IN THE
TENTH COURT OF APPEALS

No. 10-17-00420-CR

EX PARTE JOE MARTINEZ, JR.

From the 54th District Court
McLennan County, Texas
Trial Court No. 2017-3010-2

MEMORANDUM OPINION

Appellant Joe Martinez, Jr. appeals the trial court's denial of his application for writ of habeas corpus. In one issue, Martinez argues that the trial court abused its discretion by failing to grant his request for a reduction in the amount of his pretrial bail. We will affirm.

Martinez was originally arrested in July of 2014 for indecency with a child by contact and was released on a $25,000 bond. That case involved allegations that Martinez had inappropriate contact with his stepdaughter, E.M. New allegations were lodged against Martinez in 2017, and he was arrested again on August 7. The new case involved

allegations that Martinez had inappropriate contact with K.R.,[1] the three-year-old daughter of Martinez's other stepdaughter, B.R. Separate indictments were returned against Martinez as to each victim.[2] After his second arrest, Martinez's original bail was increased to $250,000 in Cause Number 2017-1416-C2, while the bail in Cause Number 2017-1813-C2 was eventually reduced to $40,000. Martinez seeks a reduction of his $250,000 bail in this case to $75,000.

Martinez argues that the bail imposed is impermissibly oppressive, that he is unable to post the current bail amount, and that his military service, community involvement, employment history, and religious faith support a reduced bail.

The primary purpose of pretrial bail is to secure the defendant's attendance at trial, and the power to require bail should not be used as an instrument of oppression. *Ex parte Allen-Pieroni*, 524 S.W.3d 252, 254 (Tex. App.—Waco 2016, no pet.). Additionally, bail conditions must not unreasonably impinge on a defendant's constitutional rights, and the courts "must be mindful that one of the purposes of release on bail pending trial is to prevent the infliction of punishment before conviction." *Id*. at 254-55. A defendant is entitled to the presumption of innocence on all charges, and the trial court, when setting bail, must strike a balance between that presumption and the State's interest in assuring

[1] Martinez uses the initials "K.R." and "B.R.," while the State uses the initials "K.M." and "B.M." We will use the initials from Martinez's brief.

[2] Cause Number 2017-1416-C2 includes eight counts of indecency with a child by contact involving E.M. Cause Number 2017-1813-C2 includes two counts of indecency with a child by contact involving K.R.

that a defendant will appear for trial. *Ex parte Dupuy*, 498 S.W.3d 220, 230 (Tex. App.—Houston [14th Dist.] 2016, no pet.). When bail is set so high that a defendant cannot realistically pay it, however, the trial court essentially "displaces the presumption of innocence and replaces it with a guaranteed trial appearance." *Id*. at 233.

In reviewing a trial court's ruling on a habeas claim, including those involving the setting of bail, we review the record in the light most favorable to the trial court's ruling and uphold that ruling absent an abuse of discretion. S*ee Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); *see also Ex parte Bernal*, No. 10-16-00403-CR, 2017 WL 2192867, at *1 (Tex. App.—Waco May 17, 2017, no pet.). The habeas applicant bears the burden of proving that his bail is excessive. *Ex parte Brossett*, 524 S.W.3d 273, 276 (Tex. App.—Waco 2016, pet. ref'd). While the setting of bail is within the trial court's discretion, that discretion is not unlimited. *Allen-Pieroni*, 524 S.W.3d at 255. "In reviewing a trial court's bond decision, the appellate court measures the trial court's ruling against the same factors it used in ruling on bail in the first instance." *Ex parte Anunobi*, 278 S.W.3d 425, 428 (Tex. App.—San Antonio 2008, no pet.). The trial court's decision is judged by three criteria: "it must be reasonable; it must be to secure the defendant's presence at trial; and it must be related to the safety of the alleged victim or the community." *Allen-Pieroni*, 524 S.W.3d at 255 (quoting *Anunobi*, 278 S.W.3d at 427).

Article 17.15 of the Code of Criminal Procedure provides a framework for setting a defendant's bail:

> 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). Other factors and circumstances that the trial court may consider in applying the above framework include: (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 bail conditions; (6) the existence of outstanding bails, if any; (7) the aggravating circumstances alleged to have been involved in the charged offense; and (8) whether the defendant is a citizen of the United States. *See Allen-Pieroni*, 524 S.W.3d at 255; s*ee also Ex parte Rubac*, 611 S.W.2d 848, 849-50 (Tex. Crim. App. [Panel Op.] 1981); *Ex parte Castellanos*, 420 S.W.3d 878, 882 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

The "primary factors" to be considered in assessing the reasonableness of bail are a defendant's potential sentence and the nature of the offense. *Ex parte Melartin*, 464 S.W.3d 789, 792 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Rubac*, 611 S.W.2d at 849); *see also Castellanos*, 420 S.W.3d at 882. When an offense is serious and involves

aggravating factors that may result in a lengthy prison sentence, bail must be set sufficiently high to secure the defendant's presence at trial. *Ex parte Castillo-Lorente*, 420 S.W.3d 884, 888 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also Brossett*, 524 S.W.3d at 276.

Martinez testified at the hearing on his application for a writ of habeas corpus that he had been charged in two indictments with a total of ten counts of indecency with a child by contact, a second-degree felony that is punishable by two to twenty years' incarceration per count. *See* TEX. PENAL CODE ANN. § 21.11 (West Supp. 2017);[3] § 12.33 (West 2011). The sentences imposed for multiple convictions under § 21.11 may run consecutively. *See* TEX. PENAL CODE ANN. § 3.03(b)(2) (West Supp. 2017). Although the indictment in this case is not part of the record, the State elicited testimony from the witnesses at the habeas hearing that Martinez was charged with inappropriately touching his stepdaughter, E.M., over her clothes every day for months while E.M. was a minor and that Martinez was alleged to have done the same thing to K.R., the three-year-old daughter of his other stepdaughter. After the two indictments were returned, Martinez's possible punishment increased from a maximum of twenty years for the original single charge to a possible 200 years if convicted of all ten charges. The possible penalty Martinez faces reflects the seriousness of the charges against him, as does the familial

[3] The statute has been amended since Martinez was first arrested, but none of those changes affect this appeal.

relationship between Martinez and the alleged victims. *See In re Hulin*, 31 S.W.3d 754, 759 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("Sexual assault of a child is a serious offense"); *see also Ex parte Bennett*, No. 2-07-175-CR, 2007 WL 3037908, at *2 (Tex. App.—Fort Worth Oct. 18, 2007, no pet.) (mem. op., not designated for publication). Because of the seriousness of the charges against Martinez, and the lengthy sentence he faces if convicted, the bail set by the trial court was not unreasonable.

In conjunction with the evaluation of whether a particular bail amount is reasonable, art. 17.15 also requires consideration of a defendant's ability to make bail. *Castillo-Lorrente*, 420 S.W.3d at 889; *see also Ex parte Ragston*, 422 S.W.3d 904, 908 (Tex. App.—Houston [14th Dist.] 2014, no pet.). "Although a defendant's ability to make bail is a factor for consideration, inability to make bail, even to the point of indigence, does not control over the other factors." *Brossett*, 524 S.W.3d at 276. Further, a defendant's inability to make bail does not automatically render a bail excessive. *Ex parte Scott*, 122 S.W.3d 866, 870 (Tex. App.—Fort Worth 2003, no pet.). "If the ability to make bond in a specified amount controlled, then the role of the trial court in setting bond would be completely eliminated, and the accused would be in the unique posture of determining what his bond should be." *Ex parte Miller*, 631 S.W.2d 825, 827 (Tex. App.—Fort Worth 1982, writ ref'd). To demonstrate inability to make bail, a defendant generally must establish that his funds and his family's funds have been exhausted. *Castillo-Lorente*, 420 S.W.3d at 889. The defendant must also show that he made an effort to furnish bail in the

amount set. *Miller*, 631 S.W.2d at 827.

While Martinez presented testimony about his military service, community involvement, employment history, religious faith and strong ties to the Waco community, he provided scant information to the trial court regarding his financial ability to make any kind of bail. The only information regarding Martinez's finances came from the testimony of three witnesses—Martinez, Martinez's sister, and Mike Glockzin, one of Martinez's co-workers.[4] Martinez testified that he retired after thirty years in the Marine Corps, from which the trial court could reasonably have concluded that Martinez received a pension. Glockzin testified that Martinez had been employed at a credit union for over ten years, from which the trial court could reasonably have concluded that Martinez received a salary prior to being jailed. When Martinez was asked by his attorney if he could afford to post bail, Martinez shook his head no. Martinez noted, however, that he might be able to make a bail of $75,000 in each case. Martinez's sister also testified that he could not make bail. Martinez did not, however, "detail either his or his family's specific assets and financial resources, nor did he explain what efforts, if any, were made to furnish the bond." *Scott*, 122 S.W.3d at 870; *see also Balawajder v. State*, 759 S.W.2d 504, 506 (Tex. App.—Fort Worth 1988, pet. ref'd) (noting that vague references

[4] Although Martinez argues that the State did not present evidence at the bail hearing regarding the circumstances surrounding the charges against him or regarding any communications between him and the victims, information elicited from a witness on cross-examination also constitutes evidence. *See Remorowski v. State*, No. 03-02-00317-CR, 2013 WL 21241330, at *3 (Tex. App.—Austin May 30, 2013, pet. ref'd) (mem. op., not designated for publication).

to inability to make bail do not justify reduction in amount set). In the absence of any evidence from Martinez regarding his finances or assets, the trial court could reasonably have concluded that Martinez had failed to carry his burden to prove that the bail set was excessive.

We find that the trial court did not abuse its discretion in denying Martinez's application for a writ of habeas corpus and overrule his one objection. The trial court's order is affirmed.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins`
(Chief Justice Gray dissents. A separate opinion will not issue. He provides the following note)*
Affirmed
Opinion delivered and filed April 25, 2018
Do not publish
[CR25]

* "(Almost four years ago Martinez was arrested for one of these offenses and was released on bail in the amount of $25,000. He has not fled. He stayed here in the community. He worked. It appears the alleged victim of the second charge is younger than the arrest warrant for the first charge. I cannot consider his family's resources unless they voluntarily put them on the table. I see nothing to indicate he is a flight risk. I respectfully dissent.)"