IN THE
TENTH COURT OF APPEALS

No. 10-16-00403-CR

EX PARTE ADON GUADALUPE BERNAL

From the 19th District Court
McLennan County, Texas
Trial Court No. 2016-1511-C1

MEMORANDUM OPINION

In one issue in this appeal from the denial of an application for writ of habeas corpus, appellant, Adon Guadalupe Bernal, contends that the trial court abused its discretion by increasing his bail from $25,000 to $75,000 after Bernal tested positive for marihuana at an arraignment hearing. Because we conclude that Bernal has not satisfied his burden of proof, we affirm.[1]

[1] In a supplemental brief filed on April 10, 2017, Bernal indicated that, although he has made his $75,000 bail, this issue is not moot. The State filed a letter brief stating that it would not contest Bernal's contention that his bail issue was not mooted by him making bail.

I. BACKGROUND

Here, Bernal was charged by indictment with one count of knowingly possessing a controlled substance—methamphetamine—in an amount of one gram or more but less than four grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115 (West 2010). Also included in the indictment were enhancement and habitual allegations referencing Bernal's prior convictions for unlawful possession of methamphetamine and burglary of a habitation.

After arrest, Bernal's bail was set at $10,000; however, after indictment, bail was increased to $25,000. Bernal posted a $25,000 surety bond on November 2, 2016. At the November 4, 2016 arraignment hearing, the trial court ordered that Bernal be drug tested. Bernal tested positive for marihuana. In response, the trial court determined that the $25,000 bail was insufficient and increased Bernal's bail to $75,000.

Subsequently, Bernal filed an application for writ of habeas corpus, arguing that the increase in bail to $75,000 was contrary to the law. After a hearing, the trial court denied Bernal's habeas-corpus application and certified Bernal's right of appeal. This appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

As this is an appeal from an application for writ of habeas corpus, it is Bernal's burden to prove his factual allegations by a preponderance of the evidence. *See Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995); *see also Ex parte Rolling*, No. 10-11-00189-

CR, 2012 Tex. App. LEXIS 1654, at *2 (Tex. App.—Waco Feb. 29, 2012, no pet.) (mem. op., not designated for publication). Therefore, in reviewing the trial court's ruling on a habeas claim, we review the record evidence in the light most favorable to the trial court's ruling and uphold that ruling absent an abuse of discretion. *See Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); *Ex parte Graves*, 271 S.W.3d 801, 803 (Tex. App.—Waco 2008, pet. ref'd); *see also Ex parte Rolling*, 2012 Tex. App. LEXIS 1654, at *2.

Here, Bernal complains about the trial court's decision to increase his bail after the positive marihuana test. We review a trial court's decision regarding bail settings for an abuse of discretion. *Ex parte Rubac*, 611 S.W.2d 848, 849 (Tex. Crim. App. [Panel Op.] 1981); *see Montalvo v. State*, 315 S.W.3d 588, 592 (Tex. App.—Houston [1st Dist.] 2010, no pet.). The applicant bears the burden to show that the trial court abused its discretion in setting the amount of bail or imposing a specific condition. *Ex parte Rubac*, 611 S.W.2d at 849-50; *see Ex parte Anunobi*, 278 S.W.3d 425, 428 (Tex. App.—San Antonio 2008, no pet.). When reviewing a trial court's decision, we will not disturb that ruling as long as it is "at least within the zone of reasonable disagreement." *Cooley v. State*, 232 S.W.3d 228, 234 (Tex. App.—Houston [1st Dist.] 2007, no pet.). "But an abuse of discretion review requires more of the appellate court than simply deciding that the trial court did not rule arbitrarily or capriciously. The appellate court must instead measure the trial court's ruling against the relevant criteria by which the ruling was made." *Id.*

Article 17.09 of the Texas Code of Criminal Procedure provides that once a defendant has "given bail for his appearance in answer to a criminal charge, he shall not be required to give another bond in the course of the same criminal action[.]" TEX. CODE CRIM. PROC. ANN. art. 17.09, § 2 (West 2015). However, as an exception to this rule, article 17.09 states that "whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause," the judge or magistrate may "require the accused to give another bond in such amount as the judge or magistrate may deem proper." *Id.* art. 17.09, § 3; *see also Ex parte Wood*, 308 S.W.3d 550, 553 (Tex. App.—Beaumont 2010, no pet.). "No precise standard exists for determining what constitutes 'good and sufficient cause' under [a]rticle 17.09." *Miller v. State*, 855 S.W.2d 92, 93-94 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *see, e.g., Ex parte Marcantoni*, No. 14-03-00079-CR, 2003 Tex. App. LEXIS 3308, at *7 (Tex. App.—Houston [14th Dist.] Apr. 17, 2003, no pet.) (mem. op., not designated for publication) ("Article 17.09, § 3 does not limit good and sufficient cause to a violation of a specific bond condition imposed on a defendant. . . . There is no precise standard for determining what constitutes 'good and sufficient cause' under Article 17.09, § 3."). Therefore, each case must be reviewed on a case-by-case basis. *Miller*, 855 S.W.2d at 94. And because the trial court has considerable discretion under article 17.09 to increase bail, we will not disturb its decision unless we find that the trial court has

abused its discretion. *Id.* at 93; *see Ex parte Rubac*, 611 S.W.2d at 850; *see also Schoppe v. State*, Nos. 10-15-00374-CR & 10-15-00375-CR, 2016 Tex. App. LEXIS 11582, at **11-12 (Tex. App.—Waco Oct. 26, 2016, no pet.) (mem. op., not designated for publication).

III. ANALYSIS

In his sole issue in this appeal, Bernal contends that the trial court abused its discretion by increasing his bail because article 38.35 of the Code of Criminal Procedure bars the use of a presumptive drug test in a criminal proceeding, such as a bail proceeding. *See* TEX. CODE CRIM. PROC. ANN. art. 38.35 (West Supp. 2016). And because the presumptive drug test was cited as the sole reason to increase bail, the trial court abused its discretion in increasing his bail to $75,000.

In support of his argument, Bernal directs us to the following provision of article 38.35:

> Except as provided by Subsection (e), a forensic analysis of physical evidence under this article and expert testimony relating to the evidence are not admissible in a criminal action if, at the time of the analysis, the crime laboratory conducting the analysis was not accredited by the commission under Article 38.01.

Id. art. 38.35(d)(1). Article 38.35 defines a "[c]riminal action" as including "an investigation, complaint, arrest, bail, bond, trial, appeal, punishment, or other matter related to conduct proscribed by a criminal offense." *Id.* art. 38.35(a)(2).

However, despite the foregoing, article 17.44 of the Code of Criminal Procedure provides that: "(a) A magistrate may require as a condition of release on bond that the

defendant submit to . . . testing on a weekly basis for the presence of a controlled substance in the defendant's body." *Id.* art. 17.44(a)(2) (West 2015). Moreover, a magistrate may revoke a defendant's bond and order him arrested if he "refuses to submit to a test for controlled substances or submits to a test for controlled substances and the test indicates the presence of a controlled substance in the defendant's body . . . ." *Id.* art. 17.44(c)(2).

Even if we were to assume that article 38.35 applies to bail proceedings and requires evidence demonstrating that the entity conducting the drug test is accredited by the commission under article 38.01, *see* TEX. CODE CRIM. PROC. ANN. art. 38.35(d)(1), we cannot say that Bernal satisfied his burden at the hearing on his application. In particular, the trial court mentioned that the sole reason for increasing Bernal's bail was the result of the drug test conducted at the arraignment hearing. However, the record does not contain any evidence regarding the circumstances of the drug testing and whether the laboratory conducting the drug test is accredited. In fact, the Clerk's Record includes only a brief form indicating that the drug test was conducted by lab technician Kyle Revette on November 4, 2016 at 8:47 a.m. and that the test indicated the presence of THC. There is no information as to the affiliation of Revette or the laboratory for which he works. In other words, even if we were to assume his position on the law in this area, Bernal did not produce evidence of a statutory violation—namely, that Revette does not work for an accredited crime laboratory. *See, e.g.*, *State v. Robinson*, 334 S.W.3d 776, 779

(Tex. Crim. App. 2011) (concluding in a DWI case that a habeas applicant did not satisfy his burden of proving a statutory violation when he failed to produce evidence that the person who drew his blood was not qualified). Accordingly, we conclude that Bernal failed to satisfy his burden of showing that the trial court abused its discretion in denying his application for writ of habeas corpus. *See Ex parte Thomas*, 906 S.W.2d at 24; *Ex parte Rubac*, 611 S.W.2d at 849; *Ex parte Anunobi*, 278 S.W.3d at 428; *see also Ex parte Rolling*, 2012 Tex. App. LEXIS 1654, at *2. We overrule Bernal's sole issue on appeal.

IV. CONCLUSION

We affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed May 17, 2017
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