

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-350

SEPTEMBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Vermont District Court,
	}	Unit 3, Franklin Circuit
	}	
Noah Morrison	}	DOCKET NO. 147-1-07/ 582-5-07

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

Defendant appeals the trial court’s decision to hold him without bail pending a violation-of-probation hearing. Defendant contends that the trial court abused its discretion by denying him the opportunity to be released on conditions. We reverse and remand for further consideration of the factors listed in 13 V.S.A. § 7554(b).

Defendant was arraigned in Franklin District Court on August 27, 2007 and charged with violating the conditions of his probation by failing to verify that he attended the requisite substance-abuse counseling, not completing a Community Reparation Program, and acting in a violent or threatening manner. Defendant was also charged with a single count of reckless endangerment, a misdemeanor, based on an incident in which defendant allegedly fired a gun in the general vicinity of a residential neighborhood. The court determined that defendant should be held without bail. Defendant then sought review of the denial-of-bail decision under 13 V.S.A. § 7554(d). Following the hearing, the court again denied bail, emphasizing that defendant had not been forthcoming about the location of the firearm used in the reckless-endangerment incident. In particular, the court stated that it did “not believe the defendant’s account of these events and concludes that he knows where the gun is. To release him at this time would give him the opportunity to retrieve the gun[,] and he would present a danger to himself and others.” This appeal followed.

Rule 32.1(a)(3) of the Vermont Rules of Criminal Procedure provides that, in the context of a probation revocation proceeding, an order denying bail or changing the terms of release “shall be reviewable in the manner provided in 13 V.S.A. §§ 7554 and 7556 for pretrial release.” Under 13 V.S.A. § 7556(b), “[a]ny order so appealed shall be affirmed if it is supported by the proceedings below.” Thus, we must determine whether the court’s decision to deny bail is supported by the proceedings.

The Legislature has made clear that while there is no constitutional right to bail pending

revocation-of- probation proceedings, see 28 V.S.A. § 301(4), the “trial court has discretion to grant bail.” State v. Blackmer, 160 Vt. 451, 456, 631 A.2d 1134, 1137 (1993). Although this discretion is “broad,” id. at 457, 631 A.2d at 1139, Rule 32.1(a)(3) clearly states that “the judicial officer shall consider the factors set forth in 13 V.S.A. § 7554(b).” See V.R.Cr. P. 32.1(a)(3). These factors include the nature and circumstances of the offense, the weight of the evidence against the accused, the accused’s family ties, history of employment, financial resources, ties to the community, record of convictions, record of appearance at court proceedings, and the character and mental condition of the accused. Id. The court may consider any acts or threats of violence with respect to the accused’s character and mental condition. Id. In reviewing the court’s consideration of these factors, we will affirm the court’s decision unless there is a showing that the court failed to exercise its discretion or “exercised it for reasons clearly untenable or to an extent clearly unreasonable.” State v. Patch, 145 Vt. 344, 353, 488 A.2d 755, 761 (1985).

A review of the record in this case discloses that the trial court considered few, if any, of the factors listed in 13 V.S.A. § 7554(b). The court did mention the defendant’s discharge of a firearm and the potential threat posed by defendant to himself and his community, which arguably could constitute evidence of the accused’s character and mental condition under section 7554(b).

Moreover, the court did not consider any of the other factors listed in section 7554(b). Notably, several significant factors seem to favor the defendant. The probation violations at issue were not felonies, and the new charge is also a misdemeanor.

On the other hand, the court’s decision was also based on defendant’s inability to produce the gun used in the reckless endangerment incident. The court stated that it disbelieved defendant’s statements about the location of the gun and feared that defendant would retrieve the gun if released. It is unclear how this concern relates to the section 7554(b) factors. Defendant offered a plan of supervision that would prevent access to the gun, and the court rejected it without discussion. The record thus contains little evidence of defendant’s actual mental condition.

Although the court has broad discretion to deny bail where, as here, defendant has no right to bail pending probation-revocation proceedings, Rule 32.1(a)(3) expressly states that the court’s discretion “shall” be guided a consideration of the factors listed in section 7554(b). Because the court did not adequately consider these factors, I reverse and remand for the court to reconsider its decision in light of the factors set forth in 13 V.S.A. § 7554(b).

Reversed and remanded.

FOR THE COURT:

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John A. Dooley, Associate Justice