Opinion on Motion for Rehearing issued May 15, 2008

In The
Court of Appeals
For The
First District of Texas

NOS. 01-07-00994-CR

EDWARD GEORGE MCGREGOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause Nos. 1137739

MEMORANDUM OPINION ON MOTION FOR REHEARING

Appellant, Edward George McGregor, requests that we rehear an appeal from

a judgment that sets bail at $750,000 for the indictment for the offense of capital murder for which the State is seeking the death penalty. We deny the motion for rehearing, but we withdraw our opinion and judgment that issued April 10, 2008. We substitute the following opinion for the April 10, 2008 opinion. In his sole issue, appellant contends that the bail is excessive. We conclude that the record fails to show that the trial court abused its discretion in setting the amount of bail. We therefore affirm.

Background

Appellant is a 35-year-old man who has lived in the Houston area since he was nine years of age. His parents, brother, grandmother, niece, aunts, uncles, and cousins live in the Houston area. Until recently, appellant worked as a UPS truck driver for 11 years. He has no prior felony convictions, but is a suspect in the deaths of four women, including the complainant in this indictment, with whom he had contact shortly before their deaths, which occurred over a 16-year span of time between 1990 and 2006.

Police officers' interest in appellant began after Daniel Subjects died in August 2005. Subjects was a single, black woman found nude in her apartment. Her body was draped over the edge of a partially water-filled bath tub with her head submerged in the water, her knees on the bathroom floor, and articles of clothing wrapped around

her head. Her purse was found dumped, as if someone had rummaged through the contents. An investigation of her cell phone records revealed that appellant was the last person who called her before she was killed. Police officers who interviewed appellant after Subjects's death, informed him that they were interested in him because his name came up in Subjects's cell phone records. Although he was one of the last people to speak to Subjects before her death, appellant was not charged with her death.

Six months later, in February 2006, Mandy Rubin was killed under similar circumstances to those surrounding the death of Subjects. Like Subjects, Rubin was a single, black woman found nude in her apartment with her body in the same position as Subjects's body and also with articles of clothing wrapped around her head. Like Subjects's purse, Rubin's purse was found dumped, as if someone had rummaged through the contents. The investigating police officers could not find Rubin's cell phone in her apartment or car, and it appeared to be the only thing missing from her apartment. The officers obtained Rubin's cell phone records, which showed that someone had gone into her cell phone server and deleted the messages after she was dead. Despite the efforts to conceal the messages, the officers' search of the cell phone records showed that a call from appellant was one of the last phone calls she received before she was killed. Because appellant was one of the last people

to speak to Rubin before her death, Houston police officers interviewed appellant. Additionally, officers obtained a DNA sample from appellant and submitted it to Identigene to get his DNA profile. Appellant was not charged with Rubin's death.

After the deaths of Subjects and Rubin, appellant was charged in Fort Bend County in May 2006 with the 1990 death of Kim Wildman, who was found nude in her kitchen, dead from a stab wound. Within a statistical probability, appellant's DNA matched DNA found at the home of Wildman. Appellant acknowledged that he was with Wildman shortly before her death, claiming that he had consensual sex with her up until about 8:30 p.m. the night she was attacked. At the time of Wildman's death, appellant was 17 years of age and lived with his parents, who lived a couple of houses from Wildman, an Anglo woman. The report of the 911 call from Wildman documented that "the caller mentioned 'stab', 'male', 'black', and whom she did not know, and 'hurry' and 'dying'."

Some time after his arrest in May 2006, appellant posted a $250,000 bond for his capital murder arrest for the death of Wildman. The bond amount was reached after a bond reduction hearing at which appellant testified. Appellant said that he had no equity in the house he had just purchased in Fort Bend County in April 2006. Appellant said that he had no vehicles. Appellant testified that he had a UPS Stock Purchase Program for which UPS took about $250 out of his paycheck, but he had no

idea how much money was in that retirement account. He said that he could not borrow against it or cash it out until he retired. He stated that he had no liquid funds or assets he could use to make a bond. At the same hearing, appellant's mother, Sonia McGregor, testified that if they combined the resources of everyone in their family, they "could try to come up with $5,000" to make a bond. However, after the court set bond at $250,000, the bond was made by a premium paid by appellant's sisters and by their pledges of their house titles and 401K accounts. After he made the bond, appellant complied with the conditions of the bond by appearing in court and wearing a satellite leg monitor. That bond is still in effect.

Within no more than eight months after making the bond for the Fort Bend County charge, appellant was rearrested in December 2006 for a capital murder in Harris County for the 1994 death of Edwina Barnum, the complainant in this case. Within a statistical probability, appellant's DNA was determined to match the DNA found in a used condom recovered in Edwina Barnum's apartment, where she was found dead.[1] Like Subjects and Rubin, Barnum was a black female, living in an apartment alone. As in Rubin's case, Barnum was found with her wrists bound

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[1] The Barnum offense report contains a statement by Dr. Brown that there apparently has not been a sexual assault. The detective who prepared the Barnum offense report states in it that there was no obvious sign of sexual assault on her because she was fully clothed and there was no noticeable trauma to her vaginal/rectal area.

behind her back. The killer placed a belt around Barnum's neck to strangle her, and then stabbed her through the belt into the neck. Similar to the Subjects and Rubin cases, the contents of Barnum's purse had been dumped in a manner that appeared as though the purse had been gone through. Appellant denied that he knew Barnum. However, Barnum's best friend told Officer Miller that Barnum knew appellant and that they had been to parties together. The State indicted appellant for the offense of capital murder of Barnum in the course of committing burglary or sexual assault of Barnum, and it is seeking the death penalty.[2]

All four deaths share numerous similarities, but they are not identical. All the women were found dead alone in their homes, and each had contact with appellant shortly before death. Bleach was poured only over Subjects's head. The hands of Rubin and Barnum were bound with cords. Three of the four women were stabbed. Barnum was found in the bedroom, Wildman was in the kitchen, and the other two women were found in the bathroom. Barnum wore a blouse and shorts, but the other women were nude. In addition to being stabbed, Barnum was also shot and tasered on the back. The purses of three of the women had been rifled through.

The locales of the murder scenes and time periods were different in that Subject

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[2] *See* TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 2003 & Supp. 2007).

and Rubin were killed in 2005-2006 in the southwest part of Houston, Barnum lived off the Gulf Freeway and was murdered in 1994, and Wildman was murdered in Fort Bend County in 1990. In addition, although the DNA evidence connects appellant to the deaths of Barnum and Wildman, no other physical evidence, such as hair, fiber, or fingerprints, connects him to the four offenses. Further, there were other suspects in the deaths of each of these women. Police officers at one point targeted Subject's estranged husband as a suspect because someone thought that he saw him leave the scene shortly before her body was discovered. As to Rubin, the police had a security guard as a suspect, and the offense report in that case said that the security guard did not pass a polygraph test. In the Barnum case, the police had numerous suspects, including the boyfriend of one of Barnum's girlfriends. He was thought to have become enraged by a suspected lesbian affair between Barnum and the girlfriend.

The trial court initially set bond for the indictment for the death of Barnum at one million dollars, but reduced the bond to $750,000. At the November 2007 bond reduction hearing, appellant's mother Sonia testified that, as a result of the publicity from the Fort Bend County case, UPS fired appellant and he was unable to get retirement or pension benefits from UPS. Sonia testified that she believed that she and her family could raise the $5,000 it would take to make a $50,000 bond. Sonia further stated that appellant has no equity in the house he bought and that he owns no

vehicles, planes, boats, stocks, bonds or other assets that he could use to make the bond. Sonia told the court that she would do everything she could to assure appellant's appearance in court if he made the bond, and she had no doubt he would appear in court. Appellant has been incarcerated since December 1, 2006.

Standard of Review

The standard for reviewing bail settings is whether the trial court abused its discretion. *See Ex parte Rubac*, 611 S.W.2d 848, 849, 850 (Tex. Crim. App. 1981); *Ex parte Ruiz*, 129 S.W.3d 751, 753 (Tex. App.—Houston [1st Dist.] 2004, no pet.). In the exercise of its discretion, a trial court should consider the following factors in setting a defendant's bail:

1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.

2. The power to require bail is not to be so used as to make it an instrument of oppression.

3. The nature of the offense and the circumstances under which it was committed are to be considered.

4. The ability to make bail is to be regarded, and proof may be taken upon this point.

5. The future safety of a victim of the alleged offense and the community shall be considered.

TEX. CODE CRIM. PROC. ANN. art. 17.15 (Vernon 2005); *see Ludwig v. State*, 812

S.W.2d 323, 324 (Tex. Crim. App. 1991) (noting that court is "to be governed in the exercise of [its] discretion by the Constitution and by the [article 17.15 factors]"). The burden of proof is upon a defendant who claims bail is excessive. *Rubac*, 611 S.W.2d at 849; *Ex parte Martinez-Velasco*, 666 S.W.2d 613, 614 (Tex. App.—Houston [1st Dist.] 1984, no pet.). In reviewing a trial court's ruling for an abuse of discretion, an appellate court will not intercede as long as the trial court's ruling is within the zone of reasonable disagreement. *Ex parte Beard*, 92 S.W.3d 566, 573 (Tex. App.—Austin 2002, pet. ref'd) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991)). 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. *Montgomery*, 810 S.W.2d at 392; *Beard*, 92 S.W.3d at 573. The appellate court must instead measure the trial court's ruling against the relevant criteria by which the ruling was made. *Montgomery*, 810 S.W.2d at 392; *Beard*, 92 S.W.3d at 573. The primary purpose for setting bond is to secure the presence of the defendant in court at his trial. *Ex parte Vasquez*, 558 S.W.2d 477, 479 (Tex. Crim. App. 1977); *Ex parte Bonilla*, 742 S.W.2d 743, 744 (Tex. App.—Houston [1st Dist.] 1987, no pet.).

Analysis

In his sole issue, appellant challenges the $750,000 bail amount as excessive.

To determine whether the trial court abused its discretion in setting the amount of bail, we apply the required five factors. TEX. CODE CRIM. PROC. ANN. art. 17.15; *see Ludwig*, 812 S.W.2d at 324.

1. Sufficient Bail to Reasonably Assure Appearance

The $250,000 bond in Fort Bend for the capital murder allegation was sufficient to cause appellant to appear in court for all of his court appearances during the less than eight months time that appellant was out on bond for that case. However, the record shows that since appellant made that bond, circumstances have changed. First, appellant is now charged with two capital murders for the deaths of Barnum and Wildman for both of which there is DNA evidence. Second, appellant is now charged with an offense for which the State is seeking the death penalty, as compared to the earlier possibility of only a single life sentence. Third, the possible punishment evidence is evidence of appellant's connection to four murders of women who were killed in violent acts. Although the $250,000 bond was sufficient to result in appellant's appearance in court for a period of time of less than one year, the changed circumstances suggest that the bond would have to be higher than that to reasonably assure appellant's appearance in court. We conclude the court could have reasonably concluded a bond greater than $250,000 was required to reasonably assure appellant's appearance in court when required.

2. Power to Require Bail Not to be Used as an Instrument of Oppression

The amount of bail should be set sufficiently high to give reasonable assurance that the accused will comply with the undertaking, but should not be set so high as to be an instrument of oppression. *Ex parte Bufkin*, 553 S.W.2d 116, 118 (Tex. Crim. App. 1977); *Ex parte Willman*, 695 S.W.2d 752, 753 (Tex. App.—Houston [1st Dist.] 1985, no pet.). Although appellant presented some evidence of limited financial ability, the trial court could have reasonably determined that the evidence lacked credibility, because appellant and his family claimed appellant only had resources to make a $50,000 bond, but they instead made a $250,000 bond for the accusation in Fort Bend. Furthermore, appellant worked at UPS for over 10 years, had $250 deducted from his paychecks to participate in the UPS Stock Purchase Program, and had a retirement account in an unknown amount, although he claimed he could not obtain these funds. The State is seeking the death penalty for the capital murder of Barnum, which requires a life sentence as the only other possible punishment. The State's evidence includes the violent deaths of two women who were linked to appellant through DNA evidence and the violent deaths of two additional women linked to appellant through telephone records that show he had contact with them shortly before they were killed. Further, the State's evidence shows similarities in the deaths of the four women. Given the lack of credible evidence about appellant's

resources and the aggravating circumstances involved in the offense and possible punishment, we cannot conclude that the bail amount was used as an instrument of oppression.

3. Nature of Offense and Circumstances of Commission

Appellant contends that the evidence to connect him to the offense is limited only to DNA evidence that could have been placed there under circumstances that would not include his guilt for capital murder. Also, appellant asserts that there is evidence that in the Barnum investigation there were multiple other suspects including a boyfriend of Barnum's girlfriend. Further, no evidence in the bond hearing showed that anyone forcefully entered Barnum's apartment or that Barnum was sexually assaulted.

Although appellant challenges the evidence of his identity as the person who caused the death of Barnum, the DNA evidence shows within a statistical probability that his DNA was in the used condom found when Barnum was discovered dead in the apartment. The evidence presented at the bond hearing showed Barnum was brutally murdered, having been strangled, stabbed, shot, and tasered. Her dead body was found with her hands tied behind her back. Although appellant denied that he knew Barnum, Barnum's best friend reported that Barnum had socialized with appellant and appellant's DNA was found in Barnum's home where she was found

dead.

In considering the nature of the offense, it is proper to consider the possible punishment. *Ex parte Vasquez*, 558 S.W.2d at 479–80. The State's punishment evidence would likely show three extraneous murders of women killed with similar violence. The State is seeking the death penalty, but even if the jury rejected the death sentence, the only other possible sentence for capital murder is confinement for life in prison. *See* TEX. PEN. CODE ANN. § 12.31(a) (Vernon Supp. 2007). The nature of the offense warrants a high bond due to the extreme violence in the way Barnum was killed, the violence involved in the other death linked to appellant through DNA evidence, and the other two violent deaths linked to appellant circumstantially.

4. Ability to Make Bail

Appellant contends that he has no equity in his house and no liquid assets. After his arrest in Fort Bend, according to appellant's family, he lost his job and retirement and pension benefits. For these reasons, appellant's family asserts that the biggest bail that they can make based on the family members' cumulative resources, which amounts to a total of $5,000, is a bond in the amount of $50,000. The trial court, however, could properly have discredited that testimony based on the making of the bond in Fort Bend. As here, at the May bond hearing in Fort Bend, appellant's family represented that they could only come up with $5,000 total from their

combined resources to make a maximum bond of $50,000. Although the family testified that their resources were limited to making a $50,000 bond, the family instead had sufficient resources to make a bond at five times that amount. Given the past misstatements about the financial resources available to appellant, the trial court could have reasonably determined that appellant had access to funds from his investments in the stock purchase program, the retirement account, the investment in the house he purchased, or other undisclosed funds.

We also note that although ability to make bail is a factor to be considered, ability alone, even indigency, does not control the amount of bail. *Ex parte Charlesworth*. 600 S.W.2d 316, 317 (Tex. Crim. App. 1980); *Ex parte Hulin*, 31 S.W.3d 754, 759 (Tex. App.—Houston [1st Dist.] 2000, no pet.). We conclude that the information about appellant's resources does not conclusively show that he cannot make a $750,000 bond and that in this capital murder case, factors other than his ability to make bail are more pertinent to the disposition of the appeal.

5. Future Safety of the Community

Although appellant has no prior felony convictions, he is accused of two capital murders in the violent deaths of two women, in addition to being suspected of causing the deaths of two other women during a 16-year period of time between 1990 and 2006. We conclude that the trial court could have reasonably determined

that appellant posed a significant risk to the future safety of the community.

6. Other Factors

Courts should also consider the defendant's work record, family ties, residency, criminal record, and conformity with previous bond conditions. *Rubac*, 611 S.W.2d at 849. Consideration of these factors alone favors a lower bond for appellant, as these factors show that he was employed for 11 years before his arrest, has strong family ties to an extensive extended family in the Houston area, is a long-time resident of the Houston area, has no prior felony convictions, complied with the provisions of the bond he posted in Fort Bend County, and he recently purchased a home here. All these factors favor reducing the bond. However, courts should also consider aggravating factors involved in the offense. *See id.* at 850. The aggravating factors weigh heavily in favor of the higher bond. As described in detail above, shortly before their deaths, appellant had contact with each of the four women who were killed in violent deaths. There can be no more serious aggravating factor than multiple murders. Although some factors point towards a lower bail, the aggravating factor outweighs those considerations.

Conclusion

Although some circumstances point toward a lower bond for appellant, the aggravating circumstances warrant a higher bond, particularly in light of the lack of

credible evidence about appellant's financial resources. Appellant is indicted for capital murder for the violent death of Barnum, an offense for which the State seeks the death penalty. Furthermore, the punishment evidence would likely include appellant's connection to the deaths of three other women killed in violent deaths. Although the $250,000 bond was sufficient to result in appellant's appearance in court for a period of time less than one year, the changed circumstances suggest that the bond would have to be higher than that to reasonably assure appellant's appearance in court. We also note that the trial court could reasonably have suspected the credibility of the financial information provided by appellant and his family since they misrepresented to the Fort Bend trial court that they could only make a $50,000 bond in the Fort Bend charge when they instead were able to make a $250,000 bond. The trial court could have determined that appellant and his family were not forthcoming about the extent of appellant's financial resources. We hold that the trial court's decision to leave the bond at $750,000 is not outside the zone of reasonable disagreement. *See Ex parte Davis*, 147 S.W.3d 546, 553 (Tex. App.—Waco 2004, no pet.) (finding that $750,000 bail appropriate in murder case after application of article 17.15 factors). We overrule appellant's issue and affirm the trial court's judgment.

Elsa Alcala
Justice

Panel consists of Justices Taft, Keyes, and Alcala.

Do not publish. *See* TEX. R. APP. P. 47.2(b).