IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,265

STATE OF FLORIDA,

Petitioner,

vs.

JEAN DAVID PAUL,

Respondent.

****
ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
****

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellant herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court and Respondent in the Fourth District Court of Appeal. Petitioner will be referred to herein as “the State”. Respondent, Jean David Paul, was the defendant in the trial court and Petitioner in the Fourth District Court of Appeal. He will be referred to herein as “Respondent” or “Defendant”. References to the record will be indicated as “R” followed by the title of the document referenced. Reference to the transcript will be by “T” followed by the page number. The Appedix consists of the Fourth Disctrict Court of Appeal’s opinion and mandate.

STATEMENT OF THE CASE AND FACTS

On June 11, 1998, an Information was filed which charged the Defendant with Attempted Murder in the Second Degree for the May 22, 1998, shooting of Ricardo Guerrier. (R - Information). The Defendant was released on a $25,000 bond pursuant to the trial court's order of June 10, 1998. (R - Order dated June 10, 1998). Little more than six months later, and while still on bond, Respondent was arrested for:

1. carrying two concealed firearms, one with the serial number scratched off
2. possession of cannabis under 20 grams
3. possession of drug paraphernalia.

(R - Probable Cause Affidavit dated December 31, 1998). As a result of this arrest, the State moved to revoke Respondent's bond. (R - Motion to Revoke Bond).

During the hearing on the State's Motion to Revoke Bond, the Defendant's brother, Sam Paul ("S. Paul"), admitted he did not have a gun permit, but the firearm with the serial number removed was his which he had purchased during the previous year, from a vendor whose name he could not recall, and the related gun purchase paperwork could not be located. (T 7-10 and 21-22). Further, S. Paul claimed when he had visited his father, about two weeks before Respondent's latest arrest, he borrowed his father's car.(T 10-13). The purpose of borrowing the automobile was to enable him to cash a pay check and to pawn the firearm, but he did not know which pawn

shop he planned to visit. (T 11-14 and 17-24). S. Paul also explained he was the party responsible for scratching the serial number from the weapon in order to make the gun saleable. (T 21-24). The weapon was not sold that day because he was interrupted; instead, he left it in his father's car. (T 20-24)

Detective Soubasis ("Soubasis") testified that on December 30, 1998, he observed the Defendant and four other persons smoking cannabis behind a Pembroke Pines movie theater. (T 30-32). Before he could obtain back-up, the group departed the area and got into a vehicle. (T 32) At this point, the officers converged on the car, found the Defendant behind the wheel, and ordered the occupants to show their hands. (T 32-33). The front seat passenger and Respondent did not comply immediately, instead, they moved their hands near the floorboard of the front seat. (T 33). Eventually, the occupants were removed from the vehicle. (T 33-34).

As the Defendant stepped from the automobile, several plastic baggies dropped to the ground. (T 34). Later, these were determined to contain marijuana. (T 34) Having been read his Miranda[1] rights, Respondent admitted he had been smoking marijuana that evening and the officers would find more marijuana in the car. (T 34-36). During the search, Soubasis located under the driver's seat an unloaded .38 caliber Davis Industries chrome handgun, with the serial number removed, and a loaded 9 mm handgun in a bookbag

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

behind the front passenger seat. (T 36-37). During this encounter, Soubasis smelled burned cannabis and determined the suspects were under the influence of marijuana based upon their relaxed demeanor, and the look of their eyes. (T 45).

Speaking with Soubasis, Respondent admitted the backpack and guns were his and that he had purchased both firearms "on the street." (T 37 and 45). While aware the serial number had been removed from one of the guns, the Defendant could not explain why he had purchased that firearm. (T 37) Responding to Soubasis's inquiry, Respondent offered he had been involved in a shooting incident in Miramar, during which he had shot someone, and that "he carries the guns for protection in case the person that he was involved with [in] this conflict wanted to get back at him to come and shoot at him." (T 37-38).

Respondent testified he and his friends were using his father's car that evening and although he was in the driver's seat when confronted by the police, he had not been driving because he did not have his driver's license. (T 46-47). While admitting he told Soubasis the guns were his, Respondent informed the trial judge he had made this statement in hopes of protecting his brother and another friend. (T 47-48). Further, the Defendant confessed to having smoked marijuana on the evening of his arrest. (T 48).

On cross-examination, the Defendant denied the backpack was his or that he had informed the officer he had purchased the guns. (T 49). However, he acknowledged, then denied, informing the

officer he was carrying the guns for protection. (T 49-50). When the prosecutor inquired how it was Soubasis learned of Respondent's other criminal case (attempted murder trial), the Defendant stated the officer looked up his name which he obtained from his driver's license which was found in the car. (T 50-51). Respondent then confessed he had not been truthful to the trial judge when he had stated he did not have his driver's license that evening. (T 51). At this point, the trial judge asked the Defendant to step down from the witness stand. After hearing defense counsel did not wish to question the Defendant further, the judge stated, "[The Defendant] is obviously not telling the truth. His brother comes in here and lied (sic). So all I'm hearing is a bunch of lies. Do you want to say anything? It is pretty obvious--." (T 51-52).

Following the testimony of Justal Paul, Respondent's father, in which Mr. Paul agreed he would be willing to monitor his son if house arrest were ordered, the trial judge heard arguments of counsel. The State asserted the bond should be revoked because Respondent was charged with a "dangerous crime" and while out on bond, committed additional criminal offenses which confirmed Respondent posed a threat of harm to the community. (T 59-60). The prosecuting attorney noted that the Defendant had committed a burglary of a dwelling and grand theft for which he had received a juvenile adjudication on April 8, 1997. (T 59). Arguing for revocation of bond, the prosecutor stated:

> … Burglary of a dwelling is one of the

> enumerated dangerous offenses, and he then commits [attempted] murder two, which is another enumerated dangerous offense, which that (sic) is current arrest. And then he proceeds to go out and possess firearms, while out on that.
>
> I think, Judge, if we wait until the point of him (sic) using the firearm to determine that he is a risk to the community, I think we are doing a disservice to the community. He is alleged to have used a firearm before, where he has fired shots and he has hit a person, that's what we are alleging under the attempt murder two.
>
> And, now, he is out in the possession of more guns and is smoking marijuana. He is hanging out at night. I mean, this was trouble about to happen had this officer not taken the time to watch these people and approach them.

(T 60).

Based upon the trial judge's reasoning which follows, the Defendant's bond was revoked.

> I'm making a finding that [the Defendant] did violate pretrial release by not refraining from any criminal activity of any kind under 903. There is probable cause to believe that he was carrying a concealed firearm, and to believe that one firearm that he did have had an altered serial number, which was actually crossed off, and that he possessed marijuana and drug paraphernalia. I'm not sure what that is, maybe the baggies.
>
> (The prosecutor, Mr. Stiffler, informed the trial court that it was "[t]he baggies and the rolling papers."
>
> We have testimony that we have taken from the police officer here, it is not charged, but he did indicate that he saw [the Defendant] smoking marijuana. Your client admits that he was smoking marijuana on this occasion.

> The Court does so find that he is on bond. This bond is for a dangerous crime, which is attempted second degree murder. The Court finds, based upon what I have heard, that he poses a threat of harm to the community. He is presently charged with a dangerous crime. There is substantial probability that he committed the crime, and that the facts and circumstances of the crime indicate a disregard for the safety of the community, and that there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons.
>
> I would find that he did previously have a conviction for a dangerous crime within ten years, which is burglary dwelling (sic). The fact that he is carrying guns, smoking marijuana, that certainly shows that he is a danger. I can't protect the community from him, except by putting him in jail until the case is concluded, that's my ruling. His bond is revoked. Draw me up an order.

(T 62-63 and R - Order Revoking Bond).

The Defendant filed a petition for writ of habeas corpus with the Fourth District Court of Appeal ("Fourth District") challenging the revocation of his bond. (Emergency Petition). The State responded, and the Defendant filed a reply. (R - State's Response and the Defendant's Reply). The State asserted the Fourth District should reconsider its decision in Merdian v. Cochran, 654 So. 2d 573 (Fla. 4th DCA 1997) and follow Houser v. Manning, 719 So. 2d 307, 309-10 (Fla. 3d DCA 1998) which found that once a defendant violates a bond condition, the bond may be revoked without regard to section 907.041, Florida Statutes. (R - State's Response in Opposition to Emergency Petition, pg. 8). The Third District Court of Appeal "(Third District"), in Houser, also questioned Merdian

and its apparent oversight of Gardner v. Murphy, 402 So. 2d 525 (Fla. 5th DCA 1981). Houser, 719 So. 2d at 309-310. The Fourth District rejected the analysis presented in Houser, granted the Defendant's petition for writ of habeas corpus, and remanded the matter to the trial court for further proceedings consistent with the opinion. Paul v. Jenne, 24 Fla. L. Weekly D581 (Fla. 4 DCA March 03, 1999). (Appendix). The Fourth District also certified conflict with Houser. Paul, 24 Fla. L. Weekly at D583. Two weeks later, the Third District certified conflict with Paul. Rieche v. Spears, 727 So. 2d 409 (Fla. 3d DCA 1999)(certifying conflict with Paul and finding a denial of a subsequent bond upon revocation of the original bail was proper "notwithstanding that the terms of the pretrial detention statute and rule were not satisfied"). This Court's discretionary jurisdiction was invoked.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal erred in finding pre-trial release on bond following the forfeiture of the original bond due to the commission of new criminal offenses is a matter of constitutional right. Once afforded pre-trial release following an initial arrest, a defendant's constitutional rights have been satisfied. When a defendant forfeits his bond by committing another crime, a new bond is not required automatically; a trial court has the discretion and inherent authority to deny bail. Houser v, Manning, 719 So. 2d 307 (Fla. 3d DCA 1998); Gardner v. Murphy, 402 So. 2d 525 (Fla. 5th DCA 1981). This Court should adopt the reasoning in Houser and Gardner and find a defendant who has committed a crime while on pre-trial release is not entitled to new bond as a matter of right; the trial court has discretion, independent of section 907.041, Florida Statutes to deny a subsequent bond upon defendant's violation of a condition of the original pretrial release.

ARGUMENT

WHETHER A TRIAL COURT HAS DISCRETION AND INHERENT AUTHORITY, INDEPENDENT OF SECTION 907.041(4), FLORIDA STATUTES, TO DENY A SUBSEQUENT BOND APPLICATION TO A DEFENDANT WHO VIOLATES A CONDITION OF HIS ORIGINAL BOND BY COMMITTING A NEW CRIMINAL OFFENSE.

While a defendant has a constitutional right to have a reasonable bond following his initial arrest, the defendant who violates a condition of his pretrial release is not entitled to automatic readmission to bond. Once initially released on bond, a defendant's constitutional rights have been satisfied. When the defendant violates a bond condition, he forfeits that bond and the trial court has discretion to revoke it. Florida courts have held that requiring readmission to bond following a subsequent violation of the bond terms is not mandated under the constitution, but is left to the sound discretion of the trial judge. Houser v, Manning, 719 So. 2d 307 (Fla. 3d DCA 1998); Gardner v. Murphy, 402 So. 2d 525 (Fla. 5th DCA 1981).

In the instant matter, the Fourth District found the dictates of section 907.041(4)(b), Florida Statutes must be met when pretrial release is denied, and because they were not met here, the writ was issued. Paul v. Jenne, 24 Fla. L. Weekly D581, 582 (Fla. 4th DCA March 3, 1999). The Fourth District erred in granting the writ of habeas corpus and remanding Respondent's case to the trial court for consideration of a new bond under section 907.041(4)(b)(4), Florida Statutes after Respondent had committed

new offenses while on bail for a dangerous crime.

Prior to its 1982 amendment, Article I, section 14 of the Florida Constitution provided:

> Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on **reasonable bail** with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great.

As amended, Article I, section 14 of the Florida Constitution now provides:

> Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on **reasonable conditions**. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or **assure the integrity of the judicial process**, the accused may be detained.

Consistent with this constitutional provision, the criteria to be followed when determining the propriety of bail are included in section 903.046, Florida Statutes (1997) which provides:

> (1) The **purpose of a bail** determination in criminal proceedings is to ensure the appearance of the criminal defendant at subsequent proceedings and to **protect the community against unreasonable danger** from the criminal defendant.
>
> (2) When determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the

court shall consider:

(a) The nature and circumstances of the offense charged.

(b) The weight of the evidence against the defendant.

(c) The defendant's family ties, length of residence in the community, employment history, financial resources, and mental condition.

(d) The **defendant's past and present conduct, including any record of convictions**, previous flight to avoid prosecution, or failure to appear at court proceedings. However, any defendant who previously had willfully and knowingly failed to appear and breached a bond as specified in s. 903.26, but who had voluntarily appeared or surrendered, shall not be eligible for a recognizance bond; and any defendant who willfully and knowingly failed to appear and breached a bond as specified in s. 903.26 and who was arrested at any time following forfeiture shall not be eligible for a recognizance bond or for any form of bond which does not require a monetary undertaking or commitment equal to or greater than $2,000 or twice the value of the monetary commitment or undertaking of the original bond, whichever is greater.

(e) The **nature and probability of danger which the defendant's release poses to the community**.

(f) The source of funds used to post bail.

(g) **Whether the defendant is already**

> **on release pending resolution of another criminal proceeding or on probation, parole, or other release pending completion of a sentence**.
>
> (h) The street value of any drug or controlled substance connected to or involved in the criminal charge. It is the finding and intent of the Legislature that crimes involving drugs and other controlled substances are of serious social concern, that the flight of defendants to avoid prosecution is of similar serious social concern, and that frequently such defendants are able to post monetary bail using the proceeds of their unlawful enterprises to defeat the social utility of pretrial bail. Therefore, the courts should carefully consider the utility and necessity of substantial bail in relation to the street value of the drugs or controlled substances involved.
>
> (i) **The nature and probability of intimidation and danger to victims**.
>
> (j) **Any other facts** that the court considers relevant.

Thus, it would appear this statutory provision gives trial judges discretion in granting or denying pretrial release.

Even in enacting section 907.041, the legislature made its intent clear that while there is a presumption that an accused should be granted pretrial release, it is not mandatory.

> (1) Legislative intent.--It is the policy of this state that persons committing serious criminal offenses, posing a threat to the safety of the community or the integrity of the judicial process, or failing to appear at

> trial be detained upon arrest. However, persons found to meet specified criteria shall be released under certain conditions until proceedings are concluded and adjudication has been determined. The Legislature finds that this policy of pretrial detention and release will assure the detention of those persons posing a threat to society while reducing the costs for incarceration by releasing, until trial, those persons not considered a danger to the community who meet certain criteria. It is the intent of the Legislature that the primary consideration be the protection of the community from risk of physical harm to persons.
>
> (2) Rules of procedure.--Procedures for pretrial release determinations shall be governed by rules adopted by the Supreme Court.

Section 907.041(1) and (2). Clearly, pretrial release is contemplated, but such release is not unconditional or unrestricted. Gardner, 402 So. 2d at 526. In fact, this Court, recognized "there are circumstances under which the right to bail in otherwise bailable causes would be forfeited by breach of prior bonds." Ex. Parte McDaniel, 86 Fla. 145, 97 So. 317, 318 (1923). Considering the 1982 version of Article I, section 14, Florida Constitution, the Third District determined the trial court's power to enforce the conditions of the pretrial release or to order revocation of bail was not reduced by the amended constitution. Houser, 719 So. 2d at 310-11. While a trial court must set a reasonable bail for a defendant's initial arrest, the judge has inherent authority to deny bail when his orders are disregarded. Middleton v. Polk, 399 So. 2d 1105 (Fla. 5th DCA 1981)(where a

defendant's conduct "evinces a flagrant disregard of the court's authority or effort of process" the defendant's constitutional right to pretrial release may be forfeited).

A person granted release on bond must abide by certain reasonable conditions, some imposed by statute, and others imposed at the discretion of the trial court. See sections 903.046 and 903.047, Florida Statutes (1997). Should the defendant fail to abide by the conditions of his bail, it may be revoked pursuant to Florida Rule of Criminal Procedure 3.131(g). Hence, pre-trial release is a right which may be forfeited by the subsequent actions of the defendant. As noted by the Fifth District Court of Appeal, "…it is constitutionally permissible to revoke for cause a reasonable bail already granted and to then deny subsequent applications…" Gardner, 402 So. 2d at 526.

Consistent with these provisions, the Third District held that "[o]nce a defendant's bond has been properly revoked for a violation of a bond condition, the question whether to grant any further bond is addressed to the sound discretion of the trial court." Houser, 719 So. 2d at 309. Following Gardner, the court in Houser agreed "[t]here is no reason why a defendant who has committed a new criminal offense while released on bond should then be conditionally released again in a revolving door fashion." Houser, 719 So. 2d at 310 (citation omitted).

The defendant in Houser argued he must be granted bond unless the State proves the need for pretrial detention under section

907.041. Id. Rejecting this, the Houser court opined:

> There is not the slightest indication that the 1982 enactments were intended to cut back on the court's power to enforce bond conditions, and revoke bond where bond conditions have been breached. Indeed, it has been explicitly held that section 907.041 is complementary to, and does not replace, a trial court's already-existing power to deny bail. See State v. Ajim, 565 So.2d 712 (Fla. 4th DCA 1990).

Houser, 719 So. 2d at 310-11. As a result, the Third District found a new bond need not be granted when a defendant's prior bond was revoked due to a violation of the conditions of the pretrial release.

Upon the completion of the testimony at the bond revocation hearing in the instant case, the trial judge stated:

> The Court does so find that he is on bond. This bond is for a dangerous crime, which is attempted second degree murder. The Court finds, based upon what I have heard, that he poses a threat of harm to the community. He is presently charged with a dangerous crime. There is substantial probability that he committed the crime, and that the facts and circumstances of the crime indicate a disregard for the safety of the community, and that there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons.
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> I would find that he did previously have a conviction for a dangerous crime within ten years, which is burglary dwelling (sic). The fact that he is carrying guns, smoking marijuana, that certainly shows that he is a danger. I can't protect the community from him, except by putting him in jail until the case is concluded, that's my ruling. His bond is revoked. Draw me up an order.

(T, pg. 62-63). Thus, the trial judge found the Defendant warranted pretrial detention based upon the proof presented.

Relying upon its decisions in Merdian v. Cochran, 654 So. 2d 573 (Fla. 4th DCA 1995) and Metzger v. Cochran, 694 So. 2d 842 (Fla. 4th DCA 1997), the Fourth District found the above order did not comply with section 907.041(4)(b)(4), and thereby, limited the trial court's authority to deny pretrial release except as provided by that statutory provision. Paul, 24 Fla. L. Weekly at D583. In Merdian, the court was faced with a challenge to the denial of bond where the trial court had not made "any finding that no conditions would protect the community from the risk of physical harm and assure the presence of the petitioner at trial." Merdian, 654 So. 2d at 575. The Fourth District Court of Appeal opined that "[o]nly where no conditions of release can reasonably protect the community from the risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, may the accused be detained. Id. Because there was no proof produced, the order revoking bond was vacated and the matter returned to the trial court. Id. at 576.

In rendering its decision in Metzger, the Fourth District found that a determination that a defendant is a danger to the community when he violates his bond conditions was not a sufficient basis for denying pretrial release under Florida Rule of Criminal Procedure 3.131(b)(3), but that section 907.041(4)(b)(4) must also be considered. As a result, Metzger adds an additional burden upon

the State, and affords a Defendant more protection than contemplated by either the Florida Rules of Criminal Procedure or the constitution.

In the instant case, the trial judge made the specific finding that the Defendant was on bond for a dangerous offense and that "based upon what I have heard, [] he poses a threat of harm to the community … I can't protect the community from him, except by putting him in jail until the case is concluded…" (T, pg. 62-63). Thus, it would appear the order denying bond in this case should have been affirmed under the Merdian line of cases as well as Houser.

Under Houser, a defendant, on bail at the time he committed a new offense, re-admission to bail would be left to the sound discretion of the trial court[2]. The Fourth District's opinion in the instant case certified conflict with Houser in that it found the State must prove always that the defendant meets the criteria of section 907.041(4)(b)(4) before pretrial detention is proper.

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[2]A review of the trial judge's order denying bond could be interpreted as having found the Defendant qualified for pretrial detention under both section 907.041(4)(b)(4)b and c, Florida Statutes (1997). (T 6, pgs. 62-63). Thus, the trial court could be deemed right for any reason. Before the District Court, the State noted the Defendant challenged only the finding that juvenile adjudications qualified as a basis to deny bail. Thus, only that issue was addressed. However, the State maintained that attempted murder was a dangerous crime under the statute, there was a substantial probability the Defendant committed this act and, while on bond for attempted murder, committed the crime of possession of handguns which showed a disregard for the safety of the community. (R - State's Response in Opposition, pgs. 9-10 and note 2)

While agreeing with Houser that bond may be revoked when a defendant violates his bond, the Fourth District:

> disagree[d] that a trial court has the absolute discretion to *deny* bond unless a defendant meets the criteria for detention without bond under the pretrial detention statutes. By breaching a condition of the bond originally set by the court, a defendant forfeits the right to continued release under the terms of *that* bond. However, the defendant does not forfeit his or her constitutionally guaranteed right to bail altogether; a refusal to readmit a defendant to any bail at all must be subjected to the limitations of the pretrial detention statute.

Paul, 24 Fla. L. Weekly at D583 (emphasis in original).

The conclusion drawn in Merdian, its progeny, and reaffirmed in Paul, restricts and reduces the inherent authority of the court to enforce its orders of pretrial conditions, expands the constitutional right of the defendant to pretrial release, and permits the defendant to obtain bail in an ever "revolving door fashion" as cautioned against in Houser. This Court should find, as did the Third District in Houser, and the Fifth District Court of Appeal in Gardner, that a trial court has inherent authority to deny a defendant re-admission to bail when the defendant violates his pretrial release by committing another criminal offense.

CONCLUSION

Wherefore, based on the foregoing, Petitioner requests respectfully this Court approve the reasoning in Houser v. Manning, 719 So. 2d 307 (Fla. 3d DCA 1998), quash Paul v. Jenne, 24 Fla. L. Weekly D581 (Fla. 4th DA March 3, 1999), and find the trial court may order pretrial detention, independent of section 907.041, when a defendant violates a condition of his bond by committing a new criminal offense.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Appellant" has been furnished by courier, to: Diane M. Cuddihy, Chief Assistant Public Defender, Broward County Courthouse, 201 S.E. 6th Street, North Wing - Third Floor, Fort Lauderdale, Fl 33301 on this _____ day of May, 1999.

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