

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEPHEN SHANBOUR,

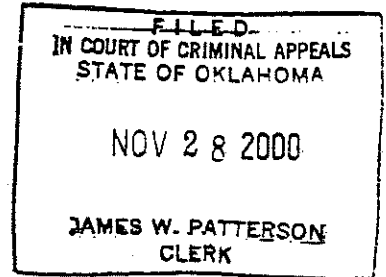
Petitioner,

-vs.-

The Honorable VIRGIL C. BLACK,
Presiding Judge, District Court of
Oklahoma County,

Respondent.

No. HC-2000-1118



**ORDER ASSUMING ORIGINAL JURISDICTION AND
REMANDING PROCEEDINGS TO DISTRICT COURT TO FIX BAIL**

Petitioner, through counsel, R. Scott Adams, filed an application herein requesting a writ of habeas corpus for the purpose of establishing bail upon certain criminal charges pending against him in Oklahoma County District Court, Case No. CF-2000-4864. Specifically Petitioner, an Oklahoma City attorney, is charged by Information dated August 10, 2000, alleging the following seventy-five counts:

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|---------|---|
| Count 1 | Stalking with Injunction in Effect (felony) |
| Count 2 | Stalking (misdemeanor) |
| Count 3 | Stalking (felony) ¹ |
| Count 4 | Blackmail (felony) |
| Count 5 | Attempted Extortion by Threatening Letter (felony) ² |

¹ The allegations in Count 3 of the Information identify Petitioner's alleged offense as having been "feloniously committed." (O.R. 49.) Review of the allegations in Count 3 do not, however, reveal any fact which would cause this offense to rise to that of a felony. Nonetheless, for the purposes of analysis of Petitioner's claim, the Court treats Count 3 as alleging a felony offense.

² The allegations in Count 5 of the Information state Petitioner, by means of a letter which threatened to destroy complainant's automobile, "attempted" to obtain from complainant "consent" to perform a sexual act upon her. "Extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right." 21 O.S.1991, § 1481. Although it is questionable whether obtaining consent to perform sexual acts could be considered "property" for the purposes of Extortion statutes, the Court will treat Count 5 for the purposes of this order as alleging a valid felony offense of Attempted Extortion by Threatening Letter.

Counts 6 through 9, 11, 12, 14 through 48, 50, 52, 53, 55, 57, 59 through 62, 64, 65, 67 through 69, 74, and 75	Distribution of Obscene or Indecent Writings (felonies)
Counts 66, 71, and 73	Attempted Distribution of Obscene or Indecent Writings (felony)
Counts 10, 13, 49, 51, 54, 56, 58, 63, and 70	Distribution of Obscene or Indecent Picture or Photograph (felonies)
Count 72	Attempted Distribution of Obscene or Indecent Picture or Photograph (felony)

(O.R. 49-63.)

Following his arrest and prior to filing of the Information, Petitioner was brought before the District Court on July 11, 2000, for the purposes of determining bond. After hearing testimony offered by the State through the lead detective investigating Petitioner's matter, the District Court denied bond on all charges. On August 8, 2000, the District Court heard testimony from two mental health professionals who had evaluated Petitioner. The District Court also received testimony from an attorney assisting Petitioner in closing his law practice, from a former employee of Petitioner's, and from two of the complaining witnesses. At the conclusion of this second hearing, the District Court again denied bond. The trial court clerk's docket sheet does not show the District Court has ever filed a journal entry of its order denying bond.³

This last hearing preceeded the filing of the Information by two days. The Assistant District Attorney announced at the beginning of the hearing that he had authorized the filing of an Information that would allege among other things Stalking, Extortion, and Blackmail. (Aug. Tr. 8-9.) The prosecutor noted that

³ In *Brill v. Gurich*, 1998 OK CR 49, ¶ 14, 965 P.2d 404, 408, it was held that when entering an order denying bail, the District Court shall make "written findings of fact and a statement of the reasons for the detention, supporting the conclusion with clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, and that proof of guilt is evident or the presumption great."

the filing of the Information had, by agreement of the parties, been intentionally delayed to await the evaluation reports from the two mental health professionals and the providing of treatment to Petitioner. (Aug. Tr. 7.) The record also indicates that Petitioner, pursuant to an agreed District Court order, is currently placed for evaluation and treatment at a secure Louisiana mental health facility. (O.R. 71-72.)

An original proceeding for writ of habeas corpus has been sanctioned as a proper procedure for seeking review of a trial court's refusal to admit a defendant to bail. *E.g., In re Morphis*, 1974 OK CR 5, 518 P.2d 315. In such a proceeding the trial court's order granting or denying bail is "review[ed] only for an abuse of discretion." *Brill v. Gurich*, 1998 OK CR 49, ¶ 16, 965 P.2d 404, 409. In Petitioner's matter we recognize the District Court did not have before it the Information enumerating each of Petitioner's alleged offenses, but instead had only the warrant and testimony of witnesses and the statements of counsel as to what crimes would be charged against Petitioner. Nonetheless the filed Information provides that with which Petitioner is currently charged and that to which he must now be admitted to bail if eligible. Thus we review Petitioner's bail eligibility in light of the current Information.

Under the Oklahoma Constitution the right to bail is absolute unless the defendant is charged with an offense falling within one of several enumerated classes. The applicable constitutional provisions setting forth these classes reads in relevant part:

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.

Okla. Const. art. II, § 8.

Petitioner argued below that none of Petitioner's alleged offenses fell within these enumerated classes. (Aug. Tr. 4-6.) The State argued Petitioner's Stalking, Blackmail, and Extortion offenses should be considered "violent offenses" within the meaning of subdivision (A)(2) of Section 8. (Aug Tr. 6-9.) The District Court overruled Petitioner's claim. (Aug. Tr. 9)

The above-cited constitutional provision creates a general presumption in favor of bail before trial.⁴ This particular provision resulted from a November 8, 1988, general election amending the existing constitutional provision on bail. Okla. Const. art. II, § 8 (West annotation). Unlike laws in some other jurisdictions concerning admission to bail when a defendant is accused of a violent crime,⁵ the Oklahoma amendment does not have a provision delineating what is

⁴ In *Brill* the Court observed:

We first want to reiterate that our constitutional provisions guarantee the right to bail to an accused in a criminal case subject to limited exceptions. This guarantee is based upon the legal principle that a person accused of a crime is presumed to be innocent of the charged offenses and shall be admitted to bail until his or her guilt has been determined. See *Petition of Humphrey*, 1979 OK CR 97, 601 P.2d 103, 106. Unless this right to bail before trial is preserved, the presumption of innocence will lose its meaning.

Brill, 1998 OK CR 49 at ¶ 3, 965 P.2d at 405. Okla. Const. art. II, § 9, also supports the presumption in favor of bail by declaring "[e]xcessive bail shall not be required."

⁵ *E.g.*, Colo. Rev. Stat. § 16-4-101 (1999) (making all non-capital offensesailable except when the person under certain conditions has been accused of having committed a "crime of violence" which "shall have the same meaning as that set forth in section 16-11-309 (2)"); D.C.

to be included within its violent offense category. As the state constitution does not define "violent offenses," this Court must decide whether this category should be construed as encompassing Petitioner's alleged offenses of Blackmail, Attempted Extortion, and Stalking (both felony and misdemeanor). In doing so the Court relies upon the common definition and understanding of the term "violent" while keeping in mind the general presumption in favor of bail.

The adjective "violent" is defined as that which is

"1: characterized by extreme force (a violent storm) : marked by abnormally sudden physical activity and intensity (a violent attack) 2: furious or vehement to the point of being improper, unjust, or illegal (lay violent hands on an individual) (a violent denunciation) 3: extremely or intensely vivid or loud (violent colors) (violent noise) : unusually intense (violent pain) : unnaturally strong (violent passion) 4: produced or effected by force : UNNATURAL (a violent death) (come to a violent end) 5: tending to distort or misrepresent (a violent interpretation) 6: extremely excited : emotionally aroused (become violent after an insult).

Webster's Third New International Dictionary 2554 (3d ed. 1984). From the foregoing it is apparent the chief characteristic of violence is that it includes an assaulting force. This Court has previously noted that the terms "force" and "violence" are closely associated.⁶ The Court has also observed that it is the lack of force and violence which in part distinguishes the crime of robbery from extortion.⁷

Code Ann. § 23-1322 (Supp. Sept. 2000) (providing for bail hearing on motion of government attorney "in a case that involves: (A) A crime of violence, or a dangerous crime, as these terms are defined in § 23-1331"); Va. Code Ann. § 19.2-120 (B) (Michie 2000) (creating presumption that accused should not be admitted to bail when "currently charged with: 1. An act of violence as defined in § 19.2-297.1").

⁶ *Smith v. State*, 1987 OK CR 94, ¶ 38, 737 P.2d 1206, 1215 ("The word 'force' is actually used to define violence.").

⁷ *Kernell v. State*, 53 Okl.Cr. 259, 262, 10 P.2d 287, 288 (1932) ("The lack of consent, the force and violence used, or the putting in fear of the person robbed, distinguish the offense of robbery from extortion, obtaining goods under false pretense, and larceny.").

Although offenses of stalking, blackmail, and extortion are crimes that might lead to violence or are ones which threaten violence, these offenses in themselves are not "violent offenses" within the normal sense of that term. Instead this term is aimed at those "[c]rimes characterized by extreme physical force such as murder, forcible rape, and assault and battery by means of a dangerous weapon." Black's Law Dictionary 1570 (6th ed. 1990) (defining "violent offense").⁸ Thus to be a violent offense actual physical force or the threat of imminent physical force must be present as an element of the offense.

Those offenses which only carry threat or risk of a future violent act, such as those at issue in Petitioner's matter, are not within the common understanding of violent offenses. To define "violent offenses" to include all crimes carrying a threat or risk of future violence is to confuse dangerous offenses with violent offenses. An argument could be made that there is a potential for violence in almost any crime against persons or property because almost all such crimes involve a risk of danger. Even shoplifting involves the risk of physical force should the shop owner give chase to the thief. Violent offenses are logically limited to those offenses which by definition involve threat of *imminent* force and violence or *actual* force and violence - not *prospective* force and violence.

The Court therefore **FINDS** that all of the offenses listed within the Information pending against Petitioner are bailable offenses and as such require the District Court to fix a reasonable bail. Accordingly, Petitioner's matter must be remanded to the District Court for this purpose. In so doing, this Court is keenly aware that the District Court denied bail out of concern for certain witnesses and minor children who it believed might be threatened if Petitioner were released on

⁸ See also 1999 FBI Ann. Rep., *Crime in the United States* 10 (2000) ("Violent crime is composed of four offenses: murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. All violent crimes involve force or threat of force.").

bail. Although these concerns cannot override the state constitution, the District Court is not powerless when fixing bail to adjust the amount thereof upon Petitioner's agreement to comply with any reasonable guidelines which the trial court believes would better ensure the safety of particular persons or the community as a whole. This is especially so here where Petitioner's pleadings state a willingness to submit to "any reasonable conditions the Court deems appropriate." (Pet'r's brief at 16.)

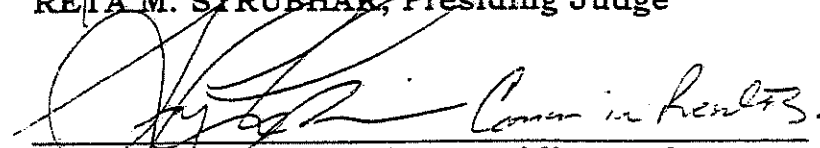
IT IS THEREFORE THE ORDER OF THIS COURT that original jurisdiction is **ASSUMED** and Petitioner's matter **REMANDED** to the District Court with instructions for it to fix bail at a reasonable sum upon each of those offenses alleged in the Information pending before it.

IT IS SO ORDERED.

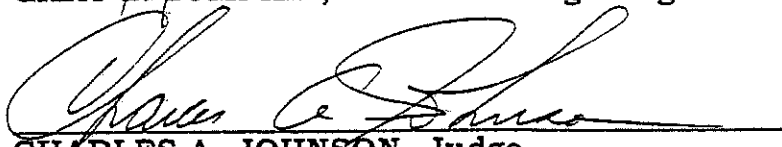
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 28th day of November, 2000.



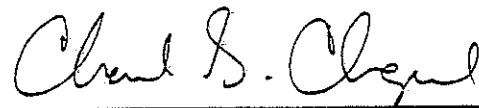
RETA M. STRUBHAR, Presiding Judge



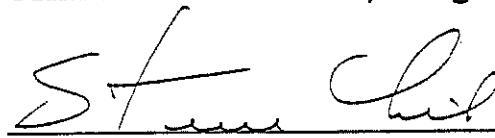
GARY L. LUMPKIN, Vice Presiding Judge



CHARLES A. JOHNSON, Judge

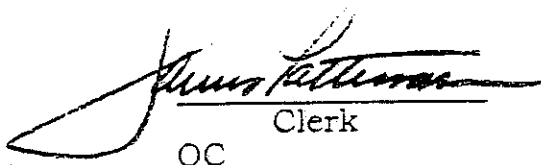


CHARLES S. CHAPEL, Judge



STEVE LILE, Judge

ATTEST:



Clerk
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