S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

August 23, 2012

Opinion No. 12-82

Authority of Judicial Commissioners and Judges Regarding the Setting and Alteration of Bail

QUESTIONS

1. After a judicial commissioner has initially set the amount of bail, does that commissioner prior to the defendant's appearance in general sessions court or the general sessions judge thereafter have authority to modify the amount of bail or alter bail conditions upon further consideration of the factors set forth in Tenn. Code Ann. § 40-11-118?

2. If a defendant proposes to post a cash bail less than the amount previously set by the judicial commissioner or judge, can the judicial commissioner prior to the defendant's appearance in general sessions court or the general sessions judge thereafter reduce the bail amount and authorize a cash deposit in that amount with the clerk of the court?

3. If a defendant does not qualify for release on his own recognizance pursuant to Tenn. Code Ann. § 40-11-115 and a bail amount is set, is a subsequent reduction of the bail amount upon application of the defendant to post a cash deposit in a lower amount an appropriate condition of release pursuant to Tenn. Code Ann. § 40-11-116(b)(3)?

4. Does a bail bonding company or association have standing to contest in court, pursuant to Tenn. Code Ann. §§ 40-11-144(b), 27-8-101 to -118, or 29-14-101 to -113, the manner in which bail is set by judicial commissioners or general sessions judges, provided the bail bonding company or association is not prohibited by the commissioner or judge from posting bail for any defendant for which a bail amount is set?

OPINIONS

1. As "magistrates" within the meaning of Tenn. Code Ann. § 40-1-106, both commissioners and general sessions judges have authority to admit a defendant to bail at any time prior to or at the time the defendant is bound over to the grand jury. A general sessions judge may alter the original bail amount or conditions or release at any time prior to or at the time the defendant is bound over to the grand jury, but the reasons for any such alteration must be set forth in writing. A judicial commissioner does not have authority to alter bail after a defendant has already been admitted to bail. In determining the appropriate bail amount, magistrates must consider the factors set forth in Tenn. Code Ann. § 40-11-118(b).

2. A general sessions judge may reduce a defendant's original bail amount at any time prior to or at the time the defendant is bound over to the grand jury, provided the reduction is based on the factors listed by Tenn. Code Ann. § 40-11-118(b), and the reasons for any alteration are set forth in writing. A judicial commissioner does not have authority to alter the amount of bail after a defendant has already been admitted to bail.

3. Yes. A reduced bail amount is an appropriate condition of release pursuant to Tenn. Code Ann. § 40-11-116(b)(3) if (1) the reduction is based on consideration of the factors listed by Tenn. Code Ann. § 40-11-118(b); (2) the reduced bail amount will reasonably assure the appearance of the defendant; and (3) the reasons underlying the bail reduction are set forth in writing.

4. A bonding company does not have standing to pursue litigation challenging the manner in which a magistrate sets bail unless it can establish by a preponderance of the evidence: (1) a distinct and palpable injury, rather than one that is conjectural or hypothetical; (2) a causal connection between the claimed injury and the challenged conduct; and (3) that the alleged injury is capable of being redressed by a favorable decision of the court. The question whether standing exists in a particular case will necessarily depend upon the specific facts of that case.

ANALYSIS

1. The questions posed relate to the authority of judicial commissioners and general sessions judges under the Release from Custody and Bail Reform Act of 1978, codified at Tenn. Code Ann. §§ 40-11-101 to -405 (hereinafter "Bail Reform Act"). The Bail Reform Act generally addresses the authority of "magistrates" to release a defendant in a criminal case on the defendant's own recognizance and to establish bail or other conditions for the defendant's release pending trial. For purposes of the Bail Reform Act, Tenn. Code Ann. § 40-1-106 denominates both judicial commissioners and general sessions judges as "magistrates," providing:

> The judges of the supreme, appellate, chancery, circuit, *general sessions* and juvenile courts throughout the state, *judicial commissioners* and county executives in those officers' respective counties, and the presiding officer of any municipal or city court within the limit of their respective corporations, *are magistrates within the meaning of this title*.

(Emphasis added).

Tenn. Code Ann. § 40-11-104 governs the duration of both a magistrate's authority to admit a defendant to bail and a trial court's authority to do the same:

> Any magistrate may release the defendant on the defendant's own recognizance pursuant to § 40-11-115 or § 40-11-116 or admit the defendant to bail pursuant to § 40-11-117 or § 40-11-122 *at any time prior to or at the time the*

> *defendant is bound over to the grand jury*. The trial court may release the defendant on the defendant's own recognizance pursuant to § 40-11-115, admit the defendant to bail under § 40-11-116, § 40-11-117 or § 40-11-122, or alter bail or other conditions of release pursuant to § 40-11-144 at any time prior to conviction or thereafter, except where contrary to law.

(Emphasis added).

While Tenn. Code Ann. § 40-11-104 governs a magistrate's authority to *admit* a defendant to bail, it does not specifically address the authority of a magistrate to *alter* the bail amount or conditions of release after bail is already set. This issue is addressed by Tenn. Code Ann. §§ 40-11-106 and -143. Sections 40-11-106(b)(1) and (2) govern a defendant's right to appeal the bail determination of a judicial commissioner and provide in pertinent part:

> (b)(1) . . . Once a sheriff or judicial commissioner has taken bail or refused to take bail, the jurisdiction of the court having jurisdiction of the offense shall be limited to the issue of whether the sheriff or judicial commissioner has abused discretion.
>
> . . . .
>
> (2) . . . any defendant, claiming that a sheriff or judicial commissioner has acted arbitrarily or capriciously, may, by motion, file an appeal to the court having jurisdiction of the offense. Upon appeal, it is the court's duty to determine whether the sheriff or judicial commissioner has acted arbitrarily or capriciously.

Tenn. Code Ann. § 40-11-143 governs alterations in bail and conditions of release and provides:

> A motion for a change in bail or other conditions of release shall be by written motion, served upon opposing counsel or upon the defendant personally if the defendant is not represented by counsel, within a time reasonable under the circumstances before the hearing on the motion. In granting or denying a motion for a change in bail or other conditions of release, *the court shall set forth in writing the reasons for its action*.

(Emphasis added).

Thus, any appeal of a judicial commissioner's determination on bail admission is to be taken to "the court having jurisdiction of the offense," Tenn. Code Ann. § 40-11-106(b)(2), and any motion to alter bail is also to be made with the "court" having jurisdiction over the offense, *see* Tenn. Code Ann. § 40-11-143. In this context, proper forums that could have jurisdiction of the offense would include general session courts, circuit courts, and criminal courts, because these courts are vested with original criminal jurisdiction. *See* Tenn. Code Ann. § 40-1-107 (providing that "[o]riginal jurisdiction of criminal actions is committed to the courts of general sessions, city judges of certain towns and cities, the circuit courts, criminal courts and the court for the trial of impeachments"). This conclusion is confirmed by the language of Tenn. Code

Ann. § 40-11-143, which vests *courts* with the exclusive authority to *alter* a defendant's bail amount and conditions of release.

The Bail Reform Act does not define the term "court," leaving open the question of whether a judicial commissioner also qualifies as a court that could consider a motion to alter bail under Tenn. Code Ann. § 40-11-143. The Tennessee Supreme Court has defined a court as follows:

> A court is an instrumentality of sovereignty, the repository of its judicial power, with authority to adjudge as to the rights of person or property between adversaries. The presence of a judge or judges is necessary as an essential element of a court.

Mengel Box Co. v. Fowlkes. 135 Tenn. 202, 206, 186 S.W. 91, 92 (1916). In light of this definition, in *State v. Bush*, 626 S.W.2d 470 (Tenn. Crim. App. 1981), the Tennessee Court of Criminal Appeals considered whether the statute authorizing the appointment of judicial commissioners by a county's chief legislative body created either inferior courts or corporation courts. The Court of Criminal Appeals identified the characteristics of a "court" as follows:

> The presence of a sufficient number of the members of a body in the government, to which the public administration of justice is delegated, regularly convened in an authorized place, at an appointed time, engaged in the full and regular performance of its duties.

Id. at 472-74 (quoting *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 489, 505, 19 S.W. 618, 622 (1892)). Holding that the statutes authorizing the appointment of judicial commissioners did not create an inferior court or a corporation court, the Court reasoned:

> The act in question does not provide that the Judicial Commissioner convene a court at any particular place or time. His jurisdiction is limited to the issuance of warrants for arrest and search and to the issuance of mittimus. He is not given duties which would lend themselves to "full and regular performance" at an appointed time or place.
>
> The duties fixed by the legislation for Judicial Commissioners are characteristic of those of a "magistrate," and not of a "court."

Id. at 473. The statutes governing the establishment of judicial commissioners have not appreciably changed since the *Bush* decision, *compare* Tenn. Code Ann. § 40-120 (1981 Supp.) *with* Tenn. Code Ann. §§ 40-5-201 to -204 (2006), thus the finding that judicial commissioners are not "courts" remains valid precedent. Accordingly, given that a judicial commissioner is not a "court" and only a "court" may alter a defendant's bail amount and conditions of release under the Bail Reform Act, then a judicial commissioner lacks statutory authority to alter a defendant's bail amount and conditions of release.

As previously mentioned, a general sessions court may reconsider a defendant's bail amount or conditions of release prior to or at the time the defendant is bound over to the grand jury. Indeed it is the common practice of criminal defense attorneys and district attorneys to petition a general sessions court for alteration of bail. *See* 9 David Louis Raybin, *Tennessee Practice: Criminal Practice and Procedure* §§ 4.7-4.8, 4.10-4.11, 4.13 (2011).

Based on the foregoing, a general sessions judge may alter a defendant's bail amount or conditions of release at any time prior to or at the time the defendant is bound over to the grand jury. The reason for any alteration must be set forth in writing. Tenn. Code Ann. § 40-11-143. Moreover, while the Bail Reform Act authorizes judicial commissioners to admit a defendant to bail, they may not subsequently alter that defendant's bail amount or conditions of release because Tenn. Code Ann. §§ 40-11-106 and -143 vest only *courts* with the exclusive authority to do so. Finally, in determining the appropriate amount of bail, magistrates must consider the factors set forth in Tenn. Code Ann. § 40-11-118(b).

2. The second question concerns the authority of various judicial officers to reduce an original bail amount and "authorize a cash deposit in that amount with the clerk of the court." Initially, because Tenn. Code Ann. § 40-11-143 broadly authorizes *courts* to make a "change in bail," the statute envisions that courts may make either a reduction or an increase in bail. *See Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011) (stating the rules of statutory construction that a court should not restrict a statute beyond its intended scope, and that when a statute is clear its plain meaning should be applied without complicating the task). In conformity with this statute, it is the common practice of defense attorneys and district attorneys to petition for both reductions and increases in bail. *See* 9 David Louis Raybin, *Tennessee Practice: Criminal Practice and Procedure* §§ 4.7-4.8, 4.10-4.11, 4.13 (2011). However, bail must be set no higher than is necessary to "reasonably assure the appearance of the defendant as required." Tenn. Code Ann. § 40-11-118(a). Moreover, in determining whether the bail amount should be altered, magistrates must consider the factors set forth in Tenn. Code Ann. § 40-11-118(b).

A court lacks authority to designate for the defendant one of the several methods allowed a defendant to make bail under the Bail Reform Act and thus cannot "authorize a cash deposit." Once bail has been set for a defendant, the defendant may secure the bond in one of three ways. First, the defendant may secure the bail bond by executing a deed of trust conveying real estate to the clerk of the court. Tenn. Code Ann. § 40-11-122(1). Second, the defendant may secure the bail bond by sureties. Tenn. Code Ann. §§ 40-11-122(2) - (3). Third, the defendant may deposit with the clerk of the court a sum in cash "equal to the amount of bail." Tenn. Code Ann. § 40-11-118(a). Because the bail statutes authorize alternative means of providing the security amount required by the bail bond, with the option given to the defendant, a court has no authority to limit a defendant's options. *See* Op. Tenn. Att'y Gen. 04-008, at 2 (Jan. 21, 2004) (quoting *Lewis Bail Bond Co. v. General Sessions Court of Madison County*, No. C-97-62, 1997 WL 711137, at *5 (Tenn. Ct. App. Nov. 12, 1997)).

In sum, once a court has reduced the bail required, a defendant may secure a bail bond for a reduced bail amount by depositing a cash sum equal to the amount of bail without regard to any judicial authorization. Moreover, a defendant also retains the option of securing a bail bond via the alternative means prescribed by Tenn. Code Ann. § 40-11-122 without regard to judicial

authorization. Finally, a defendant may not be compelled to secure a bail bond with a cash deposit instead of with real estate or a surety. *See* Op. Tenn. Att'y Gen. 04-008, at 2; Op. Tenn. Att'y Gen. 03-054 (April 30, 2003).

3. The third question posed regards the adequacy of a reduced bail amount as a condition of release pursuant to Tenn. Code Ann. § 40-11-116(b)(3), which states that "[i]f conditions on release are found necessary, the magistrate may impose . . . any other reasonable restriction designed to assure the defendant's appearance, including, but not limited to, the deposit of bail." A court's determination of whether a bail amount should be reduced upon a defendant's written application is guided by the standards set forth in the Bail Reform Act. Tenn. Code Ann. § 40-11-143 authorizes a court to make "a change in bail or other conditions of release" if the reasons for the alteration are set forth in writing. Tenn. Code Ann. § 40-11-118(b) provides that "[b]ail shall be set as low as . . . is necessary to reasonably assure the appearance of the defendant as required." Tenn. Code Ann. § 40-11-118(b) sets forth the following criteria to consider in establishing bail, which would also govern an application seeking a reduction in bail:

> In 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;
> (3) The defendant's family ties and relationships;
> (4) The defendant's reputation, character and mental condition;
> (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;
> (6) The nature of the offense and the apparent probability of conviction and the likely sentence;
> (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;
> (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
> (9) Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear.

Based on the foregoing, a reduced bail amount upon written application by the defendant is an appropriate condition of release pursuant to Tenn. Code Ann. § 40-11-116(b)(3), provided that (1) the reduction is based on consideration of the factors set forth in Tenn. Code Ann. § 40-11-118(b); (2) the reduced bail amount will reasonably assure the appearance of a defendant; and (3) the reasons for the reduction are set forth in writing. A defendant retains the option of securing any reduced bail bond via the alternative means prescribed by Tenn. Code Ann. § 40-11-122.

4. The final question asks whether a bail bonding company or association has standing to contest in court the manner in which bail is set by judicial commissioners or general sessions judges. Courts employ the doctrine of standing to determine whether a particular litigant is entitled to have a court decide the merits of a dispute or of particular issues. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976) (holding that courts use the standing doctrine to decide whether a particular plaintiff is properly situated to prosecute an action). Grounded upon "concern about the proper – and properly limited – role of the courts in a democratic society," the doctrine of standing precludes courts from adjudicating "an action at the instance of one whose rights have not been invaded or infringed." *ACLU v. Darnell*, 195 S.W.3d 612, 619-20 (Tenn. 2006) (quoting *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001)). As the Supreme Court of Tennessee has explained:

> In order to establish standing to sue, a plaintiff must establish the following elements by a preponderance of the evidence: (1) "a distinct and palpable injury," rather than one that is "conjectural or hypothetical"; (2) "a causal connection between the claimed injury and the challenged conduct"; and (3) "that the alleged injury is capable of being redressed by a favorable decision of the court."

Fannon v. City of Lafollette, 329 S.W.3d 418, 424 (Tenn. 2010) (quoting *ACLU v. Darnell*, 195 S.W.3d at 620).

Accordingly, in order to establish standing to contest the manner in which a judicial commissioner or general sessions judge sets bail in a particular case, a bail bond company or association would have to establish the aforementioned three elements by a preponderance of the evidence. For example, in *Lewis Bail Bonding Co.*, 1997 WL 711137, at *1-5, the Court of Appeals determined that a bonding company had standing to challenge the order of a general sessions court requiring that all bonds be secured by cash deposit. The Court reasoned that "[a]lthough the bail statutes at issue were not enacted by the legislature with the intention of protecting the livelihood of bail bondsmen, we believe that bail bondsmen are sufficiently affected by the cash only policy complained of to warrant finding that a licensed bondsman has standing to seek relief." *Id*. at *2.

Similarly, in *Graham v. General Sessions Court of Franklin County*, 157 S.W.3d 790, 792 (Tenn. Ct. App. 2004), the Court did not question that two bonding companies had standing to challenge an order of a general sessions court requiring that bonds below $4,400 be secured by the signature of two property owners living in Franklin County. The order at issue in *Graham* conflicted with Tenn. Code Ann. § 40-11-122 and precluded qualified bail bonding companies from securing any bail bonds for any defendant whose bail was less than $4,400. *Id.* at 792-96.

The question whether a bail bonding company or association has standing in a particular case will necessarily depend upon the specific facts of the case, the issues presented and the impact of the challenged conduct on the bail bonding company or association.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

NICHOLAS W. SPANGLER
Assistant Attorney General

Requested by: The Honorable Wm. Paul Phillips
District Attorney General, 8th Judicial District
575 Scott High Drive
Post Office Box 10
Huntsville, TN 37756