

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2004-396

OCTOBER TERM, 2004

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 3,
	}	Addison Circuit
v.	}	
	}	
Larkin Forney	}	DOCKET NO. 426-7-03 AnCr
	}	
	}	
	}	

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

Defendant Larkin Forney appeals the district court's denial of his motion to reduce cash bail and release him into the custody of his parents. On appeal, defendant argues that the record does not support a risk of nonappearance, and therefore, the \$50,000 bail imposed by the district court is designed to keep him incarcerated because the district court believes him to be dangerous to the public. Defendant also argues that, despite a history of seriously inadequate supervision, the district court erred in finding that his parents are incapable of supervising him upon his release. As to the challenge of supervision, the Court shares the district court's concerns; however, upon review of the record and the applicable law, the Court concludes that the bail is not supported by the record. The matter is remanded to the district court with instructions to reduce bail and impose the least restrictive combination of conditions that will assure defendant's appearance and protect the public.

Defendant has been incarcerated since July 2003 when he failed to post \$50,000 bail after being charged with arson and misdemeanor reckless endangerment. Defendant did not initially appeal that order, but remained incarcerated awaiting trial on a number of charges. Defendant has other charges pending against him because of acts he allegedly committed while he was released on bail prior to his trial on felony counts for a third DWI, and a refusal to take an evidentiary breath test for a third DWI. While on release from the DWI charges, defendant initiated a consensual sexual relationship with a girl whom he met on the internet and whom he allegedly believed was of age. A police investigation conducted after defendant and the girl had been hospitalized for drug and alcohol overdoses revealed that the girl was under the age of sixteen, and that the two allegedly engaged in sexual intercourse on two occasions. These revelations led to two charges of sexual assault on a minor. After arraignment on these charges, the district court imposed conditions and set bail at \$10,000. Defendant could not post bail and as a result was briefly incarcerated until bail was raised. While out on release, defendant was charged with violating the condition that he not use the internet. Finally, out of frustration with his predicament, defendant apparently attempted to commit suicide by dousing himself in gasoline and setting a fire in his room at his parent's house. The ensuing fire badly burned defendant and left his face and arms visibly disfigured. The fire also seriously damaged his parent's house. As a result, defendant was charged with arson and misdemeanor reckless endangerment of his mother, and the high bail was set.

For some time after his incarceration, defendant's competence to stand trial was in question. That issue was resolved in favor of competence in April 2004. Prior to the April 2004 hearing, defense counsel moved the district court to reduce bail and amend conditions. The district court denied the motion on the record at the April competency hearing. Defense counsel renewed the motion in July 2004, and the district court denied it, ruling that the motion was identical to the motion it denied in April. The district court instructed defense counsel to explain what, if any, changed circumstances required a new hearing. Defense counsel then renewed the motion yet again in August 2004. The district court denied this renewed motion at a status conference on August 30, 2004. The district court refused to reduce bail and/or release defendant to the custody of his parents because it questioned whether the parents could be adequate supervisors. If another supervisor could be found, the district court was willing to release defendant. After this third denial, defendant

appealed the ruling to this Court pursuant to 13 V.S.A. § 7556(b). Defendant has now been in pre-trial incarceration for approximately fifteen months.

Under section 7556(b), this Court must affirm the district court's order " if it is supported by the proceedings below." A review of the April and August 2004 hearing transcripts leads this Court to two conclusions. First, the district court did not find, nor would the record support a finding, that defendant presented a risk of nonappearance justifying the amount of bail required. The State's Attorney essentially concedes, even after noting the number of pending charges, that the issue here is not about compelling defendant's appearance at trial. Therefore, the Court will turn to its second conclusion, that the district court is holding defendant because the trial judge believes, from the nature of the charges, that defendant could " be a danger to people in a number of different ways if he is in the community," and does not feel defendant should be released to the custody of his parents. On this record, and in light of the Vermont Constitution and controlling statutes, these are impermissible grounds on which to continue defendant's incarceration.

The Vermont Constitution does permit the State to hold an accused without bail before trial in cases where defendant stands accused of an offense punishable by life imprisonment or of a violent felony, but only if evidence of guilt for such an offense is great. Vt. Const. ch. II, § 40(1), (2); 13 V.S.A. § 7553 (life imprisonment); 13 V.S.A. § 7553a (violent felony). The State has not argued, nor does the record reveal, that this more restrictive bail statute applies. Rather, defendant is entitled to bail under the Vermont Constitution as implemented in 13 V.S.A. § 7554(a) & (b). Under our law, defendant is entitled to reasonable bail and the least restrictive combination of conditions of release that will both assure his appearance at trial and protect the public during his release.

Excessive bail cannot be used to compel defendant's incarceration under § 7554, when he is otherwiseailable within the terms of the statute and the Constitution. The Vermont Constitution expressly prohibits excessive bail forailable offenses. Vt. Const. ch. II, § 40. Though the district court has wide discretion in determining the amount of bail and the appropriate combination of conditions to assure the defendant's appearance and protect the public, the bail amount must be reasonable in light of the constitutional prohibition of excessive bail and the presumption of innocence to which the defendant is entitled. State v. Pray, 133 Vt. 537, 542 (1975); see also State v. Cyr, 134 Vt. 460, 462 (1976)(" [B]ail cannot be used solely as a device to protect the public." ) " [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." State v. Wood, 157 Vt. 286, 289 (1991).

Under § 7554(b), the district court is entitled to consider, in determining which conditions to impose to assure appearance and protect the public, numerous factors such as the nature and circumstances of the offenses, the accused's family ties, the weight of the evidence against defendant, his employment, financial resources, character and mental condition, length of residence in the community, and record of appearance at court proceedings. 13 V.S.A. 7554(b). But the presumption of the statute is in favor of release. Only under " extraordinary circumstances" can the district court impose conditions that physically restrict defendant in order to protect the public. § 7554(a)(2)(C). No findings were made on extraordinary circumstances. General danger to the public from the possibility that defendant may commit another crime on release is insufficient to hold defendant in pre-trial detention. Accordingly, the amount of bail is inconsistent with the court's power to hold defendant under our law.

The trial court's decision is reversed and the matter remanded for a new bail hearing, at which the trial court may set reasonable bail, if appropriate, and such conditions of release as will protect the public in accordance with 13 V.S.A. § 7554.

FOR THE COURT:

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Denise R. Johnson, Associate Justice