Affirmed in Part, Reversed and Remanded in Part, and Plurality and Concurring and Dissenting Opinions filed September 20, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00023-CR

EX PARTE JOSEPH ARIE BUKS

On Appeal from the 458th District Court
Fort Bend County, Texas
Trial Court Cause No. 20-DCR-093359

CONCURRING AND DISSENTING OPINION

I agree with all portions of the plurality opinion, with the exception of Part VI, which concerns appellant's argument that Condition C3 interferes with his Sixth Amendment right to communicate with his attorney.

When appellant filed his application for writ of habeas corpus, he made a barebones assertion that the conditions of his bail were unconstitutional. He never specifically referenced Condition C3 or his Sixth Amendment right to an attorney.

Appellant subsequently filed a memo in support of his writ of habeas corpus. In this memo, appellant largely challenged the conditions of his bail on First

Amendment grounds. He never argued that the conditions infringed on his Sixth Amendment right to an attorney.

Appellant raised his Sixth Amendment argument for the first time during the hearing. During opening statements, defense counsel made the following argument: "These computer monitoring conditions are also improperly infringing upon my ability to represent my client. I can't communicate effectively with him, unless those communications are going to be monitored by somebody, and that's just wrong from any angle."

In support of this argument, counsel elicited testimony from appellant's mother, who said that communications between appellant and his defense team are challenging. The mother stated that she supplied appellant with a flip phone, which lacks internet access and all of the conveniences that come with a modern smart phone. Appellant cannot send or receive text messages, emails, or documents.

While testifying as a witness, defense counsel added that he operates out of a small office, and that his client communications are primarily through email, text messages, and video conferencing. Counsel said that he is unable to share electronic documents with appellant because of the bail conditions. Counsel also indicated that he has been unable to arrange an interview between appellant and an expert, because the expert conducts all interviews over video conferencing.

In her opening statement, the prosecutor represented that she was never given notice of appellant's Sixth Amendment claim because the claim had not been briefed in any of his earlier filings. Without such notice, the prosecutor stated that she had no witnesses to testify about the State's monitoring practices. But even without such witnesses, the prosecutor represented that monitoring software can filter out privileged electronic communications, just like with phone calls between inmates and their attorneys.

In her closing statement, the prosecutor emphasized that appellant had a means of communicating with his attorney that did not involve any sort of monitoring whatsoever. The prosecutor referred to the evidence that appellant had a flip phone that lacked internet access. She said that appellant, who had two vehicles, could meet with his attorney face to face, and that they could share documents the old-fashioned way, which was through postal delivery.

The prosecutor similarly argued that if appellant chose to use an internet-capable device, his privileged communications would be filtered. The prosecutor even offered that the trial court could amend the bail conditions to explicitly prohibit the government monitoring of attorney-client communications.

The trial court rejected appellant's argument that the conditions of his bail unduly interfered with his Sixth Amendment rights. In an address to defense counsel, the court explained its decision as follows:

> Given the grayness of your hair, I'm sure you're aware that people used to practice law without the Internet. Occasionally, we would fax things to people and you can pick up a fax and we can use the phone to call—calling people and asking them to come in is not totally improper. And you can use a flip phone. It's not—you know, I don't know. I mean, we muddled through without the Internet for a long time.

Appellant challenges this ruling on appeal. As the party seeking habeas relief in the court below, appellant had the burden of proving by a preponderance of the evidence that the conditions of his bail impermissibly infringed on his Sixth Amendment right to communicate with his attorney. *See Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). By leaving Condition C3 in place, the trial court implicitly determined that appellant did not satisfy this burden. That decision must be reviewed for an abuse of discretion, which requires this court to consider all of the evidence in the light most favorable to the trial court's ruling. *Id.*

The plurality recites the evidence but does not meaningfully analyze it. For instance, the plurality does not discuss whether the evidence conclusively established that Condition C3 unduly infringed on appellant's Sixth Amendment rights. (It didn't.) Nor does the plurality discuss whether the evidence was insufficient to support the trial court's ruling that appellant could effectively communicate with his counsel notwithstanding Condition C3. (It wasn't.)

Instead of conducting an analytical review of the evidence, the plurality concludes that Condition C3 must be amended because it neither ensures appellant's appearance at trial nor serves to protect the community. This conclusion is demonstrably wrong. The very purpose of Condition C3 is to protect the community, and the trial court had a substantial basis for keeping it in place. The trial court heard evidence that appellant solicited a person whom he believed to be a thirteen-year-old girl over the internet. The person happened to be an undercover officer. After appellant's arrest and a search of his phone, evidence was discovered that appellant had engaged in sexual discussions with another person who represented to be fifteen years old. The trial court heard testimony that appellant might solicit other minors if he were allowed to have unmonitored access to the internet. By not acknowledging this evidence, the plurality violates the standard of review.

Under a proper application of the standard of review, this court should uphold Condition C3. The trial court was not obliged to credit any of the testimony from appellant's mother or his defense counsel, who both spoke to the challenges associated with more basic means of communication. As the trial court sensibly observed at the end of the hearing, there was a time before the age of the internet when attorneys and clients communicated effectively, and those means of communication were still available today. Appellant could still make calls to his attorney by using his flip phone. He could still make in-person visits to his attorney's

office. Appellant and his attorney could still exchange documents through the mail or by fax machine. Even though these means of communication are not as convenient as electronic communications over the internet, they all avoid the concern of improper monitoring, which fully negates appellant's argument. This court should accordingly hold that the trial court did not abuse its discretion when it rejected appellant's claim that Condition C3 unduly infringed his rights under the Sixth Amendment. *See State v. Kelly*, 204 S.W.3d 808, 819 (Tex. Crim. App. 2006) ("Appellate courts should also keep in mind that the party with the burden of proof assumes the risk of nonpersuasion. If this party loses in the trial court and the trial court makes no explicit fact findings, then this party should usually lose on appeal.").

For all of these reasons, I would affirm the trial court's order in its entirety. I would not remand this case to the trial court to hear evidence about the monitoring software's filtering capabilities—which is relief that not even appellant has requested in his brief. In fact, defense counsel rejected such a compromise in closing argument at the hearing, stating he would never trust a monitoring system. Insofar as the plurality grants this extraordinary relief, I respectfully dissent.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Zimmerer and Hassan. (Zimmer, J., plurality) (Christopher, C.J., concurring and dissenting) (Hassan, J., concurring and dissenting).

Publish — Tex. R. App. P. 47.2(b).