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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re ANTHONY PAUL MAXWELL,

On Habeas Corpus.

C075314, C075315

(Super. Ct. Nos. CM037930,
CM039056)

Anthony Paul Maxwell filed these consolidated original petitions for habeas corpus, alleging the trial court improperly conditioned bail on his waiver of his Fourth Amendment rights. The People concede Maxwell is entitled to relief.

We do not herein express any view on the legality of conditioning bail on a waiver of Fourth Amendment rights in *any* case, an issue left open by our Supreme Court. Instead, we accept the People's concession and conclude the trial court failed to articulate adequate reasons for conditioning Maxwell's bail on his waiver of Fourth Amendment rights in *this* case. Accordingly, we shall grant defendant's petitions and order the search condition--presently stayed--to be stricken from defendant's bail orders.

If and only if the trial court makes further findings and elects to reimpose a search waiver as a condition of pretrial release, would we need to consider the lawfulness of such a condition in the abstract. Here, because no particularized findings justifying such a condition were made in Maxwell's case, the condition cannot stand.

BACKGROUND

Because the People failed to controvert any of the allegations of defendant's propria persona petition in their concession letter filed in lieu of a return, we accept defendant's allegations as true.¹ (See *People v. Duvall* (1995) 9 Cal.4th 464, 476-478.)

On December 17, 2012, in what the parties refer to as "case 1" (case No. CM037930) defendant was charged with possession for sale of heroin and possession of an injection device, a misdemeanor.² He was released on \$200,000 bail on or about March 13, 2013.

On May 29, 2013, defendant was charged with possession of heroin, in what the parties refer to as "case 2" (case No. CM038756). On June 25, 2013, defendant was released on his own recognizance (OR), after waiving his Fourth Amendment rights.

On June 27, 2013, defendant was arrested for possession for sale of heroin, in what the parties refer to as "case 3" (case No. CM039056). He was released on \$175,000 bail on or around July 18, 2013.

Thus, at that point defendant had posted bail--without search conditions--in case 1 and case 3, and was on OR release--with a Fourth Amendment waiver--on case 2.

¹ The People had earlier filed an informal return, contesting defendant's position. Evidently, they reconsidered. We later appointed counsel for defendant, and counsel filed a traverse to the letter the People filed in lieu of a formal return.

² Although not clearly alleged in the petition, it appears defendant was also charged with two strikes and one prior prison term in case 1 and one strike and one prior prison term in case 2. It appears that a fourth case, alleging possession of methadone, two strikes, and a prior prison term, case No. CM039990, was filed on December 5, 2013.

On August 7, 2013, defendant was held to answer on cases 1 and 3, but case 2 was dismissed for lack of evidence on the People's motion. Defendant, in pro. per., asked for documentation of the dismissal of case 2, to show that he was no longer subject to the search condition. The trial court responded: "You don't get to have pending controlled substances cases and not have search conditions." The trial court then added the requirement that defendant waive his Fourth Amendment rights to his existing bail orders (which were ordered by different judges) on counts 1 and 3. Defendant signed an order "over objection & duress," accepting bail with search conditions in cases 1 and 3.

Defendant filed the instant original petitions on December 6, 2013, one each in case 1 and case 3, which we have consolidated.

DISCUSSION

Bail originally served only to ensure the defendant's presence at court, but, since passage of Proposition 8, the Victim's Bill of Rights, "Public safety and the safety of the victim shall be the primary considerations." (Cal. Const., art. I, § 28(f)(3); see Pen. Code, § 1275; 4 Witkin & Epstein, Cal. Crim. Law (4th ed. 2012) Pretrial Proceedings, § 88, pp. 329-330, § 98, pp. 337-338); see also Cal. Const., art. I, §12.)³

³ The bail provision of Proposition 8 provides as follows: "Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations." (Cal. Const., art. I, § 28(f)(3).) That *constitutional* provision became effective on June 9, 1982. (See *People v. Smith* (1983) 34 Cal.3d 251, 257.) Yet, citing a *statutory* change, two appellate courts have opined that public safety was not a legitimate criterion until 1987. (See *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 642 (*Gray*); *In re McSherry* (2003) 112 Cal.App.4th 856, 861 (*McSherry*).)

“Although the ‘right’ to bail has constitutional recognition in the prohibition against excessive bail [citation], bail is not always a matter of right. However, with certain exceptions [citation], a defendant charged with a criminal offense ‘shall be released on bail.’ ” (4 Witkin & Epstein, Cal. Crim. Law, *supra*, § 90, p. 331.) A judge may “set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate.” (Pen. Code, § 1269c.) Whether a defendant’s bail may be conditioned upon a waiver of Fourth Amendment rights is an open question.

The California Supreme Court has assumed without deciding that such a condition is impermissible. (*In re York* (1995) 9 Cal.4th 1133, 1152.)

The Ninth Circuit Court of Appeals has rejected such a possibility, in a divided opinion with a written dissent from denial of rehearing en banc. (*United States v. Scott* (9th Cir. 2006) 450 F.3d 863; see also *Dela Cruz v. Kauai County* (9th Cir. 2002) 279 F.3d 1064, 1068 [“we are satisfied that one who has been released on pretrial bail does not lose his or her Fourth Amendment right to be free of unreasonable seizures”].)

Two post-Proposition 8 California appellate decisions are instructive.

In *McSherry*, *supra*, 112 Cal.App.4th 856, McSherry was a mentally disordered sex offender with a record of kidnapping and sex offenses against children by using a car, and of loitering near schools, and was charged again with loitering near schools. The *McSherry* court upheld a bail order--with modifications--designed to ensure public safety by precluding McSherry from driving any motor vehicle, and ordering him to stay away from children and schools, parks, etc., with children present. (*Id.* at pp. 858-859, 863.)

In *Gray*, *supra*, 125 Cal.App.4th 629, Gray was a physician charged with unlawfully prescribing and possessing drugs, possessing child pornography, and sexually abusing a former patient. (*Id.* at p. 635.) He was granted bail and ordered to stay away from the former patient. (*Ibid.*) Without notice, the Attorney General, on behalf of the Medical Board, appeared at Gray’s arraignment and asked for a bail condition precluding Gray from practicing medicine pending the outcome of the criminal case, which the trial

court granted. (*Id.* at pp. 635-636.) After a further hearing, the trial court confirmed the order, finding public safety required it. (*Id.* at p. 636.) In granting relief based on lack of notice and the availability of other remedies, the *Gray* court held in part as follows:

“In the case of a defendant arrested without a warrant for a bailable felony offense, bail is set at the scheduled amount for the charged offense unless a peace officer files a declaration under penalty of perjury setting forth the facts justifying an order setting a higher bail. (Pen. Code, § 1269c.) If simply raising the amount of bail requires such a verified showing, then surely an order depriving a defendant of his or her livelihood and professional license requires, at a minimum, a verified showing of imminent danger to the public.” (*Gray, supra*, 125 Cal.App.4th at p. 641.)

As set forth in the Background, *ante*, in this case the trial court made no particularized findings to justify conditioning defendant’s then-extant bail order on a Fourth Amendment waiver. It was not to secure defendant’s presence, for that was accomplished by maintaining what was presumptively an appropriate amount of bail. Nor did the trial court explain how public safety would be served by such a waiver, and we decline to speculate. Requiring the accused to waive a constitutional right in order to qualify for bail must be justified--if justifiable--by some particularized need. Facts demonstrating such need must be set forth in the record, to provide a means for adequate appellate review. Here, we have only a record showing the trial court’s apparent blanket view that *all* drug cases required search conditions to be added to bail orders. That is not the law.⁴

⁴ We note that another trial court in this appellate district has conditioned bail on such a waiver at least once. (See *People v. Gilbert* (May 6, 2004, C044838) [nonpub. opn.] [2004 Cal.App.Unpub. LEXIS 4483] [upholding search because defendant told officers he was on searchable probation, not that his search condition was imposed as a result of bail, declining to reach validity of conditioning bail on Fourth Amendment waiver].) However, we do not have information that this practice is widespread.

Further, Penal Code section 1289 allows a judge “upon good cause shown” to modify bail. (See *In re Annis* (2005) 127 Cal.App.4th 1190, 1195-1196.) However, one judge cannot peremptorily change another judge’s bail order. (See *In re Alberto* (2002) 102 Cal.App.4th 421, 426-431.) That is what happened here, where the only changed circumstance was that one of defendant’s three cases had just been dismissed for lack of evidence. We fail to see how the *dismissal* of one case for lack of evidence justifies imposing a new bail condition to two existing bail orders issued by other judges.

We will order the trial court to vacate the search conditions, previously stayed by this court.

DISPOSITION

The consolidated petitions for writ of habeas corpus are granted. The trial court is directed to vacate those portions of its bail orders imposing any search conditions, and ensure that the modification of bail is communicated to all relevant law enforcement agencies forthwith.

DUARTE, J.

We concur:

RAYE, P. J.

HULL, J.