

**Motion Granted; Order and Dissenting Opinion filed November 20, 2018.**



**In The  
Fourteenth Court of Appeals**

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**NO. 14-16-00583-CR**

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**DARON TAYLOR, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 178th District Court  
Harris County, Texas  
Trial Court Cause No. 1400163**

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**DISSENT TO ORDER SETTING BAIL**

This court lacks the authority under article 44.04(h) of the Texas Code of Criminal Procedure to grant appellant Daron Taylor bail pending review in the Court of Criminal Appeals. The majority holds otherwise and sets bail using criteria that undermine binding precedent. For these reasons, I respectfully dissent.

## *Availability of Bail*

A defendant tried as an adult generally has a constitutional right to reasonable bail before trial.<sup>1</sup> A defendant convicted and sentenced as an adult has no constitutional right to reasonable bail if the court of appeals reverses or vacates the conviction, although the Legislature may provide for bail by statute.<sup>2</sup> A respondent in juvenile court has no constitutional or statutory right to bail either before or after the adjudication hearing or the disposition hearing.<sup>3</sup> Though the juvenile proceedings are not criminal proceedings, the adjudication hearing is analogous to the guilt/innocence phase of a criminal trial, and the disposition hearing is analogous to the punishment phase of a criminal trial.<sup>4</sup>

### *Interpretation of Article 44.04(f)*

The outcome of today's case turns on this court's application of article 44.04(h), which provides:

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. If the defendant requests bail after a petition for discretionary review has been filed, the Court of Criminal Appeals shall determine the amount of bail. The sureties on the bail

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<sup>1</sup> See Tex. Const. art. I, §11.

<sup>2</sup> See *Dallas v. State*, 983 S.W.2d 276, 278 n.1 (Tex. Crim. App. 1998), *disapproved of on other grounds by Ex parte Anderer*, 61 S.W.3d 398, 405 & n.33 (Tex. Crim. App. 2001).

<sup>3</sup> See Tex. Fam. Code Ann. §§ 53.02, 54.01, 56.01 (West, Westlaw through 2017 1st C.S.); *Espinosa v. Price*, 188 S.W.2d 576, 577 (Tex. 1945); *Ex parte D.W.C.*, 1 S.W.3d 896, 897 (Tex. App.—Beaumont 1999, pet. denied); *In re S.L.L.*, 906 S.W.2d 190, 193 (Tex. App.—Austin 1993, no writ).

<sup>4</sup> See *In re B.D.S.D.*, 289 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

must be approved by the court where the trial was had. The defendant's right to release under this subsection attaches immediately on the issuance of the Court of Appeals' final ruling as defined by Tex. Cr. App. R. 209(c).<sup>5</sup>

Under the canons of statutory construction, we are to interpret a statute according to its plain language, unless the language is ambiguous or the interpretation would lead to absurd results that the Legislature could not have intended.<sup>6</sup> We are to focus on the literal text, reading it in context and construing it “according to the rules of grammar and common usage.”<sup>7</sup> In an attempt to discern the fair, objective meaning of the text at the time of its enactment, we are to presume every word has been used for a purpose and we are to give each word, phrase, clause, and sentence effect if it is reasonably possible to do so.<sup>8</sup> We are not to add or subtract from the statute.<sup>9</sup> Only in the rare, absurd-results scenario may the court stray from this model and, even then, only out of absolute necessity.<sup>10</sup>

Under article 44.04(h)'s plain language, the Legislature has not given this court authority to grant appellant reasonable bail pending review in the Court of Criminal Appeals. The statute provides that a defendant, if in custody, is entitled to release on reasonable bail, pending final determination of an appeal by the state or the defendant on a motion for discretionary review “[i]f a conviction is reversed by

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<sup>5</sup> Tex. Code Crim. Proc. Ann. art. 44.04(h) (West, Westlaw through 2017 1st C.S.).

<sup>6</sup> *Tapps v. State*, 294 S.W.3d 175, 177 (Tex. Crim. App. 2009).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

a decision of a Court of Appeals.”<sup>11</sup> This statute also provides that the sureties on the bail set by the appellate court must be approved by the court that tried the case.<sup>12</sup>

Under Texas Rule of Appellate Procedure 43.2, entitled “Types of Judgment,” a court of appeals may dispose of an appeal in one of the following ways:

- (1) affirm the trial court’s judgment in whole or in part;
- (2) modify the trial court’s judgment and affirm it as modified;
- (3) reverse the trial court’s judgment in whole or in part and render the judgment that the trial court should have rendered;
- (4) reverse the trial court’s judgment and remand the case for further proceedings;
- (5) vacate the trial court’s judgment and dismiss the case; or
- (6) dismiss the appeal.<sup>13</sup>

Under the unambiguous language of article 44.04(h), bail under that statute is available only in the third and fourth scenarios.

In today’s case, this court did not reverse appellant’s conviction. Neither the third nor the fourth scenario is in play. The court instead opted to “vacate the judgment of the criminal district court, dismiss the case in that court, and declare that the case is still pending in the juvenile court.”<sup>14</sup> So, under the plain text of article 44.04(h), appellant is not entitled to release on reasonable bail under this statute.

Because this court vacated the trial court’s judgment and dismissed the trial-court case rather than reverse the conviction, this court lacks the power to set the

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<sup>11</sup> Tex. Code Crim. Proc. Ann. art. 44.04(h) (emphasis added).

<sup>12</sup> *See id.*

<sup>13</sup> Tex. R. App. P. 43.2.

<sup>14</sup> *Taylor v. State*, 553 S.W.3d 94, 100 (Tex. App.—Houston [14th Dist.] 2018, pet. filed).

amount of reasonable bail under article 44.04(h). But, that does not leave appellant without the possibility of release on bail. Appellant may seek bail through an original habeas-corpus action in the Court of Criminal Appeals.<sup>15</sup>

Applying the statute's plain language would not lead to absurd consequences that the Legislature could not possibly have intended. Indeed, the statutory regime shows good reason for the Legislature to have chosen the path of not mandating release on reasonable bail if the court of appeals vacates the judgment and dismisses the case in the trial court.

Any bail after conviction, and the sureties on the bail bond, must be approved by the court "where trial was had."<sup>16</sup> Bail is sufficient if it substantially meets the requirements of the Code of Criminal Procedure.<sup>17</sup> In today's case, if the Court of Criminal Appeals denies review, or grants review and affirms this court's judgment, either action would render the proceedings in the district court void ab initio because the court lacked subject-matter jurisdiction, and under the judgment and mandate of this court or the high court, appellant's case would be before the juvenile court in the pre-adjudication-hearing stage — a stage at which appellant has no right to be released. Moreover, the juvenile court has discretion to order appellant detained if the court finds one or more of the following:

- (1) he is likely to abscond or be removed from the jurisdiction of the court;
- (2) suitable supervision, care, or protection for him is not being provided by a parent, guardian, custodian, or other person;

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<sup>15</sup> See *Ex parte Borgen*, 646 S.W.2d 450, 451 (Tex. Crim. App. 1983).

<sup>16</sup> Tex. Code Crim. Proc. Ann. art. 44.04(e) (West, Westlaw through 2017 1st C.S.).

<sup>17</sup> *Id.*

- (3) he has no parent, guardian, custodian, or other person able to return him to the court when required;
- (4) he may be dangerous to himself or may threaten the safety of the public if released; or
- (5) he previously has been found to be a delinquent child or previously has been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.<sup>18</sup>

Given appellant’s circumstances — involvement in two capital murders, one parent deceased, and one parent in prison — there appear to be grounds for the juvenile court to deny appellant release.

The statutory scheme itself confirms that our lawmakers did not contemplate bail availability in the context of this case. Defined in article 17.02, “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 accusation.”<sup>19</sup> If appellant were eligible for release under article 44.04(h), in posting his bail bond, appellant necessarily would undertake to appear “before a court or magistrate to answer a **criminal accusation.**”<sup>20</sup> Yet, there is no criminal accusation in the juvenile court.<sup>21</sup>

In sum, concluding that this court cannot grant appellant release under article 44.04(h) does not mandate his release from confinement, nor does it mean that appellant has no other avenue to seek release on reasonable bail pending further court action. It simply means that appellant did not meet eligibility for bail under the

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<sup>18</sup> See Tex. Fam. Code Ann. § 53.02(b).

<sup>19</sup> Texas Code of Criminal Procedure 17.02.

<sup>20</sup> Tex. Code Crim. Proc. Ann. art. 17.02 (emphasis added); see *id.* art. 44.04(e).

<sup>21</sup> See *Espinosa*, 188 S.W.2d at 577; *Ex parte D.W.C.*, 1 S.W.3d at 897.

legislatively-created criteria in article 44.04(h), and this court lacks authority under that statute to grant bail.

The majority asserts that if this court’s vacatur of the trial court’s judgment stands, the judgment of conviction under which appellant has been confined will disappear, and therefore appellant must be released on bond.<sup>22</sup> But, once this court’s judgment takes effect, appellant will be under the jurisdiction of the juvenile court, and appellant will have no constitutional right to release on bail.<sup>23</sup> In any event, appellant has the ability to seek release on bail through an original habeas-corpus action in the Court of Criminal Appeals.<sup>24</sup> The majority does not explain why a release on bail must be available to appellant under article 44.04(h) even if he does not satisfy the legislatively created criteria for release on bail under that statute.

Citing the Court of Criminal Appeals’s opinion in *Moon v. State*,<sup>25</sup> the majority incorrectly states that the high court has described the disposition in cases like this one as a “reversal of the juvenile court’s transfer order.”<sup>26</sup> The *Moon* court described the disposition in the case before it as follows: “the court of appeals vacated the district court's judgment of conviction, dismissed the criminal proceedings, and declared the case to be still ‘pending in the juvenile court.’”<sup>27</sup> In the footnote the majority cites for support, the *Moon* court did not describe the disposition in the case as a “reversal of the juvenile court’s transfer order”; rather, the *Moon* court stated that it was leaving for the juvenile court’s determination the

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<sup>22</sup> See *ante* at 2–3.

<sup>23</sup> See Tex. Fam. Code Ann. §§ 53.02, 54.01, 56.01; *Espinosa*, 188 S.W.2d at 577; *Ex parte D.W.C.*, 1 S.W.3d at 897; *In re S.L.L.*, 906 S.W.2d at 193.

<sup>24</sup> See *Ex parte Borgen*, 646 S.W.2d at 451.

<sup>25</sup> 451 S.W.3d 28 (Tex. Crim. App. 2014).

<sup>26</sup> *Ante* at 2–3.

<sup>27</sup> *Moon*, 451 S.W.3d at 36.

issue of what procedural options were available in this context.<sup>28</sup> The high court also noted a statutory alternative under Texas Family Code section 54.02(j) that might be available “assuming that the state can satisfy the criteria under Section 54.02(j).”<sup>29</sup> Rather than describe the disposition as a “reversal of the juvenile court’s transfer order,” the high court noted that the procedure under section 54.02(j) *might* be available if the state could satisfy all criteria under section 54.02(j), one of which is that “a previous transfer order was reversed by an appellate court or set aside by a district court.”<sup>30</sup>

The majority also notes that in *Guerrero v. State*, this court described its judgment as including a remand to the juvenile court, even though the appeal was from a conviction in the district court.<sup>31</sup> The *Guerrero* court described the judgment in that case, not the judgment in today’s case.<sup>32</sup> We did not purport to remand Taylor’s case to the juvenile court.<sup>33</sup>

Neither *Moon* nor *Guerrero* change the fact that this court lacks authority to grant release on reasonable bail under article 44.04(h).

Despite this court’s lack of authority to grant release, the majority undertakes to set reasonable bail. In doing so, the majority applies the wrong legal standard.

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<sup>28</sup> *See id.* at 52, n.90.

<sup>29</sup> *Id.*; see Tex. Fam. Code Ann. § 54.02 (West, Westlaw through 2017 1st C.S.).

<sup>30</sup> Tex. Fam. Code Ann. § 54.02(j); see *Moon*, 451 S.W.3d at 52, n.90.

<sup>31</sup> *Guerrero v. State*, 471 S.W.3d 1, 4 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (stating that the district court’s judgment “is vacated, the case in that court is dismissed, and *the cause is remanded to the juvenile court* for further proceedings”) (emphasis added).

<sup>32</sup> *See id.*

<sup>33</sup> *See Taylor v. State*, 553 S.W.3d at 100.



## *The Legal Standard for Setting Reasonable Bail*

The Court of Criminal Appeals, in *Montalvo v. State*, applied a multi-factor balancing test to set the amount of reasonable bail under article 44.04(h).<sup>34</sup> A decade later, in *Aviles v. State*, a panel of this court came up with its own standard, one that makes no mention of *Montalvo* and instead mandates consideration of three super-criteria for the 44.04(h) determination:

- (1) the fact that the conviction has been overturned;
- (2) the State's ability, if any, to retry the appellant; and
- (3) the likelihood that the decision of the court of appeals will be overturned.<sup>35</sup>

The legal standard the *Aviles* court created with these super-criteria conflicts with the high court's *Montalvo* precedent because the *Montalvo* court did not say that courts should give primary consideration to any factors or that any factor was a primary factor.<sup>36</sup> The *Montalvo* court did not mention any of the factors that make up the *Aviles* super-criteria.

In *Montalvo*, the intermediate court of appeals reversed the defendant's conviction, and the defendant sought release on bail under article 44.04(h) after the State filed a petition for discretionary review by the Court of Criminal Appeals.<sup>37</sup> Because the defendant made the bail request after the State sought high-court review, article 44.04(h) required the Court of Criminal Appeals to determine the amount of reasonable bail.<sup>38</sup>

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<sup>34</sup> See *Montalvo v. State*, 786 S.W.2d 710, 710–11 (Tex. Crim. App. 1989).

<sup>35</sup> 26 S.W.3d 696, 698–99 (Tex. App.—Houston [14th Dist.] 2000, published order).

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See Tex. Code Crim. Proc. Ann. art. 44.04(h).

In considering reasonable bail, the *Montalvo* court listed, and the defendant thoroughly detailed, the following criteria: (1) the nature of the offense, (2) the ability to make bail, (3) defendant’s prior criminal record, (4) defendant’s employment record, (6) defendant’s family and community ties, (7) the defendant’s length of residency in the community.<sup>39</sup> The *Montalvo* court stated that other factors might be relevant in determining the amount of reasonable bail under article 44.04(h),<sup>40</sup> and then set the bail amount using the listed factors.<sup>41</sup>

Though some parts of *Aviles* are consistent with *Montalvo*,<sup>42</sup> the part of *Aviles* that introduces the three super-criteria<sup>43</sup> conflicts with the *Montalvo* precedent because the Court of Criminal Appeals did not state that courts should give primary consideration to any factor.<sup>44</sup> In creating a new layer of factors for the 44.04(h) bail determination and elevating those factors above everything else on the high court’s list,<sup>45</sup> the *Aviles* court undermined the *Montalvo* standard. Because the *Montalvo* precedent is on point and the *Aviles* super-criteria run afoul of *Montalvo*,<sup>46</sup> principles

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<sup>39</sup> See *Montalvo*, 786 S.W.2d at 711.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

<sup>42</sup> The *Aviles* court concluded that in making the 44.04(h) determination, courts should consider the five factors listed in Code of Criminal Procedure article 17.15 (rules for fixing amount of bail), Tex. Code Crim. Proc. Ann. art. 17.15 (West, Westlaw through 2017 1st C.S.), as well as the following factors: “(1) the defendant’s work record; (2) the defendant’s family and community ties; (3) the defendant’s length of residency; (4) the defendant’s prior criminal record; (5) the defendant’s conformity with previous bond conditions; (6) the existence of other outstanding bonds, if any; and (7) aggravating circumstances alleged to have been involved in the charged offense.” *Aviles*, 26 S.W.3d at 698. These parts of *Aviles* are consistent with *Montalvo*. See *Montalvo*, 786 S.W.2d at 711.

<sup>43</sup> See *Aviles*, 26 S.W.3d at 699.

<sup>44</sup> See *Montalvo*, 786 S.W.2d at 711.

<sup>45</sup> See *Aviles*, 26 S.W.3d at 698–99.

<sup>46</sup> See *Montalvo*, 786 S.W.2d at 711; *Aviles*, 26 S.W.3d at 698–99.

of vertical stare decisis demand that this court follow *Montalvo* rather than apply the *Aviles* super-criteria.<sup>47</sup> Moreover, because this court has never purported to interpret, apply, or distinguish the *Montalvo* standard when applying the *Aviles* super-criteria, neither *Aviles* nor cases applying the *Aviles* super-criteria are binding precedent in this court.<sup>48</sup> Even an en banc opinion cannot trump the high court's *Montalvo* precedent.<sup>49</sup>

### *The Majority's Application of the Aviles Super-Criteria*

The majority chooses today's bail amount by looking primarily to the *Aviles* super-criteria. Yet, these criteria — the factors the majority deems most important to the analysis — have little, if any, relation to the ultimate goal of setting reasonable bail. The first super-criterion will be satisfied 100% of the time in every case in which an appellant is entitled to bail under 44.04(h),<sup>50</sup> so why make it a factor at all? The other two super-criteria require the court to speculate about what might happen in the high court and what might happen on remand in the trial court.<sup>51</sup> Why elevate this guesswork over facts, such as the defendant's work history, criminal record, family and community ties, and other fact-based criteria that make up the *Montalvo* balancing test?

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<sup>47</sup> See *Glassman v. Goodfriend*, 347 S.W.3d 772, 781 & n.8 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc).

<sup>48</sup> See *Glassman*, 347 S.W.3d at 781 & n.8 (explaining that this court is not bound by a prior holding of this court if the prior holding conflicts with a decision from a higher court that is on point). Recently, this court, sitting en banc, set bail under article 44.04(h) using the *Aviles* super-criteria, but the en banc court did not purport to interpret, apply, or distinguish the *Montalvo* standard. See *Foreman v. State*, —S.W.3d—, —, 2018 WL 5075156, at \*1–2 (Tex. App.—Houston [14th Dist.] Oct. 18, 2018, published order).

<sup>49</sup> See *Glassman*, 347 S.W.3d at 781 & n.8 (noting that this court is not bound by a prior holding of this court that conflicts with an on-point decision from a higher court).

<sup>50</sup> See *Aviles*, 26 S.W.3d at 698–99.

<sup>51</sup> See *id.*

In the race for fairness and transparency, fact-based decision-making outruns guess-based decision-making every time. By giving primacy to the *Aviles* super-criteria, the majority deprives both appellants and the public their due under the high court's *Montalvo* framework.

/s/      Kem Thompson Frost  
                 Chief Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby. (per curiam order with dissent by Chief Justice Frost).

Publish — TEX. R. APP. P. 47.2(b).