

STATE OF TENNESSEE

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Opinion No. 03-054

Constitutionality of proposed legislation granting judges the authority to order a cash deposit bond in certain cases.

QUESTION

Is proposed House Bill 1696, which amends the bail statutes to grant judges the authority to require a defendant to post a cash deposit bond, as opposed to other types of bonds, for all bailable offenses involving a worthless check, a child custody or support violation, or a probation violation, unconstitutional?

OPINION

Yes. The Tennessee Constitution guarantees the right to bail in all non-capital cases by “sufficient sureties.” By requiring a defendant to post a particular type of bond, a defendant who has other “sufficient sureties,” but not the required type, would be denied his or her constitutional right to bail by “sufficient sureties.”

ANALYSIS

Article I, § 15 of the Tennessee Constitution provides “[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great.” The Tennessee Supreme Court has determined that this provision makes bail mandatory except in capital cases. *See Wallace v. State*, 193 Tenn. 182, 187, 245 S.W.2d 192, 194 (1952).

The purpose of bail is to ensure an accused’s appearance and submission to the court’s judgment; thus bail set at a figure higher than “an amount necessary to fulfill this purpose is ‘excessive’ under the Eighth Amendment” to the United States Constitution. *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951); *see also* Tenn. Const. art. 1, § 16 (“That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). As recognized by the Tennessee Supreme Court, there are four different types of bail that a defendant may post to obtain his or her release pending trial: (1) a cash deposit bond, which is a sum of money in cash equal to the amount of bail, deposited with the clerk of court, (2) a bond secured by real estate located in this state, (3) a bond secured by a written agreement signed by the defendant and at least two sufficient sureties who are not professional bondsmen or attorneys, and (4) a bond secured by a professional bail bondsman. *See State v. Clements*, 925 S.W.2d 224, 225 (Tenn. 1996); Tenn Code Ann. §§ 40-11-118, 40-11-122.

In an unpublished opinion, the Tennessee Court of Appeals has suggested that a judge does not have the discretion under the constitution to order a particular type of bail because that order could effectively deny a defendant his or her right to bail by “sufficient sureties”:

If the judge were held to have discretion to require a cash-only bond, he would also arguably have the power, for instance, to demand that a defendant put up qualifying real estate in order to secure his release. If a particular defendant had no qualifying real estate, such a requirement could effectively detain the accused in violation of Article I, § 15 of the Tennessee Constitution and T.C.A. § 40-11-102 which provide that “all defendants shall be bailable by sufficient sureties.” The same result could arise if a cash-only deposit was required of a defendant who had real estate or other sufficient surety, but no cash.

Lewis Bail Bond Co. v. General Sessions Ct. of Madison County, No. C-97-62, 1997 WL 711137, at *5 (Tenn. Ct. App. Nov. 12, 1997). Appellate courts in other jurisdictions have likewise determined that “cash-only bail” violates their state constitutions which guarantee bail upon “sufficient sureties” because it restricts a defendant’s constitutional right to post bail by providing alternative forms of sufficient surety. See *State v. Brooks*, 604 N.W.2d 345, 348-55 (Minn. 2000); *State ex rel. Jones v. Hendon*, 609 N.E.2d 541, 543-44 (Ohio 1993); *State v. Golden*, 546 So.2d 501, 502-04 (La. Ct. App. 1989); see also *Williams v. City of Montgomery*, 739 So.2d 515, 517-18 (Ala. Civ. App. 1999) (concluding that city’s bail policy, under which only cash bail or complete payment of outstanding fines would be available under *capias* warrants, did not violate state constitution because a defendant’s right to non-excessive bail by sufficient sureties before conviction does not apply after conviction).

Black’s Law Dictionary defines “surety” as:

One who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor. One who undertakes to pay money or to do any other act in event that his principal fails therein. A person who is primarily liable for payment of debt or performance of obligation of another. . . . One bound with his principal for the payment of a sum of money or for the performance of some duty or promise and who is entitled to be indemnified by some one who ought to have paid or performed if payment or performance be enforced against him.

Black’s Law Dictionary 1441 (6th ed. 1990). “Surety” is also defined as “a formal engagement (as a pledge) given for the fulfillment of an undertaking” and “one who has become legally liable for the debt, default, or failure in duty (as appearance in court) of another.” Webster’s Ninth New Collegiate Dictionary 1187 (1983). Thus, as noted by the Supreme Court of Minnesota, “Surety can encompass a broad array of undertakings, often by a third person, that provide adequate assurance for the performance of an obligation.” *Brooks*, 604 N.W.2d at 353.

Considering the broad meaning of the word “surety,” the unpublished opinion of the Tennessee Court of Appeals, and the opinions from other jurisdictions interpreting similar constitutional provisions, it is the opinion of this Office that the proposed legislation would violate the Tennessee Constitution, which guarantees defendants the right to bail by “sufficient sureties.”¹ By permitting a judge to restrict the type of bail that a defendant may post to a cash deposit bond, the legislation could effectively deny bail to those defendants who have property available or who have the ability to secure the help of a professional bondsman or other responsible individuals, but who do not have the requisite cash. Accordingly, it denies bail by “sufficient sureties” in violation of the constitution.

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¹The legislation might also violate the equal protection guarantees of the United States and Tennessee Constitutions because it permits a judge to limit the form of bail for certain offenses and not others, when the purpose of bail, assuring the appearance of the defendant, is the same for all offenses.