, including the "seriousness of the charges, number of offenses, nature and circumstance, record of convictions, prior failure to appear, the fact that defendant fled from the courthouse, [and] the character and mental condition as far as the violence in the case," all of which had remained unchanged since the court order to set bail at $25,000. However, the court also considered the new information about defendant's alleged plan to leave the state after posting bail and held that the unchanged factors considered in light of the new information weighed heavily in favor of a determination that defendant would flee and would not be present. While noting that "defendant's length of residence in the community and his family ties are such that they indicate he may well appear," the trial court concluded that $100,000 "is an appropriate amount of bail to reasonably assure [] defendant's appearance at this time."

This Court reviews a decision setting conditions of release, including the amount and type of bail, for abuse of discretion and will affirm "if it is supported by the proceedings below." 13 V.S.A. § 7556(b); see also State v. Pratt, 2006 VT 97, ¶ 6, 180 Vt. 357. Here, the trial court's consideration of and findings regarding the 13 V.S.A. § 7554(b) factors, along with the new information regarding defendant's phone calls, are sufficient to support the increased bail and thus we affirm.

A court may "only impose bail to assure the defendant's appearance at future court proceedings—in other words, the purpose of bail is solely to reduce the defendant's risk of flight." State v. Bailey, 2017 VT 18, ¶ 8. Further, the court must "impose the least restrictive . . . conditions . . . which will reasonably assure appearance of the person." 13 V.S.A. § 7554(a)(1). The court acted within its discretion when it concluded that the new evidence of defendant's alleged plan to flee after posting bail weighed overwhelmingly in favor of increasing defendant's bail. Further, the court considered other less restrictive means, such as having bail be one part cash and surety and another part an appearance bond, and concluded that those alternatives were insufficient to ensure defendant's appearance. It was well within the trial court's discretion to infer from the circumstances of this case—which included one successful flight—and defendant's recent statements regarding potential intent to flee that a higher bail was required to ensure appearance.

Defendant argues that, based on this Court's recent decision in Pratt, defendant's bail is excessive because "bail requirements at a level a defendant cannot afford should be rare." 2017 VT 9, ¶ 9. However, as noted above, the bail in this case was not excessive because it was not 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 (quoting Stack v. Boyle, 342 U.S. 1, 4-5 (1951)). Here, the new information of defendant's alleged plan to flee in combination with his past flight led the trial court to reasonably calculate that the increased bail was the least restrictive means to ensure defendant would appear.

Lastly, defendant argues that the court's reliance on the affidavit was improper under 28 V.S.A. § 107(b)(3). Because defendant did not object to the admission of the affidavit in the trial court, he has not preserved the issue for appeal. State v. Cate, 165 Vt. 404, 410 (1996).

Finally, the Court must correct an erroneous comment made at the bail appeal hearing held on January 16, 2018. The Court was relying on an inaccurate Department of Corrections interim

memo—counsel was correct in asserting that the definition of "Offender Local Records" includes only seven subcategories. The Court misspoke in suggesting that the parties can appeal this decision to a three-Justice panel. Section 7556(b) of Title 13 states that "[n]o further appeal may lie from the ruling of a single justice in matters to which this subsection applies."

Affirmed.

FOR THE COURT:

Marilyn S. Skoglund, Associate Justice