In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00219-CR

EX PARTE BRANDON BROWN

On Appeal from the 202nd District Court
Bowie County, Texas
Trial Court No. 15F0579-202

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

Brandon Brown was arrested for murder on July 30, 2015, and his bail was set at $750,000.00. Over ninety days passed without Brown being formally charged with an offense. On November 18, 2015, the State filed its indictment against Brown. On November 25, 2015, with the assistance of his court-appointed counsel, Brown filed an application for writ of habeas corpus alleging that under Article 17.151 of the Texas Code of Criminal Procedure, he was entitled to be released on a personal bond or, in the alternative, was entitled to a reasonable bond. After a December 7 hearing, the trial court denied Brown's application. Brown appeals, arguing that the trial court erred in its application of Article 17.151.[1] Because we agree with Brown, we reverse

[1]We have jurisdiction over this appeal from the denial of an application for habeas corpus relief even though we would not have jurisdiction to consider the denial of a pretrial motion for bail reduction. Although both procedural mechanisms seek the same result, only an order denying an application for habeas corpus relief is appealable. *Ragston v. State*, 424 S.W.3d 49, 50, 52 (Tex. Crim. App. 2014). In *Greenwell v. Court of Appeals for the Thirteenth Judicial District*, the Court of Criminal Appeals explained that "[t]he right of appeal occurs [in the habeas proceeding but not the pretrial motion for bail reduction] because the habeas proceeding is in fact considered a separate 'criminal action,' and the denial of relief marks the end of the trial stage of that criminal action and the commencement of the timetable for appeal." *Greenwell v. Court of Appeals for the Thirteenth Judicial District*, 159 S.W.3d 645, 649–50 (Tex. Crim. App. 2005) (footnote omitted) (citation omitted). Consequently, "[h]abeas corpus proceedings are separate and distinct proceedings independent of the cause instituted by the presentation of an indictment or other forms of the State's pleadings[, and s]uch habeas proceedings should be docketed separately from the substantive cause and given a different cause number." *Ex parte Carter*, 849 S.W.2d 410, 412 n.2 (Tex. App.—San Antonio 1993, pet. ref'd).

In this case, Brown did not file his habeas corpus application as a separate proceeding; however, that fact does not negate our appellate jurisdiction. *See Ex parte Bui*, 983 S.W.2d 73, 75 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) ("The manner in which they were docketed does not affect jurisdiction. No authority was found or cited to this Court for dismissing an appeal because a habeas corpus proceeding was docketed with the underlying action."); *see also Ex parte Young*, 257 S.W.3d 276, 278 (Tex. App.—Beaumont 2008, no pet.) (Gaultney, J., concurring in part, dissenting in part) ("The failure to docket a habeas corpus proceeding separately does not affect this Court's jurisdiction, nor does that clerical error make the habeas corpus proceeding something other than a 'separate and distinct proceeding[] independent of the cause instituted by the State.'" (alteration in original) (quoting *Ex parte Bui*, 983 S.W.2d 73, 73 n.1, 75 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd))). Essentially, a pretrial application for writ of habeas corpus is still considered a separate action, even when it is filed under the same cause number as the underlying criminal action, and the trial court's order denying that application is still a final and appealable judgment because it resolves all the issues presented in the habeas proceeding.

the trial court's order denying Brown's application and remand the matter to the trial court for further proceedings in accord with Article 17.151 and the guidance provided by this opinion.

I. Standard of Review

A "decision of a trial judge at a habeas proceeding regarding the imposition or reduction of bail 'will not be disturbed by this Court in the absence of an abuse of discretion.'" *Ex parte Gill*, 413 S.W.3d 425, 428 (Tex. Crim. App. 2013) (quoting *Ex parte Spaulding*, 612 S.W.2d 509, 511 (Tex. Crim. App. 1981)). A trial court abuses its discretion when it acts arbitrarily or capriciously or "'without reference to guiding rules and principles.'" *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990) (quoting *Downer v. Aquarmine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)).

II. The Mandate of Article 17.151

Article 17.151 of the Texas Code of Criminal Procedure reads:

> A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within: . . . . 90 days from the commencement of his detention if he is accused of a felony.

TEX. CODE CRIM. PROC. ANN. art. 17.151, § 1 (West 2015). This Article preserves the presumption of innocence by ensuring that "an accused as yet untried and unreleased on bond will not suffer 'the incidental punitive effect' of incarceration during any further delay attendant to prosecutorial exigency." *Ex parte Jones*, 803 S.W.2d 712, 716 (Tex. Crim. App. 1991) (quoting *Ex parte Green*, 688 S.W.2d 555, 557 (Tex. Crim. App. 1985)).

"Under Article 17.151, the State has the initial burden to make a prima facie showing that it was ready for trial within the applicable time period." *Ex parte Ragston*, 422 S.W.3d 904, 906–07 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Jones*, 803 S.W.2d at 717); *see Ex parte Brosky*, 863 S.W.2d 775, 778 (Tex. App.—Fort Worth 1993, no pet.). "The question of the State's 'readiness' within the statutory limits refers to the preparedness of the prosecution for trial." *Brosky*, 863 S.W.2d at 778 (citing *Behrend v. State*, 729 S.W.2d 717, 720 (Tex. Crim. App. 1987)). The State may show readiness "either by announcing within the allotted time that it is ready, or by announcing retrospectively that it had been ready within the allotted time." *Ragston*, 422 S.W.3d at 907.

III. Analysis

At the hearing on Brown's application, the State stipulated that Brown was indicted outside of the ninety-day period. Further, the State did not indicate in any way that it was prepared for trial. In fact, Matt Cashatt, a detective with the Texarkana, Texas, Police Department, testified that he had not turned over the complete case file to the district attorney's office, that the case investigation was still ongoing, that he was still working to locate a person who was either a witness or a possible suspect, and that he had recently developed new information on the case.[2] *See Jones*, 803 S.W.2d at 718.

The trial court took notice of Brown's indigency screening form, which indicated that Brown, who had no job and lived with his mother, was indigent. At the hearing, Brown testified

[2]Through Cashatt, the State attempted to explain its delay in indicting Brown. In denying Brown's application, the trial court found "that good faith efforts were exercised in an effort to ensure these cases were indicted within the [sic] reasonable periods of time."

that he was still jobless and had no assets.[3] He further indicated that he did not have any family members who could assist him in making a $750,000.00 bond. Yet, due to the seriousness of the offense and the fact that Brown had been located in Tulsa, Oklahoma, factors used in fixing the amount of bail under Article 17.15 of the Texas Code of Criminal Procedure, the trial court denied Brown's application and continued him on the $750,000.00 dollar bond.[4] In denying Brown's application, the trial court stated, "[T]he Court believes that these restrictions contained in 17.151 are unreasonable."

"The first sentence of article 17.151 unequivocally declares that a defendant detained pending trial 'must be released' if the State is not ready for trial within the appropriate amount of time." *Gill*, 413 S.W.3d at 430 (quoting TEX. CODE CRIM. PROC. ANN. art. 17.151, § 1). "In such a situation, the trial court may not consider any factors outside of those in article 17.151, such as

[3]The State argues, "[Brown] was the only witness to testify regarding his ability to make bond and without further evidence of the factors enumerated previously, the trial court could not determine whether a reduction in bail was warranted." The hearing on Brown's application establishes that Brown's indigence was not contested.

[4]Article 17.15 states,

> The amount of bail to be required in any case is to be regulated by the court, judge, magistrate or officer taking the bail; they are to be governed in the exercise of this discretion by the Constitution and by 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 (West 2015).

the factors enumerated in article 17.15, which explains how a trial court should generally exercise its discretion in setting bail." *Hernandez v. State*, 465 S.W.3d 324, 326 (Tex. App.—Austin 2015, pet. ref'd).[5] "Conditioning release under article 17.151 on matters such as victim- or community-safety concerns deprives the statute of any meaning apart from article 17.15 and potentially frustrates article 17.151's clear intent." *Gill*, 413 S.W.3d at 430.

Because it is undisputed that the State was not ready for trial within ninety days from the commencement of Brown's detention, Brown was "entitled to have bond set at either a personal bond or at an amount he [could] make." *Ex parte Carson*, 215 S.W.3d 921, 923 (Tex. App.—

[5]The State cites *Hernandez* in support of its argument that the trial court could consider the Article 17.15 factors. Hernandez was arrested for aggravated robbery on September 25, 2014. *Hernandez*, 465 S.W.3d at 325. On December 18, the trial court released Hernandez, who had not been indicted, on a $25,000.00 personal recognizance bond. *Id.* After his indictment on January 6, 2015, the trial court held an ex parte hearing on the State's motion to increase bond and entered an order requiring Hernandez to post a $75,000.00 bond. *Id.* at 326. Hernandez challenged the trial court's order under Article 17.151, arguing that the trial court had no authority to revisit the issue of bond. *Id.*

Rejecting Hernandez' argument, the Austin Court of Appeals held that although a defendant is entitled to release under Article 17.151 "[i]f the State is not prepared for trial by a certain date, the trial court maintains the discretion to revisit the issue of bond and release at a later date, given sufficient cause to do so." *Id.* at 327. The court further held that "once Hernandez was indicted, the trial court was within its discretion to consider whether the personal recognizance bond was sufficient in light of the seriousness of the crime." *Id.*

This language prompts the State's argument that the trial court could consider Article 17.15 factors in light of Section 3 of Article 17.09, which reads:

> Sec. 3. Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested, and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody.

TEX. CODE CRIM. PROC. ANN. art. 17.09 (West 2015).

In *Hernandez*, the State moved to increase Hernandez' bond, following his release on a personal recognizance bond, on the grounds (1) that newly-discovered DNA test results linked Hernandez to the crime and (2) that the State was now ready for trial. *Hernandez*, 465 S.W.3d at 327. Here, because Brown had not been released under Article 17.151, there was no argument for a reconsideration of his bond. *Hernandez* is distinguishable both on its facts and the procedures employed. In the procedural posture in which this case is presented, *Hernandez* cannot be used to support the denial of the writ of habeas corpus or a reasonable bond.

Texarkana 2007, no pet.) (This statute has been interpreted by the Texas Attorney General to mean "'the bail must be reduced to an amount defendant can pay and thereby secure his release. . . . A token reduction of one dollar will not comply with this section's requirement that defendant "be released . . . by reducing the amount of bail required."'" (quoting Tex. Att'y Gen. Op. No. H–1130 (1978))).[6]

IV. Conclusion

We reverse the trial court's order denying Brown's application and remand this cause to the trial court for further proceedings consistent with this opinion. The mandate in this case shall issue immediately. *See id.* at 924 (citing TEX. R. APP. P. 2) (providing authority for court to suspend rules, including time frame for issuance of mandate, to expedite decision).

Bailey C. Moseley
Justice

Date Submitted: February 2, 2016
Date Decided: February10, 2016

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[6]Brown's application stated that he could raise funds required to pose a $2,500.00 personal bond.