VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

NOV 10 2004

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-479

NOVEMBER TERM, 2004

State of Vermont	}	APPEALED FROM:
	}	
	}	District Court of Vermont,
v.	}	Unit No. 2, Chittenden Circuit
	}	
Enreko Tyler	}	
	}	DOCKET NO. 3851-7-04 Cncr

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

Defendant appeals from the district court's denial of his motion to reduce his cash bail from $250,000 to $50,000. Under 13 V.S.A. § 7556(b), defendant may appeal a condition of release (including cash bail) to a single justice of this Court. "Any order so appealed shall be affirmed if it is supported by the proceedings below." Id. This Court held a telephone hearing with Deputy State's Attorney Pamela Johnson and defense counsel Frank Twarog on Wednesday, November 10, 2004.

The facts and procedural history are as follows. Defendant was arrested and charged with attempted murder on July 27, 2004, following a late-night brawl in downtown Burlington. According to the State, at about 3:00 a.m. on July 25, 2004, defendant began heckling Terrence Wills outside a bar. The men exchanged words, which escalated to the point that Wills, "a man much larger than" defendant, pushed defendant to the ground and walked away. At that point, defendant got in a friend's car, drove a short distance, and got out and again exchanged words with Wills. The argument escalated again, with Wills putting defendant in a headlock. Defendant then lashed out with a knife, cutting Wills on the arm and stabbing him in the diaphragm, stomach, and chest.

Defendant was arraigned and held without bail. On August 19, 2004, he filed a motion for review of bail. The State responded by requesting that the court continue to hold defendant without bail. The district court took evidence at a hearing on August 25, 2004.

The court issued a written decision on September 1, 2004, denying the state's motion to hold defendant without bail, and setting conditions of release, including cash bail of $250,000. In setting the cash bail, the district court stated that "[g]iven the seriousness of the charge, the strength of the State's case, because he had been a resident of Vermont for such a short time and given his contacts

to the State of Georgia, cash bail is necessary to assure his continued appearance." The court identified the following factors in its bail analysis: the fact that defendant has been a resident of Vermont for "such a short time" (4 years) and has a son in Georgia "whom he visits and supports regularly"; the State's "persuasive evidence" of guilt; the "obvious self-defense theory available to the Defendant"; the involvement of alcohol in the incident; defendant's use of a deadly weapon; and defendant's "close personal relationships" with his employer and co-coach.

Defendant then filed a motion to modify the cash bail by reducing it from $250,000 to $50,000, arguing that he has been a continuous resident of Vermont for seven years, not four as the district court noted in its decision, and that he did not travel regularly to Georgia to see his son. Defendant submitted two affidavits from friends indicating that he moved to Burlington on a full time basis in late 1997 or early 1998, and that he did not travel to Georgia to see his son, rather, his son would visit him during summers in Vermont. Otherwise, his contacts with his son are via "frequent telephone calls." He also reiterated that he lacks the financial resources to post the $250,000 cash bail.

On September 30, 2004, the district court denied the motion by entry order, stating simply that the existing conditions and cash bail "strike the Court as the least restrictive necessary to ensure the re-appearance of the Defendant on this murder charge." This appeal followed.

Under 13 V.S.A. § 7556(b), this Court will affirm the district court's order setting bail conditions "if it is supported by the proceedings below." When setting a cash bail, the district court must fix a reasonable figure in light of the constitutional prohibition on excessive bail and the presumption of innocence to which all defendants are entitled. State v. Pray, 133 Vt. 537, 542 (1975). Excessive bail cannot be used to compel a defendant's incarceration under 13 V.S.A. § 7554, when he is otherwise bailable under the terms of the statute and the Vermont Constitution. See Vt. Const. ch. II, § 40 (prohibiting excessive bail for bailable offenses). As this Court has held, "the 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).

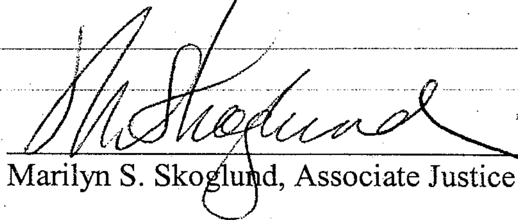
The district court's decision denying defendant's motion to modify cash bail is not supported by the proceedings below. In particular, the district court understated defendant's connections to Vermont, and overstated his connections to Georgia. First, the uncontradicted evidence supports a finding that defendant has been a resident of Vermont for approximately seven years, not four years, as the district court stated in its original bail decision. Second, defendant's submissions make clear that he does not visit his son in Georgia "regularly," as the district court stated in its September 1 bail decision, but rather sees his son in Vermont and maintains regular telephone contact with him. The court's decision to set a cash bail amount so far out of defendant's reach that it is the functional equivalent of a denial of bail is not supported by the proceedings. Therefore, the defendant's motion to reduce the cash bail amount is granted.

Finally, the State argues that if defendant's motion to reduce cash bail is granted, this Court should remand for reconsideration by the trial court of its conclusion that defendant is entitled to bail. The State's argument turns on its contention that "the district court . . . improperly considered whether a jury would find that Appellant's stabbing of the victim was justified . . . or mitigated."

We reject this argument. In concluding that while the state's evidence was "strong," it was not "great" for purposes of § 7553, the district court considered the evidence presented including an observation that "one key witness . . . seems to be vacillating about her account." Therefore, we affirm the district court's ruling denying the State's motion to hold defendant without bail.

The district court's decision denying defendant's motion to modify the cash bail amount is reversed. Cash bail is reduced to $50,000 cash or surety. Conditions 1, 2, and 3 are imposed. If bail is posted, then defendant shall be released into the joint custody of Megan Brooks and Jack O'Brien, who must jointly agree, by signing the Conditions of Release form, that they will supervise him continuously when he is home or out on errands (Brooks) and at work (O'Brien), and further agree to report any violations of his conditions of release to the Burlington Police within 1 hour of discovering such violation. Defendant must report in person to the Burlington Police Department 7 days a week between the hours of 4 and 6 pm. He must remain in Chittenden County unless he receives advanced written permission of the district court to travel outside the County. He is forbidden to purchase or consume any alcoholic beverages and may not go to any establishment that has as its primary function the sale of alcohol, e.g., liquor stores, bars, clubs, etc. He may not purchase or carry or possess any deadly weapons, including knives of any sort. He must not contact or harass Terrence Wills, and must remain 1000 feet away from Mr. Wills at all times. The Conditions of Release form shall be prepared at the Chittenden County District Court. Defendant shall not be released until he has signed the Conditions of Release form.

FOR THE COURT:



Marilyn S. Skoglund, Associate Justice