In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00397-CR
NO. 09-16-00413-CR

EX PARTE MICHAL LYNN DAVIS

On Appeal from the 163rd District Court
Orange County, Texas
Trial Cause Nos. B160374-R & B160377-R

MEMORANDUM OPINION

Michal Lynn Davis (Davis or Appellant) appeals the trial court's pretrial orders denying his application for relief on habeas corpus. We affirm.

PROCEDURAL BACKGROUND

On May 15, 2016, Davis was arrested on three charges: intoxication manslaughter, failure to stop and render aid, and possession of a controlled substance. Davis, who had been released on bond, filed a motion to reduce his bond which was heard by a trial court on June 27, 2016, and the court reduced the bonds in all three of Davis's cases and signed a Second Amended Order Setting Conditions

of Bond ("Second Amended Order"). On September 14, 2016, Davis was then released from custody on a personal bond.

On September 21, 2016, a grand jury indicted Davis for two offenses: intoxication manslaughter, and failure to stop and render aid resulting in death or serious bodily injury. *See* Tex. Penal Code Ann. § 49.08 (West 2011); Tex. Transp. Code Ann. § 550.021 (West Supp. 2016). On October 3, 2016, Davis appeared in the 163rd District Court, and the court adopted the Second Amended Order as "the current order" of the court as to drug testing requirements. During the hearing, the court also explained that the then-existing conditions of bond required Davis to have an ignition interlock device installed on his vehicle. Davis told the court that he did not own a vehicle and he was not driving. The court then changed the conditions of bond and ordered Davis not to operate a motor vehicle until further notice, even if Davis were to get an ignition interlock device installed. The court also explained "[i]f you violate that order, then you can expect to go back to jail with no bond."

On October 17, 2016, the district court held a hearing pursuant to a report that Davis had violated conditions of bond. At the hearing, Jayme Culbertson (Culbertson), the director of the adult probation office in Orange County, testified that he had seen Davis as a condition of Davis's bond. According to Culbertson, Davis reported to the probation office on October 12, 2016, for a weekly drug test,

and on that day, Culbertson observed Davis entering a vehicle at the driver's seat and drive away and that Davis was alone in the vehicle. The court took judicial notice of the court's file and noted that it had received no report from the company that installs ignition interlock devices that Davis had such a device installed on a vehicle. Davis declined to testify. At the conclusion of the hearing, the court explained as follows:

> . . . Mr. Davis, the Court finds that you violated [a] condition of bond order -- entered by this Court, ordering you not to operate a motor vehicle at all; and the Court further finds, because of the lack of any compliance with the bond order that requires you to show that you have an interlock device installed before you operate a motor vehicle, that time having r[u]n, that no such compliance has been demonstrated. The Court, therefore, finds that you violated conditions of bond. The Court finds the bond in both of these cases to be insufficient due to violation and orders you taken into custody today. No bond.

On October 19, 2016, the court entered an Order Denying Bond, which stated in relevant part:

> [] At the hearing, the Director of Community Supervision, Jayme Culbertson, testified. The Court finds the witness and the witness' testimony to be credible and believable.
> [] The Court finds, by a preponderance of evidence, that on October 12, 2016, the defendant operated a motor vehicle in violation of the condition of bond prohibiting the defendant from doing so.
> [] The court further finds by a preponderance of evidence the defendant did not have an Ignition Interlock installed, and the defendant's operation of the motor vehicle on the date in question additionally violated the Bond Condition prohibiting the defendant from operating a motor vehicle without an Ignition Interlock.

> [] The court further finds by a preponderance of evidence that the conditions of bond were related to the safety of the community.
> [] The bail was found to be insufficient and revoked. The Court ordered the defendant be taken into custody and held without bail pursuant to Texas Constitution Art. 1, Sect 11b.

Davis filed an Application for Writ of Habeas Corpus Seeking Bail on October 18, 2016, which alleged that his "confinement and restraint is illegal because no bond is excessive, oppressive in violation of the Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 11, 13 and 19 of the Texas Constitution, and Articles 1.09 and 17.15 of the Texas Code of Criminal Procedure." The court held a hearing on October 27, 2016, at which both Davis and the State appeared. Davis did not offer any new evidence, and the court took judicial notice of the October 17th hearing. Davis requested reasonable bond and argued that violation of the conditions of bond pertains to the sufficiency of the bond and should not put him in jeopardy of no bond. Davis further argued that he had not tested positive for alcohol and that the charges against him concerned an illegal substance that an ignition interlock "would never catch[.]"

On October 27, 2016, the trial court denied the application for writ of habeas corpus. Davis filed a notice of accelerated appeal on the denial of bail, subject to the trial court's ruling on his application for writ of habeas corpus. Following entry of the trial court's orders denying the application for writ of habeas corpus, Davis filed

an amended notice of appeal of the court's denial of his application for writ of habeas corpus.

ISSUE ON APPEAL

In a single issue, Appellant argues that the trial court erred by denying him pretrial bail, that he was denied procedural and substantive due process, and that section 11b is unconstitutional on its face and as applied to him. Citing to *United States v. Salerno*, 481 U.S. 739 (1987), Appellant argues that a court may only deny pretrial bail when the trial court finds by clear and convincing evidence that "1) release of a pretrial detainee on bond would pose a substantial risk of harm to the community; and 2) no conditions of pretrial release, if imposed, would reasonably assure the safety of the community[.]" According to Appellant, "the State offered no evidence, and the trial court made no finding, whether release of Petitioner on bail would pose a threat to the safety of the community or whether any conditions of pretrial release could reasonably assure the safety of other persons and of the community."

STANDARDS OF REVIEW

We have jurisdiction over an appeal from a trial court's merit-based denial of habeas proceedings. *See Ex parte Hargett*, 819 S.W.2d 866, 868-69 (Tex. Crim. App. 1991). We review the denial of an application for writ of habeas corpus under

an abuse of discretion standard. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); *Ex parte Klem*, 269 S.W.3d 711, 718 (Tex. App.—Beaumont 2008, pet. ref'd). We consider the entire record and review the facts in the light most favorable to the trial court's ruling. *Kniatt*, 206 S.W.3d at 664; *Klem*, 269 S.W.3d at 718. We afford almost total deference to the trial court's determination of historical facts supported by the record, especially findings that are based on an evaluation of credibility and demeanor. *Klem*, 269 S.W.3d at 718. We afford the same deference to the trial court's rulings on the application of the law to fact questions when the resolution of those questions turns on an evaluation of credibility and demeanor. *Id.* If the trial court's resolution of the ultimate issues turns on an application of legal standards, we review the determination de novo. *Id.*

Similarly, we review a trial court's ruling on bail under an abuse of discretion standard of review. *See* Tex. Code Crim. Proc. Ann. art. 17.15 (West 2015) (affording a trial court discretion to set bail); *Ex parte Rubac*, 611 S.W.2d 848, 850 (Tex. Crim. App. 1981). The defendant has the burden to show the bail set by the trial court is excessive. *Ex parte Rodriguez*, 595 S.W.2d 549, 550 (Tex. Crim. App. 1980).

DENIAL OF BAIL

An appearance bond secures the presence of a defendant in court for trial. *Id.* The trial court should set bail in an amount that is sufficient to provide reasonable assurance the defendant will appear at trial, but not so high as to be oppressive. *Ex parte Ivey*, 594 S.W.2d 98, 99 (Tex. Crim. App. 1980). The right to be free from excessive bail is protected by the United States and Texas Constitutions. *Ex parte Melartin*, 464 S.W.3d 789, 792 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing U.S. Const. amend. VIII; Tex. Const. art. I, § 11). Nevertheless, under the Texas Constitution,

> [a]ny person who is accused in this state of a felony or an offense involving family violence, who is released on bail pending trial, and whose bail is subsequently revoked or forfeited for a violation of a condition of release may be denied bail pending trial if a judge or magistrate in this state determines by a preponderance of the evidence at a subsequent hearing that the person violated a condition of release related to the safety of a victim of the alleged offense or to the safety of the community.

Tex. Const. art. I, § 11b. By its express terms, section 11b does not require the trial court to make "findings," either oral or written. *Id.*; *Ex parte Shires*, 508 S.W.3d 856, 860 (Tex. App.—Fort Worth 2016, no pet.).

The Texas Code of Criminal Procedure provides in relevant part that

> [a]t a hearing limited to determining whether the defendant violated a condition of bond . . . , the magistrate may revoke the defendant's bond only if the magistrate finds by a preponderance of the

> evidence that the violation occurred. If the magistrate finds that the violation occurred, the magistrate shall revoke the defendant's bond and order that the defendant be immediately returned to custody.

Tex. Code Crim. Proc. Ann. art. 17.40 (West 2015).

ANALYSIS

We first note that Davis's argument on appeal differs from his argument to the trial court. Davis argued in his application for writ of habeas corpus that "no bond is excessive, oppressive in violation of the Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 11, 13 and 19 of the Texas Constitution, and Articles 1.09 and 17.15 of the Texas Code of Criminal Procedure." On appeal, Davis argues that the trial court's order denying him pretrial bond "notwithstanding the literal terms of Article I, Section 11b of the Texas Constitution, violated Petitioner's 'procedural' right to due process protected by the Fourteenth Amendment to the U.S. Constitution and was an abuse of discretion." On appeal, Davis cites to *Salerno* to support his argument that a trial court may only deny pretrial bond if it determines by clear and convincing evidence that releasing the accused on bond would pose a substantial risk of harm to the community and no pretrial conditions of bond would be adequate to assure the community's safety. *See* 481 U.S. 739. Davis did not make this argument to the trial court.

To preserve error for appellate review, the complaining party must make a specific objection and obtain a ruling on the objection. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). Additionally, the point of error on appeal must comport with the objection made at trial. *Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986). Davis failed to preserve this point of error.

Even if Appellant had preserved error, we conclude his issue is without merit. Appellant relies upon the reasoning of the dissenting opinion in *Shires* to support his argument that courts should "apply Section 11b in light of the federal standard." 508 S.W.3d at 868 (Dauphinot, J., dissenting). We believe that the majority opinion in *Shires* has the better approach. In *Shires*, our sister court addressed the same issues that Davis raises. *Id.* at 859. As explained by the Fort Worth Court of Appeals, "*Salerno* concerned a federal act passed by Congress, [and] at issue here is a provision of the Texas constitution. . . . Our own constitutional provisions will not be held unconstitutional unless they subtract from the rights guaranteed by the United States Constitution." *Id.* at 862-63 (citing *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991)).

Facial Substantive Due Process Challenge

To prevail on a facial challenge, a party must establish that the law always operates unconstitutionally in all possible circumstances. *See State v. Rosseau*, 396

S.W.3d 550, 557 (Tex. Crim. App. 2013); *see also Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992) ("A facial challenge to a statute is the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the statute will be valid."). In considering a facial challenge, we presume that the law is valid and that the legislature did not act arbitrarily or unreasonably in enacting it. *See Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). It is Appellant's burden, as the individual challenging the law, to establish its unconstitutionality. *See Rosseau*, 396 S.W.3d at 557 (citing *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 911 (Tex. Crim. App. 2011)).

To support his contention that section 11b is unconstitutional on its face, Appellant argues that section 11b, unlike the federal statute, does not require the court to find that releasing the accused on bond before trial would pose a substantial risk of harm to the community or to find by clear and convincing evidence that no conditions of pretrial release would reasonably assure the safety of the community. Appellant argues that because section 11b results in a preventive detention, it must satisfy substantive due process as outlined by *Salerno*.

As previously stated, *Salerno* involved the application of the federal Bail Reform Act of 1984 (BRA), which pertains to criminal prosecutions in federal courts. *See generally* 481 U.S. 739. Appellant cites to no Texas court that has applied

the federal statutory standard instead of the state constitutional standard, nor are we aware of any. The BRA permits pretrial detention if the court finds "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community[.]" *See* 18 U.S.C. § 3142(e).

The *Shires* majority explained that *Salerno* did not establish a clear and convincing evidence standard as a threshold requirement under the Constitution, nor did it mandate that a trial court determine that additional bond conditions would not adequately protect the safety of the community in order to satisfy due process concerns in the context of pretrial detention. 508 S.W.3d at 865. Furthermore, *Salerno* did not address due process in the circumstances present here—where the denial of bail is determined after the defendant has violated the terms of his initial bond and the original bail has been revoked. *See generally Salerno*, 481 U.S. at 741 (explaining that the BRA allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community[]").

As the majority explained in *Shires*:

> The people of Texas "can amend the Constitution in any particular that they desire," *Stephens v. State*, []133 S.W.2d 130, 131

> (1939), even when a statute enacted for the same purpose would be unconstitutional, *Oakley v. State*, 830 S.W.2d 107, 109-10 (Tex. Crim. App. 1992). Our own constitutional provisions will not be held unconstitutional unless they subtract from the rights guaranteed by the United States Constitution. *See Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). Thus, while we give great weight to the reasoning and holdings of the Supreme Court related to federal statutes, when it comes to our own constitution, "we must ultimately follow our own lights." *Olson v. State*, 484 S.W.2d 756, 762 (Tex. Crim. App. 1972) (op. on reh'g).

Shires, 508 S.W.3d at 863.

Because *Salerno* merely evaluated the express terms of the BRA, a federal statute, and dealt only with restrictions regarding an accused's right to bail at the outset of criminal proceedings, we decline Appellant's invitation to extend *Salerno* to impose such requirements on section 11b of the Texas Constitution. *See id.* Appellant has not met his burden to show that section 11b is facially unconstitutional, and we overrule Appellant's facial substantive due process challenge to section 11b.

As-Applied Procedural Due Process Challenge

An as-applied challenge to the constitutionality of a law asserts that the law is unconstitutional as it was applied to the particular facts and circumstances. *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011). In conducting a procedural due process analysis, we first determine whether a protected liberty or property interest exists and, if so, we then determine whether sufficient procedural

safeguards are employed to assure the deprivation of that interest is not arbitrary. *See Ex parte Montgomery*, 894 S.W.2d 324, 327 (Tex. Crim. App. 1995). The right to pretrial release on bail concerns a protected liberty interest. *Salerno,* 481 U.S. at 746-52.

The plain terms of section 11b do not require a trial court to make findings, but rather section 11b only requires the court to determine by a preponderance of the evidence that the accused violated a condition of release that is related to the safety of the community or of the victim of a crime. *See Shires*, 508 S.W.3d at 861. Section 11b does require a hearing. *See* Tex. Const. art. I, § 11b.

The felony charges against Davis arise from a motor vehicle accident that resulted in a citizen's death. At the October 3, 2016 hearing on conditions of bond, the court ordered Davis not to operate a motor vehicle until further notice, even if Davis were to get an ignition interlock device installed. The court further admonished Davis "[i]f you violate that order, then you can expect to go back to jail with no bond." At the October 17, 2016 bond compliance hearing, the court noted the absence of any report from the company that installs ignition interlock devices. The probation officer testified that he had observed Davis entering a vehicle at the driver's seat and drive away. Davis declined to testify and offered no witnesses to dispute the officer's testimony. At the conclusion of the bond compliance hearing,

the court found that Davis had violated conditions of bond, ordered Davis taken into custody, and denied bond.

The trial court's orders denying bond included findings. Specifically, the trial court found, by a preponderance of the evidence, that Davis had operated a motor vehicle in violation of a condition of bond, that Davis had operated a motor vehicle without an ignition interlock device installed in violation of a condition of bond, and that the conditions of bond were related to the safety of the community. Therefore, the record directly contradicts Appellant's contention that the trial court made no finding concerning whether releasing Davis on pretrial bond would pose a threat to the safety of the community.

Accordingly, on the record before us, we conclude that the trial court complied with section 11b's requirements to conduct a hearing and that the trial court did not abuse its discretion in finding by a preponderance of the evidence that the accused violated a condition of bond that related to the safety of the community. *See* Tex. Const. art. I, § 11b. We cannot say that Davis was deprived of a liberty interest arbitrarily or in a manner that lacked procedural safeguards. *See Montgomery*, 894 S.W.2d at 327. We overrule Davis's as-applied procedural due process challenge.

Having overruled Appellant's issue, we affirm the orders of the trial court.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on March 8, 2017
Opinion Delivered April 19, 2017
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Before McKeithen, C.J., Horton and Johnson, JJ.