ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-066

APRIL TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
Vito Russo	}	
	}	DOCKET NO. 1619-11-02 WmCr

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

Defendant appeals from the Windham District Court's order that he be held without bail under 13 V.S.A. § 7553a on a charge of aggravated assault. He was charged with this offense in November 2002, and on December 4, 2002, was ordered held without bail after a weight of the evidence hearing by Judge Hudson. He was tried and convicted by a jury on April 4, 2003, and sentenced on July 14, 2003. His conviction was affirmed by this court on October 12, 2004. He then filed a petition for post-conviction relief in superior court, which was granted by Windham Superior Court Judge David Howard on January 8, 2008. The State renewed its request for defendant to be held without bail at that time, and Judge Carroll granted the request after hearing on February 21, 2008. It is from this order that defendant now appeals.

Under 13 V.S.A. § 7556(d), this appeal is a de novo review based upon an entirely new evidentiary record. Accordingly, an evidentiary hearing was held on March 12 and March 27, 2008.

Section 7553a permits the court to hold a defendant without bail if he is charged with "a felony, an element of which involves an act of violence against another person, . . . when the evidence of guilt is great, and the court finds, based upon clear and convincing evidence, 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." 13 V.S.A. § 7553a. Neither party contested the fact that aggravated assault is a felony, an element of which involves an act of violence against another person.

In making its decision under § 7553a regarding whether the evidence of guilt is great, the court applies the standard applicable under Vermont Rule of Criminal Procedure 12(d) for a motion to dismiss for lack of prima facie case. This requires that the prosecution establish "by affidavits, depositions, sworn oral testimony, or other admissible evidence that it has substantial, admissible evidence as to the elements of the offense sufficient to prevent the grant of a motion for judgment of acquittal at the trial." State v. Duff, 151 Vt. 433, 439, 563 A.2d 258, 262 (1989).

The court must evaluate the evidence, taking it "in the light most favorable to the State and excluding modifying evidence," and determine whether it "can fairly and reasonably show defendant guilty beyond a reasonable doubt." Id. at 440, 563 A.2d at 263; see also State v. Turnbaugh, 174 Vt. 532, 532, 811 A.2d 662, 663 (2002) (mem.); State v. Madison, 163 Vt. 390, 394, 659 A.2d 124, 126 (1995). "[I]t is not the role of the court in a bail review hearing to judge the State's case. . . . Direct conflicts between inculpatory and exculpatory facts cannot be resolved at this stage. Such matters must await jury determination at trial. . . . [T]he court need only determine if the State's evidence is sufficient to sustain a verdict of guilty, not whether the jury will indeed be persuaded to render [a guilty verdict]." Turnbaugh, 174 Vt. at 534, 811 A.2d at 665.

The evidence presented at the de novo hearing in this matter established that on November 17, 2002, defendant drove to the car sales business owned by John McKay, where he confronted McKay regarding a civil dispute then pending between them. Defendant pointed a handgun at McKay. McKay, alarmed, drove away from the business, heading towards town. Defendant pursued him and fired at least two shots from the gun toward McKay's fleeing vehicle. McKay went to the police station, with defendant following him. When first contacted by the police, in a parking area very near the police station, defendant was pacing back and forth in an agitated manner, and urged the Brattleboro police officers to shoot him. They were able to subdue him with pepper spray and to place him under arrest. At the time of arrest, he had a box of .22 caliber bullets in his pocket, and a .22 caliber rifle was found in his vehicle.

The State presented the live testimony of McKay regarding these events and also presented affidavits from McKay, the police officers who placed defendant under arrest and investigated the case, two witnesses who heard shots as the vehicles drove past their home, and another witness who heard shots while working in his home, adjacent to McKay's business. The State also presented transcripts of the trial testimony of McKay and the chief investigating officer.

This evidence, when viewed in the light most favorable to the State, would be sufficient to sustain a verdict of guilty on the charge of aggravated assault. See 13 V.S.A. § 7553a.

In support of its argument that defendant'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 physical violence, the State presented evidence that defendant had threatened McKay in the past, and that he had a significant prior criminal record. The State also presented evidence that defendant had engaged in what it described as "obsessive" civil litigation against McKay and communications with his representatives, and that he continued to blame McKay for all of his misfortunes.

The evidence presented demonstrated clearly and convincingly that within a period of weeks before the aggravated assault, defendant had gone to McKay's business and had told McKay that it "wouldn't bother" him to "blow [McKay] away" or "to have [McKay] blown away." An acquaintance of McKay's, who was present at the time, testified about these threats. Furthermore, McKay testified that defendant had often told him that defendant's family was connected with the mafia.

McKay's attorney testified that defendant wrote to him as recently as January 8, 2008, stating that because he had prevailed on his post-conviction-relief petition at superior court, he would now be filing civil suit against McKay alleging malicious prosecution and perjury. In his letter, defendant further repeated his demand that McKay return possession of a motel business that defendant previously owned, and that was the subject of mortgage foreclosure by McKay. McKay's attorney testified that he perceived this as an attempt at extortion by defendant. On February 26, 2008, defendant again wrote to McKay's attorney, describing McKay as "sick" and "soulless." Defendant further wrote in the letter: "If what he did to me was in the form of a loaded gun or knife—I'd have holes all over! As if some angry deranged person would empty a clip or continuously stab me. That is equivalent to McKay and what he did to me."

McKay's attorney also described in some detail defendant's repeated and fruitless pro se efforts to obtain relief from the foreclosure judgment that McKay had won against defendant a few months before the aggravated assault occurred in 2002.

Finally, the State introduced letters that defendant wrote to his wife between the first and second hearings in this appeal, in which he made repeated statements about McKay (several references on each page in the first letter) and referred to him as equivalent to "Evil/Satan."

In support of his appeal, defendant presented testimony from a couple who owns a home in Mt. Holly, and who have worked with defendant through ministry in the Vermont correctional system. They testified that they would be willing to allow defendant to live with them if he were released on bail or conditions of release, and would commit to reporting any violation of such conditions. The Court finds that they were quite credible and clearly believed strongly in defendant's good will and desire to abide by court orders. Defendant also presented testimony from a correctional officer who had worked with defendant in the Southern State Correctional Facility, and who found defendant cooperative and compliant. Furthermore, defendant presented letters of support from educators and others in the correctional system regarding his generally satisfactory performance while in custody, and his participation in many educational and work programs.

In addition, defendant testified himself regarding his willingness to abide by court orders, his lack of intent to threaten McKay, and his exemplary performance while incarcerated. During cross-examination, he admitted that one of his very recent letters to his wife might have contained as many as eighteen separate references to McKay and acknowledged: "I mention McKay to every single person in my life, over and over and over."

The State presented certified copies of conviction records showing that defendant was convicted in Pennsylvania in July 1984 of burglary, and that he was convicted in Florida in May 1985 of burglary and grand theft, in December 1987 of burglary of a conveyance, grand theft, burglary of a dwelling and manufacture of cannabis, in March 1993 of burglary of a structure and petit theft, and in July 1994 of burglary of a conveyance.

On rebuttal, the State presented the testimony of the owner of a local restaurant who employed defendant for a couple of weeks and then fired him. He testified that shortly after he fired defendant in 2002, defendant saw him near a local hardware store, called out to him, and

then gestured toward him with his hand, as if holding a gun and pulling the trigger, and said "boom." The lighting was poor, so the restaurant owner could not be certain whether defendant actually had a gun, but he was sufficiently alarmed by the incident to report it to the police.

Based on all of the evidence, the most relevant and persuasive portions of which have been summarized above, the Court concludes that the State has demonstrated by clear and convincing evidence that there is no condition or combination of conditions of release that would be sufficient to protect the public, particularly McKay, should defendant be released. Though he denies it, defendant's conduct and statements demonstrate that he has a fixed obsession with McKay, and that he is convinced that McKay is the source of all of his troubles. Defendant has never wavered in his determination to exact revenge on McKay for what he sees as his unjust action in foreclosing upon his real property. His obsession has led him to continue to threaten McKay through written communications to McKay's attorney, even while incarcerated and seeking release on bail. In light of his significant criminal history, and in light of the facts surrounding this particular charge, there is great risk that if released, defendant might engage in more overtly violent and threatening conduct toward McKay or others.

For the above stated reasons, the decision of the Windham District Court to hold the defendant without bail pursuant to § 7553a is affirmed.

Affirmed.

FOR THE COURT:

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Katherine A. Hayes, Specially Assigned