

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

APR - 4 2017

ALEX E. BROWN,)
)
 Petitioner,)
 v.)
)
 THE HONORABLE CINDY H. TRUONG,)
 DISTRICT JUDGE, OKLAHOMA COUNTY,)
 STATE OF OKLAHOMA,)
)
 Respondent.)

CF-16-8601
No. MA-2016-1103

RICK WARREN
COURT CLERK

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 3 2017

MICHAEL S. RICHIE
CLERK

**ORDER GRANTING REQUEST FOR EXTRAORDINARY RELIEF AND
DIRECTING THE DISTRICT COURT OF OKLAHOMA COUNTY, THE
HONORABLE CINDY H. TRUONG, DISTRICT JUDGE, TO SET BAIL**

On December 6, 2016, Petitioner Brown, by and through counsel Ronald "Skip" Kelly, filed a Petition for Writ of Mandamus seeking relief from an order of the District Court of Oklahoma County, denying Brown's Motion to Reduce Bond. Brown has been incarcerated in the Oklahoma County jail without bond since October 18, 2016. Brown seeks an order from this Court directing the District Court of Oklahoma County, the Honorable Cindy H. Truong, District Judge, to set bail in an amount no greater than \$40,000.00.

This Court has twice directed a response in this matter. This Court's first order, entered December 9, 2016, directed Judge Truong, or her representative to address Brown's claims and to provide this Court with a copy of Judge Truong's written order denying bail, assuming one had been issued in compliance with *Brill v. Gurich*, 1998 OK CR 49, 65 P.2d 404. The response, submitted by the State as Judge Truong's designee, was filed with this Court on December 28, 2016. The response addressed Brown's request for relief but

did not include a written order, indicating instead that the “facts and findings of Judge Truong from the November 22, 2016 bond hearing was reduced to writing via transcript.” Brown filed a reply brief on January 17, 2017.

On February 9, 2017, this Court, citing its decision in *Brill v. Gurich*, 1998 OK CR 49, 65 P.2d 404, ordered Judge Truong to prepare a written order, as required by *Brill*, to include findings of fact and conclusions of law supporting the court’s decision to deny bail in this case. *See Brill*, 1998 OK CR 49, ¶ 14. A copy of Judge Truong’s order denying bail was filed with this Court on February 22, 2017. We now address Brown’s application for extraordinary relief. The following recitation of facts is taken from the pleadings, the bail hearing transcript, Judge Truong’s order denying bail and the response to Brown’s request for extraordinary relief.

On October 18, 2016, Brown was arrested and charged with Accessory to First Degree Murder. Counsel filed a Motion to Set Reasonable Bail. On October 20, 2016, Brown was arraigned and bail was denied. On October 28, 2016, Brown was formally charged with the above-reference offense in Oklahoma County Case No. CF-2016-8601.

At a conference held with the State to seek an agreement on a reasonable bond, Brown alleges the State initially agreed to a bond of \$40,000.00. As a result of this meeting, defense counsel Kelly prepared an Agreed Order to Set Bond in the amount of \$40,000.00 for signature by the State and defendant, and for presentation to Judge Truong for signature. Kelly advised the State on

November 7, 2016 that the agreed order was ready for signature. On November 8, 2016, the State, by and through Assistant District Attorney Dan Gridley, advised Kelly that the State could not agree to the bond amount and that the case had been assigned to First Assistant District Attorney Scott Rowland. Upon contacting Rowland, Kelly was advised to set a hearing date to resolve the issue of bond. A bond hearing date was set for November 22, 2016.

The State called Detective Darrell Miller of the Midwest City Police Department to testify at the bond hearing. Miller indicated that Brown's involvement in the homicide consisted of being the driver of the vehicle that dropped the suspect off at the homicide and picked him up after the homicide. The homicide occurred in April 2015 and only recently had police acquired sufficient information to arrest Brown. Miller was unsure as to whether or not Brown is or was a gang member, but testified that Brown associates with members of the Bloods gang. Miller indicated that one of the witnesses that provided information about Brown's involvement in the homicide had been beaten in jail by gang members, however Miller admitted that he had no information indicating that Brown had anything to do with the assault of that witness.

Miller also testified that Brown had been investigated in relation to an unrelated shooting that occurred in March 2016 wherein Brown shot an intruder at a home where he was a guest. No charges were filed in that incident, and Brown was alleged to have acted in self-defense. Miller also

testified that during the March 2016 shooting investigation, Brown was accessible and had not tried to leave the jurisdiction.

When questioned by defense counsel Kelly, Miller acknowledged that charges have not been filed against anyone else in this murder, including the alleged perpetrator of the homicide, although several of the individuals involved in this matter are currently incarcerated for other offenses. Miller testified that no charges have been filed against the alleged shooter because the District Attorney's office needs more evidence. Prior to his arrest, Brown and his father both spoke with Miller, but Brown refused to speak to Miller without an attorney present after being arrested. Miller acknowledged that he was aware that Brown was employed; that he had been to Brown's place of employment; and that he had been to Brown's residence. Miller admitted that as far as he knew Brown had never tried to leave the jurisdiction. When asked if he had reason to believe that Brown was a flight risk, Miller responded "I don't know."

Brown's father, Alex Glendell Brown, Jr. (hereinafter Brown, Jr.), testified that he has resided in Oklahoma County all of his life and that he and his wife live in Spencer, Oklahoma. He testified that Brown attended and graduated from Star Spencer High School where he was a good student; that he participated in a high school team engineering project that was recognized by Harvard University; that Brown was, at the time of his arrest, enrolled as a full time student at Metro Tech Aviation school in Oklahoma City; and that Brown has been employed in the family's business, A & L Metal Works, for the past

four years. When asked where Brown would reside if bond was granted, Brown, Jr. testified that Brown would live at 3001 North Midwest Boulevard and would return to his employment at the metal works business. At the time of the hearing, Brown had also been assured that he could return to school. Brown Jr. testified that he took Brown to the Midwest City Police Department to give a statement in response to the 2016 shooting that was referenced by the State. Brown Jr. testified that his company has four employees, not including his mother and father, Brown's grandparents. Brown's mother and grandparents were also present at the hearing.

On cross-examination, Brown Jr. testified that he had been convicted of Second Degree Murder when he was 16 years old; that he was never part of a gang and never associated with gangs; that he never talked to anyone about gangs; and denied knowing any of the people or suspects involved in this case. Brown Jr. denied telling Detective Miller, after being shown video surveillance of a vehicle, that the vehicle resembled his wife's vehicle.¹ Brown Jr. admitted that Brown sometimes drove his mother's vehicle, but stated that Brown had his own vehicles.

At that point, Judge Truong, after asking if any other witnesses were to be called, stated that she wanted to know why the State was objecting and at what amount the State wanted bail to be set. In response to this question, the following exchange took place:

¹ This line of questioning appears to be an attempt to establish that Brown drove his mother's

Gridley: Judge, we would ask that, if the bond is set, that it be at a substantial amount, 100,000 or more, somewhere in that neighborhood, given the totality of the circumstances surrounding this case and getting more information about the fact that---

Judge: So you're in agreement of setting it at 100,000 because I wasn't going to set any bond since the bond schedule---

Gridley: I would say, if the court is inclined to set a bond, that it would be something in six figures.

Judge: Do you want to take the hundred or do you want me to just leave it the way it is because the bond schedule is set at no bond.

Gridley: I'd just---if the court is inclined to set a bond, I'd ask that it be something at six figures.

Kelly: Your Honor, looking at the bond schedule and relying upon the Oklahoma State, the Court of Criminal Appeals, and when the court looks at the *Brill* case, it clearly states that this is not a capital offense. It's not an offense in which the range of punishment is life. It's not an offense in which the range of punishment is life without, and the range of punishment on a conviction of an accessory is 5 to 45.

Court: Okay. Well, I disagree with that. I think that he's involved in a shooting before and the fact of this case I think he's a threat to the community. So bond is denied.

Judge Truong refused to set bail, in any amount. Brown alleges that Judge Truong is biased against him and that her refusal to set a reasonable bail is improper. Brown argues that information presented on his behalf at the bail hearing complied with this Court's requirements set forth in *Brill v. Gurich*, 1998 OK CR 52, 965 P.2d 404, *Petition of Humphrey*, 1979 OK CR 97, 601 P.2d 103, and the Oklahoma Constitution. Brown produced testimony relating to

vehicle during the homicide but this was never clarified during the bond hearing.

his family ties and relationships, his employment, residency, his educational background and factors establishing his ties to the community, indicating that he was not a flight risk, and establishing his lack of a criminal record.

The response filed on Judge Truong's behalf alleges that Brown has no clear legal right to bail less than \$40,000, and that Judge Truong exercised her discretion denying bail in this case based upon the totality of the evidence before the court. The State argues that Brown arguably qualifies for denial of bail because the charged offense is violent and carries a maximum punishment of 45 years, which the State argues "equates to a life sentence". The State also argues that Brown has been "involved in two different homicides within the past year and facilitated departure of perpetrators and/or evidence from each scene", and that individuals with whom Brown associates assaulted a witness shortly after the witness provided information to the police. Logically, the State argues, based on the "totality of the evidence", there is clear and convincing evidence that Brown is linked to the commission of a violent offense which carries punishment up to the equivalent of a life sentence; that Brown represents a threat to the community; and no condition of bond would ensure the safety of the community.

Judge Truong's order states that Brown is charged with a violent offense which carries a maximum sentence that equates to a life sentence, making him a flight risk. The District Court also found, without citing to specific facts, that there is a serious risk that Brown would endanger the safety of another person

or the community because he is charged as an accessory to murder, and that there are no conditions or combination of conditions which could reasonably assure the safety of the community or witnesses if Brown was allowed to remain free on bond.

For a writ of mandamus a petitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. *See, Woolen v. Coffman*, 1984 OK CR 53, 676 P.2d 1375, 1377; Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017).

In reviewing claims alleging that a denial of bond is error, this Court reviews the decision of the district court to determine if there has been an abuse of discretion. *Brill v. Gurich*, 1998 OK CR 49, ¶ 16, 965 P.2d 404, 409; *Hainey v. State*, 1987 OK CR 120, ¶ 14, 740 P.2d 146, 150. One of the purposes of bail is to assure the presence of the accused in court to respond to the charges against him. *See, Brill*, 1998 OK CR 49 at ¶ 5, 965 P.2d at 406; *In re Petition of Humphrey*, 1979 OK CR 97, ¶ 14, 601 P.2d 103, 108. Other purposes include assurance of the safety of victims and the community pending trial of the defendant. *Id.* The district court, when evaluating a party for bail, is directed to consider a variety of factors, including the severity of the charged offense, the likelihood of conviction, and the extent of the punishment prescribed by the Legislature; the defendant's criminal record and previous bail

record, if any; his reputation, mental condition, length of residency in the community, his family ties and relationships; his employment status and record, and financial condition; the identity of responsible community members who might vouch for his reliability; and any other factors bearing on the risk that the defendant might fail to appear. See, *Brill*, 1998 OK CR 49 at ¶ 5, 965 P.2d at 406; *In re Petition of Humphrey*, 1979 OK CR 97, ¶ 14, 601 P.2d 103, 108. Article 2, § 8 of the Oklahoma Constitution requires a finding by the district court that “no condition of release would assure the safety of the community or any person.” Okla. Const. art. 2, § 8 (amended July 1, 1989).²

There is no dispute that the charge in this case is serious, and that it carries a sentence of five (5) to forty-five (45) years. The statutorily defined

² Okla. Const. art. 2, § 8 (amended July 1, 1989), labeled “Right to Bail-Exceptions” reads as follows:

§ 8. Right to bail - Exceptions

A. All persons shall be bailable by sufficient sureties, except that bail may be denied for:

1. capital offenses when the proof of guilt is evident, or the presumption thereof is great;
2. violent offenses;
3. offenses where the maximum sentence may be life imprisonment or life imprisonment without parole;
4. felony offenses where the person charged with the offense has been convicted of two or more felony offenses arising out of different transactions; and
5. controlled dangerous substances offenses where the maximum sentence may be at least ten (10) years imprisonment.

On all offenses specified in paragraphs 2 through 5 of this section, the proof of guilt must be evident, or the presumption must be great, and it must be on the grounds that no condition of release would assure the safety of the community or any person.

B. The provisions of this resolution shall become effective on July 1, 1989.

sentence, however, is not a life sentence, as defined at Okla. Const. art. 2, § 8(A)(3), regardless of how the parole board defines that term. The record in this case indicates that Brown has no criminal record, and therefore no prior bail history. The fact that Brown was involved in a homicide in 2016 was negated by the testimony establishing that he was not charged with a crime in that instance based on a claim of self-defense. The evidence presented established that Brown has been employed for the past four years, while attending school; that he has significant ties to the community; that he has responsible community members that vouch for his reliability; and that upon being released from incarceration pending trial he has a place to live and a job. There is no indication that Brown fled from the police, nor was evidence presented establishing that he has previously failed to appear, or would fail to appear, for court if released on bail. While there may be other information weighing against setting bail in this matter, it is not part of the record filed with this Court.

Judge Truong, throughout the hearing, continually referenced the “Oklahoma County bail schedule”³, which apparently allows no bail for defendants charged with Accessory to Murder. The district court’s reliance on the bail schedule as a benchmark for denying Brown’s request for bail is misplaced, as Oklahoma County’s standardized bail schedule is not one of the

³ At the initiation of the bail hearing, Judge Truong stated “Well, according to the bail schedule in Oklahoma County, Accessory to murder is bond denied.” She later stated that she was not

criteria set forth either in the Oklahoma Constitution or case law for denying bail. In her written order, Judge Truong found that the violent nature of the offense and the potential 45 year sentence make Brown a flight risk, and that Brown posed a threat to the community because he is charged with Accessory to Murder. The order does not address the numerous criteria set forth in *Brill v. Gurich*, 1998 OK CR 49, ¶ 16, 965 P.2d 404, 409, and the evidence presented at the bail hearing, necessary to support the district court's denial of bail in this instance.

We find nothing in this record establishing by clear and convincing evidence that **no** conditions of release can reasonably assure the safety of the community or any person as stated in Judge Truong's order. Even the State, when asked for a suggested bail amount, requested that bail be substantial, \$100,000 or more, but at least six figures. There was no indication by the State that bail should be denied in this matter.

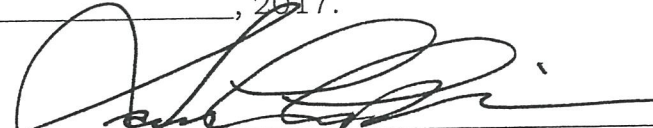
On the record presented to this Court, we find the denial of bail in this case to be excessive. Brown's request for relief is **GRANTED**. This matter is **REMANDED** to the District Court of Oklahoma County, the Honorable Cindy H. Truong, District Judge, with instructions to set a reasonable bail following the procedure and utilizing the criteria outlined in this Court's decision in *Brill v. Gurich*, 1998 OK CR 49, 965 P.2d 404, and the Oklahoma Constitution.

going to set bond in Brown's case because the Oklahoma County Bond Schedule for Accessory to Murder is "set at no bond."


The Clerk of this Court is directed to transmit a copy of this order to the Court Clerk of Oklahoma County; the District Court of Oklahoma County, the Honorable Cindy H. Truong, District Judge; the State of Oklahoma; and counsel of record.

IT IS SO ORDERED.

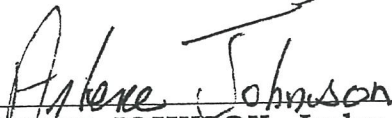
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd
day of April, 2017.



GARY L. LUMPKIN, Presiding Judge



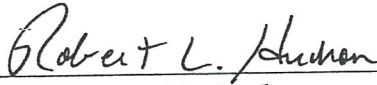
DAVID B. LEWIS, Vice Presiding Judge



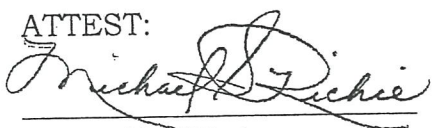
ARLENE JOHNSON, Judge



CLANCY SMITH, Judge



ROBERT L. HUDSON, Judge *Dissent see writing.*

ATTEST:


Clerk
OA/F

HUDSON, J., DISSENTING

The district court's no-bond order was not an abuse of discretion. The evidence presented at the *Brill* hearing¹ supports the district court's finding of fact that the charged offense was violent, thus making the defendant eligible for a no-bond setting. Okla. Const. art. II, § 8(A)(2). This evidence likewise supports the district court's finding, by clear and convincing evidence, that 1) proof of guilt was evident or the presumption thereof is great; and 2) that no conditions or combination of conditions of release will reasonably assure the safety of any other person and the community. *Id.*; *Brill v. Gurich*, 1998 OK CR 49, ¶ 13, 965 P.2d 404, 408.

The district court heard testimony from the lead detective investigating the case that: Petitioner was an accessory to a murder in which he dropped the killer off before the murder and picked him up afterwards; probable cause was developed to arrest Petitioner for this crime based on witness statements along with corroborating digital forensic evidence and surveillance footage; Petitioner associated with members of the Bloods gang; one of the witnesses who provided information to authorities in this case was attacked and beaten by members of the Bloods gang while incarcerated; Petitioner's jail calls were information known to the detective that Petitioner knew about a prison fight; Petitioner fled the scene of a previous homicide he committed, with the weapon used, despite later being cleared by authorities on grounds of self-defense; and

¹ See *Brill v. Gurich*, 1998 OK CR 49, 965 P.2d 404.

this earlier killing involved Petitioner shooting an intruder at a home in which he was a guest.

True, the district court heard from Petitioner's father who testified to Petitioner's ties to the community, his educational pursuits at the time of the charged offense, that Petitioner would reside with his family and be employed at the family business if bail was granted, that Petitioner had no prior criminal history, and that the father would see that Petitioner made every court appearance. But the father's testimony is countered by the violent nature of the charged offense, the evidence in the record suggesting gang retaliation against one of the State's witnesses, Petitioner's association with the same gang who retaliated against that witness and Petitioner's flight after an earlier homicide with the instrumentality of the killing even though he had a valid self-defense claim. The district court could rightly be skeptical too of the father's vouching based, *inter alia*, on his admission to having prior felony convictions for second degree murder and shooting with intent to kill.

Much has been made of the State's supposed acquiescence in Petitioner's bond request. It is undisputed that the State requested the *Brill* hearing. And the prosecutor expressed his view at the beginning of the hearing that there was never a firm agreement with the defense that Petitioner should receive bond.² The prosecutor's statements to the district court that "*if* the bond is

² The prosecutor's explanation was as follows:

MR. GRIDLEY: Judge, first off, with regard to our prior discussions about the bond in this case, Mr. Kelly came to me with a motion that he had initially filed, and I didn't have the case. I didn't know anything about the case. I told Mr. Kelly

set” and “*if* the Court is inclined to set a bond” (emphasis added) then it should be in the six-figure range was hardly a concession that bond *should* be set. Notable too is the State’s defense on appeal of the district court’s no-bond ruling. These context clues demonstrate that the State did not acquiesce in Petitioner’s bond request. Rather, the record shows the State has actively litigated its belief that bond should be denied.

I find too that the district court’s reference to the Oklahoma County bond schedule is subsumed by the district court’s oral and written rulings in this case which demonstrate both an awareness, and application, of the requirements for withholding bail under the Oklahoma Constitution and our cases interpreting it. While the record below is hardly a model of judicial clarity, it does not warrant reversal in this case. Under the total circumstances, there was no abuse of discretion from the district court’s no-bond order. I therefore dissent to granting Petitioner bond.

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RICK WARREN COURT CLERK
Oklahoma County

Rick Warren

that in the past we’ve agreed to bonds on these charges in that range, but I told him that I didn’t have the case and I think I eventually referred you to Mr. Rowland because I had not been assigned the case.

* * * * At that point in time, I didn’t have any information about the case and what was to happen. And I have learned a number of things about this case since that point in time.

(11/22/2016 Tr. 6-7).