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Opinion No. 08-54

Bail for Illegal Aliens

QUESTION

Whether House Bill 2860, which would (1) require jail officials to make a reasonable effort to determine the citizenship status of anyone confined for a felony or a second or subsequent DUI, and (2) allow magistrates authorized to admit a person to bail, when determining bail, to presume that a person who is not lawfully in the United States is "at risk of flight," is constitutional.

OPINION

Yes. It is the opinion of this Office that the proposed legislation contained in House Bill 2860 is constitutional.

ANALYSIS

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Similarly, Article 1, Section 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 interpreted the provision of the State Constitution to mean that the right to bail is mandatory in non-capital cases. *Wallace v. State*, 245 S.W.2d 192, 194 (1952). *See also State ex rel. Hemby v. O'Steen*, 559 S.W.2d 340, 341 (Tenn. Crim. App. 1977) (recognizing mandatory right to bail in non-capital cases) (citing *Wallace*). Additionally, the Court of Criminal Appeals has found that fixing excessive bail would effectively assure that a defendant would not gain his freedom and therefore is unconstitutional. *Hemby*, 559 S.W.2d at 341-42.

Admission to bail is further governed in Tennessee by the Release from Custody and Bail Reform Act of 1978 ("Bail Reform Act"). *See* Tenn. Code Ann. §§ 40-11-101 — 40-11-144. Section 118 of the act currently provides that, "[i]n determining the amount of bail necessary to reasonably assure the appearance of the defendant while at the same time protecting the safety of the public," the magistrate shall consider the following:

(1) The defendant's length of residence in the community;

> (2) The defendant's employment status and history and financial condition;
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> (3) The defendant's family ties and relationships;
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> (4) The defendant's reputation, character and mental condition;
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> (5) The defendant's prior criminal record, record of appearance at court proceedings, record of flight to avoid prosecution or failure to appear at court proceedings;
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> (6) The nature of the offense and the apparent probability of conviction and the likely sentence;
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> (7) The defendant's prior criminal record and the likelihood that because of that record the defendant will pose a risk of danger to the community;
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> (8) The identity of responsible members of the community who will vouch for the defendant's reliability; however, no member of the community may vouch for more than two (2) defendants at any time while charges are still pending or a forfeiture is outstanding; and
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> (9) Any other factors indicating the defendants ties to the community or bearing on the risk of the defendant's willful failure to appear.

Tenn. Code Ann. 40-11-118(b).

Section 1 of House Bill 2860 proposes adding the following subsection to Tenn. Code Ann. § 40-11-118:

> (c) After an inquiry into the citizenship status of the defendant pursuant to § 40-7-123, if it is determined that the defendant is not lawfully present in the United States, when determining the amount of bail, there shall be a presumption that the defendant is at risk of flight.

Because the proposed amendment appears to satisfy the purpose of the bail statute without unduly restricting the ability of a defendant to obtain reasonable bail, it would not appear to violate Article 1, Section 15, of the Tennessee Constitution. As the Tennessee Supreme Court has explained,

> The primary purpose of bail in a criminal case is not to increase the revenue of the state, or to punish the sureties, but to combine the administration of criminal justice with the convenience of a person accused but not proved to be guilty. Its object is to relieve the accused of imprisonment, and the state of the burden of keeping him, pending the trial, and at the same time, to put the accused as much under the power of the court as if he were in custody of the proper officer, and to secure the

> appearance of the accused so as to answer the call of the court and do what the law may require of him.

Wallace, 245 S.W.2d at 194 (quoting American Jurisprudence, Volume 6 (Revised), Section 6, page 61). *See also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (providing that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant"). Moreover, our legislature has provided that "[b]ail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required." Tenn. Code Ann. § 40-11-118(a).

The proposed amendment to Tenn. Code Ann. § 40-11-118 does not foreclose an illegal immigrant from obtaining reasonable bail. Rather, it merely creates a rebuttable presumption of a risk of flight, which can be overcome by evidence to the contrary. "[A] presumption of fact or inference cannot ordinarily be raised from a fact proved unless a rational connection exists between such proved fact and the ultimate facts to be presumed." *Commerce Union Bank v. Burger-In-A-Pouch, Inc.*, 657 S.W.2d 88, 90 (Tenn. 1983) (citing 29 Am.Jur.2d Evidence § 162). There is a rational connection between a person's status as an illegal immigrant and the risk of flight. Persons who are in this country illegally are subject to deportation, which increases the probability that they would leave the jurisdiction while released on bail. *See* 8 U.S.C. § 1101 *et seq*. Additionally, the proposed legislation addresses the probability that someone without ties to this country would flee. Indeed, this new factor is quite similar to those already considered in subsection (b), including the defendant's length of residence in the community, employment status, family ties, and ties to the community. Thus, Section 1 of House Bill 2860 appears to be constitutional.

Section 2 of the proposed legislation would create a new section providing for arrests. The new section, Tenn. Code Ann. § 40-7-123, would state:

> When a person is charged with a felony or with a second or subsequent violation of driving under the influence pursuant to § 55-10-401 and is confined, for any period, in the jail of the county or any municipality, a reasonable effort shall be made to determine the citizenship status of the person so confined, including but not limited to, reviewing documents in the possession of the prisoner. If the keeper of the jail or other officer cannot determine the lawful status from the documents in the possession of the prisoner, verification shall be made within forty-eight (48) hours through a query to the Law Enforcement Support Center of the United States Department of Homeland Security or other office or agency designated for that purpose by the United States Department of Homeland Security. If it is determined that the person is not lawfully present in the United States, pursuant to the federal Immigration and Naturalization Act, compiled in 8 U.S.C. § 1101 et seq., the keeper of the jail or other officer shall notify the United States Department of Homeland Security.

Essentially, Section 2 provides that, when a person is arrested for a felony or a second or subsequent violation of driving under the influence and that person is confined in the jail of the

county or any municipality, inquiry shall be made as to the citizenship status of the arrestee. In determining whether the detainee is in the country illegally, the proposed statute provides that the jailer shall use the guidelines set forth in the federal Immigration and Nationality Act, codified at 8 U.S.C. § 1101, *et seq*. The federal act regulates the authorized entry, length of stay, residence status, and deportation of aliens, and also provides for enforcement by federal authorities. Additionally, it provides that aliens who have been convicted of certain offenses may be deported. *See* 8 U.S.C. § 1227(a)(2). If the detainee is not lawfully present in the United States, that information shall be sent to the United States Department of Homeland Security. The proposed legislation merely establishes procedures for determining whether a detainee is in this country illegally and for transmitting that information to federal officials. The proposed legislation does not itself impose any penalties for failure to provide proof of citizenship. The proposed legislation in Section 2 of House Bill 2860 does not have any apparent constitutional infirmities.

Accordingly, it is the opinion of this Office that House Bill 2860 is constitutional.

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