

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)	
)	
v.)	CASE NO. KM-2020-441
)	
COREY HUNTER)	
Defendant.)	

**COMMONWEALTH'S BRIEF AS REQUESTED BY THE COURT ON THE
CONSTITUTIONALITY OF CASH BOND IN THIS MATTER**

COMES NOW the Commonwealth in response to the Court's request for briefing on the constitutionality of cash bond in this matter. The Commonwealth submits that to impose a cash bond violates Mr. Hunter's right to Substantive Due Process by depriving him of his fundamental right to freedom from incarceration. The Commonwealth further submits that the cash bond violates the Equal Protection Clause by tying his release to a financial requirement he cannot meet due to his indigency, thus resulting in continued incarceration where similarly situated wealthier individuals would obtain release. Finally, the Commonwealth submits that the cash bond violates the Excessive Bail clause of the Eighth Amendment to the United States Constitution. In support thereof, the Commonwealth states as follows.

FACTS

Corey Hunter was charged with the misdemeanor offenses of DUI and Driving without a Valid Operator's License (2nd or subsequent) on August 29, 2020. The magistrate ordered that Mr. Hunter be held without bond. Mr. Hunter was determined to be indigent and the public defender's office was appointed to his case. At a bond hearing, the General District Court imposed a \$2500 cash or corporate surety bond. Mr. Hunter could not afford the bond so his public defender appealed to Circuit Court. The Court ordered Mr. Hunter to be released on an

unsecured personal recognizance bond but ordered the parties to brief the issue of whether a cash bond would be constitutional under the facts of the case.

ANALYSIS

I. Virginia Code Provisions Governing Pretrial Release

Virginia Code § 19.2-120 states that a defendant pending trial “shall be” admitted to bail unless the magistrate or court has probable cause to believe that the defendant will not appear for future court hearings or the defendant’s liberty will constitute an unreasonable danger to the defendant or the public. When there is no probable cause of flight risk or danger, the Code authorizes judges to release defendants with conditions to ensure lawful behavior and appearance to court. Virginia Code § 19.2-123. One of the specific options given by statute is a cash or corporate surety bond. Virginia Code § 19.2-123. The Code lists additional alternatives not tied to money including pretrial supervision and restrictions on travel, association, or residence. Virginia Code § 19.2-123(A). The court may also impose any condition of release or pretrial supervision “deemed reasonably necessary to assure appearance as required,” which may include, among other things, phone and in-person check-ins, random drug testing, placement in a substance abuse education or treatment program, mental health counseling and treatment, curfews, stay away orders, prohibitions from having weapons, and prohibition from alcohol consumption. Virginia Code § 19.2-123(A); Virginia Code § 19.2-152.4:3; see Virginia Pretrial Services Training and Resource Manual, (available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-training-resources.pdf>).

II. Substantive Due Process

The Fifth and Fourteenth Amendments to the United States Constitution guarantee that

the federal and state governments shall not deprive anyone of life, liberty, or property without due process of law. Due Process guarantees rights pursuant to procedural due process and substantive due process. See Washington v. Glucksberg, 521 U.S. 702, 720 (1997). Substantive due process limits the government from infringing upon a fundamental right or liberty interest specially protected under the Due Process Clause. Washington, 521 U.S. at 721. To qualify as a fundamental right or liberty interest, the right asserted must be “deeply rooted in this Nation's history and tradition” or “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [it was] sacrificed.’” Id. Freedom from imprisonment “lies at the heart of the liberty that [the Due Process] Clause protects.” Zadvydas v. Davis, 533 U.S. 679, 690 (2001). “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

When the government infringes upon a fundamental right or liberty interest, the government action is judged under strict scrutiny. See Reno v. Flores, 507 U.S. 292, 301-02 (1993); United States v. Salerno, 481 U.S. 739, 747 (1987). Strict scrutiny requires that the challenged government action is constitutional only if it is narrowly tailored to serve a compelling state interest. See Reno, 507 U.S. at 301-02. Narrow tailoring does not require the government action to use the least restrictive means available, but does require that the government interest be achieved less effectively absent the regulation. See Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). If the government action does not infringe upon a fundamental right, but some other interest, courts apply the rational basis test, which means the government action is constitutional if it is rationally related to a legitimate governmental interest. Id. at 728; Heller v. Doe, 509 U.S. 312, 319 (1993); Walton v. Commonwealth, 255 Va. 422,

427–28, 497 S.E.2d 869, 872–73 (1998).

The Commonwealth submits that the right at stake in this case is Mr. Hunter’s right to freedom from incarceration. Clearly, freedom from incarceration is a fundamental right. By curtailing that right, the imposition of the cash bond is subject to strict scrutiny.

The government interests with respect to a defendant prior to trial are to ensure court appearance and prevent danger to the public. The Commonwealth submits that these are compelling interests both for the integrity of the justice system and public safety. However, to satisfy the second component of strict scrutiny, a cash bond must be narrowly tailored to further the government interests of ensuring court attendance and reducing danger to the public while minimizing the infringement of rights. Cash bond fails this component because the empirical, academic, and statistical evidence shows that cash bond is not an effective means of promoting the government’s objectives. In fact, evidence shows that cash bail has no deterrent effect on failures to appear or criminal behavior. See Ouss, Aurelie and Stevenson, Megan, Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors (June 20, 2020) (available at <https://ssrn.com/abstract=3335138>). Compared to alternative release conditions, cash bail compares unfavorably in terms of encouraging court attendance and lawful behavior, and evidence has existed of this fact for decades. See Clarke, Stevens et al., The Effectiveness of Bail Systems: An Analysis of Failure to Appear in Court and Rearrest While on Bail, UNC Institute of Government (January 1976) (available at <https://www.ncjrs.gov/pdffiles1/Digitization/32349NCJRS.pdf>) (stating that “forms of bail that rely solely on the threat of financial loss to ensure appearance in court proved to be the worst in terms of rates of nonappearance and rearrest.”). Cash bond may actually increase the likelihood of unlawful behavior. See Paul Heaton et al., The Downstream Consequences of Misdemeanor

Pretrial Detention , 69 STAN. L. REV. 711, 786–87 (2017) (estimating that the release on personal bond of the lowest-risk detainees would have resulted in 1,600 fewer felonies and 2,400 fewer misdemeanors within the following eighteen months). The evidence demonstrates that alternatives to monetary release conditions are more effective. See, e.g., Pretrial Justice Institute, The Pretrial Services Agency For the District of Columbia: Lessons From Five Decades of Innovation and Growth, 2 Case Studies 1, 2 (Aug. 2018), (available at <https://perma.cc/8KAD-TY5H>) (“Agency data show that 90 percent of released people make all court appearances and that 91 percent complete the pretrial release period without any new arrests.”). In Virginia in 2019, defendants on pretrial release had a 93 percent appearance rate, a 93 percent “public safety” rate referring to no new arrests, and an 85 percent supervision compliance rate. See Report on Pretrial Services Agencies FY2019, Virginia Department of Criminal Justice Services, December 2019 (available at <https://rga.lis.virginia.gov/Published/2019/RD709/PDF>).

Based on the wealth of data proving that cash bond does not further the government interests of court appearance and public safety, it is not narrowly tailored and therefore does not pass strict scrutiny. Therefore, cash bond is unconstitutional as it violates substantive due process. The Commonwealth further submits that even if the court were to find that the rational basis test should apply, a cash bond would still be unconstitutional because there is no evidence that it ensures appearance at trial or deters unlawful behavior.

III. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment forbids states to “deny any person within its jurisdiction the equal protection of the laws.” A challenge to government action on equal protection grounds, like substantive due process, employs different levels of scrutiny depending on the circumstances of the case. Courts employ “strict scrutiny” if the

government action discriminates against a “suspect class.” Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 457–58 (1988); see also Hess v. Snyder Hunt Corp., 240 Va. 49, 55, 392 S.E.2d 817, 821 (1990). Otherwise, a statute will ordinarily survive an equal protection challenge if “the challenged classification is rationally related to a legitimate governmental purpose.” Kadrmas, 487 U.S. at 458. In certain cases, for example those involving gender discrimination, equal protection claims are subject to intermediate scrutiny which requires that the law be “substantially related to an important governmental objective.” See Craig v. Boren, 429 U.S. 190 (1976).

Cash bond imposed on an indigent person, resulting in incarceration because the person cannot afford the bond, has been challenged on Equal Protection grounds. See, e.g., Pugh v. Rainwater, 572 F.2d 1053, 1058 (5th Cir. 1978). Neither indigent people or prisoners are a suspect class for Equal Protection purposes. See O’ Donnell v. Harris County, 892 F.3d 147, 153 (5th Cir. 2018). However, courts appear willing to apply heightened scrutiny where the indigent are incarcerated as a consequence of their indigence, while similarly situated but wealthier defendants would be released. See Tate v. Short, 401 U.S. 395, 397–99 (1971) (addressing imprisonment for failure to pay fines); Williams v. Illinois, 399 U.S. 235, 241–42 (1970) (addressing statute requiring convicted defendants to remain in jail beyond the maximum sentence if they could not pay fines). Another court has applied what it called intermediate scrutiny to cash bond for the indigent, although the standard appeared more similar to strict scrutiny. O’ Donnell, 892 F.3d at 153.

Here, Mr. Hunter was unable to pay a \$2500 cash bond due to his indigence and therefore remained incarcerated. Therefore, the cash bond is the practical equivalent of no bond. The government interest in Mr. Hunter’s appearance in court and his lawful behavior was no more or

no less than its interest in a person who received a cash bond but was able to pay. In essence, cash bond caused him to remain incarcerated due to his indigence, requiring strict scrutiny to apply.

Applying the strict scrutiny analysis, the Commonwealth acknowledges that the government has a compelling interest in ensuring court appearance and preventing danger to the public. However, as discussed above, the evidence shows that cash bond does not further these objectives and is less effective than other, less-restrictive alternatives. Therefore, cash bond fails the strict scrutiny test and is unconstitutional under the Equal Protection Clause. Furthermore as stated above in the Substantive Due Process analysis, the evidence that cash bond does not further the government's interests demonstrates that cash bond would fail even under a rational basis analysis.

IV. The Eighth Amendment

The Eighth Amendment to the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." See also Constitution of Virginia, Art. I, § 9 (likewise prohibiting excessive bail). The bail clause does not dictate in which cases bail is appropriate, but mandates "that bail shall not be excessive in those cases where it is proper to grant bail." Carlson v. Landon, 342 U.S. 524, 545 (1952). The narrow purpose of bail is to assure the presence of an accused, and "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." Stack v. Boyle, 342 U.S. 1, 4 (1951); see also Maryland v. King, 569 U.S. 435, 452-54 (2013) (pretrial state interest limited to ensuring the accused will appear for trial and protecting the public from danger associated with release).

Eighth Amendment jurisprudence reflects a strong preference for pretrial release. The

Supreme Court has referred to a “traditional right to freedom before conviction” which enables defendants to prepare a defense, avoids the infliction of punishment prior to conviction, and preserves the presumption of innocence. Stack, 342 U.S. at 4. In general, the Court has stated that “freedom is the norm” and holding defendants pretrial should be a “carefully limited exception” in the legal system.” United States v. Salerno, 481 U.S. 739, 755 (1987).


In Mr. Hunter’s case, the cash bond violates the Eighth Amendment’s prohibition against excessive bail. The \$2500 bond set in Mr. Hunter’s case is not an amount that is so high as to shock the conscience. However, a bail amount which is beyond the ability of an indigent defendant to pay is the practical equivalent to no bond. The choice to grant bond suggests a decision that the defendant’s release would not present a significant danger to the community or flight risk. As such, Mr. Hunter should be entitled to release.

Furthermore, the Eighth Amendment jurisprudence cited above establishes that a bond must be relevant to the narrow functions of bail which are to assure court appearance and prevent future dangerousness. Overwhelming evidence suggests that the financial condition of release does not fulfill these objectives. Weighed against the negatives of pretrial detention cited by the Courts—including the deterioration of the presumption of innocence and other fundamental principles—the setting of the cash bond violates the Eighth Amendment.

CONCLUSION

In sum, the Commonwealth submits that to impose a cash bond in Mr. Hunter's case would violate his constitutional rights to substantive due process, equal protection, and against excessive bail.

Respectfully submitted,



J. David Gardy
Assistant Commonwealth Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to Gretchen Schumaker this the 30th day of October, 2020.



J. David Gardy
Assistant Commonwealth's Attorney