

No. SC92532

**In the
Supreme Court of Missouri**

STATE OF MISSOURI,

Plaintiff,

v.

KIRK JACKSON,

Defendant.

**Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit
The Honorable Nancy Schneider, Circuit Judge**

PLAINTIFF'S BRIEF

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STATEMENT OF FACTS

On March 29, 2012, the state filed a complaint and probable cause statement against the defendant for one count of invasion of privacy of in the second degree (Petitioner's legal file, hereinafter "L.F." at 10). The complaint states in part, that the defendant knowingly filmed Nicole Maltarich in a state of full or partial nudity without the knowledge and consent of Nicole Maltarich and in a place where a person would have a reasonable expectation of privacy and, during the same course of conduct, the defendant filmed other persons in a state of full or partial nudity without their knowledge and consent and in a place where a person would have a reasonable expectation of privacy (L.F. 10).

The probable cause statement, in pertinent part stated:

Kirk Michael Jackson did operate a massage therapy business did conceal a video camera inside a tin covering a tissue box in the corner of the room where he instructed a victim to undress and lay on the massage table. The victim was suspicious of the tin which had holes on the side of the tin and believed there might have been a hidden camera. After completing the massage, the victim returned to the corner where the tin covering the tissue box was located and lifted the box which revealed hidden video camera. The victim contacted the police department after she left and made a report.

On 3-28-12 I served a search warrant on the above business. Officer S. Shields working in an undercover capacity entered the business for a massage. Kirk

Jackson [i]nstructed Officer Shields to remove her clothes and lay on the table in preparation for a massage.

* * *

Upon entering the massage room a video camera was located hidden in a wall hanging unknown to Officer Shields. The video camera was turned on recording the room.

After being placed into custody, Kirk Jackson gave written consent to search his residence

* * *

Investigation revealed ... numerous video clips of Kirk Jackson concealing a video camera prior to giving a massage to female clients. The images were of female clients partially or fully nude.

(L.F. 12).

On that same date, the case was assigned to Judge Terry Cundiff, Associate Circuit Division 6 and a warrant for the defendant's arrest was signed by the Associate Circuit Judge Matthew Thornhill, Division 12, and set at \$75,000.00, 10% not authorized, cash (L.F. 1). The warrant does not contain language to prohibit a surety bond or a property bond, only that cash and that a posting of 10% was not allowed (L.F. 1).

On March 29, 2012, attorney Kevin Kasper entered his appearance on behalf of the defendant and filed his motion to reduce bond (L.F. 1). A bond reduction was heard and denied on April 6, 2012, by Judge Cundiff (L.F. 2). No transcript of that hearing has

been filed with this court. On April 11, 2012, the Court ordered additional conditions to the defendant's bond (L.F. 2).

On April 27, 2012, an indictment was filed against the defendant for thirteen counts of the class D felony of invasion of privacy in the first degree and one count of the class D felony of invasion of privacy in the second degree (L.F. 13-18). The oldest charge is from February 5, 2011, with varying dates through and including March 28, 2012, involving thirteen different named individuals, for filming the victims in a state of full or partial nudity without their knowledge or consent and in a place where a person would have a reasonable expectation of privacy, and the defendant subsequently transmitted the image contained in the film in a manner that allowed access to that via computer (L.F. 13-18). Count 13 alleges conduct for filming a person in a state of full or partial nudity without their knowledge and consent and in a place where a person would have a reasonable expectation of privacy and, during the same course of conduct, the defendant filmed other persons in a state of full or partial nudity without their knowledge and consent and in a place where a person would have a reasonable expectation of privacy (L.F. 17-18).

On the day of the filing of the indictment, the case was assigned to Circuit Judge Division 3, Judge Lucy D. Rauch (L.F. 3).

On May 3, 2012, attorney Louis R. Horwitz entered his appearance on behalf of the defendant (L.F. 6). On May 7, 2012 the Missouri Court of Appeals Eastern District denied the defendant's application pursuant to Rule 33.09 Regarding Excessive Conditions for Release Pending Trial (Defendant's Exhibit E).

On May 29, 2012, the trial court denied the defendant's second motion for a bond reduction after a hearing (L.F. 7). No transcript of that hearing has been filed with this court.

On June 8, 2012, the defendant filed a motion to disqualify Judge Rauch (L.F. 8). That motion was granted on June 12, 2012, and the case was assigned to Circuit Judge Daniel Pelikan, Division 7 (L.F. 8).

On July 5, 2012, criminal charges were issued in the City of St. Louis against the defendant in 1222-CR03812 for two counts of invasion of privacy second degree. Bond was set at \$50,000.00 cash only (Casenet for 1222-CR03812).

On July 11, 2012, the defendant withdrew a motion for a bond hearing in Division 7 (L.F. 9). On July 12, 2012, Judge Pelikan recused himself from the case (L.F. 9).

On July 27, 2012, this court ordered briefing and argument on the defendant's Rule 33.09 motion (See Court's file).

On August 3, 2012, the case was reassigned to Circuit Judge Nancy Schneider, Division 2 (L.F. 9).

ARGUMENT

The trial court did not err denying the defendant's motions for a bond reduction, because a cash-only bond was not prohibited by the Missouri Constitution and a cash-only bond is a sufficient surety in this case, which involves fourteen felony counts of invasion of privacy.

The defendant alleges that a cash-only bond is prohibited "because the 'sufficient sureties' phrase [in the Missouri Constituion] depends on the procedural context" (App.Br. 25). He states that the amount of bail is technically not before the Court as there is no excessive bail claim (App. Br. 24). He also states that whether there has been a bond hearing is irrelevant (App. Br. 24). This may explain why he has not filed transcripts of any of the bond hearings.

A. Standard of Review

The issue of what is prohibited by the Missouri Constitution is a question of law which this court reviews de novo. State v. Richard, 298 S.W.3d 529, 531 (Mo.banc 2009). When interpreting language that is undefined, it is to be given its plain and ordinary meaning, which is its dictionary definition. State v. Silvey, 980 S.W.2d 103, 108 (Mo.App.S.D. 1998).

B. Relevant facts

The defendant was charged with fourteen class D felonies involving invasion of privacy. The bond for the charges in St. Charles County is \$75,000 cash only (which is about \$5,357.14 per count). This does not include the bond on the charges pending in St.

Louis City in 1222-CR03812. Although the bond was cash only, the defendant was not prohibited from using cash from a bail bonds company.

C. Analysis

The Missouri Constitution, Article I section 20 states “That all persons shall be bailable by **sufficient sureties**, except for capital offenses, when the proof is evident or the presumption is great” (emphasis added). “Sufficient” is defined as “enough to meet the situation or proposed end.” Merriam-Webster.com. “Surety” is defined as “a formal engagement (as a pledge) given for the fulfillment of an undertaking.” Id. It is also defined as “one who has become legally liable for the debt, default, or failure of another.” Id. Thus, the simple answer is that a sufficient surety a pledge to put up or pay something is one that is enough to meet the situation, regardless of whether or not it is cash-only or not. The facts of each case are examined and the court uses its discretion to set the appropriate bond.

Further, Article I, section 20 must be read together with Article I section 32.2, which states in pertinent part “Notwithstanding section 20 of article I of this Constitution, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may imposes special conditions which the defendant and surety must guarantee.

The word “notwithstanding” is defined as “in spite of.” Parkville Benefit v. Platte County et al., 906 S.W.2d 766, 769 (Mo.App.W.D. 1995) (citing Webster's New World Dictionary, 2d ed.1986). As this Court held in State ex rel. City of Jennings v. Riley, 236 S.W.3d 630, 632 (Mo. banc 2007), “a ‘notwithstanding any other provision of law’ clause

eliminates conflict rather than creates it because “no other provisions of law can be held in conflict with it. Id. Indeed, a conflict would exist only if both statutes included a prefatory ‘notwithstanding’ clause or if neither included such a clause.” Id.

Reading these two provisions of our Constitution, clearly shows a legislative intent to allow a court to consider other factors in determining special bond conditions, such as upon a showing that the defendant poses a danger to the crime victim, the community or any other person and the court may even deny bail for non-capital offenses.

Missouri Supreme Court Rule 33.01, in pertinent part states:

(b) The court shall set such conditions for release as will reasonably assure the appearance of the accused...

(d) The court shall shall impose one or more of the following conditions for his release ...

(3) Require the execution of a bond in a stated amount with sufficient solvent sureties, **or the deposit in the registry of the court of the sum in cash** or negotiable bonds of the United States or of the State of Missouri or any political subdivision thereof (emphasis added);

(5) Require the execution of a bond in a stated amount and the deposit in the registry of the court of ten percent, or such lesser sum as the court directs, of such **sum in cash** or negotiable bonds of the United States or the State of Missouri or any political subdivision thereof (emphasis added);

(e) In determining which conditions of release will reasonably assure appearance, the court shall, on the basis of available information, **take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused** ... (emphasis added).

§ 544.455, RSMo (2011), states in pertinent part:

1. Any person charged with a bailable offense ... the associate circuit judge or judge may either in lieu of or in addition to the above methods of release, impose any or any combination of the following conditions of release:

(3) Require the execution of a bail bond with sufficient solvent sureties, **or the deposit of cash in lieu thereof** (emphasis added);

...

(5) Require the execution of a bond in a given sum and the deposit in the registry of the court of ten percent, or such lesser percent as the judge directs, **of the sum in cash** or negotiable bonds ... (emphasis added);

2. In determining which conditions of release will reasonably assure appearance, the associate circuit judge or judge shall, on the basis of available information, take into account the nature

and circumstances of the offense charged, the weight of the evidence against the accused, ...

Taking the above rule and statute, it is clear the court can require the deposit in the registry of the court of the sum of cash for a bailable offense. Additionally, in State v. Echols, 850 S.W.2d 344, 346 (Mo. banc 1993), this Court has stated that in cash bail, the law looks to the money as surety. Therefore, this legal issue has already been properly decided. More specifically, in Echols, the court cited People v. Castro, 119 Misc.2d 787, 464 N.Y.S.2d 650 (Sup.Ct.1983), and stated:

the court gives an excellent history and treatment of cash bail in criminal cases. The court stated that the distinctions in the rights, duties and obligations between bail bondsmen and depositors of cash bail originate in English common law. At common law, bail bonds carry with them a stringent degree of responsibility by the one posting the bond. The strict theory in the thirteenth century was that all chattels of the sureties were at the king's mercy, and those who put up bail were liable to render their own bodies to jail. This harsh practice was alleviated by the practice of having the court assess a financial penalty if the surety did not produce the prisoner. From this, the concept of forfeiture of bail bonds was developed as a financial penalty assessed against the surety if he failed to produce the defendant. In short, in a bond with a surety, the

responsibility for insuring the defendant's appearance is on the surety. *Id.* 464 N.Y.S.2d at 655.

The court further stated that, in contrast, cash bail is a creature of statute and that absent statutory authority there is no right to deposit cash as bail because cash bail did not exist at common law. In cash bail the law looks to the money as surety for the appearance of the defendant rather than to the surety. This follows from the fact that the money deposited with the court insures the defendant's appearance, and there is no promise by a surety to pay money in the future if the defendant fails to appear. The money in a cash bail is held by the court as trustee on the terms that if the defendant appears as required, the money will be returned to the depositor, and if the defendant fails to appear, the money shall be given to the appropriate authority. *Id.* 464 N.Y.S.2d at 655–56.

State v. Echols, *supra* at 346.

In re Honorable Frank A. Conard, 944 S.W.2d 191 (Mo.banc 1997), was a disciplinary action against Judge Conard. This court examined Article I, sections 20 and 32.2 of the Missouri Constitution noting that upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may impose special conditions with the defendant and surety must guarantee. *Id.* at 201.

In examining the probable cause statement filed with the case, it is abundantly clear what the nature and circumstances of the offense charged and the weight of the

evidence against the accused is great. It is also apparent that the defendant is a danger to the community due to the nature of the offenses, the number of victims, and his potential ability to inflict further damage by disclosing video of the victims and that allowing the court to impose special conditions which must be guaranteed (L.F. 12, Missouri Constitution Article I, Section 32). Although the bond was cash only, the defendant was not prohibited from using cash from a bail bonds company.

Similar result have been reached in other states. In Fragoso v. Fell, 111 P.3d 1027 (Az.App. 2005), a court held that the term “sufficient surities” did not prohibit a cash-only bond. In State v. Guitierrez, 140 P.3d 1106 (New Mexico App. 2006), a court held that the term “sufficient surities” in the New Mexico Constitution did not prohibit a cash-only bond. In Fullerton v. County Court, 124 P.3d 866 (Colorado. App. 2005), a court held that “sufficient surety” did not prohibit a cash-only bond. In State v. Briggs, 666 N.W.2d 573 (Iowa 2003), a court determined that the phrase “sufficient surities” did not prohibit a cash-only bond.

CONCLUSION

The trial court did not err denying the defendant's motions for a bond reduction, because a cash-only bond was not prohibited by the Missouri Constitution and a cash-only bond is a sufficient surety in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 2,882 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of the foregoing was sent through the electronic filing system, (efiling) on this 17th day of August, 2012, to Louis Horwitz, a registered user of the Missouri efiling system at louhorwitz@centurytel.net.

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