**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-111

APRIL TERM, 2008

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| George Dean Martin | } | APPEALED FROM: |
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| v. | } | District Court of Vermont, |
| | } | Unit No. 2, Addison Circuit |
| State of Vermont | } | |
| | } | DOCKET NO. 485-7-02 Ancr |

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

Defendant's appeal of the trial court's denial of his motion for release pending appeal pursuant to V.R.Cr.P. 46(c) is denied. Under V.R.Cr.P. 46(c), a defendant may petition the trial court for release pending appeal. When evaluating the motion, the trial court is to consider "the factors set forth in 13 V.S.A. § 7554(b), as well as the defendant's conduct during the trial and the fact of conviction." Section 7554(b) provides a list of factors: the nature and circumstances of the offense, weight of the evidence against the defendant, family ties, employment, financial resources, character and mental condition, length of the defendant's residence in the community, his record of convictions, and record of appearance at court proceedings. This Court reviews an appeal of the trial court's denial of a Rule 46(c) motion on the record. V.R.A.P. 9.

Defendant was resentenced at a hearing on March 10, 2008. After his resentencing, defendant made two motions: a motion for stay of his sentence pending appeal pursuant to V.R.Cr.P.38(b) and a Rule 46(c) motion for release. The trial court denied both motions. Defendant appeals solely the Rule 46(c) denial. We thus proceed without balancing the merits of defendant's appeal against the length of the sentence imposed, as is required by Rule 38(b).[*]

Most, if not all of the relevant § 7554(b) factors were addressed by the court or are not in dispute. At the hearing, the court acknowledged defendant's family ties to his children and desire to care for his ill mother. Defendant is gainfully employed and appears to have overcome his problems with alcohol abuse, having abstained from drink in the six months since his release

[*] Although initially intrigued, this court is not persuaded by defendant's argument that we should substitute consideration of the likelihood that defendant will prevail on appeal, a specific factor to be balanced against the length of sentence in a Rule 38(b) motion to stay, in place of the "weight of the evidence" prong listed under § 7554(b). The two rules address two distinct policy concerns. Rule 38(b) addresses whether a stay should be granted when a sentence could be served before a decision is reached on a meritorious appeal. Rule 46(c) considers risk of flight factors as well as defendant's trial conduct, plus the fact of conviction—without regard for the merits of the appeal. Thus, the "weight of the evidence" prong of § 7554(b) is inapposite to our analysis in the context of this appeal.

from jail. His longstanding ties to the community were not disputed at pretrial or at sentencing. There was no claim that defendant acted other than appropriately either during trial or since sentencing. It was established pretrial—and not disputed—that defendant was previously convicted some years ago on a stolen property offense, although this was not raised in the instant matter. The court noted that defendant completed a commendable charity project to aid the prison library while incarcerated. He has not violated his probation, has come to court when required to do so, and has acknowledged responsibility for his crime.

Against these more favorable Rule 46(c) factors the trial judge examined "the fact of conviction" and "nature and circumstances of the offense." V.R.Cr.P. 46(c); 13 V.S.A. § 7554(b). At the resentencing, defendant stood as a convicted felon on a homicide charge, responsible for the deaths of two children. The nature and circumstance of the misconduct were severe. The fact of the conviction is beyond question since its affirmation by this court. Defendant is not now entitled to bail as a matter of right, State v. Ryan, 134 Vt. 304, 305 (1976), and the heavy weight of the conviction and severity of the offense are not necessarily trumped, as a matter of law, by the many factors weighing in his favor. See State v. Woodmansee, 132 Vt. 558, 560 (1974) (upholding denial of bail for impecunious multiple felon pending appeal of conviction for accessory to murder, by threat, under Rule 46, despite being a lifelong resident with family ties, no probation or parole violations, good bail history and no misbehavior during trial). As the court observed in Woodmansee, "[t]hese facts are all to the good, but are no more than what is expected of all citizens." Id.

That the trial court afforded maximum weight to the factors in defendant's favor appears borne out in the court's decision to extend his sentence solely on the basis of punishment, since the sentencing objectives of deterrence, public protection and rehabilitation had already been achieved. Although we might reach a different result if we were to balance the Rule 46(c) factors in the first instance, this Court's review of the trial court's decision is deferential. State v. Foy, 144 Vt. 109, 115, 475 A.2d 219, 223 (1984) ("This Court will not interfere with discretionary rulings that have a reasonable basis, even if another court might have reached a different conclusion.") (citation omitted); In re L.R.R., 143 Vt. 560, 562, 469 A.2d 1173, 1175 (1983) (we will not set aside a discretionary ruling of the trial court "simply because a different result might have been supportable, or because another court might have reached a different conclusion"). Due to the severity of the offense, the fact of conviction and defendant's settled culpability, it was no patent abuse of the court's discretion to deny defendant's motion for release.

FOR THE COURT:

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Brian L. Burgess, Associate Justice