Opinion issued July 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00493-CR

EX PARTE SHAWN PATRICK CHILDERS, Appellant

On Appeal from the 21st District Court
Washington County, Texas
Trial Court Case No. 19005

MEMORANDUM OPINION

Appellant Shawn Patrick Childers is charged with three counts of the first-degree felony offense of aggravated robbery for allegedly robbing a bank at gunpoint. *See* TEX. PENAL CODE § 29.03(a)(2), (b). The trial court set his bail at $30,000 for each count. Childers filed a pretrial application for writ of habeas corpus,

requesting that the trial court grant him a personal bond or lower his bail. The court denied the habeas application.

On appeal, Childers raises four issues. He first argues that the trial court abused its discretion by denying his request for a personal bond. He also argues that the trial court erred by denying his habeas application to the extent the order possibly relied on an executive order suspending personal bonds in some cases, which Childers contends violates three provisions of the Texas Constitution. We affirm.

Background

A Washington County grand jury indicted Childers for three counts of aggravated robbery for robbing three bank tellers at gunpoint at the Burton State Bank in western Washington County. The trial court set his bond at $30,000 for each count, for a total bond amount of $90,000.[1] Childers filed two applications for writ of habeas corpus, the second of which is at issue in this appeal.

In his first application, Childers requested that the trial court reduce the amount of bond. The trial court held a hearing, at which Childers and the State's witnesses testified.

---

[1] "'Bail' is 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. The terms "'bail' and 'bond' as used in Chapter 17 [of the Code of Criminal Procedure] are interchangeable terms and may refer both to the amount set and the amount posted, depending on the context, . . ." *Ex parte Gomez*, 624 S.W.3d 573, 577 (Tex. Crim. App. 2021).

Childers testified that he had lived in La Grange with his mother for six months before his arrest, and she is his only family member there. He had also lived in La Grange before living with his mother, but he did not say for how long or with whom. He worked at an ice plant for two or three years before he was arrested, and he was hopeful but uncertain that this job would be available to him if he was released. He is a member of a church and a country club. Childers admitted that he had been charged with a misdemeanor assault offense fifteen years earlier in Fayette County, and he received a bond and complied with the terms of the bond. Childers requested that the trial court reduce his bond to $45,000. He also testified that he could afford the monthly fees for an ankle monitor should monitoring become a condition of his bail. On cross-examination, Childers said that he travelled to Louisiana once a month, and he may have gone there in the days following the bank robbery.

The State called four witnesses: the investigator of the bank robbery and the three female tellers who were robbed. Jeff Wolf, a Texas Ranger who investigated the Burton State Bank robbery, testified that the robber went to each of the three tellers, pointed a revolver at each one, and demanded money. After taking more than $12,000, the robber left in a stolen pickup truck.

Wolf testified that his investigation eventually led him to suspect Childers as the robber, but Wolf provided no further details. He said that Childers frequently

travelled throughout the state and visited a casino in Louisiana the day after the robbery. He also said that Childers did not live with his mother, as Childers had testified. Rather, he lived with a woman who claimed to be Childers's common-law wife. Wolf did not say where Childers's wife lived.

Wolf and other law enforcement officers arrested Childers two days after the grand jury issued the indictment against him. When he was arrested, Childers admitted to officers that he had a vial of poison in his pocket. He said that he had been carrying the poison with him for the previous day or so, which Wolf testified is when the grand jury issued the indictment. Wolf testified that "in 18 years of doing this, [he had] never arrested anybody that was carrying poison on themselves." Wolf conceded that he had not yet received a chemical analysis of the contents of the vial.

Wolf also testified that Childers had told officers he owned only one firearm, but Wolf obtained a search warrant and found multiple firearms. Wolf learned that Childers had been carrying a firearm with him at all times leading up to his arrest. Wolf testified that he believed he had recovered the revolver used in the bank robbery, which he speculated might contain DNA evidence. Wolf testified at the bond hearing that he would be concerned about officer safety if it became necessary to execute a search warrant or have other dealings with Childers.

Finally, Wolf testified that he had received reports from grand jury witnesses that Childers was contacting them and asking about their grand jury testimony.

The State also called the three tellers who were robbed. Each testified that they were robbed at gunpoint inside the bank. They did not identify Childers as the robber, although one teller testified that Childers "very much" met the bank robber's description. All three tellers had since resigned or retired from their jobs due at least in part to the robbery. One teller testified that she does not sleep well at night, and she is "scared to death that he's going to find out where [she] live[s] and come to [her] house."

During his closing argument, Childers requested that the trial court reduce bail to $45,000. The trial court orally denied Childers's request.

Childers subsequently filed a motion to reduce bond, arguing that the amount of bond set by the trial court was excessive, he had minimal financial resources, and he had attempted to raise money from family and friends to post bond but had been unable to do so. After a hearing on the motion at which the parties briefly made their arguments, the trial court orally denied the motion.

Childers filed a second application for writ of habeas corpus. He urged that he could not afford his bond and he was eligible for release on a personal bond.[2] Childers also argued that he "understands this Court will not grant Mr. Childers a personal bond due to the Governor's Order, GA-13, which purports to suspend

---

[2] A personal bond is made without sureties or other security. *See* TEX. CODE CRIM. PROC. arts. 17.03(a), 17.04(a).

Article 17.03" for persons arrested for an offense involving a threat of physical violence. Childers argued that the order violates three provisions of the Texas Constitution, and therefore the trial court should "ignore" the unconstitutional executive order.

At the hearing on the second habeas application, neither party mentioned Childers's constitutional challenges. Defense counsel requested that the trial court reduce bail, arguing that Childers was incarcerated while awaiting trial because he could not afford bail. The State argued that the circumstances remained the same from the prior two hearings in which Childers had sought to reduce the bond amount.

At the end of the hearing, the trial court orally denied Childers's second habeas application. Defense counsel asked the trial court to sign the order that he submitted. The trial court agreed and signed the order, but it struck through a sentence referencing the challenged executive order. Childers appeals from the denial of his second application for writ of habeas corpus.

Denial of Habeas Relief

In his first issue, Childers contends that the trial court erred by denying his application for a writ of habeas corpus requesting a personal bond.[3]

[3] Childers's habeas application also requested that the trial court reduce bond, but Childers does not raise this issue on appeal.

A. Standard of Review and Governing Law

The primary purpose of setting bond is to secure the defendant's presence in court for trial. *Ex parte Vasquez*, 558 S.W.2d 477, 479 (Tex. Crim. App. 1977); *Golden v. State*, 288 S.W.3d 516, 519 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). The United States and Texas Constitutions protect a defendant from excessive bail. U.S. CONST. amend. VIII; TEX. CONST. art. I, §§ 11, 13; *see Ex parte Robles*, 612 S.W.3d 142, 146 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

When faced with excessive bail, an accused may assert his or her constitutional right to reasonable bail by filing a pretrial application for writ of habeas corpus. TEX. CODE CRIM. PROC. art. 11.24. The defendant bears the burden to prove that bail is excessive. *Ex parte Gomez*, 624 S.W.3d 573, 576 (Tex. Crim. App. 2021); *see Ex parte Nugent*, 593 S.W.3d 416, 423 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (stating that habeas "applicant bears the burden of establishing by a preponderance of the evidence that the facts entitle him to relief").

We review a trial court's ruling on a habeas application for an abuse of discretion. *Ex parte Gomez*, 624 S.W.3d at 576; *Ex parte Arango*, 518 S.W.3d 916, 923–24 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). A trial court does not abuse its discretion if its ruling lies within the zone of reasonable disagreement. *Bigon v. State*, 252 S.W.3d 360, 367 (Tex. Crim. App. 2008); *Ex parte Nugent*, 593

S.W.3d at 423. We will uphold the habeas court's order so long as it is correct under any theory of law applicable to the case. *Ex parte Nugent*, 593 S.W.3d at 423.

In conducting our review, we consider the evidence presented in the light most favorable to the trial court's ruling, regardless of whether the trial court's findings are express or implied or based on affidavits or live testimony, provided the findings are supported by the record. *Ex parte Gomez*, 624 S.W.3d at 576; *Ex parte Nugent*, 593 S.W.3d at 423. We afford "almost total deference to a trial court's factual findings when supported by the record, especially when those findings are based upon credibility and demeanor." *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013).

The trial court has discretion to set the amount of bail in any case, but this discretion is subject to the following factors in article 17.15 of the Code of Criminal Procedure:

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. art. 17.15;[4] *see Ex parte Gomez*, 624 S.W.3d at 576 (stating that article 17.15 governs trial court's exercise of discretion in setting bail). In determining the amount of bail to set, courts also consider the defendant's employment history, family ties, length of residency, criminal history, previous bond compliance, other outstanding bonds, and any aggravating facts of the charged offense. *Ex parte Gomez*, 624 S.W.3d at 576; *Ex parte Rubac*, 611 S.W.2d 848, 849–50 (Tex. Crim. App. [Panel Op.] 1981).

B. Analysis

1. Nature and Circumstances of Offense

Childers concedes that three first-degree felony charges for aggravated robbery would generally factor against pretrial release on a personal bond. But he argues that none of the victims identified him as the robber at the hearing on his habeas application, which he contends amounts to an effective acquittal following a mini trial. The State responds that the charged offenses are serious and the potential punishment is substantial, which weighs in favor of the trial court's decision to deny Childers's request for a personal bond.

---

[4] This Court has previously noted the amendments to article 17.15 of the Code of Criminal Procedure, which went into effect on December 2, 2021. *See Ex parte Moreno*, No. 01-20-00312-CR, 2021 WL 4733239, at *7 n.5 (Tex. App.—Houston [1st Dist.] Oct. 12, 2021, no pet.) (mem. op., not designated for publication). Because the proceedings here preceded the effective date of these amendments, our inquiry is governed by the version of article 17.15 in effect before the amendments. *See id.*

The primary factor to be considered in assessing the reasonableness of bail is the nature and circumstances of the offense, including the range of punishment for the charged offense. *Ex parte Rubac*, 611 S.W.2d at 849; TEX. CODE CRIM. PROC. art. 17.15; *see Ex parte Gomez*, 624 S.W.3d at 576 (stating that "'nature and circumstances' of the case implicate the range of punishment"). When the nature of the alleged offense is serious and the offense carries a probable lengthy sentence following trial, bail should be "set sufficiently high to secure the presence of the accused at trial because the accused's reaction to the prospect of a lengthy prison sentence might be not to appear." *Ex parte Hulin*, 31 S.W.3d 754, 761 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

A grand jury has indicted Childers for allegedly robbing $12,000 from a bank at gunpoint. The evidence presented at the habeas hearing shows that the bank robber went to three female bank tellers, pointed a revolver at each one, and demanded money from the bank. They discussed the effects of the robbery on their lives, including quitting their bank employment and feeling scared. Moreover, after the robbery and around the time the grand jury issued its indictment, Childers allegedly began carrying a firearm and a vial of poison with him. When Childers was arrested, officers found a vial of poison in his pocket. Wolf testified that Childers also allegedly began contacting witnesses about their grand jury testimony around this

time. Thus, the evidence introduced at Childers's bail hearing indicates that the nature and circumstances of the bank robbery are serious and violent.

Although the tellers did not identify Childers as the bank robber at the habeas hearing, we disagree that this effectively amounts to an acquittal of the aggravated robbery charges. At a criminal trial, the State bears the burden to prove a defendant's guilt beyond a reasonable doubt. *Patterson v. New York*, 432 U.S. 197, 210 (1977) (stating that Due Process Clause "requires the prosecution to prove beyond a reasonable doubt all of the elements" of charged offense). But this was not a trial on Childers's guilt for the alleged offense. This was a habeas proceeding, and Childers bore the burden of proof on the issues of the excessiveness of bail and his entitlement to habeas relief. *See Ex parte Gomez*, 624 S.W.3d at 576; *Ex parte Nugent*, 593 S.W.3d at 423. Identification of the defendant as the perpetrator of the offense is not one of the criteria that a trial court must consider in setting the amount of bail. *See* TEX. CODE CRIM. PROC. art. 17.15; *Ex parte Gomez*, 624 S.W.3d at 576. Thus, the tellers' failure to identify Childers as the bank robber has no bearing on his guilt for the aggravated robbery charges. In any event, we note that Wolf's testimony connected Childers to the bank robbery.

Childers is charged with three counts of the first-degree felony offense of aggravated robbery, and he faces up to ninety-years or life in prison and a $10,000 fine if convicted. *See* TEX. PENAL CODE §§ 12.32, 29.03(a)(2), (b). Courts have

upheld bond amounts greater than $30,000 (and even the combined $90,000) for defendants charged with aggravated robbery. *See, e.g.*, *Ex parte Robles*, 612 S.W.3d at 150 (concluding that trial court did not abuse its discretion in denying defendant's request to reduce bail from $75,000 to $10,000 for one count of aggravated assault with deadly weapon); *Ex parte Everage*, No. 03-17-00879-CR, 2018 WL 1788795, at *6–8, 9 (Tex. App.—Austin Apr. 13, 2018, no pet.) (mem. op., not designated for publication) (considering high bail amounts in cases concerning similar charges, concluding that $500,000 bail on first-degree felony charge of aggravated robbery is excessive, and ordering bail reduced to $250,000 for charge); *Ex parte Guerra*, 383 S.W.3d 229, 234 (Tex. App.—San Antonio 2012, no pet.) (upholding $950,000 bail for charged offenses of capital murder, "brazen armed robbery," and unauthorized use of vehicle).

Furthermore, as the State points out, Childers must serve more of his sentence if a jury convicts him and finds that he used or exhibited a firearm during the robbery, as the charges here allege. *Compare* TEX. GOV'T CODE § 508.145(d)(2) *with id.* § 508.145(f). Given the serious and violent nature and circumstances of the charged offenses and the potential for a life sentence if convicted, this factor weighs against a personal bond. *See* TEX. CODE CRIM. PROC. art. 17.15.

2. Sufficiently High Bail to Assure Appearance But Not Oppress

Childers argues that he is indigent and cannot afford bail, and a personal bond would reasonably assure his appearance at trial because he would be subject to incarceration and $90,000 in debt if he failed to appear. He also argues that he is a United States citizen and certain bond conditions, including travel limitations and GPS tracking, would assure his appearance at trial.

The State responds that Childers's lack of community ties and sparse work history show that a personal bond would not sufficiently assure his appearance at trial. The State also argues that Childers frequently traveled to casinos in Louisiana. Finally, the State argues that Childers offered no evidence showing that the amount of bail is oppressive.

A trial court should set bail sufficiently high to provide reasonable assurance that the defendant will appear at trial without setting it so high that it amounts to an instrument of oppression. TEX. CODE CRIM. PROC. art. 17.15; *see Ex parte Gomez*, 624 S.W.3d at 579; *Ex parte Hulin*, 31 S.W.3d at 761. A defendant's ties to the community and work history are relevant to whether the amount of bail will reasonably assure the defendant's presence at trial. *Ex parte Tata*, 358 S.W.3d 392, 400 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd).

Childers argues that the penalties for failing to appear, including further incarceration and debt, would reasonably assure his appearance at trial. But as

discussed above, Childers faces a potential life sentence on each count if convicted of aggravated robbery. This potential penalty for appearing at trial is far more significant than the penalties for failing to appear at trial. *See Ex parte Hulin*, 31 S.W.3d at 761 (stating that when nature of alleged offense is serious and includes probable lengthy sentence following trial, bail should be set sufficiently high to secure accused's presence because accused's reaction to prospect of lengthy prison sentence might be to not appear). Thus, we are not persuaded that the penalties for failing to appear would reasonably assure Childers's appearance at trial.

Additionally, there is little record evidence indicating that Childers would abide by his proposed bail conditions of travel limitations and GPS tracking. Childers's testimony that he complied with bond conditions when he was charged with a misdemeanor offense fifteen years ago says little about his willingness to comply with bond conditions attached to the present, more serious felony charges. Moreover, the evidence of his frequent out-of-state travels is some evidence that Childers could be a flight risk, and therefore a personal bond would not assure his presence at trial.

There is scant evidence that Childers would remain in La Grange or otherwise near Washington County where his charges are pending if released on a personal bond. *See Milner v. State*, 263 S.W.3d 146, 149 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (stating that trial court could have concluded that reasonably high bail

was necessary to assure defendant's appearance at trial in part because defendant had "little reason to remain in Brazoria County," where he was charged, if released on bail). While Childers testified that he is a United States citizen and had lived with his mother in La Grange, other evidence indicates that he actually lived elsewhere with a common-law wife. There is no evidence of Childers's residency more than six months before his arrest. Nor is there evidence of his work history more than three years before his arrest. And although he testified that he is a member of a church and a country club, there is no evidence that these memberships tie him to the community in a way that would reasonably assure his appearance at trial if he were released on a personal bond.

Finally, Childers presented no evidence that the trial court used the amount of bond as an instrument of oppression, that is, "for the purpose of forcing [Childers] to remain incarcerated pending trial." *See id.* When bail is set so high that a defendant cannot realistically pay for it, the trial court essentially "displaces the presumption of innocence and replaces it with a guaranteed trial appearance." *Ex parte Dupuy*, 498 S.W.3d 220, 233 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citation omitted). Here, there is no evidence that the trial court denied Childers's request for a personal bond just to keep him incarcerated pending trial. *See id.*; *cf. Ex parte Harris*, 733 S.W.2d 712, 714 (Tex. App.—Austin 1987, no pet.) (concluding that trial court's statement, "I'd rather see him in jail than to see someone's life taken,"

indicated that trial court set bail at amount defendant could not afford for "express purpose" of forcing defendant to remain incarcerated pending appeal of conviction). As discussed above, courts have upheld higher bond amounts for similar charged offenses. And as we discuss below, Childers did not establish that he was unable to afford bail. Therefore, these two factors weigh against a determination that a personal bond is appropriate. *See* TEX. CODE CRIM. PROC. art. 17.15.

3. Ability to Make Bail

Childers argues that he is indigent and cannot afford any amount of bail. The State responds that Childers's only evidence of his inability to afford bail is his vague testimony that he could raise bail money from his funds and from family and friends if the trial court were to reduce bail to $45,000. The State argues that Childers did not establish that he had exhausted his and his family's funds or had made an unsuccessful effort to furnish bail.

In setting the amount of bail, courts also consider the defendant's ability to make bail. TEX. CODE CRIM. PROC. art. 17.15. However, the "ability of an accused to make bail does not itself control the amount of bail, even if the accused is indigent." *Ex parte Tata*, 358 S.W.3d at 400 (quoting *Wright v. State*, 976 S.W.2d 815, 820 (Tex. App.—Houston [1st Dist.] 1998, no pet.)); *see Ex parte Charlesworth*, 600 S.W.2d 316, 317 (Tex. Crim. App. [Panel Op.] 1980) ("Although the ability to make bail is a factor to be considered, ability alone, even indigency,

does not control the amount of bail."). If the defendant's ability to make bail in a specific 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.

To demonstrate an inability to make bail, a defendant generally must establish that his and his family's funds have been exhausted. *Id.* at 149. Absent such a showing, a defendant usually must establish that he unsuccessfully attempted to make bail before we can determine that bail is excessive. *Id.*

Childers did not prove that he is indigent and cannot afford any amount of bail. To the contrary, he testified that he believed he could afford bail in the amount of $45,000 if the trial court reduced it to that amount. He also testified that he could afford $416 per month for an ankle monitor if the trial court imposed such a condition *and* if he could return to work. Although Childers argued in his motion to reduce bond that he has minimal financial resources and has unsuccessfully attempted to raise money from family and friends, Childers did not establish his inability to afford bail. *See Ex parte Moreno*, No. 01-20-00312-CR, 2021 WL 4733239, at *12 (Tex. App.—Houston [1st Dist.] Oct. 12, 2021, no pet.) (mem. op., not designated for publication) ("General references to an applicant's inability to make bail does not render the bail amounts set by the trial court excessive or justify a reduction of the bail amounts.").

Likewise, he did not establish either that his and his family's funds have been exhausted or that he unsuccessfully attempted to make bail. *See id.*; *Milner*, 263 S.W.3d at 149; *see also Ex parte Castille*, No. 01-20-00639-CR, 2021 WL 126272, at *6 (Tex. App.—Houston [1st Dist.] Jan. 14, 2021, no pet.) (mem. op., not designated for publication) (affirming order denying reduction of bail in part because defendant's argument that he unsuccessfully attempted to raise funds, had no other resources, and could not afford bail was unsupported by evidence of defendant's and his family's specific assets and financial resources or efforts made to furnish bond). Therefore, Childers has not established his inability to make bail. This factor weighs against a personal bond. *See* TEX. CODE CRIM. PROC. art. 17.15.

4. Future Safety of Victims and Community

Childers argues that there is no evidence that he is a threat to the bank tellers or to the community, and none of the victims identified him as the robber.

The final factor courts consider in setting bail is the future safety of victims of the alleged offenses and the community. *Id.* As an initial matter, Childers had the burden to prove that bail was excessive, including by offering proof to satisfy this safety factor, and we consider the evidence presented in the light most favorable to the trial court's ruling. *See Ex parte Gomez*, 624 S.W.3d at 576; *Ex parte Nugent*, 593 S.W.3d at 423. The trial court's denial of Childers's habeas application implicitly determined that Childers is a threat to the victims and the community, and

therefore the question is whether Childers adduced evidence that he is *not* a threat. Childers did not offer any evidence showing he is not a threat. Rather, he argues that none of the victims identified him as the bank robber.

We disagree that the victims' failure to positively identify Childers as the bank robber shows that the bank tellers and the community at large will be safe if he is released. Wolf's brief testimony about his investigation connected Childers to the robbery, and one of the tellers testified that Childers "very much" matched the robber's description. The three tellers testified about a serious and violent robbery at gunpoint, and one teller testified that she is "scared to death that [the robber is] going to find out where [she] live[s] and come to [her] house."

There is also evidence that Childers carried a firearm and poison on him after the bank robbery, when witnesses were testifying to the grand jury, when the grand jury issued an indictment against him, and when he was arrested. Wolf testified that officer safety could be compromised if law enforcement had to serve a warrant or otherwise deal with Childers in the future. And finally, there is evidence that Childers contacted grand jury witnesses about their grand jury testimony.

This evidence indicates that Childers would pose a threat to the tellers and to the community at large if he is released on a personal bond. Most of this evidence is unchallenged by Childers and independently weighs in favor of Childers posing a threat to the tellers and the community even without a positive identification from

the tellers. *See Milner*, 263 S.W.3d at 151 (concluding that alleged victim of offense could be at risk if defendant makes bail, even though "no specific evidence [of such risk] was introduced"). We conclude that this factor weighs against issuance of a personal bond. *See* TEX. CODE CRIM. PROC. art. 17.15.

5. Other Factors

In addition to the factors set out in the Code of Criminal Procedure, courts also consider a defendant's employment history, family ties, length of residency, criminal history, previous bond compliance, other outstanding bonds, and any aggravating facts of the charged offense. *Ex parte Gomez*, 624 S.W.3d at 576; *Ex parte Rubac*, 611 S.W.2d at 849–50. We have already discussed many of these factors above. The evidence indicates that Childers has minimal employment history, family ties to the area, and length of residency, which all weigh against issuing a personal bond in this case.

Childers only has one previous charge for a criminal offense: a misdemeanor assault charge from fifteen years ago. Childers testified that the trial court imposed bail in that case, and he complied with the bail conditions. However, there is no evidence of the specific bail conditions imposed in that case or the potential sentence he faced for the prior charged offense. Moreover, the three felony charges that Childers faces in this case are more serious than the single misdemeanor offense he previously faced and carry a harsher potential penalty. Thus, evidence that Childers

generally complied with bond conditions attached to a prior misdemeanor offense says little about his willingness to comply with conditions attached to a personal bond in this felony case.

But even assuming that Childers's prior criminal history and bond compliance weigh in his favor, there are numerous aggravating circumstances in this case. For example, Childers allegedly used a firearm during the robbery, robbed three separate tellers at gunpoint, stole thousands of dollars, escaped in a stolen truck, carried weapons and poison on him after the robbery, had a vial of poison in his pocket when he was arrested, and contacted grand jury witnesses. These other factors weigh against a personal bond. In the totality of the circumstances, Childers's minimal criminal history and bond compliance does not persuade us that the trial court abused its discretion in denying Childers's requested personal bond.

We conclude that the trial court's denial of Childers's habeas application requesting a personal bond lies within the zone of reasonable disagreement. We therefore hold that the trial court did not abuse its discretion in denying Childers's application for a writ of habeas corpus. We overrule Childers's first issue.

C. Constitutional Challenges to Executive Order

In his second through fourth issues, Childers contends that the Governor issued an unconstitutional executive order suspending personal bonds in certain cases, which the trial court may have relied on in denying his request for a personal

bond. The State responds that Childers did not preserve error on this issue. Alternatively, the State argues that Childers did not prove that the trial court's denial of his request for a personal bond relied on the executive order, and therefore any decision by this Court on the constitutionality of the executive order would be an impermissible advisory opinion.

First, we disagree with the State that Childers waived error on his constitutional issues. To preserve error, the record must show that (1) the complaint was made to the trial court by timely request, objection, or motion stating the grounds for the ruling with sufficient specificity to make the trial court aware of the complaint; and (2) the trial court must rule or refuse to rule on the complaint. TEX. R. APP. P. 33.1(a); *see Leal v. State*, 469 S.W.3d 647, 649 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *see also Ex parte Fusselman*, 621 S.W.3d 112, 122–23 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd) (applying Rule 33.1 to constitutional challenge). Here, Childers asserted his constitutional challenges in his habeas application, which the trial court denied.[5] Childers's complaint complied with rule 33.1, and therefore he preserved his constitutional challenges for review.

[5] To the extent the State argues that Childers did not preserve error on his constitutional issues because he was required to raise them both in his habeas application and at the hearing on his habeas application, we disagree. The State cites no legal authority supporting this argument. Moreover, Rule 33.1 does not require a complaint to be made both by motion and at a hearing on the motion. *See* TEX. R. APP. P. 33.1(a)(1). Error preservation is not "hyper-technical or formalistic," but rather it requires a defendant to communicate the complaint straightforward in plain

Nevertheless, we agree with the State that Childers seeks an impermissible advisory opinion on the constitutionality of the executive order. Courts lack authority to issue advisory opinions. *Pfeiffer v. State*, 363 S.W.3d 594, 601 (Tex. Crim. App. 2012). This Court has recently stated that "an opinion is advisory when a court tries to resolve an issue but the party seeking review of the issue will not benefit from its resolution in any way." *Costilla v. State*, — S.W.3d —, No. 01-20-00297-CR, 2021 WL 4848862, at *6 (Tex. App.—Houston [1st Dist.] Oct. 19, 2021, no pet.); *cf. Pfeiffer*, 363 S.W.3d at 601 (stating that opinion is not advisory if party is likely to benefit from resolution of issues in party's favor because such issues are functionally in dispute).

Because the trial court had discretion to deny habeas relief under article 17.15 of the Code of Criminal Procedure article 17.15, there is no need for us to consider whether the executive order could have supplied an additional ground for denying relief. *See* TEX. CODE CRIM. PROC. art. 17.15; *Ex parte Gomez*, 624 S.W.3d at 576. Our holding regarding article 17.15 is sufficient to affirm the trial court's order regardless of our resolution of the constitutional issues. *See Ex parte Nugent*, 593

English to the trial court at a time when the court is in a proper position to remedy the complaint. *Leal v. State*, 469 S.W.3d 647, 649 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). We conclude that, by raising the constitutional issues in his habeas application, Childers sufficiently made the trial court aware of his complaint and therefore preserved error on his constitutional issues. *See* TEX. R. APP. P. 33.1(a)(1).

S.W.3d at 423 (stating that habeas ruling will be upheld if correct under any theory of law applicable to case). Therefore, Childers would not benefit from a resolution of his constitutional challenges, and any opinion by this Court on these issues would be advisory. *See Pfeiffer*, 363 S.W.3d at 601; *Costilla*, 2021 WL 4848862, at *6.

Childers argues that the trial court's order did not state a reason for denying his habeas application, and therefore the trial court could have concluded that it lacked authority to issue a personal bond under the executive order even if Childers met the criteria for a personal bond. Because the trial court did not provide reasons for denying Childers's habeas application and did not issue findings of fact or conclusions of law, this argument is speculative. It is well settled that courts should avoid addressing constitutional grounds when a case can be resolved on non-constitutional grounds. *See Bond v. United States*, 572 U.S. 844, 855 (2014); *Turner v. State*, 754 S.W.2d 668, 675 (Tex. Crim. App. 1988) (stating that "constitutionality of a statute is not to be determined in any case, unless such a determination is *absolutely* necessary to decide the case in which the issue is raised") (quoting *Briggs v. State*, 740 S.W.2d 803, 806–07 (Tex. Crim. App. 1987)); *Jenkins v. State*, 468 S.W.3d 656, 671 n.8 (Tex. App.—Houston [14th Dist.] 2015, pet. dism'd) ("It is well settled that the constitutionality of a statute is not to be determined unless such a determination is absolutely necessary to decide the case."). We have already resolved the appeal on non-constitutional grounds. We therefore do not address

Childers's constitutional challenges. We overrule Childers's second through fourth issues.

Conclusion

We affirm the trial court's order denying Childers's application for writ of habeas corpus.

April L. Farris
Justice

Panel consists of Chief Justice Radack and Justices Countiss and Farris.

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