2020 WL 524915
City Court, New York,
Cohoes.

The People of the State of New York, Plaintiff,
v.
Jonathan R. Johnston, Defendant.

CR-0192-20/CO
|
Decided on February 3, 2020

Attorneys and Law Firms

For the People: P. David Soares, Albany County District Attorney (Shanza Malik, Esq. of counsel)

For Defendant: Stephen Herrick, Albany County Public Defender (Jessica Gorman, Esq. of counsel)

Opinion

Thomas Marcelle, J.

***1** Jonathan R. Johnston ("defendant") is charged with disobeying a traffic-control device in violation of Vehicle and Traffic Law § 1110 (a); aggravated unlicensed operation of a motor vehicle in the second degree in violation of the Vehicle and Traffic Law § 511 (2) (a) (ii) and aggravated unlicensed operation of a motor vehicle in the second degree in violation of the Vehicle and Traffic Law § 511 (2) (a) (iv). The latter two charges are Class A misdemeanors. Defendant appeared before the court, was provided the assistance of counsel and was arraigned (CPL 170.10). Counsel waived a formal reading of the charges and entered pleas of not guilty. Next, the court had to either "release[e] the defendant on his own recognizance or fix[ ] bail for his future appearance in the action" (CPL 170.10 [7]).

Under the new bail statute, after a defendant is arraigned, the court's options are based on two criteria: (1) the type of offense and (2) the defendant's risk of non-appearance. The legislature has created two categories of offenses—"qualifying offenses" and "non-qualifying offenses" (CPL 530.20 [1] [a-b]).[1] In all cases, the court must impose the least restrictive set of conditions "to secure the [defendant]'s return to court when required" (CPL 510.30 [1]). However, in qualifying offense cases, the court, if it believes it to be the least restrictive means to prevent the defendant from absenting himself from court, may impose cash bail as a prerequisite to release (CPL 530.20 [1] [b]).

In non-qualifying offense cases, like this one, the court must presume that the defendant should be released on his own recognizance (CPL 530.20 [1] [a]; 510.10 [3]). This presumption, however, is permissive and may be overcome if the court "finds on the record or in writing that release on the [defendant]'s own recognizance will not reasonably assure the [defendant]'s return to court" (id). To make such a finding, the court must examine information "relevant to the [defendant]'s return to court" (CPL 510.30 [1] [a-g]). If the court determines the presumption is overcome, it may place conditions on the defendant's release (CPL 530.20 [1] [b]). However, a court may never impose cash bail in non-qualifying offense cases, even when a court believes that cash bail is the least restrictive condition that "will reasonably assure the [defendant]'s return to court" (CPL 530.20 [1] [a]).

***2** In this case, the court has examined the relevant statutory factors and is left with a grave doubt that defendant will return to answer the charges (CPL 510.30 [1] [a-g]). Of particular significance to the court is defendant's record of failing to appear (CPL 510.30 [1] [a] and CPL 510.30 [1] [e]). There is a lot to consider here. Between September 2015 and February 2016, the defendant failed to answer a summons or to pay fines in town courts located in three different counties (Saratoga, Delaware and Rensselaer Counties). These failures to appear earned him suspensions from three town courts. After clearing

his suspensions, defendant relapsed back into his non-appearing ways. Between January 2017 and June 2019, defendant failed to answer a summons or to pay a fine in five different town courts in four different counties (Albany, Orange, Rensselaer and Schenectady Counties), earning him six separate suspensions. In all of these traffic matters, defendant was released without the burden of cash bail to ensure his return to court. Lacking a proper incentive, defendant has repeatedly and consistently ignored the lawful instruction of at least seven different courts commanding him to appear before them.

Most recently, in September 2019 defendant was charged in this court with several crimes including a violation of the Vehicle and Traffic Law § 511 (2) (a) (ii) and a violation of the Vehicle and Traffic Law § 511 (2) (a) (iv). During the course of prosecution, defendant twice disregarded a lawful order to appear in court on a return date. A bench warrant was issued on September 24, 2019, and defendant was returned on it on October 11, 2019. A month later, on November 19, 2019, the court had to once again issue a bench warrant because the defendant had failed to appear to answer the charges. Defendant returned to court on December 23, 2019.

Defendant has a long and incorrigible record of refusing to come back to court. The court believes with more than a fair amount of certainty that the defendant will not appear to answer the charges if released on his own recognizance. Thus, the court must "select[ ] the least restrictive alternative and conditions that will reasonably assure the [defendant]'s return to court" (CPL 530.20). Although not explicitly denoted, the phrase "least restrictive" surely refers to restrictions on defendant's liberty. It should be said that non-monetary conditions are not always less onerous on a defendant's liberty than bail.

If limited to non-monetary conditions, the court would have to place travel restrictions on defendant and require him to wear an electronic monitoring device as specifications of release. Thus, defendant's location would be both limited and easily determined. These conditions would allow the police to locate, seize and bring the defendant back to answer the charges lodged against him should he fail again to reappear. All of this would be quite the intrusion on defendant's liberty. Rather, the court is of the opinion that "the least restrictive alternative and conditions that will reasonably assure [defendant's] return to court" is cash bail (CPL 530.20 [1] [a]). However, the court is forbidden from setting cash bail because neither charge in this case constitutes a qualifying offense (CPL 510.30; 530.20).

This raises the question whether the legislature exceeded its authority by mandating that a court may never impose cash bail in non-qualifying offenses even when it determines—based upon an individual assessment—that it is the least restrictive method to ensure a defendant's appearance. The court allowed the parties time to brief and then argue this issue. Defense counsel argued against any constitutional violation; the prosecutor took no position.

The legislature is the strongest of the branches, wielding the most power, but its power does have limitations. One limit is the doctrine of separation of powers. New York's Constitution divides power among three branches of government. The Constitution "regulate[s], define[s] and limit[s] the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers" (*New York State Bankers Association, Inc. v. Wetzler,* 81 NY2d 98, 105 [1998]). Although this doctrine does not appear explicitly in the State Constitution, separation of powers has "deep, seminal roots in the constitutional distribution of powers among the three coordinate branches of government" (*Cohen v. State,* 94 NY2d 1, 11 [1999]). "The concept of the separation of powers is the bedrock of the system of government adopted by this State " (*Soares v. Carter*, 25 NY3d 1011, 1013 [2015] [internal quotations and citations omitted).

***3** The Constitution gives each branch distinct roles: the legislative branch creates the law (NY Constitution, article III, § 1); the executive branch enforces the law (article IV, § 1); and the judicial branch interprets the law and decides cases and controversies that arise under the law (article VI, § 1) (*see generally Bourquin v. Cuomo*, 85 NY2d 781 [1995]). In criminal law, the legislature determines those acts which constitute a crime by passing a penal statute that describes the crime's elements and sets the punishment thereof (*People v. Kohl*, 72 NY2d 191, 200 [1988]). The penal law in turn provides the authority for the executive branch to arrest, detain and prosecute those individuals who it has cause to believe violated the law (*Soares*, 25 NY3d at 1013). Those arrested and accused by the executive branch are taken before a judge to be formally charged (CPL 170.10). Thereafter, the court must guarantee that the defendant receives a fair process in accordance with the procedure established by the legislature and the mandates of the state and federal constitutions.

The legislature has a dual concern when it comes to bail. The first concern is public safety, and the legislature's most fundamental power revolves around making laws to protect the public (*Mugler v. Kansas*, 123 US 623, 661 [1887]). Whether

a defendant may be detained pre-trial because he poses a danger to the community, is a call for the legislature to make —"[t]he means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed " (*Missouri Pac. R. Co. v. City of Omaha*, 235 US 121, 127 [1914]). To the extent that the legislature deems appropriate, it may authorize, within constitutional limits, a court to consider dangerousness as a factor (*see United States v. Salerno*, 481 US 739, 754-55 [1987]).

Here, the legislature has not exercised its prerogative to make dangerousness explicitly relevant to pre-trial release. Moreover, to impose dangerousness as a factor in a pre-trial release (or not to do so) is of no moment to a court with respect to the exercise of its power. As discussed below, a court's institutional concern is making defendants appear before it to answer for the charges which have been lodged against them. A dangerous defendant who is committed to the custody of the sheriff poses little threat of non-appearance. Therefore, this decision neither touches nor treads upon a defendant's reputed dangerousness as a factor in a pre-trial release.

The second concern of the legislature regarding bail is to provide for the welfare of the people of New York. An indispensable part of providing for the social welfare is to create a level playing field in the criminal justice system. There is a hazard innate to a cash bail system—it disproportionately affects indigent defendants. That is, affluent defendants may have the resources to obtain pre-trial liberty while poor defendants cannot. The consequences are that not only do poor defendants suffer a loss of liberty at a moment when they are presumed innocent, but also, because of their incarceration, they are hampered in preparing their defense to the accusations against them. This is not a perceived unfairness; it is quite real. It is this concern that largely motivated bail reform.

Prior to bail reform, it must be said that, while there were bail factors to be considered, the area of pre-trial release was rather an amorphous and ill-defined process. Of course, a standardless regime coupled with no duty of the court to explain a decision to set bail can lead to abuses (*see People ex rel. Gonzalez v. Warden, Brooklyn House of Det.*, 21 NY2d 18, 24 (1967) [noting that the court "would be less than candid if we did not admit that the present bail system is subject to abuse"]; *see also In re Bauer*, 3 NY3d 158, 116—17 [2004]). To solve this problem, the legislature enacted a new, elevated standard to focus and to cabin a court's decision-making process. As far as it is relevant to this case, it placed two restrictions upon the court.

***4** The first restriction the legislature implemented is a set of standards and burdens to which a judge must adhere when making bail decisions. Most importantly, the legislature imposed the presumption that a defendant is entitled to release on recognizance and the requirement that the court must set the "least restrictive alternative and conditions that will reasonably assure the [defendant]'s return to court" should the presumption be overcome (CPL 530.20 [1] [a]). No problem exists with the enactment of standards for that is the legislature's job. Establishing standards, burdens of proof and the "appropriate confidence level [for judicial action] is ultimately a judgment best left to legislatures" (*Hall v. Florida*, 572 US 701, 742 [2014] [Alito, J. dissenting]). Additionally, in conjunction with the "least restrictive" standard, the legislature enumerated a list of factors for the court to consider (CPL 510.30 [1] [a-g]) and required the court to explain in writing or on the record any decision that erased the presumption of recognizance (CPL 530.20 [1] [a]). Again, no problem is presented because "[a bail decision] calls for a fact determination" (*People ex rel Lobell v. McDonnell*, 296 NY 109, 111 [1947]), and "[u]nless the record sets forth the factors utilized in determining the amount of bail , the exercise of discretion must be deemed arbitrary" (*People ex rel. Ryan v. Infante*, 108 AD2d 987, 988 [3d Dept 1985]).

The second restriction that the legislature placed upon the judiciary is to deny judges the ability to set bail in a certain category of cases. It is this categorical prohibition on judicial discretion that raises the question of whether the legislature impermissibly trespassed upon the judicial power. This is not an easy question with an obvious answer. It is not as simple as drawing a line and declaring that bail is either a judicial or a legislative function. While the powers of the branches of government are separate, they work in a coordinate, overlapping and for the most part harmonic fashion. The boundaries that divide the branches' exercise of power lack precision and no mathematical formula exists to determine encroachments—yet, boundaries do exist (*see Plaut v. Spendthrift Farm, Inc.*, 514 US 211, 241 [1995] [Breyer, J., concurring]).

Deciding whether certain powers have been committed by the Constitution to another branch of government, or whether an action of that branch exceeds such authority, is itself a delicate exercise in constitutional power. However, it is the role of the judiciary to say what the law is and thus "be[ ] the final arbiter of true separation of powers disputes" (*Cohen*, 94 NY2d at 11). No matter how unpleasant, a court cannot shrink from this task.

The place to start untangling this separation of powers question is by defining the core function of the judiciary. The judiciary is an "independent branch of the government, as necessary and powerful in [its] sphere as either of the other great divisions" (*Riglander v. Star Co.*, 98 AD 101, 105 [1st Dept 1904]). As such, a court has a fundamental interest in retaining its independence in the administration of justice. Thus, every court has the inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants" *Landis v. N. Am. Co.*, 299 US 248, 254—55 [1936]; [*see also Gabrelian v. Gabrelian*, 108 AD2d 445, 448 [2d Dept 1985] [noting the judiciary has the ability "to do all things reasonably necessary for the administration of justice within the scope of their jurisdiction"]). For without this power, the court would not be an independent, co-equal branch. Instead, it would be a dependent branch.

In a learned opinion, the Bronx Supreme Court expanded upon the inherent judicial power: "The concept of judicial exercise of inherent power has been recognized in New York from the earliest times. Courts of record [ ] are vested with inherent powers, which are neither derived from nor dependent upon express statutory authority, and which permit such courts to do all things reasonably necessary for the administration of justice within the scope of their jurisdiction" (*People v. Green*, 170 Misc 2d 519, 522—23 [Sup Ct, Bronx County 1996] [internal citations and quotations omitted]). Thus, "under the inherent powers doctrine, [a court] is vested with all powers reasonably required to enable it to: perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective . . . . Inherent judicial powers derive not from legislative grant or specific constitutional provision, but from the fact it is a court ... and to be a court requires certain incidental powers. . ." (*Wehringer v. Brannigan,* 232 AD2d 206, 207 [1st Dept 1996] [internal citations and quotations omitted]; *see also Jones v Allen*, 185 Misc 2d 443, 446-47 [App Term, 2d Dept 2000]; *Lang v. Pataki*, 176 Misc 2d 676, 689-691 [Sup Ct, New York County 1998]).

***5** So, the question becomes whether setting bail is a part of the court's inherent power to efficiently control the course of a criminal proceeding. History counsels that bail is ultimately a judicial function—such was the conclusion of English common law courts: " 'The magistrate in taking bail exercises an authority essentially judicial.' Cooley Const. Lim. (5 ed.) 378, n. 4. This is substantially the remark of Lord DENMAN in *Linford v. Fitzroy,* 13 Q. B. 240. This eminent judge there said: 'But, upon the fullest consideration, we are of opinion that the duty of the magistrate in respect to admitting to bail can not [sic] be thus split and divided; that it is essentially a judicial duty' " (*Gregory v. State ex rel. Gudgel*, 94 Ind 384, 386 [1884]).

As the Indiana Supreme Court noted after having surveyed the historical trek of bail: "it is often difficult to draw the line between powers which are *quasi*-judicial and those which are, in a constitutional sense, judicial powers, but we encounter no such difficulty here, for the power to fix bail has always been regarded by the courts and text-writers as a judicial one, and is, in its nature, essentially a judicial power belonging to courts" (*Gregory*, 94 Ind at 389). Thus, it seems a safe conclusion that "common law courts had inherent power to grant bail to prisoners before them and over whom they had jurisdiction" (*State v. Smith*, 84 Wash2d 498, 501 [1974]).

It is important to understand why history broke the way of the courts. Unlike defining crimes and proscribing punishment which is a legislative function, *bail is not punishment*. Rather, bail's purpose is to ensure an orderly process for the courts and that defendants answer for the crime of which they have been accused (*Stack v. Boyle*, 342 US 1, 4-5 [1951]). Consequently, a court's historical power to set bail "is incidental either to the power to hold a defendant to answer, or to the power to hear and determine the matter in which the defendant is held" (*Smith*, 84 Wash2d at 501)—that is, bail, or more accurately setting conditions of release, is about protecting and exercising a court's inherent power.

Discretion to determine the means—including setting cash bail—for securing a defendant's appearance in court is essential to a court's ability to efficiently control the course of a criminal proceeding. To be sure, the legislature may enact laws complementing the inherent authority of the judiciary. The legislature may develop and set laws that govern procedure in both the civil and criminal arenas (*Kohl*, 72 NY2d at 200; *Gonzalez*, 21 NY2d at 24). Nevertheless, "while the legislature has the power to alter and regulate the proceedings in law and equity, it can only exercise such power in that respect as it has heretofore exercised; and it has never before attempted to deprive the courts of that judicial discretion which they have been always accustomed to exercise" (*Cohn v. Borchard Affiliations*, 25 NY2d 237, 249 [1969] [internal citations and quotations omitted]). In other words, the legislature has grand discretion to limit options and "[s]o long as a statute does not wrest from courts [ ] *final* discretion . . . , it does not infringe upon the constitutional division of responsibilities" (*People v. Eason,* 40 NY2d 297, 301 [1976] [emphasis in the original]).

But bail reform "wrest[s] from courts [ ] *final* discretion" in determining the least onerous conditions to ensure that a defendant answers the charges; thus, it imperils the court's ability to properly and efficiently administer justice (id). In short, a judge unable to make judgments is not a judge. Consequently, by stripping judges of necessary discretion to control the appearance of a defendant, the legislature improperly interfered with the judiciary's capacity to fulfill its constitutional mandate.

***6** One collateral point bears emphasis. The converse situation, where the legislative branch tells a court *not* to release a defendant under particular circumstances (*see e.g.* CPL 530.20 [2] [a]), does not interfere with the court's inherent power to ensure that the defendant appears before it. A defendant in jail is going nowhere. Thus, forcing a court to remand a defendant to jail, while potentially raising other constitutional issues, does not implicate the separation of powers since the defendant can be produced in court upon demand.

To summarize, it was fitting and proper for the legislature to set the standard, a high standard, that a court must employ in determining conditions of pre-trial release. While it is a most expeditious solution for the legislature to mandate categorical decisions to repair bail abuses, expediency is not the touchstone of the separation of powers. By its nature the separation of powers requires vigilant and cautious governance that prevents one branch, no matter how well intentioned, from usurping the role of another. In the vast majority of cases, the least restrictive condition standard will result in non-monetary conditions of release, but not always. And such is the case here. In this case, given defendant's historic inability to return to court as directed, the court needs to set conditions of release. Since the court finds that the least restrictive condition to ensure defendant's return to court requires the setting of bail, CPL 530.20 (1) and CPL 510.10 (3) are unconstitutional as applied to this case.

Now, before setting bail, the court must consider defendant's financial circumstances and ability to post bail without undue hardship (CPL 510.30 [f]). The court will allow the defendant this opportunity. Therefore, defendant is to appear in Cohoes City Court on Wednesday February 5, 2020 at 9:00 a.m. for further proceedings consistent with this decision.

The foregoing constitutes the Decision and Order of the court.

Dated: February 3, 2020

Cohoes, New York

Thomas Marcelle

City Court Judge

All Citations

--- N.Y.S.3d ----, 2020 WL 524915, 2020 N.Y. Slip Op. 20024

Footnotes

1 CPL 530.20 provides:
1. (a) In cases other than as described in paragraph (b) of this subdivision the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court. The court shall explain its choice of alternative and conditions on the record or in writing.
(b) Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing.

