IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re KENNETH HUMPHREY, on Habeas Corpus.	A152056 (San Francisco City and County Super. Ct. No. 17007715)

Nearly forty years ago, during an earlier incarnation, the present Governor of this state declared in his State of the State Address that it was necessary for the Legislature to reform the bail system, which he said constituted an unfair "tax on poor people in California. Thousands and thousands of people languish in the jails of this state even though they have been convicted of no crime. Their only crime is that they cannot make the bail that our present law requires." Proposing that California move closer to the federal system, the Governor urged that we find "a way that more people who have not been found guilty and who can meet the proper standards can be put on a bail system that is as just and as fair as we can make it." (Governor Edmund G. Brown Jr., State of the State Address, Jan. 16, 1979.) The Legislature did not respond.

Undaunted, our Chief Justice, in her 2016 State of the Judiciary Address, told the Legislature it cannot continue to ignore "the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor." Questioning whether money bail genuinely ensures public safety or assures arrestees appear in court, the Chief Justice suggested that better risk assessment programs would achieve the purposes of bail more fairly and effectively. (Chief Justice Tani Cantil-Sakauye, State of the Judiciary Address, Mar. 8, 2016.) The Chief Justice followed up her address to the Legislature by establishing the Pretrial Detention Reform Workgroup in October 2016 to study the current system and develop recommendations for reform.

This time the Legislature initiated action. Senate Bill No. 10, the California Money Bail Reform Act of 2017, was introduced at the commencement of the current state legislative session. The measure, still before the Legislature, opens with the declaration that "modernization of the pretrial system is urgently needed in California, where thousands of individuals held in county jails across the state have not been convicted of a crime and are awaiting trial simply because they cannot afford to post money bail or pay a commercial bail bond company." We hope sensible reform is enacted, but if so it will not be in time to help resolve this case.

Meanwhile, as this case demonstrates, there now exists a significant disconnect between the stringent legal protections state and federal appellate courts have required for proceedings that may result in a deprivation of liberty and what actually happens in bail proceedings in our criminal courts. As we will explain, although the prosecutor presented no evidence that non-monetary conditions of release could not sufficiently protect victim or public safety, and the trial court found petitioner suitable for release on bail, the court's order, by setting bail in an amount it was impossible for petitioner to pay, effectively constituted a *sub rosa* detention order lacking the due process protections constitutionally required to attend such an order. Petitioner is entitled to a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines petitioner is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention

THE PARTIES' POSITION

Petitioner Kenneth Humphrey was detained prior to trial due to his financial inability to post bail. Claiming bail was set by the court without inquiry or findings concerning either his financial resources or the availability of a less restrictive non-monetary alternative condition or combination of conditions of release, petitioner maintains he was denied rights guaranteed by the Fourteenth Amendment.

Acknowledging that a bail scheme that "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid" (*United States v. Salerno* (1987) 481 U.S. 739 at p. 745 (*Salerno*), petitioner does not claim California's money bail system is facially unconstitutional. However, he maintains that requiring money bail as a condition of pretrial release at an amount it is impossible for the defendant to pay is the functional equivalent of a pretrial detention order. (*United States v. Leathers* (D.C. Cir. 1969) 412 F.2d 169, 171, ["the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all"]; *In re Christie* (2001) 92 Cal.App.4th 1105, 1109 ["the court may neither deny bail nor set it in a sum that is the functional equivalent of no bail"].) Because the liberty interest of an arrestee is a fundamental constitutional right entitled to heightened judicial protection (*id.* at p. 750), such an order can be constitutionally justified, petitioner says, only if the state "first establish[es] that it has a *compelling* interest which justifies the [order] and then demonstrate[s] that the [order is] *necessary* to further that purpose." (*People v. Olivas* (1976) 17 Cal.3d 236 at p. 251, citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 597; *In re Antazo* (1970) 3 Cal.3d 100, 110-111; *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785.) Petitioner argues that in order to do this, the state must show and the court must find that no condition or combination of conditions of release could satisfy the purposes of bail, which are to assure defendants' appearance at trial and protect victim and public safety.

As no such showing or finding was made, petitioner asks us to issue a writ of habeas corpus and either order his immediate release on his own recognizance or remand the matter to the superior court for an expedited hearing, with instructions to (1) conduct a detention hearing consistent with article I, section 12, of the California Constitution and the procedural safeguards discussed in *Salerno*, and; (2) set whatever least restrictive, non-monetary conditions of release will protect public safety; or (3) if necessary to assure his appearance at trial or future hearings, impose a financial condition of release after making inquiry into and findings concerning petitioner's ability to pay.

In his informal opposition to the petition the Attorney General asked us to deny the petition. Relying upon the "Public Safety Bail" provisions of section 28, subd. (f)(3), of the

California Constitution—which states that "[i]n setting, reducing or denying bail . . . .[p]ublic safety shall be the primary consideration"—the Attorney General distinguished the federal cases petitioner relies upon and argued that the magistrate did not violate petitioner's rights to due process or equal protection by deciding not to further reduce bail or release petitioner on his own recognizance.

However, after we issued an order to show cause, the Attorney General filed a return withdrawing his earlier assertion that the magistrate was not obligated to make any additional inquiry into petitioner's ability to pay under the circumstances of this case. The Attorney General now agrees with petitioner that a writ of habeas corpus should issue for the purpose of providing petitioner with a new bail hearing. As stated in the return: "The Department of Justice has determined that it will not defend any application of the bail law that does not take into consideration a person's ability to pay, or alternative methods of ensuring a person's appearance at trial. Given this determination, after further deliberations, we withdraw our earlier assertion that the magistrate was not obligated to make any additional inquiry into petitioner's ability to pay under the circumstances of this case."

We shall explain why we agree with the parties that the trial court erred in failing to inquire into petitioner's financial circumstances and less restrictive alternatives to money bail, and that a writ of habeas corpus should therefore issue for the purpose of providing petitioner a new bail hearing.

FACTS AND PROCEEDINGS BELOW

The Underlying Offenses

Petitioner, a retired shipyard laborer, is 63 years of age and a lifelong resident of San Francisco. On May 23, 2017 (all dates are in that year), at approximately 5:43 p.m., San Francisco police officers responded to 1239 Turk Street regarding a robbery. The complaining witness, Elmer J., who was 79 years of age and used a walker, told the officers he was returning to his fourth floor apartment when a man, later identified as petitioner, followed him into his apartment and asked him about money. At one point petitioner told Elmer to get on the bed and threatened to put a pillow case over his head. When Elmer said he had no money, petitioner took Elmer's cell phone and threw it onto the floor. After Elmer gave him $2, petitioner stole $5 and a bottle of cologne and left. Elmer did not know or recognize petitioner. While reviewing the surveillance video with front desk clerks, the officers were informed that the African-American

person in the video was petitioner, who lived in an apartment on the third floor of the building. The officers went to petitioner's apartment and arrested him without incident. Petitioner was subsequently charged with first degree robbery (Pen. Code, § 211), first degree residential burglary (§ 459), inflicting injury (but not great bodily injury) on an elder and dependent adult (§ 368, subd. (c)), and theft from an elder or dependent adult, charged as a misdemeanor. (§ 368, subd. (d).)

The Initial Setting of Bail

At his arraignment on May 31, petitioner sought release on his own recognizance without financial conditions based on his advanced age, his community ties as a lifelong resident of San Francisco and his unemployment and financial condition, as well as the minimal property loss he was charged with having caused, the age of the three alleged priors (the most recent of which was in 1992), the absence of a criminal record of any sort for more than 14 years, and his never previously having failed to appear at a court ordered proceeding. Petitioner also invited the court to impose an appropriate stay-away order regarding the victim who, as noted, lived on a different floor of the same "senior home" in which appellant resided.

The prosecutor did not affirmatively argue for pretrial detention pursuant to article 1, section 12, of the California Constitution, but simply asked the court to "follow the PSA [Public Safety Assessment] recommendation, which is that release is not recommended," and requested bail in the amount of $600,000, as prescribed by the bail schedule, and a criminal protective order directing petitioner to stay away from the victim.

After indicating it had read the Public Safety Assessment Report on petitioner, the trial court stated as follows: "I appreciate the fact that Mr. Humphrey has had a lengthy history of contact here in the City and County of San Francisco. I also note counsel's argument that many of his convictions are older in nature; however, given the seriousness of this crime, the vulnerability of the victim, as well as the recommendation from pretrial services, I'm not going to grant him OR [release on his own recognizance] or any kind of supervised release at this time. I will set bail in the amount of $600,000 and sign the criminal protective orders to [stay] away from [the victim].". . .

The Hearing on the Bail Motion

The hearing on petitioner's bail motion took place on July 12, five days before the date set for the preliminary hearing. At the start of the proceeding defense counsel provided the court

a letter from the Golden Gate for Seniors program stating that it had accepted petitioner for a residential placement commencing on July 13, the next day. After defense counsel said he had "laid out all my points in the bail motion" in detail, he emphasized that petitioner had not engaged in criminal conduct for many years, was 63 years of age, had been battling with addiction since he was a teenager, but had recently "made some significant strides," and that he took only five dollars and a bottle of cologne from his victim, who was not physically injured. Finally, counsel reiterated that though this was a "three-strikes" case, petitioner's prior convictions were very old, the most recent having occurred a quarter of a century ago, in 1992. For the foregoing reasons, defense counsel asked the court to release petitioner on his own recognizance, and failing that to be "OR'd to Golden Gate for Seniors."

The prosecutor pointed out that one of petitioner's priors was a felony for which he served a prison sentence, and that under section 1275, the court had to find unusual circumstances in order to deviate from the bail schedule. Asserting that there were no such circumstances, and the $600,000 previously imposed by the court was the scheduled amount of bail, the prosecutor urged the court not to reduce that amount. Arguing that petitioner's present and past criminal offenses were all committed due to the need to "feed his habit," the prosecutor maintained that his addiction and inability to address it constituted "a continued public safety risk." The prosecutor added that petitioner should be considered "a great public safety risk" because he "followed a disabled senior into his home. He stole from him. He did so in a building that he had access to, [t]hat he resided in." Finally, the prosecutor argued that petitioner was a flight risk because he was exposed to a lengthy prison sentence.

The one-page form risk assessment report submitted to the court by the pretrial services agency, which does not indicate a representative of the agency ever met with petitioner, provides no individualized explanation of its opaque risk assessment of petitioner and no information regarding the availability and potential for use of an unsecured bond, which imposes no costs on the defendant who appears in court, or supervised release programs involving features like required daily or periodic check-ins with the pretrial services agency, drug testing, home detention, electronic monitoring, or other less restrictive release options. Nor, so far as the record shows, did the court ask the pretrial services agency to provide any such information.

In explaining its decision, the trial court stated that it had public safety concerns because "this was a serious crime and serious conduct involved and pretty extreme tactics employed by

Mr. Humphrey, if I accept what is in the police report," noting also that his offenses were similar to those he had committed in the past, "so that continuity is troubling to the court." The court acknowledged that "maybe little was taken," but said "that's because the person whose home was invaded was poor [and] I'm not [going to] provide less protection to the poor than to the rich." The court also felt petitioner's criminal history and the circumstances of the offenses, which the court described as "basically a home invasion," "are captured in the scheduled bail of $600,000. And as [the district attorney] argued, I have to find unusual circumstances to deviate. However, the court was impressed with petitioner's "willingness to participate in treatment, and I do commend that. I cannot see my way to an OR release on that basis, but I do think that is an unusual circumstance that would justify some deviation from the bail schedule." The court also attached significance to petitioner's strong ties to the community, and found that factor also qualified as an unusual circumstance justifying deviation from the bail schedule. Nonetheless, the court believed a high bail was still warranted "because of public safety and flight risk concerns," "and so I'm [going to] modify bail to be $350,000." At no point during the hearing did the court note that, as indicated in the risk assessment report and emphasized by counsel, petitioner had never previously failed to appear at a court ordered hearing.

When the court added an additional condition—that upon release on bail petitioner participate in the Golden Gate for Seniors residential drug treatment program—the public defender observed that petitioner was too poor "to make even $350,000 bail" and would therefore have to remain in custody pending trial and be unable to participate in a residential drug treatment program. The court did not comment on the anomalousness of imposing a condition of release that it made impossible for petitioner to satisfy by setting bail at an unattainable figure.

The petition for writ of habeas corpus was filed in this court on August 4, at which time petitioner was in custody. . .

The Court Erred in Failing to Inquire Into and Make Findings Regarding Petitioner's Financial Ability to Pay Bail and Less Restrictive Alternatives to Money Bail

Petitioner's claim that the due process and equal protection clauses of the Fourteenth Amendment required the trial court to determine the availability of less restrictive non-monetary conditions of release that would achieve the purposes of bail is based on two related lines of cases.

The first, exemplified by *Bearden v. Georg*ia (1983) 461 U.S. 660 (*Bearden*), does not relate to bail directly but more generally to the treatment of indigency in cases in which a defendant is exposed to confinement as a result of his or her financial inability to pay a fine or restitution. These cases establish that a defendant may not be imprisoned solely because he or she is unable to make a payment that would allow a wealthier defendant to avoid imprisonment. In the second line are bail cases, primarily *Salerno, supra,* 481 U.S. 739, establishing that, because the liberty interest of a presumptively innocent arrestee rises to the level of a fundamental constitutional right, the right to bail cannot be abridged except through a judicial process that safeguards the due process rights of the defendant and results in a finding that no less restrictive condition or combination of conditions can adequately assure the arrestee's appearance in court and/or protect public safety, thereby demonstrating a compelling state interest warranting abridgment of an arrestee's liberty prior to trial.

As we shall describe, the principles underlying these cases dictate that a court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and community. . .

Bail Determinations Must be Based upon Consideration of Individualized Criteria

Failure to consider a defendant's ability to pay before setting money bail is one aspect of the fundamental requirement that decisions that may result in pretrial detention must be based on factors related to the individual defendant's circumstances. This requirement is implicit in the principles we have discussed—that a defendant may not be imprisoned solely due to poverty and that rigorous procedural safeguards are necessary to assure the accuracy of determinations that an arrestee is dangerous and that detention is required due to the absence of less restrictive alternatives sufficient to protect the public.