ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-113

MARCH TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Eric Kurtz	}	
	}	DOCKET NO. 450-2-10 Cncr
	}	
		Trial Judge: Matthew I. Katz

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

Defendant appeals from the district court's denial of his unopposed motion to amend a condition of release imposed by the court following his arraignment on a charge of driving under the influence (DUI), third offense, under 23 V.S.A. § 1201(a)(2). The specific condition at issue required: "Defendant's truck is to be placed up on blocks at his residence in Burlington—to occur by 4:00pm today 2/11/10." The motion relied on the fact that defendant did not own the truck in question. Rather, the truck was owned by his girlfriend and was used in the operation of the girlfriend's construction business.

Under 13 V.S.A. § 7556(c), a defendant may appeal a condition of release to a single justice of this Court. "Any order so appealed shall be affirmed if it is supported by the proceedings below." Id. This Court held a telephone hearing with Deputy State's Attorney Paul Finnerty and defense counsel Edward Kenney on Tuesday, March 30, 2010.

The defendant is charged with DUI, third or fourth offense (the record before this Court is not clear), and leaving the scene of an accident. At the time of the charged incident he was driving a heavy-duty pickup truck. As part of the incident, it is alleged he struck a bicyclist with the truck, causing the bicyclist to be flipped in the air and to land in a snow bank. Defendant was later found to have an extremely high blood-alcohol content—.301 at least an hour after the alleged accident. The court found no reason to impose bail, as defendant's appearance in court was not at risk. Rather, the conditions that he not operate a motor vehicle and that the truck be placed up on blocks to disable it were imposed because the court found defendant to be "a dangerous individual" and noted the "strong evidence of alcoholism." It further found that, notwithstanding the girlfriend's ownership of the truck, "Vermont's pre-trial release statute clearly envisions conditions of release which impose a hardship on third persons," citing § 7553(a)(1)(A) (placing defendant in custody of designated person) and § 7553(a)(1)(B) (placing restrictions on place of abode during period of release). The court further relied on the arresting officer's notation on the processing form that defendant told him he suffers from pancreatitis.

The court read the note to say "not supposed to drive 2 yrs. ago diagnosed." Actually, the note says "not supposed to *drink* 2yrs. ago diagnosed." (Emphsis added.) The court relied on its misreading and wrote "[t]his defendant's own physician evidently told him his physical condition made driving dangerous, yet what does he do but get himself highly drunk on top of the pancreatitis and drive the large truck."

We review the trial court's decision setting conditions of release under a deferential standard, affirming if the decision is supported by the proceedings below. 13 V.S.A. § 7556(c); see also State v. Ashline, No. 2010-108, slip op. at 2 (Vt. March 22, 2010) (deferring to trial court's imposition of identical condition of release because of "defendant's extremely high level of intoxication" and lack of evidence that "entire family relies on one car for transportation or where compliance with the condition would be so onerous as to amount to an abuse of discretion."). I find that here the trial court's exercise of discretion cannot be sustained.

First, I note the Legislature has created a specific procedure for the immobilization and/or forfeiture of a motor vehicle operated by a defendant convicted of a second or subsequent offense of operating while under the influence, pursuant to 23 V.S.A. § 1201. See 23 V.S.A. §§ 1213a, 1213b, & 1213c. Here, obviously, defendant has yet to be convicted. Further, the statute governing immobilization requires notice of an immobilization hearing be sent to the registered owner of the vehicle at issue and "any other person appearing to be an innocent owner." The statute states that the court shall not order the immobilization of a motor vehicle if an owner, other than the defendant, shows by a preponderance of the evidence that the owner did not consent to or have any express or implied knowledge that the motor vehicle was being or was intended to be operated in a manner that would subject the motor vehicle to immobilization, or that the owner had no reasonable opportunity or capacity to prevent the defendant from operating the motor vehicle. Here, the court held no equivalent immobilization hearing. More importantly, had the Legislature intended immobilization to be available as a condition of release, surely they would have added that circumstance to their detailed crafting of immobilization process after conviction.

However, I do not know how the trial court analyzed the case under the immobilization statutes, as the argument on the motion to amend occurred in chambers, was not recorded, and the court makes no mention of the statutes in its written decision.

Rather, I hold that the court's decision is not supported by the record in two very important respects. First, the court heard nothing from the owner of the truck as to her knowledge of defendant's use of the truck on the day in question or of defendant's intoxication at the time. Second, the court merely speculated that the girlfriend "tolerates" defendant's use of the truck and that she "cannot be counted on to control this defendant, keep him from driving."

While I agree with the trial court's assessment of defendant's level of danger to the public, the record does not support the court's immobilization of the girlfriend's truck. I hereby strike that condition of release and remand for reconsideration of the conditions of release. I impose the following conditions until further order of the district court: Standard conditions 1,2, and 3; condition 5: defendant must report to the Burlington Police Department twice daily, once

before 8:00am and once between 6:00pm and 8:00pm; condition 7: defendant cannot drive any motor vehicle.

Reversed and remanded. Pending reconsideration, conditions of release 1, 2, 3, 5, and 7 are imposed.

FOR THE COURT:

Marilyn S. Skoglund, Associate Justice