

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

February 4, 2005

Opinion No. 05-018

Pre-set Bond Schedules

QUESTIONS

1. Does Tenn. Code Ann. § 40-11-105 entitle a defendant to an individual determination of bond amount by a judge or a clerk within three hours of arrest and confinement to the jail? Does it matter whether the arrest is a warrantless arrest, arrest pursuant to a warrant, or arrest pursuant to *capias* or attachment?
2. If a judge or clerk is not readily available (example: nights or weekends), may jailers use “pre-set bond schedules” published by the judges in the jurisdiction to release detainees?
3. If the answer to question (2) is yes and bond must be “reasonable,” do the maximum bond amounts listed in Tenn. Code Ann. § 40-11-105 constitute at least a legislative determination of what is a “reasonable” bond for a pre-set schedule? Are judges limited in the bond amounts used in pre-set schedules by any other statutes or case law?

OPINIONS

1. Yes. Given the factors to be considered under Tenn. Code Ann. § 40-11-118(b) in setting the amount of bond and the fact that, before trial, all defendants shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great, a defendant is entitled to an individual determination of bond whether the arrest is a warrantless arrest, arrest pursuant to a warrant, or an arrest pursuant to a *capias* or attachment.
2. No. Tenn. Code Ann. § 40-11-105(a)(1) does not authorize a jailer to release a defendant based upon a “pre-set bond schedule” published by the judges in the jurisdiction.
3. Because the answer to Question (2) is no, this issue is moot.

ANALYSIS

1. Tenn. Code Ann. § 40-11-102 states in part that “[b]efore trial, all defendants shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great.” Moreover, this right is guaranteed in the Tennessee Constitution. *See* Tenn. Const., Art. 1, §§ 15-16. The Legislature has said that bond “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).

Tenn. Code Ann. § 40-11-105(a)(1) provides that bail determinations may be made "by the committing magistrate, by any judge of the circuit or criminal court, or by the clerk of any circuit or criminal court." The clerk of any circuit or criminal court may admit a defendant to bail only if the judge is not present in the court and the clerk reasonably believes that the judge will not be present within three hours after a defendant has been committed to the county or city jail following arrest. Tenn. Code Ann. § 40-11-105(a)(2). In determining the amount of bond necessary to assure the appearance of the defendant, while at the same time protecting the safety of the public, the court shall consider the following:

- (1) The defendant’s length of residence in the community;
- (2) The defendant’s employment status and history and the defendant’s 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 and record of appearance at court proceedings or 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 such 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 such 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.

Tenn. Code Ann. § 40-11-118(b)(Repl. 1997). Given the factors to be considered in setting the amount of bond and the fact that, before trial, all defendants shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great, it is the opinion of this office that a defendant is entitled to an individual determination of bond whether the arrest is a warrantless arrest, arrest pursuant to a warrant, or an arrest pursuant to a *capias* or attachment.

2. As previously stated, Tenn. Code Ann. § 40-11-105(a)(1) provides that bail determinations may be made "by the *committing magistrate*, by *any judge of the circuit or criminal court*, or by *the clerk of any circuit or criminal court*." (emphasis added). The statute does not authorize a jailer to release a defendant based upon a "pre-set bond schedule" published by the judges in the jurisdiction. *See* Tenn. Code Ann. § 40-11-106(a)(Authorizing sheriff or other officer to take bail and release defendant "[i]f bail has been set.>").

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

JENNIFER L. BLEDSOE
Assistant Attorney General

Requested by:

James Ramsey
District Attorney General
149 N. Main Street
Clinton, TN 37716