Conditions of Pre-Trial Bail in Texas -- Oppressive and Excessive?

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Often, persons accused of a crime find themselves – before they have their cases decided by a judge or a jury, before they enter a plea or otherwise resolve their cases – being “punished” by the conditions set on their bonds during pre-trial release. These people post a bond, either in cash or through a bonding company, and then are required by the court to observe a number of restrictions on their liberty while their case is pending. In many counties, including Harris County and Montgomery County in Texas, people accused of crimes, but “presumed innocent,” are still subjected to “random drug tests,” home arrest, monitoring, and often ordered to report to “pre-trial” authorities or risk having their bond revoked and put in jail until their case is resolved.

My clients often ask me how this can possibly be “legal” or “fair,” and I have to answer that it is, probably, “legal,” but that I don’t think it’s “fair.”


In Texas, pursuant to the Code of Criminal Procedure, the amount of bail required in any case is within the discretion of the court, judge, magistrate, or officer taking the bail, subject to 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 2005).

In addition, appellate courts have held that the following factors may also be considered: the accused's work record, family and community ties, length of residency, prior criminal record (if any), and any aggravating circumstances alleged to have been involved in the offense the accused is charged with committing. Ex parte Rubac, 611 S.W.2d 848, 849-50 (Tex. Crim. App. 1981).

So, it is apparent that the Texas Code of Criminal Procedure article 17.15 is a legislative effort to implement the constitutional right to bail. 41 George E. Dix & Robert O. Dawson, Texas Practice: Criminal Practice and Procedure § 16.51 (2d ed.2001) (footnote omitted) (hereafter "Dix and Dawson"); Tex.Code Crim. Proc. Ann. art. 17.15 (West Supp. 2002). Article 17.15 commits the setting of bail to the discretion of the trial court or magistrate, but sets forth five rules that, together with the constitution, govern the exercise of that discretion. Tex.Code Crim. Proc. Ann. art. 17.15. Bail should be sufficiently high to give reasonable assurance that the undertaking will be complied with, but not so high as to make it an instrument of oppression. Id. art. 17.15(1), (2); see Ex parte Vasquez, 558 S.W.2d 477, 479 (Tex.Crim.App.1977) (primary purpose of pretrial bail is to secure presence of defendant). The nature of the offense and the circumstances under which it was committed are factors to be considered in setting bail, as is the future safety of the community and the victim of the alleged offense. Tex.Code Crim. Proc. Ann. art. 17.15(3), (5). The defendant's ability to make bail also must be considered, but is not of itself controlling. Id. art. 17.15(4); Ex parte Gentry, 615 S.W.2d 228, 231 (Tex.Crim.App.1981). In applying article 17.15, consideration may be given to such evidentiary matters as the defendant's work record, ties to the community, previous criminal record, and record of appearances in the past. See Ex parte Williams, 619 S.W.2d 180, 183 (Tex.Crim.App.1981); Gentry, 615 S.W.2d at 231; Ex parte Parish, 598 S.W.2d 872, 873 (Tex.Crim.App. 1980); Ex parte Keller, 595 S.W.2d 531, 533 (Tex.Crim.App.1980).

The burden is on the accused to prove that bail is excessive. Ex parte Rubac, 611 S.W.2d 848, 849 (Tex.Crim. App.1981). An appellate court will review the trial court's ruling for an abuse of discretion. Id. at 850. Unless one can show that the trial court judge “abused” their “discretion” in setting the bond amount or the conditions, the appellate court will sustain the trial court’s ruling.
The primary purpose of an appearance bond is to secure the presence of the accused at trial on the offense charged. Ex parte Rodriguez, 595 S.W.2d 549, 550 (Tex. Crim. App. 1980). Thus, the amount of bail must be high enough to give reasonable assurance that the accused will appear as required. Ex parte Charlesworth, 600 S.W.2d 316, 317 (Tex. Crim. App. 1980). However, while bail should be sufficiently high to give reasonable assurance that the accused will appear, the power to require bail should not be used as an instrument of oppression. Ex parte Ivey, 594 S.W.2d 98, 99 (Tex. Crim. App. 1980). This occurs when the trial court sets bail at an amount "for the express purpose of forcing appellant to remain incarcerated" pending trial or appeal. See Ex parte Harris, 733 S.W.2d 712, 714 (Tex. App.-Austin 1987, no pet.) (per curiam).

Also, the conditions of bonds can be “excessive,” unless they comply with certain statutory standards and there is an evidentiary basis and justification for them.

In setting bail, a balance must be struck between the defendant's presumption of innocence and the State's interest in assuring the defendant's appearance at trial. See Simpson, 77 S.W.3d at 896 (citing Balboa v. State, 612 S.W.2d 553, 557 (Tex.Crim.App.1981)). Although both the federal and state constitutions permit the denial of pretrial bail under certain circumstances, when bail is available it is excessive if set in an amount greater than is reasonably necessary to satisfy the government's legitimate interests. See United States v. Salerno, 481 U.S. 739, 753-54, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (construing Eighth Amendment); 41 Dix and Dawson §§ 16.11, .12 (discussing federal and state constitutional right to bail).

In reviewing a trial court's ruling for an abuse of discretion, an appellate court will not intercede as long as the trial court's ruling is at least within the zone of reasonable disagreement. Montgomery v. State, 810 S.W.2d 372, 391 (Tex.Crim.App.1991) (op. on reh'g). But an abuse of discretion review requires more of the appellate court than simply deciding that the trial judge did not rule arbitrarily or capriciously. Id. at 392. The appellate court must instead measure the trial court's ruling against the relevant criteria by which the ruling was made. Id.

How do you challenge an excessive bond or overly onerous pre-trial conditions of the bond?

In Texas, a pre-trial writ of habeas corpus is appropriate only in very limited circumstances. The writ is permitted to challenge the State's power to restrain a defendant, the manner of pre-trial restraint (i.e., the denial or conditions of bail), or certain issues that would bar prosecution or conviction. Ex parte Smith, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005). If one considers that the conditions of bond are “restraints” on a defendant’s liberty, then one would argue that a defendant may challenge conditions on pre-trial bail through a writ of habeas corpus.

In Texas in 1999, magistrates were given general authority to impose reasonable conditions on pre-trial bail. Ex parte Anderer, 61 S.W.3d 398, 401 (Tex. Crim. App. 2001). “To secure a defendant's attendance at trial, a magistrate may impose any reasonable condition of bond related to the safety of a victim of the alleged offense or to the safety of the community."
Tex. Code Crim. Proc. art. 17.40(a). In setting pre-trial bail, a magistrate must consider the nature and circumstances of the alleged offense and the safety of the alleged victim and the community, and the magistrate may impose reasonable conditions related to their safety. Anderer, 61 S.W.3d at 405-06.

A condition of pre-trial bail will be upheld if it meets three criteria: (1) it must be reasonable; (2) it must be made to secure the defendant's presence at trial; and (3) it must be related to the safety of the alleged victim or the community. Anderer, 61 S.W.3d at 401.

Again, in the case of pre-trial conditions of bond, an appellate court reviews a trial court's pre-trial bail decision for an abuse of discretion. Ex parte Rubac, 611 S.W.2d 848, 849-50 (Tex. Crim. App. 1981). The applicant bears the burden to show that the trial court abused its discretion in setting the amount of bail or imposing a specific condition. Id.; Ex parte Anunobi, 278 S.W.3d 425, 528 (Tex. App.–San Antonio 2008, no pet). And, again, as with the amount of the bond and the “excessive bond” argument, an appellate court will not intercede as long as the trial court's ruling is at least within the zone of reasonable disagreement. Cooley v. State, 232 S.W.3d 228, 234 (Tex. App.–Houston [1st Dist.] 2007, no pet.) (citing Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)).

However, the conditions of bail "may not impinge unreasonably upon rights guaranteed by the Constitution." Anderer, 61 S.W.3d at 402. So, the inquiry should center around how much the pre-trial conditions “impinge unreasonably” on the defendant’s rights and, specifically, his right to liberty during the pendency of a criminal case.

Even before the statutes were amended to allow specific conditions, it was well established that courts have the inherent power to place restrictive conditions on the granting of bail. Estrada v. State, 594 S.W.2d 445, 446 (Tex. Crim.App. [Panel Op.] 1980). The trial court's discretion to set the conditions of bail is not, however, unlimited. As noted regarding the amount of bail, a condition of pre-trial bail 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. Ex parte Anderer, 61 S.W.3d 398, 401-02 (Tex.Crim.App.2001) (making a distinction between pre-trial bail and bail pending appeal); see TEX.CODE CRIM. PROC. ANN. art. 17.40(a) (Vernon Supp.2008) (authorizing trial court to impose "any reasonable condition of bond related to the safety of a victim of the alleged offense or to the safety of the community" in order to "secure a defendant's attendance at trial"); see also Burson v. State, 202 S.W.3d 423, 425-26 (Tex.App.–Tyler 2006, no pet.) (interpreting § 17.40(a) to mean a single bail condition may be solely related to the safety of the victim or community, and need not necessarily relate to all three criteria mentioned in Anderer).

In that respect, the courts must be mindful that one of the purposes of release on bail pending trial is to prevent the infliction of punishment prior to conviction. Anderer, 61 S.W.3d at 405. Again, however, it must be emphasized that the primary purpose for setting a bond is to

In cases involving minor victims of sex offenses, or intoxication offenses, the conditions of bond can be quite onerous, requiring intensive monitoring of the defendant and his actions and sometimes, in DWI cases, severely restricting the defendant’s right to operate an automobile before trial.

When considering conditions of bail, one should apply the standards discussed above and, if they are thought to be excessive, or to unreasonably restrain the liberty of the (presumed innocent) defendant, and be prepared to show how the conditions are not related to securing the defendant’s presence in court, to safeguard a victim, or to protect the community.

Selected Texas Statutes

Texas Code of Criminal Procedure

Art. 17.29. ACCUSED LIBERATED. (a) When the accused has given the required bond, either to the magistrate or the officer having him in custody, he shall at once be set at liberty.

(b) Before releasing on bail a person arrested for an offense under Section 42.072, Penal Code, or a person arrested or held without warrant in the prevention of family violence, the law enforcement agency holding the person shall make a reasonable attempt to give personal notice of the imminent release to the victim of the alleged offense or to another person designated by the victim to receive the notice. An attempt by an agency to give notice to the victim or the person designated by the victim at the victim's or person's last known telephone number or address, as shown on the records of the agency, constitutes a reasonable attempt to give notice under this subsection. If possible, the arresting officer shall collect the address and telephone number of the victim at the time the arrest is made and shall communicate that information to the agency holding the person.

(c) A law enforcement agency or an employee of a law enforcement agency is not liable for damages arising from complying or failing to comply with Subsection (b) of this article.

(d) In this article, "family violence" has the meaning assigned by Section 71.004, Family Code.


Art. 17.38. RULES APPLICABLE TO ALL CASES OF BAIL. The rules in this Chapter respecting bail are applicable to all such undertakings when entered into in the course of a criminal action, whether before or after an indictment, in every case where authority is given to

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any court, judge, magistrate, or other officer, to require bail of a person accused of an offense, or of a witness in a criminal action.


Art. 17.40. CONDITIONS RELATED TO VICTIM OR COMMUNITY SAFETY. (a) To secure a defendant's attendance at trial, a magistrate may impose any reasonable condition of bond related to the safety of a victim of the alleged offense or to the safety of the community.

(b) At a hearing limited to determining whether the defendant violated a condition of bond imposed under Subsection (a), 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. Once the defendant is placed in custody, the revocation of the defendant's bond discharges the sureties on the bond, if any, from any future liability on the bond. A discharge under this subsection from any future liability on the bond does not discharge any surety from liability for previous forfeitures on the bond.

Added by Acts 1999, 76th Leg., ch. 768, Sec. 1, eff. Sept. 1, 1999.

Amended by: Acts 2007, 80th Leg., R.S., Ch. 1113, Sec. 4, eff. January 1, 2008.

Art. 17.43. HOME CURFEW AND ELECTRONIC MONITORING AS CONDITION. (a) A magistrate may require as a condition of release on personal bond that the defendant submit to home curfew and electronic monitoring under the supervision of an agency designated by the magistrate.

(b) Cost of monitoring may be assessed as court costs or ordered paid directly by the defendant as a condition of bond.

Added by Acts 1989, 71st Leg., ch. 374, Sec. 4, eff. Sept. 1, 1989.

Art. 17.44. HOME CONFINEMENT, ELECTRONIC MONITORING, AND DRUG TESTING AS CONDITION. (a) A magistrate may require as a condition of release on bond that the defendant submit to:

(1) home confinement and electronic monitoring under the supervision of an agency designated by the magistrate; or

(2) testing on a weekly basis for the presence of a controlled substance in the defendant's body.
(b) In this article, "controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.

(c) The magistrate may revoke the bond and order the defendant arrested if the defendant:

(1) violates a condition of home confinement and electronic monitoring;

(2) refuses to submit to a test for controlled substances or submits to a test for controlled substances and the test indicates the presence of a controlled substance in the defendant's body; or

(3) fails to pay the costs of monitoring or testing for controlled substances, if payment is ordered under Subsection (e) as a condition of bond and the magistrate determines that the defendant is not indigent and is financially able to make the payments as ordered.

(d) The community justice assistance division of the Texas Department of Criminal Justice may provide grants to counties to implement electronic monitoring programs authorized by this article.

(e) The cost of electronic monitoring or testing for controlled substances under this article may be assessed as court costs or ordered paid directly by the defendant as a condition of bond.


Amended by: Acts 2009, 81st Leg., R.S., Ch. 163, Sec. 1, eff. September 1, 2009.

For More Information

For more information, please visit www.charlesbfrye.com. And, for information about your rights when you’re accused of driving while intoxicated (DWI) in Texas, visit www.nothankyouofficer.com. If you have questions about asset seizure and forfeiture, visit www.texasforfeiturelaw.com.

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