COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00348-CR

EX PARTE HEATH SHIRES

FROM THE 271ST DISTRICT COURT OF WISE COUNTY
TRIAL COURT NO. CR-18036

DISSENTING OPINION

The right to pretrial release on bail concerns a protected liberty interest.[1] Article I, Section 11b of the Texas constitution requires the trial court to determine "by a preponderance of the evidence . . . that the [defendant] violated a condition of release related to the safety of the victim of the alleged offense or

[1] *United States v. Salerno*, 481 U.S. 739, 746–52, 107 S. Ct. 2095, 2101–04 (1987) (applying the compelling interest test); *Schall v. Martin*, 467 U.S. 253, 263, 104 S. Ct. 2403, 2409 (1984).

to the safety of the community."[2] The majority concedes that Section 11b *requires* the trial court to make an evaluation concerning the risk posed to the safety of the community and the victim by the defendant's pretrial re-release after he has violated a bond condition.[3] The question remains whether the Texas constitution may provide the accused less protection than the United States Constitution. That is, may the trial judge's determination be based on a preponderance of the evidence, as section 11b provides, or must it instead be based on clear and convincing evidence?

Judge Cochran has previously reminded us of fundamental constitutional principles regarding pretrial incarceration:

> The early common-law history of the right to pretrial bail showed "a profound regard for a man's personal freedom." In England, a defendant who qualified for bail was "almost invariably" released by the sheriff, both for the sake of the accused, but also to avoid the "costly and troublesome" nature of imprisoning the accused. Because English sheriffs sometimes abused their power to grant bail, the 1275 Statute of Westminster authorized a general right to bail for all offenses "for which one ought not to lose life nor member" or when the accusation was based on "light suspicion." During the early American era, state bail systems were used solely "to ensure the appearance of the accused at trial."
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> Beginning in the mid-twentieth century, Congress and the states began to authorize pretrial detention for certain particularly heinous crimes and particularly dangerous defendants, in part because some judges had intentionally set bail so high that a prisoner could not realistically pay it and thus courts were employing their own, unconstitutional form of pretrial detention. Not only did

[2] Tex. Const. art. I, § 11b.

[3] Majority Op. at 9.

that ploy violate the Excessive Bail Clause of the federal constitution, it also "cast() doubt on the honesty of the American criminal justice system and prevent(ed) the development of objective standards of dangerousness."

> Texas, like Congress, enacted constitutional provisions that allow pretrial detention without bail for some selected crimes and defendants and ensure that all other defendants may be released before trial under a personal recognizance bond or appropriate bail. Article 17.15 of the Texas Code of Criminal Procedure sets forth the proper criteria for determining bail. The "primary purpose" of bail is to ensure a defendant's presence at trial. And, as part of "the nature of the offense," the length of the potential sentence is one factor to consider in the bail-setting decision. Other "pertinent factors" include a defendant's family and community ties in the area, work record, length of residency, prior criminal record, and ability to make the bond. On appeal or in a habeas proceeding, the defendant has the burden to prove that bail is excessive.
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> However, the citizen who has been accused, but not convicted, has a "strong interest in liberty." Bail may not be used as "an instrument of oppression" to keep an accused "off the streets" or to coerce a plea. The Supreme Court has explained that "(t)he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness;" all the while he is "living under a cloud of anxiety, suspicion, and often hostility." In addition, a pretrial detainee is "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." In balancing the accused's due-process interests and the community's safety interests, the Texas Legislature has statutorily ensured that a trial judge will, in the vast majority of cases, release a defendant pre-trial, while giving the trial judge appropriate tools to provide suitable oversight to prevent the accused from fleeing the jurisdiction, intimidating witnesses, committing crimes, or posing a realistic threat to the community.[4]

Appellant argues, in part, that to protect the constitutionality of Article I, Section 11b, it must be read in light of due process requirements. To do so, he argues, we must hold that pretrial incarceration without bail pursuant to this

[4] *Ex parte Benefield*, 403 S.W.3d 240, 241–43 (Tex. Crim. App. 2013) (Cochran, J., concurring in refusal of PDR) (citations omitted).

provision of the Texas constitution is permitted only when the trial court "find[s] '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," as required by *United States v. Salerno*.[5] He alternatively contends that Article I, Section 11b of the Texas constitution facially violates the substantive due process component of the Fourteenth Amendment and that it has deprived him of procedural due process as applied. Finally, Appellant argues that the State offered no evidence, and the trial court made no finding, whether release of Appellant 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.

That is, Appellant suggests that due process requires that, as courts, we apply the standard mandated by the federal constitution as explained by *Salerno*.[6]

If the floor, rather than the ceiling, of due process is established by the federal constitution, we must apply the reasoning of the *Salerno* court. The trial court can deny release on pretrial bond only when, after hearing the evidence, the trial court determines by clear and convincing ***evidence*** that the release of

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[5] *See* 481 U.S. at 750–51, 107 S. Ct. at 2103.

[6] *See id.*

the accused on pretrial bond ***would*** pose a substantial risk of harm to the community and that no conditions of pretrial release, if imposed, would reasonably assure the safety of the community.[7] We do not need to reach Appellant's issues challenging the constitutionality of Section 11b. We simply need to apply Section 11b in light of the federal standard.

The State has the burden of proving the allegations of its motion. The trial court must be convinced ***by the evidence*** that the State has borne its burden. The issue is not whether some appellate court can, by speculation and reading between the lines, cobble together enough possibilities to support the State's allegations and to support a determination that the detainee must not be released under any conditions because no conditions exist that will reasonably protect the public. The record must reflect evidence from which the trial court can make the legally mandated determinations, and the trial court must actually make the necessary determinations.

Have we provided sufficient guidance to the trial bench in the past to explain what we believe the law requires? Probably not. Can we provide that guidance now? I believe that we should set out clearly what is required of the State, of the defense, and of the trial court. Then we should remand this case to the trial court to make determinations supported by the record and to enter

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[7] *See id.*

appropriate orders. Both the trial bench and the trial bar are entitled to this clarity, and it is our obligation to provide it.

Because the majority does not remand this case to the trial court with clear instructions, I must respectfully dissent.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

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