

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-421

NOVEMBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit 2, Bennington Circuit
	}	
Scott Morey	}	DOCKET NO. 1369-11-03 Bncr

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

The State appeals an order of the district court, setting several conditions of release, including that defendant post a surety bond or cash in the amount of \$50,000. Defendant, who suffers from significant cognitive defects, was originally charged with burglary, simple assault, and aggravated domestic assault in November 2003. He ultimately plead guilty and was sentenced to a term of between ten and thirty years' imprisonment. He later sought post-conviction relief under 13 V.S.A. § 7103, arguing that his guilty plea had not been voluntary and that he had received ineffective assistance from trial counsel. The superior court granted defendant's petition, reasoning that defendant's pleas had been involuntary. The court also opined that defendant would, in the alternative, be entitled to post-conviction relief on the basis of ineffective assistance of counsel. The bail order now being appealed was issued on October 15, 2007, pending the commencement of defendant's new trial.

At defendant's bail hearing, the State took the position that defendant should be held without bail, under 13 V.S.A. § 7553a. The State emphasized the violent nature of defendant's alleged crime and the continued fears expressed by the victim and her mother about the threat posed by defendant. The State also pointed to defendant's record of past parole violations in arguing that defendant still "posed a substantial threat" to the victim and the community.

Defendant requested that he be granted release on conditions. He argued that, in light of the passage of time after the alleged attack and the visits paid by the victim to him while in prison, the State could not meet its burden under § 7553a. Defendant also argued that he would pose no flight risk, because he had limited funds, strong ties to the community, and no past failures to appear in court proceedings. Neither party presented any testimony or evidence as to the weight of the evidence of defendant's guilt, the substantial threat posed by defendant, or possible

conditions of release that could “reasonably prevent the physical violence.” 13 V.S.A. § 7553a.

The court decided to impose a variety of conditions of release and a requirement of cash or surety bond in the amount of \$50,000. The court stated that it had “this notion that people should get bail.” The court went on to explain that “the more likely it is that somebody would be jailed for a lengthy period of time[,] the less likely it is that they will show up for court, and, therefore, the higher the bail should be.” The court further reasoned that imposition of a high cash bail would “modif[y] and make[] more workable the timelines” of the court. In particular, the court mentioned that “the sixty-day right of trial” required under § 7553b for those held without bail was “not workable.” This appeal followed.

The State makes three contentions in support of its argument that the trial court abused its discretion. First, the State contends, the court abused its discretion in deciding to impose bail and conditions of release without first conducting an evidentiary hearing to determine the weight of the evidence pursuant to the elements in § 7553a. The State acknowledges that the court erred in imposing \$50,000 bail when defendant has never posed any risk of flight. Finally, the State asserts that the court abused its discretion in not holding defendant without bail.

Defendant’s bail hearing focused on whether he could be held without bail pursuant to section 7553a. The statute sets forth particular findings that must be made by the court before defendant is held without bail: defendant must be “charged with an offense that is a felony, an element of which is an act of violence against another person,” and the court must find that “the evidence of guilt is great” and that there is clear and convincing evidence that a person poses a “substantial threat of violence” that no combination of conditions of release can address. The last finding cannot be made without evidence. The court did not consider any of these factors. The State is entitled to a ruling on the merits of whether § 7553a applies. Defendant concedes that the failure to consider the elements of § 7553a is error. I remand for the court to take evidence and rule on whether the § 7553a standards are met.

Although the above ruling resolves the State’s appeal, we address defendant’s objection to the order the court did issue and its rationale. The court set a prohibitively high bail requirement based on its belief that defendant represented a significant flight risk solely because he faced a high prison sentence. Defendant argues that he is entitled to a bail amount based on his risk of flight and not on the court’s inapplicable generalization. I agree with defendant’s objection. This court rejected the trial court’s reasoning in State v. Duff, 151 Vt. 433, 436, 563 A.2d 258, 260 (1989):

The sole support for the high cash bail requirement in this case is that defendant is charged with a very serious crime and faces a long period of incarceration. The record contains no evidence on risk of flight beyond the charge. If that alone were sufficient to set a high cash bail amount, the constitutional right to bail would be a nullity for all defendants charged with serious crimes.

We went on to conclude that the court did not have the evidence before it to impose a high cash bail, id., and we remanded for the court to determine whether defendant should be held without bail.

The logic of Duff governs here. The court may not impose a high cash bond simply because defendant committed a serious crime and faces a lengthy sentence. Moreover, the court's reference to § 7553b indicates it intended to hold defendant in jail without triggering the right to trial in 60 days under that section. This is not a valid reason for imposing high bail. See State v. Wood, 157 Vt. 286, 289, 597 A.2d 312, 313 (1991) (“[T]he imposition of bail in an amount that cannot be raised by an accused, in order to obtain his incarceration, is precisely what the law forbids”).

Although the current bail order cannot be sustained, the court has discretion to hold a defendant without bail pending a hearing under § 7553a. See State v. Bickel, 166 Vt. 633, 634, 698 A.2d 243, 243 (1997). The record in this case would support such an order. For this reason, I do not strike the bail order but direct a hearing, to be held within ten days of this order, as to defendant can be held temporarily without bail, pending a new hearing under 13 V.S.A. § 7553a.

Remanded for proceedings not inconsistent with this order.

FOR THE COURT:

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John A. Dooley , Associate Justice