TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-20-00457-CR

Ex parte Antione Latrell Williams

FROM THE 264TH DISTRICT COURT OF BELL COUNTY
NO. 78049, THE HONORABLE PAUL L. LEPAK, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Under two separate indictments, Antione Latrell Williams was charged with four counts of aggravated sexual assault involving two children. *See* Tex. Penal Code § 22.021. Williams filed an application for writ of habeas corpus asking the trial court either to release him on a personal recognizance bond or reduce the amount of his bail. After an evidentiary hearing, the trial court granted the writ application in part by reducing the amount of bail in both cases but denied Williams's request to be released on a personal recognizance bond. Williams appeals the trial court's order and argues that the trial court erred by failing to further lower his bail or release him on a personal recognizance bond. We will affirm the trial court's order.

BACKGROUND

In 2017, Williams was charged with three counts of aggravated sexual assault of a child and was subsequently sent to jail pending trial. In 2020, Williams filed an application for writ of habeas corpus generally asserting that the $200,000 bail set in the case was excessive and violated several constitutional provisions and the Code of Criminal Procedure. Alternatively,

Williams argued that his continued detention in jail during the COVID-19 pandemic violates his due-process rights. After Williams filed his writ application, he was charged with another count of aggravated sexual assault occurring approximately ten years earlier and involving a different child. When he became aware of the new charge, Williams filed an amended writ application asserting that the $200,000 bail set in the new case was also excessive and repeated his general arguments from the first writ application.

During an evidentiary hearing, Williams asserted that the pandemic must change the way that trial courts consider the factors involved in setting the amount of bail, that there are due-process issues arising from his continued confinement, that several people with COVID-19 are currently detained at the jail, and that the jail does not have adequate filtration or ventilation. Further, Williams argued that he would live with his mother if he were released, that an ankle monitor could be used to track his movements, and that his mother and aunt agreed to chaperone him and provide continuous monitoring.

At the hearing, the State called four witnesses. First, Esteban Ramirez testified that he worked for the Sheriff's Department and helped establish the COVID-19 protocols used by the county jails. In particular, Ramirez related that the county contracted with Wellpath to provide medical services to the jails, that Wellpath provides doctors and nurses to assist those at the jails, that Wellpath screens individuals transported to the jails by asking them about their potential exposure to the coronavirus and checking to see if they are experiencing any symptoms associated with COVID-19, that the nurses and doctors working for Wellpath decide who to test for COVID-19, and that individuals who are either exposed to the coronavirus or experiencing symptoms associated with COVID-19 are transferred to a hospital for testing or treatment.

In addition, Ramirez explained that some of the jails have a few negative pressure units designed to house individuals who have infectious diseases and that individuals who test positive for COVID-19 are sent to those units. Although Ramirez admitted that there are not enough of the special units to accommodate everyone who is infected, he also stated that if someone has a potential exposure, the cell block where the individual resides is turned into a quarantine area. Further, Ramirez related that medical staff decide who to quarantine, and individuals who develop COVID-19 are isolated in a quarantine area until they are asymptomatic for seven days and have two negative test results.. Additionally, Ramirez explained that the recreation areas are disinfected between uses and that there is a policy for moving detainees in a manner that minimizes the potential for spreading the virus.

Regarding efforts to prevent employees from spreading the virus, Ramirez testified that employees have their temperatures taken before work; are given masks, gloves and hand sanitizers; and are instructed to wear masks and gloves while around the detainees. Moreover, Ramirez stated that the jails recently passed an inspection addressing compliance with COVID-19 safety protocols. Additionally, Ramirez explained that detainees are issued masks and hand sanitizer and that the cells have disinfectant; however, he admitted that the jails cannot force all detainees to wear masks, keep six feet apart, or wash their hands. Although Ramirez admitted that a few of the detainees and staff have tested positive, he also testified that none of the areas where Williams has been detained have been under quarantine, that he is currently detained in the central jail, and that the central jail has never had a positive result.

Next, the State called the mother of the victim of the offense alleged in the 2017 indictment. In her testimony, the mother explained that her son J.C. was eight years old at the time of the alleged sexual assaults, that J.C. now has behavioral issues and night terrors because

of the abuse, that J.C. would be traumatized if Williams were released, and that Williams could hurt other children if he were released. Although the mother explained that she would not necessarily agree with a decision to release Williams, she stated that she would be open to the idea if he were monitored and had no access to children.

Following this testimony, the State called the mother of the victim of the older offenses alleged in the 2020 indictment. In her testimony, the mother explained that she allowed Williams to move in with her and her children to help him out. The mother testified that Williams sexually assaulted her then six-year-old daughter, that her oldest son also made an allegation against Williams, that she reported the allegations to the police, and that the case was not prosecuted at that time. Further, the mother related that Williams has not had any contact with her family since she reported him to the police but that she was concerned that he could hurt another child if he were released.

Finally, the State called Detective Amanda Holtzclaw. In her testimony, Detective Holtzclaw stated that as part of her investigation of the allegations involving J.C., she learned that there were two cases involving Williams from 2007 and 2011 and that she was currently investigating Williams in another sexual abuse case with an outcry from 2019 involving allegations similar to those pertaining to J.C. In addition, Detective Holtzclaw explained that Williams admitted to her that he was a football coach and offered to babysit the children of his friends and that he met some of the alleged victims through those activities. Detective Holtzclaw also testified that she is concerned that Williams will hurt more children if he is let out.

After the witnesses finished testifying, Williams argued to the trial court that he was entitled to the presumption of innocence and that he deserves bail after having been jailed

for an extended period of time. Further, Williams requested that he be released and allowed to live at his mother's apartment and that the State use an ankle monitor to track his movements. In response, the State argued that the jails are taking appropriate safety precautions to minimize the spread of the coronavirus, that Williams has not been exposed to the coronavirus, and that no particularized showing has been made that the coronavirus endangers his health. Additionally, the State argued that opening the door for Williams under these circumstances would open the door to all jail detainees. Finally, the State emphasized that there are multiple victims, that Williams has shown a pattern of gaining access to children, and that the danger to the community outweighs any risk posed by the coronavirus.

At the end of the hearing, the trial court agreed to reduce the amount of bail in both cases but also imposed conditions if Williams paid the bail. In its order, the trial court reduced the amount of bail for the offense alleged in the 2017 indictment to $40,000 and the amount of bail for the offenses alleged in the 2020 indictment to $20,000. In addition, the trial court imposed the following bond conditions if he made bail: Williams will have no contact with anyone under the age of seventeen years old, must live with his mother, must wear a global positioning system device, and be continuously supervised by his mother or his aunt.

In its order, the trial court also noted that Williams asked to be released on a personal recognizance bond but explained that the Governor's Executive Order GA-13 issued in response to the pandemic prohibits jail detainees from being released on personal recognizance bonds if they have been charged with crimes of violence. Accordingly, the trial court denied Williams's request that he be released on a personal recognizance bond.

Williams appeals the order by the trial court.

DISCUSSION

In one issue on appeal, Williams presents several sets of arguments asserting that the trial court erred by failing to sufficiently lower the amount of bail and by failing to release him on a personal recognizance bond.[1]

Amount of Bail

In his first set of arguments, Williams asserts that although the trial court reduced the amount of bail, the reduced amount was still excessive under the circumstances.

A bail determination is committed to the sound discretion of a trial court, but the exercise of that discretion is guided by statutory and constitutional directives. *See Ex parte Beard*, 92 S.W.3d 566, 567-68 (Tex. App.—Austin 2002, pet. ref'd). Trial courts must balance the presumption of innocence against the State's interest in ensuring that the defendant will appear at trial. *Id.* at 573. "Excessive" bail is prohibited by the federal and state constitutions. *See* U.S. Const. amend. VIII; Tex. Const. art. I, § 13. Bail is excessive "if set in an amount greater than is reasonably necessary to satisfy the government's legitimate interests." *Ex parte Beard*, 92 S.W.3d at 573. In addition to the constitutional prohibition against excessive bail, article 17.15 of the Code of Criminal Procedure sets out the following statutory requirements:

> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.

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[1] In its brief, the State contends that this Court need not address Williams's arguments because the arguments are multifarious. *See Davidson v. State*, 249 S.W.3d 709, 717 n.2 (Tex. App.—Austin 2008, pet. ref'd) (explaining that issue containing "more than one specific ground of error is a multifarious one" and that appellate courts "may refuse to consider it"). To the extent that these arguments are multifarious, we address them in the interests of justice. *See id.* (noting that appellate courts "may consider multifarious issues if [they] can determine, with reasonable certainty, the alleged error about which the complaint is made").

> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
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> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
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> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.
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> 5. The future safety of a victim of the alleged offense and the community shall be considered.

Tex. Code Crim. Proc. art. 17.15. When determining what constitutes a reasonable bond, the primary factors to be considered are the nature of the offense and the length of the potential sentence. *Ex parte Rubac*, 611 S.W.2d 848, 849 (Tex. Crim. App. 1981). A trial court may also consider the defendant's work record, family ties, length of his residency, ability to make the bond, past criminal record, conformity with previous bond conditions, other outstanding bonds, and aggravating circumstances that are alleged to have been involved in the charged offense. *Id.* at 849-50; *see Aviles v. State*, 26 S.W.3d 696, 698 (Tex. App.—Houston [14th Dist.] 2000, order).

The burden of proving that the amount of bail is excessive falls on the defendant. *Ex parte Rubac*, 611 S.W.2d at 849; *Ex parte Beard*, 92 S.W.3d at 568. Appellate courts review a trial court's ruling on a request for bail reduction under an abuse-of-discretion standard. *See Ex parte Gill*, 413 S.W.3d 425, 428 (Tex. Crim. App. 2013). Under that standard, appellate courts will not disturb the trial court's ruling if it falls within the zone of reasonable disagreement. *Ex parte Beard*, 92 S.W.3d at 573.[2]

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[2] In its appellee's brief, the State acknowledges that Williams moved to have the amount of bail reduced but contends that Williams failed to preserve this set of arguments because he failed to argue to the trial court what specific amount would be reasonable and because he failed to show that he tried unsuccessfully to secure bond for the reduced bail amount set by the trial court. *See Roy v. State*, 854 S.W.2d 931, 931 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (determining that defendant failed to preserve bail issue). However, we note that courts of appeals

Nature and Circumstances of the Offenses and the Length of the Sentences

Regarding the nature and circumstances of the offenses as well as the potential length of the sentences, we note that Williams has been charged with four first-degree felonies in two indictments for allegedly sexually assaulting two children, *see* Tex. Penal Code § 22.021(e); *see also Ex parte Subur-Smith*, 73 S.W.3d 436, 439 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (considering punishment range as one of "primary" factors), and that he is faced with a potential life sentence in each count, *see* Tex. Penal Code § 12.32. In addition, the trial court could order some of the sentences to be served consecutively. *See id.* § 3.03(b)(2)(A) (allowing trial court to order that sentences for certain sexual offenses "run concurrently or consecutively"); *see also Ex parte Melartin*, 464 S.W.3d 789, 793 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (considering that sentences could be stacked).

Moreover, the mothers of the two alleged victims testified that their children were eight years old and six years old at the time of the alleged assaults. Additionally, Williams does not point to any case law suggesting that the reduced bail amounts are excessive for the types of offenses at issue, and cases addressing bail for sexual offenses with child victims have found reasonable bail set in amounts that exceed the $60,000 aggregate amount here for four counts. *See Clemons v. State*, 220 S.W.3d 176, 177, 179 (Tex. App.—Eastland 2007, no pet.) (determining that $400,000 bail was not excessive for two counts of indecency with child and two counts of aggravated sexual assault of child); *Ex parte Parker*, 26 S.W.3d 711, 712-13 (Tex. App.—Waco

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have addressed excessive bail claims even when the defendants did not present evidence regarding the ability to pay the amount of the reduced bail. *See Ex parte Robles*, 612 S.W.3d 142, 148 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (agreeing that defendant "offered no evidence of an unsuccessful effort to furnish bail" but addressing excessive bail issue); *Ex parte Hulin*, 31 S.W.3d 754, 761 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (addressing excessive bail issue even though defendant did not present evidence regarding her ability to pay reduced bail amount). We will assume that this set of arguments has been preserved for appellate consideration.

2000, no pet.) (upholding $50,000 bail for one count of aggravated sexual assault involving minor victim); *Ex parte Garcia*, 100 S.W.3d 243, 245-46 (Tex. App.—San Antonio 2001, no pet.) (affirming $50,000 bail imposed in case involving one count of indecency with child).

Given the nature of the offenses and their potential sentences as well as the testimony describing the age of the victims, the trial court could have reasonably determined that the reduced bail amounts were appropriate. Accordingly, these factors weigh in favor of a determination that the amount of bail was not excessive.

Safety Concerns

Regarding the safety of the victims and the community, the mother of the alleged victim listed in the 2017 indictment admitted during her cross-examination that she was not worried about Williams coming around her family and that she would be open to the idea of Williams being released provided that he did not have access to children; however, the mother also explained that she would not necessarily agree with the idea of his release, that her child would be traumatized if Williams were released, and that she was concerned that Williams could hurt other children. Similarly, the mother of the alleged victim listed in the 2020 indictment admitted that Williams had not contacted her family since the allegations were made years ago, but she also stressed that she had concerns that he could potentially hurt another child. Detective Holtzclaw testified that there were other cases being investigated by the State involving similar allegations against Williams and involving other victims. In addition, Detective Holtzclaw explained that Williams admitted that he coached football and liked to babysit children, that he met some of his victims through those activities, and that she is worried about the potential for Williams to hurt other children if he were released. *Cf. Ex parte Robles*, 612 S.W.3d 142,

148-49 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (explaining that repeated commission of similar offenses "evinced sufficient danger to the community to deny appellant's request to lower bail").

Based on the preceding, the trial court could have reasonably determined that the reduced bail amounts were appropriate given the safety concerns associated with his release. Accordingly, this factor also weighs in favor of a determination that the amount of bail was not excessive.

Ability to Make Bail

Although an accused's ability to post bail is a factor that may be considered, an inability to pay the amount of bail set does not necessarily render the amount assessed excessive. *See Maldonado v. State*, 999 S.W.2d 91, 96 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). This is true even if an accused has been determined to be indigent. *See Ex parte Charlesworth*, 600 S.W.2d 316, 317 (Tex. Crim. App. 1980); *see Ex parte Nimnicht*, 467 S.W.3d 64, 68 (Tex. App.—San Antonio 2015, no pet.). Generally, unless a defendant shows that his funds as well as those of his family members have been exhausted, the defendant must typically establish that he unsuccessfully attempted to furnish bail before a court can conclude that the amount of bail was excessive. *See Ex parte Tata*, 358 S.W.3d 392, 400 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd).

In this case, although the record demonstrates that Williams was declared indigent and was appointed counsel, he presented no evidence regarding any unsuccessful attempts to pay the bail or establishing that his funds and the funds of his family members have been exhausted. *Cf. Ex parte Hulin*, 31 S.W.3d 754, 761 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (stating

that failure to establish inability to meet reduced amount of bail "is normally fatal to a claim that lowered bail is too high").

Accordingly, the trial court could have reasonably determined that Williams failed to meet his burden of showing that the amount of bail was excessive, and this factor does not weigh in favor of a further reduction beyond the significant reduction that the trial court ordered when it ruled on his writ application.

Bail Sufficient to Ensure Compliance but Not Oppress

A trial court should set bail in an amount that is high enough to provide assurance that the accused will appear as directed. *See Ex parte Charlesworth*, 600 S.W.2d at 317; *see also Ex parte Rodriguez*, 595 S.W.2d 549, 550 (Tex. Crim. App. 1980) (explaining that primary purpose of bond is to guarantee presence of accused at trial). However, bail should not be used to oppress the accused by setting an amount "for the express purpose of forcing [the accused] to remain incarcerated" while waiting for trial. *See Ex parte Harris*, 733 S.W.2d 712, 714 (Tex. App.—Austin 1987, no pet.).

In this case, nothing in the record indicates that the trial court decided not to reduce Williams's bail to force him to remain in jail while waiting for trial. *Cf. id.* (deciding that trial court abused its discretion by refusing to reduce bond amount and emphasizing that trial court explained that "I'd rather see him in jail than to see someone's life taken"). On the contrary, as set out above, the trial court agreed to lower the total amount of bail from $400,000 to $60,000. *Cf. Ex parte Dupuy*, 498 S.W.3d 220, 233 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (noting that trial court "lowered appellant's bail" when concluding that record did not suggest that trial court set bail "in order to keep him incarcerated"); *Ex parte Nimnicht*,

467 S.W.3d at 70 (determining that amount of bail was not used as instrument of oppression and emphasizing fact that "the trial court reduced the bail amount"). Further, the trial court discussed the delays at issue in this case when explaining why it was reducing the amount of bail.

In light of the preceding, we conclude that Williams failed to show that the amount of bail was set for the purpose of keeping him jailed rather than to ensure his presence at trial. Accordingly, this factor does not weigh in favor of bail reduction beyond what the trial court already ordered.

Remaining Factors

Although Williams argued at the hearing that he would live with his mother and that his mother and aunt agreed to monitor him if he were released, he failed to present any evidence regarding his family ties, his work history, or the amount of time that he has lived in the community. *Cf. Ex parte Nimnicht*, 467 S.W.3d at 68 (noting that defendant's unemployment weighed in favor of determination that "community ties were not a strong assurance of his appearance at trial"). Given this lack of evidence, the trial court could have reasonably concluded that Williams's work history, family ties, and residency in the community did not offer a meaningful incentive for him to remain in the area pending trial. In addition, although no evidence regarding Williams's criminal history was introduced during the hearings beyond the alleged aggravated sexual assaults, the financial questionnaire filled out in this case showed that Williams had previously been charged with theft and burglary of a habitation. *Cf. Milner v. State*, 263 S.W.3d 146, 151 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (observing that criminal history did not favor "a bail reduction").

On appeal, Williams argues that the factors courts rely on for making bail determinations must necessarily change during the pandemic, particularly considering his assertion that jail detainees are more likely than the general population to experience infectious diseases due to their living situations. Building on this premise, Williams asserts that courts should "now balance the public health safety risk posed by the continued incarceration of pretrial defendants in crowded correctional facilities with any additional community safety risk posed by the defendant's release." Williams also urges that the risk of flight must be considered differently given the travel and safety restrictions caused by the pandemic.

To the extent that Williams is arguing that a new bail factor should be created and should supplant the factors identified by the Court of Criminal Appeals in *Ex parte Rubac* set out above, no statutory authority or case law has been cited allowing this Court to consider a modified bail analysis. On the contrary, one of our sister courts of appeals has rejected the idea of adding a factor to the list of permissible considerations outlined in *Ex parte Rubac* to address whether "the defendant's presence in jail pose[s] a health and safety risk to himself and the community." *Ex parte Robles*, 612 S.W.3d at 149-50. Essentially, our sister court reasoned that intermediate appellate courts may not and should not alter the factors delineated by the Court of Criminal Appeals. *See id.* at 149. In any event, our sister court reasoned that the trial court could have considered the evidence under the other factors identified by the Court of Criminal Appeals. *See id.* at 149-50.

Consistent with the analysis from our sister court, we conclude that we may not modify or add to the list of specific bail factors adopted by the Court of Criminal Appeals but will consider the evidence presented to the trial court pertaining to Williams's health and the conditions of the jail as that evidence pertains to those bail factors. *See id.* During Williams's

cross-examination of Ramirez, Ramirez admitted that two detainees and seven jailers in the county had been diagnosed with COVID-19, that the particular jail where Williams was being held did not have special filtration systems or negative pressure cells, and that the jails could not force detainees to engage in prophylactic measures such as mask wearing in their cells and maintaining a proper social distance. However, Williams neither presented any evidence that he was particularly at risk due to an underlying condition or other health problem nor presented any evidence establishing how travel restrictions would prevent him from fleeing if he were released. *See id.* at 150. Moreover, the State presented evidence through Ramirez's testimony establishing the procedures that the jails utilize to protect the detainees, detect the presence of COVID-19, isolate detainees that have potentially been exposed, and treat individuals who have been infected. Furthermore, Ramirez testified that none of the units in which Williams has been detained have had to quarantine, that there have been no positive results in the jail where Williams is currently being held, and that the jails recently passed an inspection assessing, in part, the efforts made to combat the spread of the coronavirus. Moreover, Williams did not demonstrate "how the jail's COVID-19 procedures are insufficient to protect him." *See id.* To the extent that the evidence presented at the hearing bears upon a bail determination, the trial court could have reasonably decided from the evidence that the risk to Williams did not compel an additional reduction in bail.

In sum, Williams bore the burden of proving that the amount of bail was excessive, and the record in this case supports a determination that he failed to meet his burden. The factors addressed above do not support a further reduction to the amount of bail.

Continued Detention

In his next set of arguments, Williams highlights that he had been in jail for years by the time the trial court ruled on his writ application, argues that his continued detention is impermissibly punitive rather than regulatory, and contends that this punitive detention is excessive and "offends due process constraints." Further, Williams highlights that it is uncertain when trials will be able to resume given the status of the pandemic. Moreover, Williams argues that the conditions of his release would have minimized any potential danger to the community. Accordingly, Williams argues that the trial court should have released him on a personal recognizance bond.

"The Due Process Clause of the Fifth Amendment forbids pretrial detention that is punitive, rather than regulatory, in nature." *United States v. Stanford*, 394 F. App'x 72, 74 (5th Cir. 2010) (citing *United States v. Salerno*, 481 U.S. 739, 747-48 (1987)); *see also Guzman v. State*, 85 S.W.3d 242, 249 n.24 (Tex. Crim. App. 2002) (explaining that federal court interpretations of constitutional rights are persuasive authority). "Absent an expressed intention to punish, whether detention constitutes impermissible punishment or permissible regulation turns on whether the government has a nonpunitive reason for detention and whether detention" seems excessive in relation to "the nonpunitive purpose." *United States v. Stanford*, 722 F. Supp. 2d 803, 806 (S.D. Tex. 2010) (quoting *United States v. Millan*, 4 F.3d 1038, 1043 (2d Cir. 1993)). "'[E]xcessively prolonged' detention may become so unreasonable in relation to the regulatory goals of detention that it violates due process." *Id.* (citing *Salerno*, 481 U.S. at 747 & n.4; *United States v. Hare*, 873 F.2d 796, 800-01 (5th Cir. 1989)).

When deciding whether continued detention violates a detainee's due-process rights, courts should consider factors relevant to the initial detention decision, including "the

seriousness of the charges, the strength of the government's proof that the defendant poses a risk of flight or a danger to the community, and the strength of the government's case on the merits" as well as "additional factors such as the length of the detention that has occurred or may occur in the future, the non-speculative nature of future detention, the complexity of the case, and whether the strategy of one side or the other occasions the delay." *Hare*, 873 F.2d at 801. Appellate courts "review questions of constitutional law *de novo*." *United States v. Guidry*, 456 F.3d 493, 506 (5th Cir. 2006); *see Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

Factors Relevant to Initial Detention Decision

As set out above, the charges against Williams are first-degree-felony offenses involving the aggravated sexual assaults of two young children with each count carrying the possibility of a life sentence, and the seriousness of the charges has increased since his initial arrest because the investigation has revealed additional offenses allegedly committed against other victims. *See* Tex. Penal Code §§ 12.32, 22.021(e); *see also Ex parte Herrera*, Nos. 05-14-00598-CR, 05-14-00626—00627-CR, 2014 WL 4207153, at *3, *7 (Tex. App.—Dallas Aug. 26, 2014, no pet.) (mem. op., not designated for publication) (analyzing complaint that bail condition violated due process and concluding that imposition of condition for release was proper "[c]onsidering the government's compelling interest to protect children from becoming potential victims of sexual assault").

Regarding the potential risk to the community, the trial court did order restrictions and monitoring if Williams paid the lowered amount of bail and was released, but the mothers of the two alleged victims and Detective Holtzclaw explained that they had concerns that he could pose a risk to other children if he were released. In fact, Detective Holtzclaw testified that there

were additional allegations against Williams and that he had a pattern of being around children by volunteering to babysit the children of people whom he knows and by acting as a football coach. Although the full nature of the evidence against Williams was not disclosed during the hearings, one of the alleged victim's mothers testified that her son suffered from night terrors after the abuse and that Williams ran away when he was accused. Similarly, the mother of the other alleged victim testified that her daughter and her oldest son both made allegations that Williams abused them.

Based on the preceding, we conclude that the factors relevant to Williams's initial detention strongly weigh in favor of continued detention.

Length of Detention

"Although the length of pretrial detention is one factor courts are to consider, it alone is not dispositive and carries no fixed weight in a due process analysis." *Stanford*, 722 F. Supp. 2d at 807. Indeed, the length of detention "will rarely by itself offend due process." *United States v. Orena*, 986 F.2d 628, 632 (2d Cir. 1993). As set out previously, Williams had been detained for approximately three years before the writ hearing. Although courts have upheld similar pretrial detentions, they have also commented that detentions of similar durations weighed in favor of a due-process violation. *See, e.g.*, *United States v. El-Hage*, 213 F.3d 74, 77-79, 80, 81 (2d Cir. 2000) (addressing thirty-to-thirty-three-month detention); *Milan*, 4 F.3d at 1044 (addressing thirty-month detention). Moreover, Williams will likely continue to be detained because of the safety concerns associated with holding a trial during the pandemic.

Given the length of the detention that has already occurred as well as the likelihood of continued detention, this factor weighs in favor of a due-process violation.

Nonspeculative Nature of Future Detention and Whether One Party is Responsible for Delay

By the time of the writ hearing, no trial date had been set for either case. However, no trials had been scheduled, at least in part, due to the Supreme Court's order prohibiting in-person proceedings and jury trials, with certain exceptions, due to safety concerns associated with the pandemic. *See Eighteenth Emergency Order Regarding the COVID-19 State of Disaster*, Misc. Docket No. 20-9080 (Tex. June 29, 2020). Accordingly, the delay is not attributable to either party. *See Stanford*, 722 F. Supp. 2d at 810 (explaining that "[a]ny delay occasioned by prosecutorial strategy may be a basis upon which an exceedingly lengthy pretrial detention offends due process"). Moreover, we do note that the Supreme Court's most recent emergency order allows remote jury proceedings with appropriate waivers and consent by a defendant and in-person jury proceedings provided that certain safety protocols are complied with. *See Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster*, Misc. Docket No. 21-9026 (Tex. Mar. 5, 2021).

With the preceding in mind, we believe that the factors addressing the nature of future detention and the responsibility for the delay do not weigh in favor of a due-process violation.

Complexity of the Case

The two cases do not involve complex subject matters, and each case only involves one victim. However, the complexity of the cases has been elevated due to the discovery of additional acts of sexual abuse that Williams allegedly committed against children other than the two victims that are the subject of the two indictments. *See Hare*, 873 F.2d at 801 (explaining

that complexity of case is factor to consider when determining whether detention is regulatory or punitive in nature).

Accordingly, this factor, at most, weighs only slightly in favor of a due-process violation.

In summary, weighing the factors listed above, we conclude that Williams's pretrial detention has not transitioned from regulatory to punitive and, therefore, does not violate his due-process rights.[3]

Potential Exposure to Harm

In a related set of arguments, Williams asserts that his continued pretrial detention "amounts to cruel and unusual punishment." Although Williams recognizes that the Eighth Amendment protection against cruel and unusual punishment applies to convicted individuals, *see Ingraham v. Wright*, 430 U.S. 651, 671 (1977); *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996); *Taylor v. State*, No. 01-91-01053-CR, 1994 WL 35710, at *2 (Tex. App.—Houston [1st Dist.] Feb. 10, 1994, no pet.) (op., not designated for publication), he argues that the due process rights to pretrial detainees "are at least as great as" the Eighth Amendment protection and that those rights are violated when a defendant is "incarcerated under conditions posing a substantial risk of serious harm." Likening his situation to one in which an inmate must rely on

[3] In his brief, Williams also argues that he should have been released because his ability to prepare for trial is limited due to the pandemic. As support for this proposition, Williams points to two nonbinding federal cases authorizing the temporary release of the defendants during the pandemic. *See United States v. Kennedy*, 449 F. Supp. 3d 713, 715, 719 (E.D. Mich. 2020); *United States v. Stephens*, 447 F. Supp. 3d 63, 64, 68 (S.D.N.Y. 2020); *see also State v. Cardenas*, 36 S.W.3d 243, 245 n.3 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (explaining that federal circuit "precedent is not binding on Texas courts"). Moreover, unlike here, in both of those cases, evidence was presented to the trial court establishing the difficulty in conducting attorney-client communications during current restrictive conditions at the jails. *See Kennedy*, 449 F. Supp. 3d at 718-19; *Stephens*, 447 F. Supp. 3d at 67.

prison authorities for medical treatment, *see Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), Williams argues that "he must rely upon the State to *not create* a situation where a need to treat his medical needs will arise" because of the pandemic. Further, Williams contends that continuing to detain him when there are other alternatives and placing him "in mortal danger of contracting and spreading an infectious disease constitutes deliberate indifference to [his] health and safety." For these reasons, Williams contends that his due process rights are being violated by his continued detention.

Due process does prohibit "holding pretrial detainees under conditions that amount to punishment." *United States v. Arce*, 30 F.3d 1494, 1994 WL 399506, at *7 (5th Cir. 1994). However, "[a]s long as it is reasonably related to a legitimate governmental objective, pretrial detention without more does not amount to punishment," but "detention that is not reasonably related to a legitimate goal, or is arbitrary or purposeless, may constitute constitutionally prohibited punishment." *United States v. Preston*, No. 3:19-cr-651-K, 2020 WL 1819889, at *3 (N.D. Tex. Apr. 11, 2020) (mem. op.).

When arguing that he should be released in his writ application, Williams generally asserted that the coronavirus is a serious and highly contagious respiratory disease. Further, during Williams's cross-examination of Ramirez, Ramirez admitted that jailers and detainees had contracted COVID-19, that the central jail where Williams was being detained did not have any special air filtration device or pressure cells, that detainees cannot be forced to always wear a mask, and that the jailers cannot ensure social distancing.

However, Ramirez also provided testimony, as outlined above, regarding the safety procedures used at the jail to protect the detainees and the jailers, to isolate those individuals who have been exposed or infected, and to treat detainees who have been infected.

Risner v. Fowler, 458 F. Supp. 3d 495, 504 (N.D. Tex. 2020) (order) (determining that understandable concern about contracting COVID-19 did not warrant release and highlighting that there was no evidence "that the safety measures . . . implemented . . . are ineffective at protecting against the spread of" coronavirus). Additionally, Ramirez related that the jail recently passed an inspection assessing compliance with COVID-19 safety protocols. *See United States v. Graham*, 452 F. Supp. 3d 871, 879 (D. Minn. 2020) (order) (highlighting absence of evidence that jail was unable to effectively monitor or treat defendant if he contracted COVID-19); *United States v. Villegas*, No. 2:19-cr-568-AB, 2020 WL 1649520, at *2-3 (C.D. Cal. Apr. 3, 2020) (order) (observing that detention during pandemic may seem punitive but that there was no evidence of arbitrary or punitive intent and that prison was responding to prevent infectious outbreak, protect inmate health, and preserve internal order); *United States v. Moran*, No. SAG-19-0585, 2020 WL 1663366, at *2 (D. Md. Apr. 3, 2020) (mem. op.) (finding measures taken by prison facility were reasonable under circumstances, meaning that defendant's allegations did not rise to level of constitutional violation); *United States v. Lee*, 451 F. Supp. 3d 1, 8 (D.D.C. Mar. 30, 2020) (mem. op.) (rejecting due-process arguments in light of aggressive precautions being taken by prison to prevent spread of COVID-19).

Moreover, Williams did not argue "that he is being detained in the same part of the facility where anyone who is symptomatic or has been diagnosed with COVID-19 is being detained, that he has been exposed to anyone who is symptomatic or has been diagnosed with COVID-19, or even that he has any underlying condition that makes him more susceptible to severe illness from it." *See Preston*, 2020 WL 1819889, at *3; *see also United States v. Rowe-Hodges*, 454 F. Supp. 3d 618, 620 (E.D. Tex. 2020) (order) (observing that defendant's "general concerns about the risk posed" by coronavirus "apply to every prisoner"); *United States v.*

Boatwright, No. 2:9-cr-00301-GMN-DJA, __ F. Supp. 3d __, __, 2020 WL 1639855, at *6–7 (D. Nev. Apr. 2, 2020) (order) (rejecting due-process argument that applied equally to any detainee); *see also United States v. Munguia*, No. 3:19-cr-191-B (03), 2020 WL 1471741, at *4 (N.D. Tex. Mar. 26, 2020) (mem. op.) (denying relief where argument would be argument for releasing all detainees). And Ramirez testified that Williams had never been housed in a unit that had to undergo quarantine and that the jail where he currently is being detained had never had a positive coronavirus result.

Finally, as set out previously, although Williams argued that the risk to the public could be minimized by the restrictions ordered by the trial court, evidence was presented during the hearing demonstrating that there may be additional victims beyond the two identified in the indictments and that Williams's release could pose a risk to the safety of the community due to the possibility that other children might be victimized. *See United States v. McDonald*, 451 F. Supp. 3d 1174, 1180 (D. Nev. Apr. 3, 2020) (order) (concluding that detention during pandemic was reasonably related to legitimate government interests of protecting community and ensuring detainee's appearance at trial).

For these reasons, we conclude that Williams's continued detention is reasonably related to a legitimate governmental objective of protecting the community, does not constitute deliberate indifference to his health or safety, and does not violate his rights to due process. *See United States v. Parrish*, No. 3:19-cr-160-L(02), 2020 WL 5922044, at *8 (N.D. Tex. May 20, 2020).

GA-13

In his final set of arguments, Williams challenges the validity of the Governor's Executive Order GA-13 relating to detentions in jails during the pandemic. *See* Tex. Gov. Exec.

Order No. GA-13 (Mar. 29, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-13_jails_and _bail_for_COVID-19_IMAGE_03-29-2020.pdf. Among other things, GA-13 ordered that statutes and rules relating to personal bonds are suspended for individuals who have been convicted or have been arrested for crimes involving physical violence. *Id.* On appeal, Williams argues that GA-13 unconstitutionally restricts the right to bail under the federal and Texas constitutions, *see* U.S. Const. amend. VIII; Tex. Const., art. I, § 11, violates due-process guarantees found in the federal and Texas constitutions, *see* U.S. Const. amend V; Tex. Const. art. I, § 19, violates the separation of powers established by the Texas constitution, *see* Tex. Const. art. II, § 1, usurps the constitutional right bestowed on the legislature to suspend laws, *see id.* art. I, § 28, and exceeds the powers given to the Governor under the Government Code, *see* Tex. Gov't Code §§ 418.011-.026.

However, Williams presented no challenge regarding GA-13 to the trial court. To preserve a complaint for appellate review, the record must show, among other things, that the complaint was made to the trial court. *See* Tex. R. App. P. 33.1(a); *see also Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014) (stating that "the point of error on appeal must comport with the objection made at trial"); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (noting that objection stating one legal theory may not be used to support different legal theory on appeal). Generally, appellate complaints are forfeited in the absence of a timely request for relief in the trial court except for rights involving systemic requirements or rights that are non-forfeitable but can be affirmatively waived. *See Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). Even constitutional rights "may be forfeited for purposes of appellate review unless properly preserved." *See Johnson v. State*, No. 03-12-00006-CR,

2012 WL 1582236, at *3 (Tex. App.—Austin May 4, 2012, no pet.) (mem. op., not designated for publication).

Because Williams failed to present his arguments regarding GA-13 to the trial court, we must conclude that he failed to preserve these claims for appellate consideration. *See* Tex. R. App. P. 33.1; *see also Ex parte Moy*, 523 S.W.3d 830, 834 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (explaining that due-process challenges must be preserved to be considered on appeal); *Wilkerson v. State*, 347 S.W.3d 720, 724 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (stating that separation-of-powers challenges must be preserved); *Ex parte Tucker*, 977 S.W.2d 713, 715 (Tex. App.—Fort Worth 1998, pet. dism'd) (observing that "[a]n order denying habeas relief on the merits is appealable only with regard to those matters properly raised by the pre-trial habeas corpus petition and addressed by the trial court").

For all of these reasons, we overrule Williams's sole issue on appeal.

CONCLUSION

Having overruled Williams's issue on appeal, we affirm the trial court's order.

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Thomas J. Baker, Justice

Before Chief Justice Byrne, Justices Baker and Smith

Affirmed

Filed: April 23, 2021

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