IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Adverse Party, v. T.A.B , Defendant-Relator.	Washington County Circuit Court No. C112414CR Supreme Court No. S059925

ADVERSE PARTY'S ANSWERING BRIEF

Appeal from the Judgment of the Circuit Court
for Washington County
Honorable JANELLE WIPPER, Judge

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STATEMENT OF THE CASE

Relator seeks a peremptory writ of mandamus directing the circuit court, Honorable Judge Janelle Wipper, to modify a pre-trial release agreement requiring that he have no contact with state's witnesses pending trial. Relator claims that that condition is unlawful on both statutory and constitutional grounds. But relator is incorrect. The circuit court acted within its statutory and constitutional authority when it ordered the condition at issue. Therefore, this court should deny the petition.

First Question Presented

A defendant charged with a Measure 11 offense may be released prior to trial. When ordering the defendant's release, the trial court may "impose any supervisory conditions deemed necessary for the protection of the victim and the community." ORS 135.240(5)(b). Does ORS 135.240(5)(b) allow a trial court to order a defendant to have no contact with state's witnesses?

Proposed Rule of Law

No-contact orders protect victims and communities by preventing witness tampering, protecting the integrity of the judicial process, and ensuring that guilty offenders are not released because of tainted trial proceedings. Thus, under ORS 135.240(5)(b), trial courts are authorized, when necessary, to order a defendant to have no contact with state's witnesses.

Second Question Presented

Article I, section 14, of the Oregon Constitution, guarantees that offenses other than murder and treason "shall be bailable by sufficient sureties." ORS 135.240(5)(b) allows a trial court releasing a defendant charged with a Measure 11 offense on bail to "impose any supervisory conditions deemed necessary for the protection of the victim and the community." By allowing a trial court to impose bail conditions, does ORS 135.240(5)(b) violate Article I, section 14?

Second Proposed Rule of Law

ORS 135.240(5)(b) does not violate the Oregon Constitution. Even assuming that Article I, section 14 historically created a right to bail without conditions, in 1999, the voters created Article I, section 43, which requires trial courts to base release decisions "upon the principle of reasonable protection of the victim and the public." Thus, to the extent that Article I, section 14 guaranteed bail without conditions, Article I, section 43 now allows those conditions that are necessary for victim and community protection. ORS 135.240(5)(b) is consistent with Article I, section 43 and, therefore, does not offend the Oregon Constitution.

Factual and Procedural Background

The state charged relator with several sexual offenses in Washington County Circuit Court. (Att 1 (Indictment)).[1] All of the charges relate to conduct occurring between 2001 and 2005 between relator and his young cousin. One of the offenses qualifies as a Measure 11 offense.[2]

In November 2011, the trial court held a bail hearing to determine the amount of relator's bail and whether to impose conditions on his release. (Att 5).[3] Prior to the hearing, the court reviewed a "Confidential Release Report" that recommended several conditions, including a condition that relator not have contact with the state's witnesses. (Att 2).

The court asked the state whether any of relator's supporters—family members and friends who had appeared at the courtroom for the hearing—would be called as state's witnesses. The prosecutor explained that one family member—relator's father, —would be. The state explained that relator's father learned of the sexual abuse underlying this case and confronted relator about his conduct. According to the prosecutor, relator's father then

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[1] In its Memorandum in Opposition, the state attached several documents pertinent to this proceeding. Rather than attach those documents again, the state cites to the original attachments already filed in this court.

[2] According to current court records, relator is scheduled for trial on June 12, 2012.

[3] Attachment 5 contains an audio recording of the release hearing.

witnessed relator apologize to the victim.[4] (Att 5). Consequently, the state plans to call relator's father to recount what he saw and heard.

The state also noted that relator's father, despite being aware of the sexual abuse, did not report the abuse to authorities. Instead, according to the prosecutor, the family "thought this was over." (Att 5). The criminal investigation began only when the victim disclosed the abuse to a mandatory reporter who informed authorities. (Att 5).

After hearing from both parties and considering the information and recommendation before it, the court imposed several conditions on relator's release. As relevant here, the court ordered relator to have no contact with state's witnesses, including his father, k. (Att 5). That day, relator paid security and signed the pre-trial release agreement. (ER 1). Immediately after being released, relator asked the court to modify the release conditions so as to allow him to have contact with his father. (ER 5). The court denied that request. (Att 3 (OJIN)). Relator now challenges the trial court's decision and asks this court to order the trial court to allow him to have contact with his father.

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[4] At the hearing, defendant's attorney disputed whether defendant's apology could properly be characterized as an admission of wrongdoing. (Att 5).

Summary of Argument

Relator seeks a peremptory writ of mandamus directing the circuit court to modify a pre-trial release agreement requiring that he have no contact with state's witnesses pending trial. Relator claims that that condition is unlawful on both statutory and constitutional grounds. Relator's claims fail.

ORS 135.240(5) governs pre-trial release agreements in Measure 11 cases such as this. That statute provides that the trial court may "impose any supervisory conditions deemed necessary for the protection of the victim and the community." An order prohibiting contact with state's witnesses serves to protect against multiple potential harms to the victim and the public. No-contact orders serve to prevent witness tampering and harassment, protect the public's interest in the integrity of the judicial system, and protect both the victim and the public by ensuring that guilty offenders are not acquitted because of faulty trial proceedings. ORS 135.240(5)(b) authorizes the trial court to protect the victim and community from those types of harms.

Thus, the decision whether to impose a no-contact order in this case was within the range of permissible discretionary choices before the trial court. In a mandamus proceeding, this court may not disturb a decision that is entrusted to the discretion of the trial court. And therefore, this court should not disturb the trial court's decision in this case.

Further, ORS 135.240(5), which authorized the challenged condition in this case, does not offend the Oregon Constitution. Although historically Article I, section 14, of the Oregon Constitution gave most criminal defendants the right to bail "by sufficient sureties"—and relator contends that that right was unconditional—in 1999, the voters created Article I, section 43. That provision requires trial courts to base release decisions "upon the principle of reasonable protection of the victim and the public." Thus, although criminal defendants historically may have had a "right" to be released on bail without conditions, after 1999, any such right no longer exists. Instead, the constitution requires that trial courts base all pre-trial release decisions—including decisions related to release conditions—on the principle of "protection of the victim and public." ORS 135.240(5)(b) is consistent with that mandate.

In this case, the trial court determined that prohibiting relator's contact with state's witnesses was necessary for the protection of the victim and the public. That decision is authorized by statute, was made in the trial court's sound discretion, and did not offend the Oregon constitution. This court should not disturb the trial court's decision.

ARGUMENT

Relator filed the present petition for writ of mandamus alleging that he is entitled to bail without supervisory conditions, or at least without the condition requiring that he have no contact with state's witnesses. But relator's

contentions fail because both statutory and constitutional provisions authorize the challenged condition. Specifically, ORS 135.240(5)(b) authorized the trial court to order any condition "deemed necessary for the protection of the victim and the community." Likewise, Article I, section 43, of the Oregon Constitution required the trial court to base its release decision on "the principle of reasonable protection of the victim and the public." In its discretion, the trial court determined that the challenged condition is necessary for the protection of the victim and the public. Therefore, the trial court did not err.

A. ORS 135.240 authorizes the challenged condition and the trial court's decision was within its discretionary authority.

Relator contends, first, that the condition requiring that he have no contact with state's witnesses—and particularly, the condition requiring that he have no contact with his father—is invalid under the pertinent statutes. As relator appears to concede, the trial court's decision in this case is governed by ORS 135.240. Thus, the question is whether that provision authorizes the challenged condition.

1. ORS 135.240(5) grants trial courts broad discretionary authority to protect crime victims and the community from harm.

ORS 135.240(5)(a)-(b) provides that if a defendant is charged with a Measure 11 offense, the court authorizing his pre-trial release must require a security, and, in addition, "may impose any supervisory conditions deemed

necessary for the protection of the victim and the community." As the text makes plain, that provision grants trial courts broad discretionary authority to select release conditions that will protect victims and communities from a large variety of potential harms.

To "protect" means to "cover or shield from exposure, injury, damage, or destruction" or to "maintain the status or integrity of especially through financial or legal guarantees." *Webster's Third New Int'l Dictionary* 1822 (unabridged ed 2002). A "community" is simply "an interacting population of various kinds of individuals * * * in a common location." *Webster's* at 460. And the trial court is authorized to protect the victim and community by imposing "any" conditions that are necessary. Those word choices indicate that the legislature intended to grant broad discretionary authority to the trial court to protect the victim and community through any means necessary, including through a no-contact order.

Similar language in other statutes generally has been interpreted broadly. For example, parole board statutes authorizing parole conditions "necessary" to "promote public safety" do not require the parole board to "tailor [release] conditions narrowly to address only certain or immediate risks to public safety." *Weems/Roberts v. Board of Parole*, 347 Or 586, 598, 227 P3d 671 (2010). Instead, the relevant statutes grant the parole board "broad discretion to impose [parole] conditions to address any substantial danger in those regards." *Id*.; *see*

also Martin v. Board of Parole, 327 Or 147, 159-60, 957 P2d 1210 (1998) (parole board "could not eliminate the possibility of [harm] entirely" but "was not required to set conditions so narrowly that they would permit a substantial danger"). This court should interpret ORS 135.240's language in a similar manner: under ORS 135.240, trial courts have broad authority and are not required to "tailor conditions narrowly to address only certain or immediate risks to public safety."

Given that broad grant of authority, the question becomes simply whether a no-contact order is a permissible measure to protect the victim and community from harm. As explained below, because no-contact orders protect against several different potential harms, they are authorized under ORS 135.240.

First, a no-contact order serves to protect against potential witness tampering and witness harassment. Such protection may be necessary in a variety of cases, and a condition prohibiting contact with state's witnesses rationally serves to protect those witnesses against that possible harm.

Second, even absent a threat of active witness tampering, a no-contact order protects the community's interest in maintaining the integrity of the judicial system. Overt witness tampering and harassment are certainly harmful to both the potential witness and to the community's interest in justice. But the passive, non-criminal, influence that can result from witness contact also

presents a threat to the integrity of the judicial process. This case is exemplary. Relator's father will be an important witness for the state. He will be called to testify concerning his confrontation with relator about the sexual abuse underlying the present charges and relator's apology to the victim after that confrontation. And as the record demonstrates, despite his knowledge of the abuse, relator's father never informed authorities. Instead, the family "thought this was over." Those facts demonstrate how fragile relator's father's testimony may be. If he has contact with relator, that contact could easily lead to minimization and distortion of the facts. The public has an interest in preventing the harms that could come from that contact.

Finally, a no-contact order protects the victim and the community from the potential harm that could come from a guilty person being acquitted due to a tainted trial process. To be sure, criminal defendants are considered innocent until proven guilty. But if a defendant is guilty, and is acquitted because of a tainted judicial process, both the community in general and the crime victim specifically could be put in danger. As explained above, in this case, the trial court permissibly could have concluded that relator's father is at risk of falsifying testimony at relator's trial, and that having contact with relator before trial could increase that risk. If relator is guilty, false testimony increases the likelihood of a wrongful acquittal, thus putting the victim and community in danger.

Relator contends that ORS 135.240 contains a more narrow and limited authorization, permitting only those conditions that protect victims and community members from *violent* behavior, and only during the period of pre-trial release. But the statutory text simply does not support such a construction. The text does not use words such as "safety" or "violence." Instead, by authorizing any conditions deemed necessary for the "protection" of the community, the statute does not limit the types of harm that the trial court may seek to prevent. Further, nothing in the statute suggests that the trial court is limited to protecting the community from harms *committed during the period of the defendant's pre-trial release*. Instead, again, the statute is phrased broadly, with no timing limitation. Interpreting the statute to allow only those conditions that protect the victim and public "from dangerous acts committed during the period of the defendant's pre-trial release" would impermissibly "insert what has been omitted." *See* ORS 174.010 ("In the construction of a statute, the office of the judge is * * * not to insert what has been omitted, or to omit what has been inserted.").

Thus, ORS 135.240(5)(b), properly understood, grants a trial court authority to impose conditions necessary to protect against a broad variety of harms. Its authority is not limited to protecting the victim and the public from immediate threats of physical violence.

2. Imposing the no-contact order in this case was a permissible discretionary choice that this court should not disturb in a mandamus proceeding.

The remaining question then is whether the trial court erred in imposing a no-contact order in the circumstances of this case and, more specifically, whether in this mandamus proceeding this court may order the trial court to remove the challenged condition.

Mandamus is an "extraordinary remedy" available "only when the law *requires* a particular decision." *Dreyer v. PGE*, 341 Or 262, 276, 142 P3d 1010 (2006) (emphasis in original). Consequently, "though the writ may require [a] court * * * to exercise judgment * * * it shall not control judicial discretion." ORS 34.110. And generally, whether a pre-trial release condition is "necessary for the protection of the victim and the community" is a question left to the discretion of the trial court. *See Collins v. Foster*, 299 Or 90, 94, 698 P2d 953 (1985) (court has "latitude in ordering the 'terms and conditions' of [pre-trial] release"). Indeed, ORS 135.240(5)(b) is phrased in discretionary terms: the court "may impose" conditions "deemed necessary," but no specific conditions are required.

Thus, whether the challenged no-contact order is "necessary" in this case is a question left to the discretion of the trial court. As explained above, imposing a no-contact order is at least a "permissible" discretionary choice under the applicable statute. *See generally State v. Rogers*, 330 Or 282, 310, 4

P3d 1261 (2000) ("[I]f the application of a legal rule * * * allows for several legally correct [options], a trial court may exercise discretion to choose among those [options]."); *see also Weems/Roberts*, 347 Or at 600 (whether decision maker abused discretion "depends on whether the [decision maker's] choice is within the permissible range of choices that the legislature has authorized [it] to make"). Under ORS 34.110, this court will not "control" that discretionary decision in a mandamus proceeding.

In short, prohibiting contact with state's witnesses serves to protect against multiple harms. Thus, no-contact orders are permissible under ORS 135.240(5)(b). Whether to impose a no-contact order in this case is a matter left to the sound discretion of the trial court and is not properly reviewable in this mandamus proceeding. This court should not disturb the trial court's determination in this case.

B. ORS 135.240(5)(b) does not offend the Oregon Constitution.

Alternatively, relator contends that ORS 135.240(5)(b), in that it authorizes release conditions at all, offends the Oregon Constitution. He relies on Article I, section 14, contending that the right to bail contained in that provision is absolute, and that, therefore, "any conditions attached to bail necessarily infringe on the defendant's constitutional right to bail." (Opening Br 13). To be sure, prior to 1999, Article I, section 14, of the Oregon Constitution gave most criminal defendants the right to bail. *See State v.*

Sutherland, 329 Or 359, 987 P2d 501 (1999) (declaring certain portions of *former* ORS 135.240 unconstitutional because they infringed on the right to bail).[5] In 1999, however, the voters passed Measure 71, which created Article I, section 43, of the Oregon Constitution. To the extent that Article I, section 14, provided an *absolute* right to bail in criminal cases, Article I, section 43 eliminated that right.

Article I, section 43, requires trial courts to base release decisions "upon the principle of reasonable protection of the victim and the public, as well as the likelihood that the criminal defendant will appear for trial." Or Const Art I, § 43(1)(b). In addition, for crimes deemed "violent felonies," Article I, section 43 requires the trial court to deny bail outright upon making certain findings regarding the defendant's potential for dangerousness. Or Const Art I, § 43(1)(b).[6]

Article I, section 43 thus permits the type of release conditions that ORS 135.240(5)(b) authorizes. Article I, section 43 is broad in its scope. It

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[5] Article I, section 14 provides: "Offences [sic], except murder, and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption strong."

[6] Article I, section 43 retains Article I, section 14's requirement that "murder, aggravated murder and treason shall not be bailable when the proof is evident or the presumption strong that the person is guilty." Or Const Art I, § 43(1)(b).

requires trial courts to base *all* release decisions—including decisions about release conditions—on the principle of "reasonable protection of the victim and the public." ORS 135.240(5)(b) is consistent with that mandate in that it authorizes conditions deemed necessary for that victim- and community-protection.

And relator does not appear to disagree. In his original petition before this court, he implicitly admitted as much, arguing only that Article I, section 43, *itself* is invalid because it was enacted unlawfully.[7] Relator does not renew that argument—or raise any other argument concerning Article I, section 43—in his Opening Brief. Thus, although relator contends that ORS 135.240(5)(b) offends Article I, section 14, he does not dispute—and, in fact, appears to implicitly concede—that Article I, section 43, provides a constitutional foundation for that provision.

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[7] In his original petition, relator suggested that Article I, section 43 was enacted in violation of Article XVII, section 1's "separate vote" requirement. In its Memorandum in Opposition, the state responded to relator's "separate vote" argument. But because relator does not renew that argument in his Opening Brief, the state does not here reiterate its response. Instead, the state invites this court to refer to its argument in the Memorandum in Opposition.

CONCLUSION

This court should deny the petition for writ of mandamus. Both ORS 135.240(5)(b) and Article I, section 43, of the Oregon Constitution, authorize trial courts to impose pre-trial release conditions that are deemed "necessary for the protection of the victim and the community." In its discretion, the trial court concluded that the condition at issue here was necessary. The court did not err, and this court should not disturb the trial court's discretionary decision.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 9, 2012, I directed the original Adverse Party's' Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ronald H. Hoevet, attorney for relator, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,400 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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