

ENTRY ORDER

FEB 17 2010

SUPREME COURT DOCKET NO. 2010-042

FEBRUARY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Rutland Circuit
Christopher Bower	}	
	}	DOCKET NO. 1626-12-05 Rdcr 1
	}	
	}	Trial Judge: Thomas A. Zonay

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

Defendant appeals the district court's decision to hold him without bail pending the merits hearing on his alleged violation of the conditions of his probation. We affirm.

In 2005, defendant was convicted of aggravated assault and received a sentence of two-to-seven years, all suspended but 30 days. Upon his release, he was placed on probation, conditions of which included not being convicted of another offense and not buying, possessing, or using controlled substances. On December 28, 2009, defendant was arraigned on charges of simple and domestic assault. At that time additional conditions of release were imposed and bail was set at \$25,000.

On January 28, 2010, defendant reported to the probation office and submitted to a urinalysis test. He tested positive for cocaine and admitted to using the drug three days earlier. Defendant was immediately arrested, and a hearing was held the same day.

At the hearing on January 28, the State requested that defendant be held without bail. The State argued that defendant was not entitled to bail because the conduct at issue was a probation violation and none of the factors usually considered by a court in a bail hearing were pertinent. The State further asserted that defendant's cocaine use dated back to the December assaults. Finally, the State argued defendant should not be released because, according to the probation officer, defendant told her that he "was using these drugs because he [was] depressed over the new charges."

Defense counsel opposed the request, first arguing that defendant's cocaine use did not make him any less likely to appear for his court date, and second that the drug use did not pose a danger to anyone but himself. Defense counsel urged the court to exercise its discretion and set bail, recounting that defendant's connections to the community included a full-time job, home ownership, parents, and a history of compliance with conditions of probation up to the alleged December 2009 violation.

The court granted the State's request and ordered defendant held without bail. The court first noted that the matter under consideration was not a bail hearing for the initial charge, but whether defendant should be released after conduct that constituted both a violation of probation and a violation of conditions of release for the pending assault charges. The court also found defendant's admission that he had used cocaine, and the explanation that his drug use was prompted by the pending charges, presented a risk that he would not appear and that he would continue to violate whatever conditions were imposed. This appeal followed.

Vermont Rule of Criminal Procedure 32.1(a)(3)(A) provides the right to an appeal for probationers held without bail under the terms set out in 13 V.S.A. §§ 7554 and 7556. Section 7556(b) provides that any order denying bail to a probationer "shall be affirmed if it is supported by the proceedings below." The Legislature has also declared that after arraignment on a violation of probation charge, "the court may release the probationer pursuant to [13 V.S.A. § 7554]," but a probationer has "no right to bail or release" while awaiting a revocation hearing. 28 V.S.A. § 301(4). Nevertheless, the trial court must exercise its discretion in considering whether to release a defendant on bail pursuant to the considerations enumerated in 13 V.S.A. § 7554. See State v. Passino, 154 Vt. 377, 379, 577 A.2d 281, 283 (1990). We have held that in such circumstances, a court must demonstrate for the record how it exercised its discretion in its bail determination. Id.

Defendant argues that the court did not consider all factors, that its decision was influenced by mere allegations of other past violations, and that it assumed erroneously that defendant's drug use would lead to additional offenses and failure to appear.

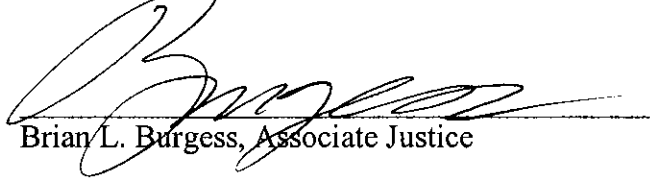
The trial court, however, did consider all pertinent factors in 13 V.S.A. § 7554(b), such as defendant's work, residence, and family status. In addition, the court acknowledged defendant had not failed to appear before. But the court also concluded that defendant's admitted drug use, while on strict probation conditions and knowing he was facing possible revocation of probation and imposition of his full sentence, weighed against release. The court pointed out defendant's drug use was not "just drug abuse" but a violation while under supervision and already at risk for sanction. Defendant also blamed the underlying criminal prosecution as the impetus for his actions. The court noted that the quality of evidence against defendant on the drug charge made a finding of a violation likely, therefore increasing his risk of incarceration. These findings provided sufficient support for the order to hold defendant without bail pending the probation revocation hearing.

Defendant correctly points out that flight is not a foregone conclusion. On these facts, however, neither is defendant's appearance. The trial court did not assume flight, but opined that such factors can present a higher risk to re-offend or not appear, or both. This Court came to a similar conclusion in State v. Brown, 136 Vt. 561, 567, 396 A.2d 134, 137 (1978), where we recognized that "multiplication of charges . . . and the mounting evidence against him might make a defendant's appearance less likely." The trial court knew conditions of release and bail did not reasonably dissuade defendant from acting irresponsibly. The trial court knew defendant could not be relied upon to abide by conditions of release. Defendant's admission suggested an increased risk of re-offending. Given the increased risk of incarceration, the trial court was

logically concerned with increased risk of non-appearance. Of course the trial court had the discretion to grant release, but its decision to do otherwise was not untenable. Under these circumstances its decision to deny bail, to which defendant had no claim of right, was not an abuse of discretion. See State v. Avgoustav, 2006 VT 90, ¶7, 180 Vt. 595, 907 A.2d. 1185 (finding no abuse of discretion where the court, in considering § 7554 factors, found defendant posed a risk of flight and denied bail).

Affirmed.

FOR THE COURT:

A handwritten signature in black ink, appearing to read "Burgess", written over a horizontal line.

Brian L. Burgess, Associate Justice