SLIP OPINION NO. 2022-OHIO-8

DUBOSE, APPELLEE, *v.* MCGUFFEY, SHERIFF, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *DuBose v. McGuffey*, Slip Opinion No. 2022-Ohio-8.]

(No. 2021-1403—Submitted December 15, 2021—Decided January 4, 2022.)
APPEAL from the Court of Appeals for Hamilton County, No. C-210489, 2021-Ohio-3815.

DEWINE, J., dissenting.

{¶ 72} Make no mistake: what the majority does today will make Ohio communities less safe. Despite the fact that Crim.R. 46(B) requires a trial court to consider "the safety of any person or the community" when setting bail, the majority today says that a trial court is prohibited from even considering public safety when setting bail. Despite the fact that Ohio voters passed a constitutional amendment that guarantees victims the right to be heard in the bail process, the majority slams the door on a victim's right to be heard. And despite the fact that trial courts—who take evidence and can assess the credibility of witnesses—are in the best position to make bail decisions, the majority today invites appellate courts

to second-guess trial-court bail decisions based on nothing more than a paper record. I dissent.

I. Background

{¶ 73} Justin DuBose is alleged to have shot a man in the head while committing an armed robbery, leaving the victim to die. After the crime, DuBose and his accomplice fled. The two were picked up in Las Vegas. When DuBose was apprehended, he provided a fake identification card to law enforcement and was in possession of multiple credit cards that were not in his name, as well as $2,000 in cash.

{¶ 74} Bail was initially set at $1.5 million. DuBose's counsel filed a motion to reduce bail, and following a hearing, the trial court indicated that bail would be reduced to $500,000. The next day, however, the trial court reinstated the original bail amount. It did so because it concluded that the family of the deceased had not been notified of the hearing, in violation of Marsy's Law, Ohio Constitution Article I, Section 10a. Marsy's Law guarantees victims the right to be notified of and heard at a proceeding involving the release of the accused. The Constitution defines "victim" to include one who "is directly and proximately harmed" by a criminal act. *Id.* at Section 10a(D).

{¶ 75} The trial court reconvened the hearing to allow the victims to be heard. At the hearing, the grandmother of the deceased told the court: "We don't feel safe with him out on bond" and "My daughter's scared to death if he gets out." The state also introduced a picture showing DuBose with a number of firearms. At the conclusion of the hearing, the court overruled the motion to reduce bail.

{¶ 76} DuBose filed a second motion to reduce bail. Attached to the motion, DuBose presented travel itinerary and Instragram posts, which he claimed proved that he was not fleeing when he was picked up in Las Vegas. Yet the travel itinerary concerned a flight to Orlando, Florida, not Las Vegas, Nevada. And the Instagram photos were from Orlando and Los Angeles, again not Las Vegas. The

trial court noted that there was no legitimate reason for DuBose to present law-enforcement officers with fake identification in Las Vegas, but it also said that it would give DuBose "the benefit of the doubt" that his travel to Las Vegas was not flight. Nonetheless, the trial court overruled DuBose's motion, citing the seriousness of the crime and the statement it had heard from the victim's family member.

{¶ 77} DuBose then filed a writ of habeas corpus in the First District Court of Appeals. The court of appeals determined that it would apply de novo review to the trial court's decision—in other words, that it would consider the bail motion anew without providing any deference to the trial court's decision. But despite applying de novo review, the court of appeals didn't hold a hearing. Nor is there any indication in the record that the court of appeals provided any notice to the victims or allowed the victims the right to be heard as required by Marsy's law. *See* Ohio Constitution, Article I, Section 10a(A)(2) and (3). After reviewing the paper record, the court of appeals concluded the trial court had erred and reduced DuBose's bail to $500,000.

{¶ 78} The majority conducts what it says is its own de novo assessment of DuBose's bail, and concludes that the court of appeals appropriately reduced DuBose's bail. Majority opinion, ¶ 26, 34. I disagree with the result reached by the majority, and with the analysis it uses to get there.

II. The majority's flawed decision

{¶ 79} In my view, there are several problems with the majority's analysis. First, the majority applies the wrong standard of review. Second, in doing so, the majority fails to accord crime victims the rights they are guaranteed under Marsy's Law. And third, the majority refuses to allow trial courts to even consider public safety when setting bail. Unfortunately, these are mistakes that will have serious consequences when it comes to the safety of Ohio communities.

A. The majority applies the wrong standard of review

{¶ 80} The majority begins its analysis by concluding that the court of appeals correctly applied de novo review to the trial court's bail decision. I disagree.

{¶ 81} Article I, Section 9 of the Ohio Constitution entrusts the trial court with the responsibility of setting bail. The applicable provision states: "Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail." *Id.* "The court" in the provision obviously refers back to the court in which the defendant has been charged with an offense, meaning it is the trial court that bears the responsibility of setting bail.

{¶ 82} Crim.R. 46(B) makes clear that the trial court has discretion as to the terms of bail. Under the rule, in determining the conditions of pretrial release, a trial court is required to impose the least restrictive conditions that "*in the discretion of the court*, will reasonably assure the defendant's appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the criminal justice process." (Emphasis added.) *Id.* It is axiomatic that when something is entrusted to a trial court's discretion, we review that decision for an abuse of that discretion.

{¶ 83} "To tell a trial judge that he has discretion in certain matters is to tell him that there is a range of choices available to him. It is to tell him that the responsibility is his, and that he will not be reversed except for straying outside the permissible range of choice, i.e., for abuse of discretion." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 372, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961) (Frankfurter, J., dissenting). Indeed, to apply anything other than abuse-of-discretion review to the trial court's discretionary decision is almost nonsensical. How can one possibly review de novo a bail amount that is set based upon a judge's discretion?

{¶ 84} In endorsing de novo review, the majority cites our recent decision in *Mohamed v. Eckelberry*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132, ¶ 5, and claims that a court of appeals may "independently weigh the evidence to make its own bail determination." Majority opinion at ¶ 16. *Mohamed*, however, was an ill-advised departure from this court's longstanding precedent.

{¶ 85} Up until *Mohamed* was decided, the weight of Ohio authority was that an abuse-of-discretion standard applied. *See, e.g.*, *Ahmad v. Plummer*, 126 Ohio St.3d 262, 2010-Ohio-3757, 933 N.E.2d 256, ¶ 17 ("the court of appeals did not abuse its discretion in determining that the $3,000,000 bail was not excessive"); *Coleman v. McGettrick*, 2 Ohio St.2d 177, 180, 207 N.E.2d 552 (1965) ("we cannot find any abuse of discretion in the action of the courts denying bail"); *Colavecchio v. McGettrick*, 2 Ohio St.2d 291, 292, 208 N.E.2d 741, (1965) (we "will not interfere with the exercise of [the trial court's] discretion unless there appears to have been a gross abuse thereof"); *Hardy v. McFaul*, 103 Ohio St.3d 408, 2004-Ohio-5467, 816 N.E.2d 248, ¶ 7, 11 (upholding court of appeals' decision that applied abuse-of-discretion standard to excessive-bail claim); *In re Green*, 101 Ohio App.3d 726, 730, 656 N.E.2d 705 (8th Dist.1995) ("In a habeas corpus action to contest the reasonableness of bond, this court must determine whether the trial court abused its discretion"); *In re Scherer*, 7th Dist. Mahoning No. 01 C.A. 167, 2001-Ohio-3420 (applying abuse-of-discretion standard to excessive-bail claim); *King v. Telb*, 6th Dist. Lucas No. L-05-1022, 2005-Ohio-800, ¶ 20 ("In a habeas corpus action which challenges the amount of bond, we must review the decision of the trial court under an abuse of discretion standard"); *see also Hartman v. Schilling*, 160 Ohio St.3d 1486, 2020-Ohio-5506, 158 N.E.3d 617, ¶ 4-5 (Kennedy, J., dissenting) (explaining that the court's decision to dismiss the habeas petition for failure to state a claim without first holding a hearing was impossible to square with the court's statement in *Mohamed* that it would apply de novo review to excessive-bail claims).

{¶ 86} In *Mohamed*, at least, this court referred the matter to a master commissioner to take evidence before determining that the bail set by the trial court was excessive. *Mohamed* at ¶ 1. Indeed, the court in *Mohamed* premised its holding that de novo review applied on the fact that "in an original action, an appellate court may permit a habeas petitioner to introduce evidence to prove his claim and then exercise its own discretion in imposing an appropriate bail amount." *Id.* at ¶ 5. But in the case at bar, there was no hearing held and no new evidence submitted. The appellate court simply reviewed the transcripts from the trial court and substituted its judgment for the trial court's. Thus, whatever justification for de novo review existed in *Mohamed* does not exist here.

{¶ 87} To make matters worse, the majority requires not only that courts of appeals review de novo trial courts' bail decisions but also that this court review de novo the decisions of the courts of appeals and the trial courts. So that means that every person who has bail set is entitled to three independent looks at his bail terms. That's hardly a model for judicial efficiency.

{¶ 88} The bigger problem, though, is that trial judges on the whole will almost certainly make better bail decisions than appellate judges. Our Constitution and Crim.R. 46 entrust bail decisions to trial judges for a reason. The typical trial judge has extensive experience in setting the conditions of release, making such decisions on a regular, often daily, basis. "With experience in fulfilling that role comes expertise." *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Moreover, "[t]he trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). By applying deferential review, we ensure that the trial-court proceedings are the "main event," not just a "tryout on the road." *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

{¶ 89} In addition, trial courts are far better equipped than appellate courts to actively monitor a defendant's compliance with the terms of bail. They are closer to the action and can more easily and more quickly modify the conditions of release based on changed circumstances. Abuse-of-discretion review, in short, not only comports with our Constitution and rules, but also makes good sense.

{¶ 90} Our Constitution places bail decisions in the hands of trial judges, and Crim.R. 46(B) makes clear that bail decisions are entrusted to the trial judge's discretion. We ought to honor these commands and allow reversal of a trial court's bail decision only when the judge has abused the discretion she has been given.

B. The majority gives victims short shrift

{¶ 91} With the passage of Marsy's Law in 2017, Ohio voters elevated the rights of victims to constitutional status. And in the early stages of this case, Marsy's Law worked as it was intended. The trial court and the prosecutor realized that they had neglected to afford the victims the opportunity to be heard in the bail process. A new proceeding was convened, and after hearing the concerns and the fears of the deceased's family, the trial court decided to retain the original bail amount.

{¶ 92} But then came the review of that decision. The court of appeals determined that it would consider the matter de novo. Marsy's Law guarantees a victim the right "to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings." Article I, Section 10a(A)(2), Ohio Constitution. It also gives the victim the right "to be heard in any public proceeding involving release" of the defendant. *Id.* at Section 10a(A)(3).

{¶ 93} If a reviewing court is going to consider a matter anew, without any deference to what happened in the trial court, then it also needs to allow the victims to exercise the same rights they have in the trial court. There is no indication that that happened here. There is nothing in the appellate court record to indicate that

the victims were given any opportunity to be present and have their voices heard. And certainly, this court hasn't provided any such opportunity to the victims. Indeed, the majority brushes aside the family's fears based on nothing more than its reading of a paper record. Majority opinion at ¶ 31.

{¶ 94} We can't have it both ways. If we are going to say that a reviewing court must ignore the credence that a trial court put in a victim's statements, then we have to insist that the victim be given an opportunity to be heard in the reviewing court. To do otherwise would deprive victims of the rights they are guaranteed under our Constitution.

C. The majority improperly prohibits courts from considering the safety of the public

{¶ 95} The majority today holds that a court may not even consider the "potential threat posed by a defendant" to the safety of the community in setting a bail amount. Majority opinion at ¶ 19, 24. This is a dangerous holding that flies in the face of the plain language of Crim.R. 46(B) and our precedent.

{¶ 96} Crim.R. 46(B) provides:

> [T]he court shall release the defendant on the least restrictive conditions that, in the discretion of the court, will reasonably assure the defendant's appearance in court*, the protection or safety of any person or the community*, and that the defendant will not obstruct the criminal justice process. If the court orders financial conditions of release, those financial conditions shall be related to the defendant's risk of non-appearance, the seriousness of the offense, and the previous criminal record of the defendant.

(Emphasis added.) By its very terms then, Crim.R. 46(B) mandates that the court consider "the protection or safety of any person or the community" in setting bail

terms. The majority tries to get around this inconvenient fact by pointing out that public safety is not explicitly listed in the sentence that relates to financial conditions. Because of this, it reasons, "public safety is not a consideration with respect to the financial conditions of bail" and financial conditions must only relate to the risk of flight. (Emphasis deleted.) Majority opinion at ¶ 24. The problem with this reading is that included within the financial-conditions sentence is not only the risk of nonappearance but also "the seriousness of the offense, and the previous criminal record of the defendant." Crim.R. 46(B). The seriousness of the offense and a defendant's prior record relate directly to public safety considerations. Indeed, if the rule's drafters meant for only "the defendant's risk of non-appearance" to be considered, they would have stopped right after those words; there would have been no need to include anything else in the sentence.

{¶ 97} Furthermore, Crim.R. 46(C) explicitly lists factors to be considered "in determining the types, *amounts* and conditions of bail." (Emphasis added.) The first factor to be considered is "[t]he nature and circumstances of the crime charged, and specifically whether the defendant used or had access to a weapon." Crim.R. 46(C)(1). Plainly, whether someone used or has access to a weapon relates directly to public safety.

{¶ 98} The majority's position is also undercut by the public process that led to this court's adoption of the amendment. When the proposed changes to Crim.R. 46 were first put out for public comment, in October 2019, the proposed rule provided that "financial conditions shall be related *solely* to the defendant's risk of non-appearance." (Emphasis added.) *See* Proposed Amendments to the Ohio Rules of Practice and Procedure (Oct. 7, 2019), available at https://www.supremecourt.ohio.gov/ruleamendments/documents/ONLINE%20PACKET.pdf (accessed Dec. 23, 2021) [https://perma.cc/ZQT7-84D9]. The final version adopted by this court after the public-comment process, however, does not include the word "solely." Thus, in contrast to the majority's position today, it is

evident that the rule amendment was not intended to forbid consideration of public safety in setting a bail amount.

{¶ 99} Indeed, the Staff Notes to the July, 1, 2020 amendments to Crim.R. 46 make clear that public safety remains a proper consideration in setting bail. The Staff Notes provide: "Crim. R. 46 has been amended to improve efficiency in setting bail *in an amount* that effectively ensures (1) the defendant's continued presence at future proceedings, (2) that future proceedings will not be impeded by any effort to obstruct justice, and (3) *the safety of any person as well as the community in general*." (Emphasis added.)

{¶ 100} The primary purpose of bail is to ensure the appearance of the defendant. *Bland v. Holden*, 21 Ohio St.2d 238, 239, 257 N.E.2d 397 (1970). But up until today, it has been understood that a judge could consider the threat a defendant poses to the public in setting a reasonable bail. *See, e.g.*, *Chari v. Vore*, 91 Ohio St.3d 323, 328, 744 N.E.2d 763 (2001) (in habeas case, upholding trial court's bail decision and noting that the trial court could appropriately consider "the nature and circumstances" of the felonies charged as well as the fact that the defendant "allegedly committed some of the offenses when he was previously on bail"); *Allen v. Altiere*, 11th Dist. Trumbull No. 2015-T-0065, 2015-Ohio-3556, ¶ 19 ("Overall, the primary purposes of bail are to ensure the appearance of the defendant at trial and to provide for public safety"); *Garcia v. Wasylshyn*, 6th Dist. Wood No. WD-07-041, 2007-Ohio-3951, ¶ 4; *Lazzerini v. Maier*, 2018-Ohio-1788, 111 N.E.3d 727, ¶ 2-6 (5th Dist.).

{¶ 101} In disregarding all considerations other than the need to ensure the appearance of the accused in court, the majority relies on *Stack v. Boyle*, 342 U.S. 1, 5, 72 S.Ct. 1, 96 L.Ed. 3 (1951). Majority opinion at ¶ 12, 15. However, the United States Supreme Court has since made clear that *Stack* does not stand for the broad proposition for which it is cited by the majority. In *United States v. Salerno*, the court explained that "[n]othing in the text of the [excessive-bail clause of the

Eighth Amendment to the federal Constitution] limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation * * * is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." 481 U.S. 739, 754, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Thus, contrary to what the majority suggests, nothing in the federal Constitution precludes a trial court from considering public safety when setting the amount of bail. And certainly nothing in the text of the Ohio Constitution imposes such a prohibition. Article I, Section 9 of the Ohio Constitution.

{¶ 102} By prohibiting trial judges from even considering public safety in determining the amount of bail, the majority acts contrary to the plain terms of Crim.R. 46. And by tying the hands of trial judges who must make difficult bail decisions, the majority's action today will almost certainly make our communities less safe.

III. The trial court did not abuse its discretion

{¶ 103} This case is properly reviewed under an abuse-of-discretion standard. Here, DuBose was charged with the most serious of crimes, murder, aggravated robbery and aggravated burglary. It has long been understood that "if an accused is charged with crimes the conviction for which would result in long incarceration, with little hope of early release or probation, the incentive to abscond is greater and the amount [of bail] must be such as to discourage the accused from absconding." *Bland* at 239. The trial court also had before it substantial evidence that DuBose was a flight risk. He fled the jurisdiction after the crime, and when he was apprehended, he provided false identification to the arresting officer. He also had with him $2,000 in cash and a number of credit cards that were not in his name. Under these circumstances, I cannot say that the trial court abused its discretion in setting the bail that it did.

IV. Conclusion

{¶ 104} I dissent because I do not believe that the trial court abused its discretion in setting Justin DuBose's bail at $1.5 million. I also dissent because I worry about the consequences of the majority's decision today. In refusing to apply any deference to bail decisions made by trial judges, in refusing to ensure that victims' rights are protected, and in prohibiting a court from even considering public safety in making bail decisions, the majority departs from our rules, our precedent, and our Constitution. And in doing so, it undermines the safety of our communities.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Alex Scott Havlin, Assistant Prosecuting Attorney, for appellant.
