

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-07-00134-CR

Michael Patrick Kennedy, Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF COMAL COUNTY, 22ND JUDICIAL DISTRICT
NO. CR2006-016, HONORABLE GARY L. STEEL, JUDGE PRESIDING**

ORDER

PER CURIAM

Michael Patrick Kennedy was arrested after he was involved in a shooting incident with an officer from the New Braunfels Police Department. Ultimately, he pleaded guilty to the crime of aggravated assault of a police officer, but he reserved the right to appeal the district court's ruling on a motion to suppress evidence that was seized from his property after the shooting. On appeal, this Court determined that the district court erred by failing to grant the motion to suppress because the search warrant affidavit did not contain enough information to allow the magistrate to determine if probable cause existed to search Kennedy's home. Accordingly, we reversed Kennedy's conviction and remanded for a new trial. Kennedy has now filed a motion asking this Court to set a reasonable bond under article 44.04(h) of the code of criminal procedure.

Article 44.04(h) mandates that when an appellate court reverses a defendant's conviction, the court must also set a reasonable bond for his release. In particular, article 44.04(h) provides, in relevant part, as follows:

If a conviction is reversed by a decision of a Court of Appeals, the defendant, if in custody, is entitled to release on reasonable bail, regardless of the length of term of imprisonment, pending final determination of an appeal by the state or the defendant on a motion for discretionary review. If the defendant requests bail before a petition for discretionary review has been filed, the Court of Appeals shall determine the amount of bail.

Tex. Code Crim. Proc. Ann. art. 44.04(h) (West 2006).

In determining the amount of bail, courts should primarily focus on the length of the defendant's sentence and the nature of the offense. *Ex parte Rubac*, 611 S.W.2d 848, 849 (Tex. Crim. App. 1981). Other factors a court may consider include the defendant's work record, family ties, length of residency, ability to make the bond, prior criminal record, and aggravating factors present in the offense. *Id.* Furthermore, when bond is requested under subarticle 44.04(h), appellate courts should also consider: "(1) the fact that the conviction has been overturned; (2) the State's ability, if any, to retry the [defendant]; and (3) the likelihood that the decision of the court of appeals will be overturned." *Aviles v. State*, 26 S.W.3d 696, 699 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

Kennedy was originally indicted for the crimes of attempted capital murder and deadly conduct and later agreed to plead guilty to the crime of aggravated assault of a police officer. Furthermore, he was initially sentenced to a prison term of 75 years, and the offense he pleaded guilty to is a first degree felony that carries a maximum punishment of imprisonment for life. *See*

Tex. Penal Code Ann. §§ 22.01(a) (defining assault), 22.01(b)(1) (providing that assault is third degree felony if it is committed against public servant engaged in his official duties), 22.02(a) (defining aggravated assault in relation to definition of assault found in section 22.01), 22.02(b)(2)(B) (West Supp. 2010) (specifying that aggravated assault is first-degree felony if committed against public servant performing his official duties), § 12.32 (West Supp. 2010) (setting out permissible punishments for first degree felonies). Moreover, we note that Kennedy's conviction was not overturned due to a lack of evidence of the offense charged; rather, his conviction was reversed due to an erroneous ruling on a motion to suppress evidence that was seized from his property after the shooting. We also note that the appellate record contains evidence demonstrating his guilt.

The State has not filed a petition for discretionary review, and the State explained in its response to Kennedy's motion to set bail that it will not be appealing the opinion of this Court. Accordingly, the likelihood that our opinion will be overturned is small. However, the State has indicated its intention to retry Kennedy, and hearings have already begun at the district court. In fact, although we believe that article 44.04(h) places the power to set bail with this Court, we note that the district court has already held a hearing regarding pre-trial bail. At the conclusion of that hearing, the district court set bail at \$2,000,000.

In light of the serious nature of the crime alleged, the length of the punishment initially imposed and that could be imposed after a trial, and the reason that the conviction was overturned, we believe that \$1,000,000 is a reasonable amount for bail in this case. In addition, the State in its response asked this Court to include conditions to release that were included in the

district court's order setting Kennedy's bond. We agree with the State that those conditions are warranted in this case and impose the following conditions on Kennedy while he is bond:

- (1) Kennedy is prohibited from having contact of any kind with Richard Kunz or members of his family;
- (2) Kennedy must surrender any passports purporting to be his passport that are either in his possession or the possession of his family or friends, and Kennedy may not apply for a passport or otherwise make any attempt to obtain a passport;
- (3) Kennedy is prohibited from possessing, purchasing, or owning firearms of any kind, including handguns and rifles;
- (4) Kennedy is required to wear a GPS enabled electronic monitoring ankle device;
- (5) Kennedy must report to the Comal County Adult Community Supervision Department ("Probation Department") at least once a week; and
- (6) Kennedy must notify the New Braunfels Police Department when he makes bond.

It is so ordered April 29, 2011.

Before Justices Patterson, Puryear, and Henson
Justice Patterson Not Participating