Affirmed and Opinion filed August 19, 2021.

In The

Fourteenth Court of Appeals

NO. 14-20-00758-CR
NO. 14-20-00759-CR
NO. 14-20-00760-CR

EX PARTE STEVEN C. ESTRADA

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause Nos. 1692288, 1692290, & 1692291

OPINION

Appellant Steven C. Estrada brings this appeal from the trial court's habeas-corpus judgments, in association with setting bail at a combined $900,000 for three offenses and with considering a written summary of underlying allegations authored by a detective who was not available to give testimony at his bail hearing. We affirm.

BACKGROUND

Appellant is charged with three offenses in three causes before the trial court: unlawful possession of body armor by a felon, felon in possession of a firearm, and burglary of a habitation. Those three charges arise out of appellant's alleged entry into a Houston Police Department "bait house" with two others while armed with guns and dressed as and announcing themselves as HPD officers, with the ostensible goal of stealing drugs from the occupants thought to be living at the bait house.

Initially, the trial court set bond at a total of $1.25 million; the possession of body armor and burglary charges each had bail set at $500,000, while the felon in possession of a firearm charge had bail set at $250,000. Appellant then filed a pretrial applications for writ of habeas corpus with the trial court, seeking a reduction in his $1.25 million bail. The trial court granted the applications, issued writs of habeas corpus, and set a hearing for October 6, 2020.

During the hearing, appellant presented several relatives from the Houston area as witnesses, who testified as to why a lower bail amount was warranted and on multiple occasions declared that they could not provide resources to satisfy a bail amount any higher than $20,000 to $25,000. That testimony also acknowledged appellant had been employed for at least the past several years until his arrest, that he had lived in Texas for his entire life and in Houston for several years, and that he has significant family ties in and around Houston and in Texas more generally. Appellant's family also testified he had tested positive for COVID-19 several months prior and had co-morbid conditions in the form of diabetes and high blood pressure, and they were worried about him becoming reinfected. Although the State called no witnesses, it did produce a copy of appellant's indictments for the three charges he was facing. In addition, and over

appellant's objection based on the Sixth Amendment to the United States Constitution and related to the document's allegedly hearsay nature,[1] the State offered into evidence a summary of the facts underlying appellant's three charges, created by the lead detective on the criminal investigation into appellant. That summary was used by the State to portray the facts underlying the three charges as "particularly egregious" in support of denying appellant his requested bail reduction. The State also offered into evidence a list of appellant's prior criminal convictions, which included eight felony convictions since 1990, including one conviction each for aggravated assault of a peace officer and evading arrest with a motor vehicle.[2] At the conclusion of the hearing, the trial court denied in part appellant's requested relief. Although the trial court reduced bail for his body armor and felon in possession of a firearm charges to $200,000 each, it left bail for appellant's burglary charge at $500,000, for total bail of $900,000. Seeking to further lower that total and contending the trial court's consideration of the detective's factual summary violated his Sixth Amendment rights under the Confrontation Clause, partially due to the summary's hearsay nature, appellant has appealed to this court.

ANALYSIS

A. Legal Standard

We review a challenge to the excessiveness of bail for an abuse of discretion. *See Ex parte Rubac*, 611 S.W.2d 848, 850 (Tex. Crim. App. [Panel

[1] Although the transcript of the bail hearing is ambiguous as to whether appellant's hearsay challenge was directed entirely towards his Sixth Amendment rights or was at least partially separate from those rights (e.g., a challenge regarding Texas evidentiary law), on appeal he has solely advanced the hearsay challenge in the context of his Sixth Amendment arguments.

[2] The record of the hearing implies appellant challenged that list on the same Sixth Amendment and hearsay grounds. However, appellant is not challenging the admissibility of that list on appeal.

Op.] 1981). Under this standard, we may not disturb the trial court's decision if it falls within the zone of reasonable disagreement. *See Ex parte Dupuy*, 498 S.W.3d 220, 230 (Tex. App.—Houston [14th Dist.] 2016, no pet.). That zone does not, however, include errors in properly applying or interpreting the law. *See In re B.R.H.*, 426 S.W.3d 163, 166 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

B. Admission of the detective's factual summary did not violate appellant's Sixth Amendment rights

Before assessing whether the trial court's overall conclusion that $900,000 bail was appropriate constituted an abuse of discretion, this court will examine whether a particular aspect of the trial court's analysis was defective: the trial court's admission of the detective's factual summary, the subject of appellant's second point of error. Appellant contends the admission of the written factual summary, authored by a detective who did not testify at his bail hearing, violated his rights under the Confrontation Clause.

Under the Sixth Amendment's Confrontation Clause, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Although this right indisputably protects criminal defendants regarding having an absent witness's out-of-court statements used against them at a criminal trial, *see generally Crawford v. Washington*, 541 U.S. 36 (2004), it is less apparent whether and to what extent Confrontation Clause protections apply at a pretrial bail hearing. As both appellant and the State acknowledge, Texas authority on this issue is scant. Texas appellate courts have split on the extent to which Confrontation Clause protections apply during pretrial proceedings, as opposed to during a trial itself. *Compare Vanmeter v. State*, 165 S.W.3d 68, 74–75 (Tex. App.—Dallas 2005, pet. ref'd) (holding Confrontation Clause did not apply to pretrial suppression hearing), *with Curry v.*

State, 228 S.W.3d 292, 298 (Tex. App.—Waco 2007, pet. ref'd) (reaching opposite conclusion regarding pretrial suppression hearing). The closest the Texas Court of Criminal Appeals has come to ruling on this issue was a 1971 case, *Ex parte Miles*, in which the Court held a defendant possessed rights under a differently formulated provision of the Texas Constitution "to be confronted with the witnesses against him at [a pretrial bail hearing] before bail can be denied," as statements by out-of-court witnesses were not "evidence substantially showing the guilt of the accused." 474 S.W.2d 224, 225 (Tex. Crim. App. 1971); *see also* Tex. Const. Art. 1, § 11a (declaring that persons accused of certain non-capital felony offenses may only have bail denied "upon evidence substantially showing the guilt of the accused"). But since that case centered on different Texas constitutional rights, as well as on the probative value of an absent witness's statements rather than any rights to confront a testifying witness, it does not squarely resolve the issue of whether appellant's Confrontation Clause rights were violated at his pretrial bail hearing.

Among federal courts, however, there is general agreement that the rights protected by the Confrontation Clause apply only to trial and not to pretrial proceedings such as bail hearings. *See, e.g.*, *United States v. Colasuonno*, 697 F.3d 164, 176 (2d Cir. 2012) (observing that "the full protections of the Confrontation Clause do not apply to" a variety of criminal proceedings outside of trial, including "bail proceedings"); *United States v. Smith*, 79 F.3d 1208, 1210 (D.C. Cir. 1996) (per curiam) (holding defendant's Confrontation Clause rights were not violated at pretrial detention hearing when government proceeded by proffer); *United States v. Winsor*, 785 F.2d 755, 756 (9th Cir. 1986) (per curiam) (noting that in pretrial detention hearing, "the government may proceed . . . by proffer or hearsay," while "[t]he accused has no right to cross-examine adverse witnesses who have not been called to testify"); *United States v. Hernandez*, 778 F. Supp. 2d 1211, 1220–27

(D.N.M. 2011) (collecting cases and concluding that Confrontation Clause protections do not apply to pretrial detention hearings). Although the United States Supreme Court has not weighed in on this question, its Confrontation Clause authority has focused on whether a criminal defendant's rights at trial have been infringed. *See Crawford*, 541 U.S. at 50–59 (analyzing defendant's rights to confront witnesses at trial with regard to both in-court and out-of-court statements); *Pennsylvania v. Ritchie*, 480 U.S. 39, 53–54 & n.10 (1987) (observing prior decisions of the Court "that have upheld a Confrontation Clause infringement claim . . . when there was a specific statutory or court-imposed restriction at trial on the scope of questioning," while noting that "the Court normally has refused to find a Sixth Amendment [Confrontation Clause] violation when the asserted interference with cross-examination did not occur at trial"). Although the Supreme Court has provided confrontation rights to criminal defendants in the non-trial context of parole revocation proceedings, that decision was rooted in the Due Process Clause of the Fourteenth Amendment, not the Confrontation Clause. *Morrissey v. Brewer*, 408 U.S. 471, 472, 488–89 (1972).

Appellant's primary argument to contend his Confrontation Clause rights were violated relies on his own characterization of the Texas Court of Criminal Appeals's *Miles* decision. He claims the *Miles* Court's statement that "an accused is entitled to be confronted with the witnesses against him at [his bail] hearing" is unqualified, not specific to the facts of the case, and not related to evidentiary admissibility, thus mandating his right to confront witnesses under the Confrontation Clause. *See also* 474 S.W.2d at 225. But contrary to appellant's argument, there is at least one important qualification in the *Miles* Court's statement: the rights the Court was speaking of were provided by a provision of the Texas Constitution which diverges significantly from the Confrontation Clause.

The Confrontation Clause is not even mentioned anywhere in the *Miles* opinion, let alone as a potential source for the rights claimed by the criminal defendant there. As informative as *Miles* is about the extent to which statements by out-of-court witnesses can be used against a criminal defendant, it sheds no light on whether the federal Confrontation Clause provides the rights appellant claims here.

Appellant's final argument is to claim that a decision from the Fifth Circuit Court of Appeals, *Barnes v. Johnson*, 184 F.3d 451 (5th Cir. 1999), demonstrates that he had a Confrontation Clause right to confront the summary-authoring detective at his bail hearing. But this is an apples-to-oranges comparison with limited usefulness. *Barnes* was a decision analyzing confrontation rights in the context of a parole revocation hearing, rather than a bail hearing or another sort of pretrial detention hearing. *Id.* at 454. Those hearings implicate a set of rights and interests entirely distinguishable from those in play during pretrial detention hearings. *Compare Morrissey*, 408 U.S. at 479, 482 (noting that parole revocation hearings involve not only analysis of "whether the parolee has in fact acted in violation of one or more conditions of his parole," but also prospect of "lengthy incarceration" upon parole revocation "[i]n many cases"), *with Smith*, 79 F.3d at 1210 (observing that bail hearing under examination was "directed at the question whether [the defendant the government] believe[s] committed crimes of violence . . . poses a danger to the community if allowed to remain at large until his trial"). In a related vein, no court has cited *Barnes* for the proposition that bail hearings, rather than parole revocation hearings, are subject to confrontation rights pursuant to the Confrontation Clause or otherwise. For these reasons, the court is not persuaded by appellant's use of *Barnes*.

Accordingly, we conclude the trial court did not violate any of appellant's Confrontation Clause rights by admitting or considering the detective's written

factual summary at appellant's bail hearing. We overrule appellant's second point of error.

C. The trial court did not abuse its discretion by setting appellant's bail at $900,000

As the trial court did not erroneously admit contested evidence at appellant's bail hearing, we turn to appellant's first and remaining point of error contending the trial court abused its discretion in setting his bail amount. The right to be free from excessive bail is protected by the United States and Texas Constitutions. *See* U.S. Const. amend. VIII; Tex. Const. Art. I, § 11. The amount of bail required in any case is within the trial court's discretion, subject to the following rules:

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

In addition to those rules, case law provides that courts may consider the following set of 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) the

aggravating circumstances alleged to have been involved in the charged offense. *Rubac*, 611 S.W.2d at 849–50.

The defendant bears the burden to prove the bail set is excessive. *Id.* at 849.

Sufficiently high to assure appearance but not oppress

Bail needs to be sufficiently high to give reasonable assurance that the defendant will appear. When bail is set so high that a person cannot realistically pay it, however, the trial court essentially "displaces the presumption of innocence and replaces it with a guaranteed trial appearance." *Dupuy*, 498 S.W.3d at 233 (quoting *Ex parte Bogia*, 56 S.W.3d 835, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.))

Appellant has significant ties to the area. He has lived in Texas his entire life and has lived in Houston for years. Up until his arrest, he has maintained employment. Several members of appellant's family testified at his bail hearing that they would ensure he followed any conditions set by the court on his bail, including having him appear in court, and appellant plans to reside with his family if and when he is released from custody. This factor does favor a lower, more achievable bail amount.

Nature and circumstances of offense

The primary factors to be considered in assessing the reasonableness of bail are the nature of the offense and the punishment that may be imposed. *Rubac*, 611 S.W.2d at 849. When the offense is serious and involves aggravating factors that may result in a lengthy prison sentence, bail must be sufficiently high to secure the defendant's presence at trial. *Dupuy*, 498 S.W.3d at 230. But a defendant is presumed innocent of all charges, and a trial court must balance that presumption with the State's interest in assuring the defendant's appearance for trial. *Id.*

Appellant is charged with unlawful possession of body armor by a felon, felon in possession of a firearm, and burglary of a habitation. *See* Tex. Penal Code Ann. §§ 30.02(a)(1) (burglary of habitation), 46.04(a) (felon in possession of firearm), 46.041 (unlawful possession of body armor by felon). The two possession offenses are each third-degree felonies, while the burglary offense is a first-degree felony. *See id.* §§ 30.02(d)(1) (burglary of habitation); 46.04(e) (felon in possession of firearm), 46.041(c) (unlawful possession of body armor by felon). Because defendant's criminal history includes multiple prior felony convictions, a conviction on any of those counts would be punishable by imprisonment for a life term, or alternatively imprisonment for 25 to 99 years. *See id.* § 12.42(d). In the event appellant is convicted on multiple counts, the trial court can order them to be served consecutively. Tex. Code. Crim. Proc. Ann. art. 42.08. If appellant is convicted of burglary of a habitation and an affirmative finding is made that appellant used or exhibited a firearm, he will have to serve more of his sentence before he is eligible for parole than he would without such a finding. *See* Tex. Gov't Code Ann. § 508.145(d)(2). In addition to imprisonment, each of his offenses would be eligible for a fine of up to $10,000. *See* Tex. Penal Code Ann. §§ 12.33(b), .42(a), (c)(1).

In light of the substantial punishments for which appellant is eligible if convicted, we conclude this factor indicates the trial court acted within its discretion in setting the bail amount it did. Although a $900,000 bail amount is certainly high, both the cumulative amount of the bail and the amount assigned to each of defendant's offenses ($500,000 for burglary, and $200,000 for each of two possession offenses) is not out of sync with other offenses eligible for lesser punishment. *See, e.g., Cooley v. State*, 232 S.W.3d 228, 229, 234 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (upholding $250,000 bail amounts for each of

defendant's three solicitation of capital murder charges, for total of $750,000 bail, when those charges were punishable by as little as five years' community supervision, or alternatively five years' imprisonment); *Ex parte Ruiz*, 129 S.W.3d 751, 752, 754–55 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (upholding $600,000 bail for single first-degree-felony charge of possession of a controlled substance, eligible for punishment with imprisonment for life or 15 to 99 years, though also carrying potential fine of up to $250,000).

Aside from the statute- and punishment-related aspects of appellant's charged offenses, the court is mindful that the facts alleged by the State regarding appellant's charges had the potential to be even worse. As mentioned above, the State alleges (and the detective's written summary elaborates) that appellant is accused of going with two colleagues, armed and dressed like HPD officers, to steal drugs from what they did not realize was a bait house. Under the facts the State alleged, appellant and his colleagues had the capacity to grievously harm or kill those they believed were in the house, and the fact that their ostensible goal was to steal drugs made bloodshed more likely. *See SantiagoVargas v. State*, No. 01-17-00349-CR, 2018 WL 3580929, at *1 (Tex. App.—Houston [1st Dist.] July 26, 2018, no pet.) (mem. op., not designated for publication) (discussing robbery aimed at obtaining narcotics and money, which ended in murder). The trial court rightfully could have accounted for these circumstances in setting appellant's bail at a high amount. *See Ex parte Jones*, Nos. 10-18-00387-CR, 10-18-00388-CR, 10-18-00389-CR, 2019 WL 1388746, at *4 (Tex. App.—Waco Mar. 27, 2019, no pet.) (mem. op., not designated for publication) (upholding defendant's bail amount partly because his underlying charged offenses were "violent[and] involved significant risk to himself and others").

Ability to make bail

At appellant's bail hearing, family members testified that appellant's family was only able to provide enough money to provide a bail bond of between $20,000 and $25,000. The testimony also noted that appellant has not been earning income since being taken into custody, and the state of his current assets left him "essentially indigent." Though the State contends that the testimony of appellant's witnesses was insufficiently detailed to justify a reduction in bail, this court concludes that in light of both the testimony of appellant's witnesses and the enormous gap between what bail they said could be afforded and what bail the trial court actually set, this factor does favor a reduction in bail. Even so, the court acknowledges this factor does not itself demonstrate the trial court set an excessive bail amount, nor does it demonstrate the bail amount was otherwise unreasonable. *See Ex parte Anderson*, Nos. 01-20-00572-CR, 01-20-00573-CR, 01-20-00574-CR, 2021 WL 499080, at *16 (Tex. App.—Houston [1st Dist.] Feb. 11, 2021, no pet.) (mem. op., not designated for publication).

Future safety of victims and community

Appellant's criminal history suggests he would be a continual danger to the public while on bond. Since 1990, appellant has been convicted of eight separate felonies, and several of them (notably his convictions for evading arrest with a motor vehicle, and aggravated assault of a peace officer) indicate he has previously been dangerous to others. *See Maryland v. King*, 569 U.S. 435, 453 (2013) ("[A]n arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail."). Appellant contends, however, that a superior alternative (whether imposed by this court or the trial court) would be to impose bond conditions that would ensure community safety instead of the trial court's bail

amount. But regardless of whether a non-monetary bail condition would assure community safety, the trial court nevertheless could have found a high bail amount supportable by appellant's lengthy criminal history. *Cf. Ex parte Briscoe*, No. 02-15-00223-CR, 2015 WL 5893470, at *4–5 (Tex. App.—Fort Worth Oct. 8, 2015, no pet.) (mem. op., not designated for publication) (holding bond conditions could substitute for a higher bail amount based partly on defendant's lack of prior felony convictions).

***Rubac* factors**

Appellant's work record. Prior to his arrest, appellant was employed for several years, and testimony at his bail hearing suggests he was employed for much longer.

Appellant's family and community ties. Appellant has significant family ties to Texas and the Houston area, as discussed above.

Length of appellant's residency. Appellant has lived in Texas for his entire life, and he has lived in Houston for several years.

Appellant's prior criminal record. As discussed above, appellant has previously been convicted of eight felonies.

Other bonds. No evidence was elicited that defendant has failed to comply with bond conditions ordered as part of his other criminal cases.

Aggravating circumstances in the charged offense. Appellant is accused of burglarizing a residence while armed, along with unlawful possession of a firearm and body armor, and the circumstances surrounding the alleged burglary made violence more likely.

COVID-19 and a defendant's health as potential *Rubac* factors

Finally, appellant contends a lower bail amount is warranted due to his purported vulnerability to COVID-19, which testimony indicates he has previously contracted and which could be impacted by his co-morbid conditions of diabetes and high blood pressure. This court has previously analyzed whether and to what extent COVID-19 and a defendant's health more generally are relevant considerations in analyzing bail amounts. *Ex parte Robles*, 612 S.W.3d 142, 149–50 (Tex. App.—Houston [14th Dist.] 2020, no pet.). In short, although those issues have not been specifically laid out as relevant in authority from the Court of Criminal Appeals, such issues could be considered under factors the Court of Criminal Appeals has declared are relevant. *Id.*

Appellant's witnesses provided testimony regarding health conditions he has which might make him more vulnerable to COVID-19, however he did not provide any expert testimony about how being kept in custody could affect his vulnerability considering the evidence that appellant previously contracted COVID-19. Although appellant's family testified as to a fear that he could be reinfected, they did not elucidate how he was more likely to be reinfected while in custody. The trial court could have reasonably decided that even if appellant was uniquely vulnerable to COVID-19 infection, the evidence provided on the subject did not warrant reducing his bail further.

As noted previously, appellant must do more than show a lower bail amount would be preferable to the amount selected for him; he must demonstrate his bail amount falls outside the zone of reasonable disagreement. *Dupuy*, 498 S.W.3d at 230. Because he has not satisfied that burden, we find no abuse of discretion in the bail amount ordered by the trial court, and we accordingly overrule his first and remaining point of error.

CONCLUSION

We affirm the trial court's habeas-corpus judgments.

/s/ Kevin Jewell
Justice

Panel consists of Justices Wise, Jewell, and Spain.
Publish – Tex. R. App. P. 47.2(b).