Opinion issued August 7, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00004-CR

NO. 01-20-00005-CR

EX PARTE JOSEPH GOMEZ, Appellant

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case Nos. 1657519 & 1657521

MEMORANDUM OPINION

Appellant, Joseph Gomez, appeals the trial court's denial of his application for a writ of habeas corpus, in which he argued that the court abused its discretion by increasing the amount of pretrial bail after he posted a bail bond in an amount set by the magistrate. On appeal, he argues that the court acted impermissibly because there was no showing of good cause for the increase. He also argues Due Process

violations concerning notice, right to counsel, and compliance with the Texas Rules of Evidence. We do not reach Gomez's procedural issues because we agree that the court abused its discretion by requiring additional bail without any showing in the record that such action was authorized by law.

We reverse the trial court's order denying Gomez's application for a writ of habeas corpus, and we render judgment granting his application for habeas relief and order reinstatement of the original bonds that were posted.

BACKGROUND

I. The Criminal Allegations Against Gomez

On November 13, 2019, Deer Park police arrested 27-year-old Joseph Gomez and charged him with burglary of a habitation as a first-degree felony and the second-degree felony offense of assault on a family member—impeding breathing.[1] The complaints alleged that he entered the home of Stephanie Woitena, a woman with whom he had a dating relationship, without consent and committed assault on a family member "by impeding the normal breathing and circulation of blood" "by applying pressure to [her] throat and applying pressure to [her] neck."

[1] *See* TEX. PENAL CODE § 30.02(d) (burglary of a habitation; first-degree felony); *id.* § 22.01(b)(2)(B) (assault on a family member impeding breathing; third-degree felony).

II. Three Hearings Regarding Pretrial Detention and Conditions of Release

A. The hearing before the magistrate (Thursday, November 14, 2019)

Early the next morning, Gomez appeared before a magistrate.[2] The district attorney provided the probable cause allegations and asked the magistrate for an order for emergency protection of Woitena and that bail be set at $100,000 on each charge. The State also filed a motion for the trial court to issue a no-contact order.

Gomez told the magistrate that he had an attorney and would not seek court appointed counsel in the district court, but he expressly consented to be represented by the public defender for the limited purpose of the hearing before the magistrate. The public defender asked for bail to be set at $20,000 on the charge of burglary of a habitation and $10,000 on the charge of assault on a family member. The public defender argued that Gomez was a below average risk: he had no prior convictions; he had not previously failed to appear for court; and he had no pending charges. Gomez was 27 years old, worked as server at a restaurant earning about $700 per month, lived with his parents, and attended San Jacinto Community College. Gomez had lived in the Houston area his entire life, and he had access to a vehicle for transportation to court.

[2] A video recording of this hearing appears in the appellate record.

The magistrate found that probable cause for further detention existed and entered orders setting bail at $25,000 on the burglary of a habitation charge and $15,000 on the assault on a family member charge. The magistrate denied a personal bond, noting that although Gomez's public safety assessment indicated a below average risk, the facts and circumstances alleged were violent and suggested a high risk to Woitena's safety. The magistrate also granted an order of emergency protection.

B. The hearing before the trial court (Friday, November 15, 2019)

Gomez's father obtained bail bonds through a surety, and Gomez was released the following morning, November 15, 2019. As instructed in the bond papers, Gomez went directly to the court for a hearing. There is no reporter's record of this hearing, but Gomez's unsworn declaration and the trial court's comments at later hearings provide some information about what happened in court that day.[3] According to Gomez, the trial court called him to the bench. Although Gomez had previously indicated that he did not want appointed counsel in the district court, according to Gomez the trial court appointed an attorney who was present in the

[3] We use the term unsworn declaration as a term of art referring to a document that may be used in lieu of an affidavit. *See* TEX. CIV. PRAC. & REM. CODE § 132.001; *see also id.* §14.001(6) (defining unsworn declaration in certain kinds of litigation brought by inmates). An unsworn declaration may be used to satisfy the oath requirement for a petition for writ of habeas corpus. *See Ex parte Johnson*, 811 S.W.2d 93, 97 (Tex. Crim. App. 1991).

courtroom to represent him for the limited purpose of that hearing. The district attorney stated the probable cause allegations that had been presented to the magistrate the previous day. The trial court granted the no-contact order. Without any further motion from the State, the court revoked the bonds that had been posted, and ordered that Gomez be rearrested and remanded into custody with bonds set at $75,000 on each charge. Gomez was immediately taken into custody.

Later that day, Gomez retained counsel, who requested a hearing. The hearing was set for the following Monday, November 18, 2019.

C. The second hearing before the trial court (Monday, November 18, 2019)

At the Monday, November 18, 2019 hearing, the court asked the State to share the same probable cause facts that had been shared at the hearing the previous Friday. Without objection, the prosecutor complied. Defense counsel argued that, although the Rules of Evidence were applicable, the court heard only hearsay evidence from the State before revoking Gomez's bonds. Counsel read an affidavit from Gomez's father into the record. The father attested to Gomez's good character for nonviolence; derided the complainant; and averred that Gomez lived at home with him, that he and his wife financially supported Gomez, and that Gomez was a full-time student. The father's affidavit stated that he had exhausted the family's funds posting the initial bail bonds and that he brought Gomez to court on November 15,

2019 after picking him up from jail.[4] The father also attested that, if released, Gomez would live with his wife and him and that he would be in court with Gomez for every setting. Finally, Gomez's father asked the court to reinstate the prior bonds and release Gomez pending trial.

The court denied the motion to reinstate the previous bonds and release Gomez. In doing so, the court stated that, at the hearing on November 15, 2019, it heard probable cause and "followed case law." The court also said: "That is not just the only consideration. There are many factors that court has to weigh in making a determination of a bond." The court did not make any findings of fact.

III. Gomez filed an application for writ of habeas corpus.

Gomez filed an application for writ of habeas corpus, in which he alleged that the $75,000 bonds were excessive and that he was unable to post bonds in that amount because he was a full-time student at San Jacinto College, he was supported

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[4] Specifically, the father averred:

> We financially support Joseph since he is in school. Joseph has nothing to contribute to posting his bond. I personally posted the previous bonds that were set at 15,000 and 25,000. I paid the percentage required by the bonding company. When Joseph was released on November 15, I picked him up from the jail and took him straight to the courthouse. I used all the available funds that my family had to post those bonds. The money was lost when the bonds were revoked on the 15th after he had appeared in court.
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> We are unable to post the bonds for Joseph as they are. My family does not have the means to post additional bonds of $75,000. We do not have the funds and will not have the funds.

by his parents, he owned no property, and he had no income. He also alleged that his parents had exhausted their resources posting the original bonds. Gomez argued that the court acted illegally by revoking his bonds and increasing his bail because there was no "cause" to justify the action. He further argued that the court violated his Due Process rights in regard to notice, right to counsel, and conduct of the proceeding without regard to the Texas Rules of Evidence.

On December 10, 2019, the court held a hearing on Gomez's application for a writ of pretrial habeas corpus. At the hearing, Gomez's evidence included the magistrate's bail orders, the bail bonds, and his unsworn declaration regarding the November 15, 2019 hearing. Gomez's father testified consistently with his affidavit about Gomez's good character and the exhaustion of resources available to pay for bail.

The trial court denied the application for pretrial habeas corpus, again without findings of fact or conclusions of law, and Gomez appealed.

ANALYSIS

In his first issue, Gomez argues that the trial court erred by revoking his bonds without "good and sufficient cause" as required by article 17.09 of the Texas Code of Criminal Procedure. Gomez argues that the court acted without regard to the law when it ordered his rearrest, revoked his bonds, and raised the amount of bail from a combined total of $40,000 to $150,000.

I. Standards of Review for Habeas Corpus and Statutory Construction

We review a trial court's decision to grant or deny habeas corpus relief for an abuse of discretion. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); *see Ex parte Rubac*, 611 S.W.2d 848, 849–50 (Tex. Crim. App. 1981) (reviewing bail pending appeal for abuse of discretion); *Montalvo v. State*, 315 S.W.3d 588, 592 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (same). When, as here, a habeas appeal concerns pretrial bail, we may not simply conclude that the trial court did not "rule arbitrarily or capriciously." *Montalvo*, 315 S.W.3d at 593. Rather, we must "measure the trial court's ruling against the relevant criteria by which the ruling was made." *See id.*; *see also Ex parte Dixon*, PD-0398-15, 2015 WL 5453313, at *2 (Tex. Crim. App. Sept. 16, 2015) (not designated for publication) ("Habeas courts determine the bearing of the evidence on the relevant bail criteria *only* in the first instance. On appellate review, it is the duty of the reviewing court to measure the ultimate ruling of the habeas court against the relevant bail factors to ensure that the court did not abuse its discretion.").

We review questions of law de novo. *See Nguyen v. State*, 359 S.W.3d 636, 641 (Tex. Crim. App. 2012) (statutory construction questions reviewed de novo); *Sandifer v. State*, 233 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2007, no pet.). When interpreting a statute, our goal is to effectuate the "'collective' intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d

782, 785 (Tex. Crim. App. 1991). To determine this, "we begin by examining the literal text" as "the best means to determine 'the fair, objective meaning of that text at the time of its enactment.'" *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015) (quoting *Clinton v. State*, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011)). "If the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning unless doing so would cause an absurd result." *Id.* We may also consider "common law or former statutory provisions, including laws on the same or similar subjects." TEX. GOV'T CODE § 311.023 (Code Construction Act). We presume that "the entire statute is intended to be effective" and that "a just and reasonable result is intended." TEX. GOV'T CODE § 311.021.

II. Bail Bonds

A. Bail balances the presumption of innocence with the State's interest in assuring the defendant's appearance at trial.

Bail effectuates the release from custody of a person accused of a crime, but legally presumed innocent, while securing his presence in court at his trial. *See Ex parte Anderer*, 61 S.W.3d 398, 402 (Tex. Crim. App. 2001); *Ex parte Bleimeyer*, No. 01-16-00838-CR, 2017 WL 586509, at *1 (Tex. App.—Houston [1st Dist.] Feb. 14, 2017, no pet.) (mem. op.; not designated for publication); *see also* TEX. CONST., art. 1, § 11, Interpretive Commentary. 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); *Montalvo*, 315 S.W.3d at 596. "The practice of admission to bail, as it has evolved in Anglo–American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." *Stack v. Boyle*, 342 U.S. 1, 7–8 (Jackson, J., concurring) (citations omitted); *see Ex parte McDonald*, 852 S.W.2d 730, 732 (Tex. App.—San Antonio 1993, no writ).

The Code of Criminal Procedure defines "bail" as "the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond." TEX. CODE CRIM. PROC. art. 17.01. A "bail bond" is "a written undertaking entered into by the defendant and the defendant's sureties for the appearance of the principal therein before a court or magistrate to answer a criminal prosecution." *Id.* art. 17.02. Alternatively, the defendant may deposit cash into the court's registry in lieu of having sureties, or the trial court may require only the accused's personal assurance that he will appear. *Id*. The amount of bail is "regulated by the court, judge, magistrate or officer taking the bail," whose discretion must be exercised in accordance with the Constitution and the rules set out in article 17.15. *Id.* art. 17.15.

B. The amount of bail must be set in accordance with law.

"The appropriate amount of bail is an individualized determination." *Ex parte Dupuy*, 498 S.W.3d 220, 233 (Tex. App.—Houston [14th Dist.] 2016, no pet.).[5] The Texas Legislature has provided guidelines for setting the amount of pretrial bail:

> The amount of bail to be required in any case is to be regulated by the court, judge, magistrate or officer taking the bail; they are to be governed in the exercise of this discretion by the Constitution and by the following rules:
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> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
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> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
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> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
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> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.
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> 5. The future safety of a victim of the alleged offense and the community shall be considered.

TEX. CODE CRIM. PROC. art. 17.15.

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[5] Courts will often review recent cases involving the setting of bail when the charged offense is the same or similar. *E.g.*, *Ex parte Estrada*, 398 S.W.3d 723, 727 (Tex. App.—San Antonio 2008, no pet.) (compiling cases involving bail when defendant charged with burglary). However, the usefulness of case law as a comparator is limited by the "changing value of money" over time, *see Dupuy*, 498 S.W.3d at 233, and "because appellate decisions on bail matters are often brief and avoid extended discussions" making it difficult to determine whether the circumstances in cases are similar. *Ex parte Beard*, 92 S.W.3d 566, 571 (Tex. App.—Austin 2002, pet. ref'd).

The court may also consider: (1) the accused's work record; (2) the accused's family and community ties; (3) the accused's length of residency; (4) the accused's ability to make the bond; (5) the accused's prior criminal record; (6) the accused's conformity with the conditions of any previous bond; (7) the existence of outstanding bonds; and (8) aggravating circumstances alleged to have been involved in the offense. *See Rubac*, 611 S.W.2d at 849–50; *Liles v. State*, 550 S.W.3d 668, 669–70 (Tex. App.—Tyler 2017, no pet.). Our consideration of the nature and circumstances of the offense requires that we take note of the range of punishment permitted by law in the event of a conviction. *E.g.*, *Ex parte Rodriguez*, 595 S.W.2d 549, 550 (Tex. Crim. App. 1980); *Ex parte Reyes*, 4 S.W.3d 353, 355 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

"The ability or inability of an accused to make bail, however, even indigency, does not alone control in determining the amount of bail." *Milner v. State*, 263 S.W.3d 146, 150 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see Ex parte Charlesworth*, 600 S.W.2d 316, 317 (Tex. Crim. App. 1980); *Ex parte Branch*, 553 S.W.2d 380, 382 (Tex. Crim. App. 1977); *Ex parte Hulin*, 31 S.W.3d 754, 759 (Tex. App.—Houston [1st Dist.] 2000, no pet.). "If the ability to make bond in a specified amount controlled, the role of the trial court in setting bond would be completely eliminated and the accused would be in the position to determine what his bond

should be." *Milner*, 263 S.W.3d at 150; *see Ex parte Miller*, 631 S.W.2d 825, 827 (Tex. App.—Fort Worth 1982, pet. ref'd).

C. Ordinarily a defendant must give bail only once, but the statute includes limited exceptions.

Article 17.09 of the Texas Code of Criminal Procedure provides limited exceptions to the general rule that a defendant is ordinarily required to post a bail bond once in a criminal proceeding. It states that, once a defendant gives bail, the "bond shall be valid and binding upon the defendant and his sureties, if any, thereon, for the defendant's personal appearance before the court . . . ." TEX. CODE CRIM. PROC. art. 17.09, § 1. The statute provides that a person may not be required to give bail twice in the same criminal action, *see id.* art. 17.09, § 2, except in the following circumstances:

> Provided 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, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested, and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody.

Id. art. 17.09, § 3 (emphasis supplied).

III. The trial court abused its discretion by revoking Gomez's bonds and setting a new amount of bail.

Gomez and the State dispute the proper construction of the statutory exceptions. Gomez argues that in the absence of "good and sufficient cause," the court erred by revoking his bail bonds and resetting the amount of bail to $75,000 per charged offense. The State argues that the statute authorizes the trial court's action whenever the court finds that the bail bond was "insufficient in amount" and that no "good cause" finding is required.

In revoking the bond set by the magistrate judge and increasing the amount of bail, the trial court was required by law to make a finding based on governing legal principles and evidence that one of the conditions in article 17.09, § 3 was satisfied. It made no such finding. Nor could it have done so under the circumstances in this case, as none of the evidence before it at the November 15 and 18, 2019 bond hearings supported revoking the original bond, rearresting Gomez, and increasing the amount of bail under the factors that both the trial court and this court are required to consider.

In this case, there is no dispute that the magistrate set the amount of bail at $25,000 on the burglary of a habitation charge and $15,000 on the assault on a family member charge. The recording from the magistration shows that she considered the factors relevant to setting bail including Gomez's personal history, his ties to the community, the seriousness of the offense, and the risk to the complainant and the

community. There is no dispute that bail was given in the amount of $40,000 on the two cases. Because it is undisputed that the bonds were not "insufficient in amount" to satisfy the amount of bail that was ordered, the trial court could not have properly revoked Gomez's bonds and increased the amount of bail under section 1 of article 17.09.

There is also no showing of any circumstances that changed in the roughly 30 hours that passed between the time the magistrate set the amount of bail and the time the trial court increased the amount of bail from $40,000, combined, to $150,000, combined. No new evidence became available, and the indictments were not returned until Monday, November 18, 2019. The only new information was that Gomez had given bail and appeared in court. There was no information on which the court could find a change in the balance of the State's interest in assuring Gomez's presence at trial as compared with the interest in preserving the presumption of innocence. We conclude that no "other good or sufficient cause" for revoking Gomez's bond, rearresting him, and ordering that he give bail in a higher amount is presented by the record in this appeal.

Case law accords with this analysis. To satisfy the "other good or sufficient cause" exception to the one-bond rule, there must be some new or changed circumstances from which the court can conclude that some good or sufficient cause

exists for revoking a bond and setting a different bond.[6] For example, in *Liles v. State*, 550 S.W.3d 668 (Tex. App.—Tyler 2017, no pet.), the defendant posted bail based on indictments that alleged he recklessly caused serious bodily injury to two children. 550 S.W.3d at 669. He appeared at about 13 docket calls over two years. *Id.* at 671. The State then obtained new indictments that alleged that the defendant had intentionally and knowingly caused serious bodily injury to both children. *Id.* at 669. These indictments alleged first-degree felonies, with a higher range of punishment than under the prior indictments.[7] *Id.* The trial court increased the amount of bail from $20,000 on each case to $250,000 on each case. *Id.*

The court of appeals noted that although the defendant had appeared at numerous docket calls after giving bail at the lower amount of $20,000 for each offense, the new indictments altered the analysis because they alleged offenses with

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6 *See Ex parte King*, 613 S.W.2d 503, 504–05 (Tex. Crim. App. 1981) (trial court abused its discretion by revoking bond and requiring another when accused's counsel filed motion for continuance); *Liles v. State*, 550 S.W.3d 668, 671 (Tex. App.—Tyler 2017, no pet.) (no abuse of discretion for revoking bond and requiring another when reindictment alleged aggravating circumstances that increased the gravity of the charged crime); *Meador v. State*, 780 S.W.2d 836, 837 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (trial court abused its discretion by revoking bond and requiring another when accused arrived late for hearing and had not retained lawyer). In both *King* and *Meador*, the trial court revoked the bonds based on the occurrence of some other event; the cases were reversed on appeal because the appellate courts determined that those events did not constitute good and sufficient cause. *See King*, 613 S.W.2d at 505; *Meador*, 780 S.W.2d at 837.

7 The new indictments alleged that the defendant had intentionally and knowingly caused serious bodily injury to both children. *Liles*, 550 S.W.3d at 669.

greatly increased punishment ranges, including the possibility of life in prison. *Id.* at 671. The court of appeals found that the trial court did not abuse its discretion under article 17.09 because it was "entirely reasonable for the trial judge to believe that a $20,000 personal bond might be insufficient to assure" the defendant's appearance at trial. *Id.*

In *Hernandez v. State*, 465 S.W.3d 324 (Tex. App.—Austin 2015, pet. ref'd), the defendant was charged with aggravated robbery and bail was set at $75,000. 465 S.W.3d at 325. Ninety days later, he was released on a $25,000 personal recognizance bond because the State was not yet ready for trial. *Id.* at 325–26 (citing TEX. CODE CRIM. PROC. art. 17.151). Several weeks later, the State obtained an indictment and filed a motion to increase bond. *Id.* at 326. After an ex parte hearing, the court signed an order requiring the defendant to give bail in the amount of $75,000. *Id.* The trial court denied the defendant's application for writ of habeas corpus, and he appealed. *Id.*

On appeal, the defendant argued that the court had abused its discretion under article 17.09, section 3. *Id.* The court of appeals reasoned that because section 4 of article 17.09 expressly prohibits a court from imposing a higher bond when a defendant exercises his right to counsel, the statute implicitly permits the court "to do so for other reasons, such as a reevaluation of the circumstances and the adequacy of a defendant's bond." *Id.* at 326–27. The court of appeals then noted that two

circumstances had changed between the time when the defendant was released and when the court ordered that he give bail in the amount of $75,000. *Id.* at 327. First, the defendant was indicted, and second additional physical evidence became available that linked the defendant to the crime. *Id.* The trial court had issued findings of fact, in which it stated that it had considered the indictment, the probable cause allegations, the physical evidence, the threat to the victim and the community, the seriousness of the offense, and the likelihood that the defendant would appear for trial. *Id.* The court of appeals held that the trial court had not abused its discretion by finding that the defendant's "personal recognizance bond was no longer sufficient and in reinstating the original requirement for a $75,000 bond." *Id.*

We contrast these cases with this case, in which no good and sufficient cause was shown for revoking Gomez's bail, rearresting him, and more than doubling the amount of the bail and in which the trial court made no findings of fact at all. We therefore hold that the trial court abused its discretion by taking those actions. We sustain Gomez's first issue.

Having sustained Gomez's first issue, we do not need to address his second issue, in which he raised several procedural and due process challenges to the trial court's action. *See* TEX. R. APP. P. 47.1.

Conclusion

We reverse the trial court's order denying Gomez's application for a pretrial writ of habeas corpus, and we render judgment granting the writ and reinstating Gomez's prior bonds. We dismiss any pending motions as moot. The Clerk of the Court is instructed to issue the mandate immediately. *See* TEX. R. APP. P. 2 (suspension of rules), 18.1(c) (issuance of mandate).

Peter Kelly
Justice

Panel consists of Justices Keyes, Kelly, and Landau.

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