

FILED
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SEPTEMBER 21, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Santos Regalado Casarez, III,)	
)	
Defendant / Petitioner,)	Supreme Court File No.
)	
vs.)	
)	
The Honorable M. Jason)	Grand Forks County Criminal No.
McCarthy, and The State of)	18-2017-CR-02521
North Dakota,)	
)	
Plaintiff / Respondent.)	

**PETITION FOR SUPERVISORY WRIT
PURSUANT TO N.D.R. APP. P. 21**

Petition for a Supervisory Writ pursuant to the ongoing denial of petitioners request to amend conditions of pretrial release in Grand Forks County District Court, Northeast Central Judicial District, North Dakota the Honorable M. Jason McCarthy, presiding.

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[¶ 3] JURISDICTIONAL STATEMENT

[¶ 4] The Defendant, Santos Casarez, III, petitions this Court to exercise their supervisory jurisdiction pursuant to N.D.C.C. § 27-02-04, which provides, “in the exercise of its original jurisdiction, [The Court] may issue writs of habeas corpus, mandamus, quo warranto, certiorari, and injunction. In the exercise of its appellate jurisdiction, and in its superintending control over inferior courts, it may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction.” This Court also holds authority pursuant to N.D. Const. art. VI, § 2 as well as N.D.R.App.P. 21.

[¶ 5] This Court determines whether it will issue writs of supervision on a case-by-case basis, and will only do so when there is no alternative remedy. For the Court to exercise this authority, it must be necessary to correct errors and prevent injustice. Roe v. Rothe-Seeger, 2000 ND 63, ¶ 5, 608 N.W.2d 289. This petition is properly in front of this Court because pretrial bail issues are considered moot when challenged after conviction. State v. Skarsgard, 2007 ND 106, ¶18, 739 N.W.2d 786. See State v. Hansen, 2006 ND 139, ¶¶ 5–11, 717 N.W.2d 541; see also Murphy v. Hunt, 455 U.S. 478, 481 (1982); United States v. Hollister, 746 F.2d 420, 426 n. 18 (8th Cir. 1984); Bostick v. United States, 400 F.2d 449, 451 (5th Cir. 1968); Louisiana v. Grillette, 588 So.2d 1338, 1340 (La. Ct. App. 1991); Minnesota v. Huber, 148 N.W.2d 137, 140 (Minn. 1967); Delangel v. Texas, 132 S.W.3d 491, 494 (Tex. App. 2004).

[¶ 6] STATEMENT OF THE ISSUES

- a. Whether the district court followed the required procedure for setting conditions of pretrial release.
- b. Whether the district court set bond for pretrial release at an unconstitutionally excessive amount.

[¶ 7] RELIEF SOUGHT

[¶ 8] Mr. Casarez requests a Supervisory Writ be issued requiring the district court to follow and abide by N.D.R.Crim.P. 46, whereby the mandatory default pretrial release is “personal recognizance” or an “unsecured appearance bond;” unless a showing has been made that such a bond will not “reasonably assure the appearance of the person as required.” (emphasis added).

[¶ 9] That Supervisory Writ further instruct the district court that, should there be such showing that the default “personal recognizance” or “unsecured appearance bond” will not “reasonably assure the appearance of the person as required,” that a monetary bond amount shall be commensurate with the ability of the accused to afford such an amount.

[¶ 10] Furthermore, should a district court deem an accused “indigent” under the North Dakota Commission on Legal Counsel for Indigents “Income Guideline,” that any monetary bond deemed necessary to “reasonably assure the appearance of the person as required” be appropriately proportionate to guidelines.

[¶ 11] STATEMENT OF CASE

[¶ 12] Mr. Casarez is currently charged with the following class C felonies in Grand Forks District Court: Aggravated Assault-Domestic Violence, Terrorizing-Domestic Violence, and Felonious Restraint. At the initial appearance on December 11, 2017, the district court set an appearance bond at \$100,000 cash or surety. (App. at 4).

[¶ 13] On December 26, 2017, a notice was filed with the district court, establishing that Mr. Casarez is indigent and eligible for court appointed counsel. (App. at 11, Index # 19). On January 16, 2018, a hearing was held in which the district court denied defense counsel's request to amend bond. (App. at 21, B.R. Tr. 5:2-3). At the Final Dispositional Conference on August 16, 2018, the district court again denied a request for any reduction in bond. (App. at 27, FDC Tr. 4:3-7).

[¶ 14] LAW AND ARGUMENT

[¶ 15] The District Court Did Not Follow The Required Procedure For Setting Conditions Of Pretrial Release.

[¶ 16] Rule 46, N.D.R.Crim.P., outlines the proper procedure for determining the appropriate conditions for pretrial release of a defendant. Pursuant to Rule 46, at the initial hearing, the court ***must*** release the defendant on their personal recognizance or on the execution of an unsecured appearance bond, ***unless the court decides*** “that unconditional release will not reasonably assure the appearance of the person as required.” *Id.* (emphasis added). If, and only if, the court decides “that unconditional release will not reasonably assure the appearance of the person as required,” then the court moves on to analyze the Rule 46(a)(2) factors and determine conditions of release. *Id.*

[¶ 17] Rule 46, N.D.R.Crim.P., goes on to discuss release conditions and release condition factors, however, the Rule is more than abundantly clear under (a)(1) – that before proceeding, the court ***must*** first determine that an “unconditional release” will not “reasonably assure the appearance of the person as required.” (emphasis added).

[¶ 18] At Mr. Casarez’s initial appearance the district court asked the State to make a bond recommendation. (App. at 13, I.A. Tr. 6:1-2). The State recommended \$100,000 cash or surety, supported only by concerns regarding the nature of the charged offense and potential threat to the victim. (App. at 13, I.A. Tr. 6:3-12). This analysis from the State was premature as the required determination regarding whether or not unconditional release would secure Mr. Casarez’s appearance at future hearings had not been made nor even addressed. Despite the circumvention of the rule’s mandate, the district court set the conditions requested by the State. (App. at 13, I.A. Tr. 7:5-6). The only statement to support this ruling established explicitly that the district court had already accepted the allegations

against Mr. Casarez as fact; allegations that have yet to be proven by the State at trial. (App. at 13, I.A. Tr. 7:2-3). Moreover, an allegation of the victim's ruptured spleen was subsequently disproven through discovery.

[¶ 19] Release conditions were next addressed at a bond review hearing on January 16, 2018. (App. at 21). At this hearing, previous defense counsel, Tyler J. Morrow, addressed the issue of an assured appearance or "flight risk" as it had not been addressed at the statutorily required time. (App. at 21, B.R. Tr. 2:8-22). Mr. Morrow outlined that Mr. Casarez has lived in North Dakota for the past 18 years and all of his family lives in North Dakota, including his two children. Id. Mr. Morrow noted that Mr. Casarez would have employment if he were to be released as well as an apartment he could move into. Id. Additionally, Mr. Morrow noted that Mr. Casarez does not have a passport and would therefore have no ability to leave the country. Id.

[¶ 20] After addressing the flight risk concern, Mr. Morrow addressed the remaining factors outlined by Rule 46. N.D.R.Crim.P.46(3). He noted that Mr. Casarez does not have a lengthy criminal history. He indicated that danger to the alleged victim should be of no concern to a bond determination as a No Contact Order and an additional Domestic Violence Protection Order both were already in place for the specific purpose of protecting the alleged victim from any contact with Mr. Casarez. (App. at 21, B.R. Tr. 2:23-3:1). The district court refused to amend release conditions from the original appearance bond. (App. at 21, B.R. Tr. 5:2-3). While all of the arguments made by Mr. Morrow establish that the bond set by the district court in this case is extremely excessive, they still come without the required determination of the district court that Mr. Casarez's appearance would not have been ensured by an unconditional release on his own personal recognizance.

[¶ 21] After several additional months of incarceration, a rejected plea agreement by the district court, and many unsuccessful attempts to negotiate with the State, bond was again addressed by current counsel at a Final Dispositional Conference on August 16, 2018. (App. at 27, FDC Tr. 2:19-20). After defense counsel addressed the same concerns previously raised by Mr. Morrow, the district court again refused to amend the bond. (App. at 27, FDC Tr. 4:3-10). At the bond hearing on January 16, 2018, the district court listed “danger to the alleged victim” as a reason to maintain bond conditions. (App. at 21, B.R. Tr. 5:1-3). At the Final Dispositional Conference, defense counsel addressed the district court’s concern in that the alleged victim no longer resides in North Dakota. (App. at 27, FDC Tr. 3:10-13). The district court then unilaterally decided to change the issue of concern to one of “public safety.” (App. at 27, FDC Tr. 4:5-6). At no time did the district court make the required determination, pursuant to Rule 46(a)(1), that Mr. Casarez’s appearance could not have been ensured with an unconditional release on his personal recognizance.

[¶ 22] The District Court Set Bond For Pretrial Release At An Unconstitutionally Excessive Amount.

[¶ 23] Excessive bail is prohibited by the N.D. Const. art. I, § 11, and U.S. Const. Amend. VIII. The Supreme Court of the United States has established that any bail or bond amount, set higher than necessary to ensure the presence of the defendant, is excessive and therefore a violation of the Eight Amendment. Stack v. Boyle, 342 U.S. 1, 5 (1951); United States v. Motlow, 10 F.2d 657 (7th Cir. 1926). In this case, the determination regarding Mr. Casarez's likelihood of future appearances was never made, rendering any amount fundamentally unconstitutional. Furthermore, the \$100,000.00 appearance bond was determined solely upon the recommendation by the State based on potential future harm to the victim. (App. at 13, I.A. Tr. 6:3-12 & 7:5). This is a blatant violation of Mr. Casarez's presumption of innocence and his due process rights to have bail set reasonably. The district court in no way and at no time made any inquiry into Mr. Casarez's ability to afford such a bond.

[¶ 24] In fact, the district court subsequently determined Mr. Casarez indigent (App. at 11). Thus, pursuant to the 2018 Income Guidelines from the North Dakota Commission on Legal Counsel for Indigents, Mr. Casarez does not gross more than \$1,265.00 per month nor does he have equity in property over \$20,000.00. (App. at 12). Of note, Mr. Casarez's monthly income determination was only applicable while he was working which ceased upon his pre-trial incarceration. When this fact was expressed to the district court, the court articulated its own personal disdain for the defendant, based solely on mere accusations (which was subsequently proven false) by stating, “[y]eah, well, you’re going to lose a job, and someone has a ruptured spleen.” (App. at 13, I.A. at 7:2-3).

[¶ 25] At the bond review hearing on January 16, 2018, Mr. Morrow addressed the amount of Mr. Casarez’s bond in the context of standard cases in North Dakota. (App. at 21, B.R. Tr.3:2-9). Mr. Morrow noted that he was representing a client on a homicide charge for which only a \$10,000 unsecured bond was required. (App. at 21, B.R. Tr. 3:6-7). He noted that Mr. Casarez’s bond was the highest he had ever seen for C felony charges in the State of North Dakota. Id.

[¶ 26] Unlike the situation in Skarsgard, where excessive pretrial bail was not raised until after his conviction, 2007 ND 160, ¶ 17-18, 739 N.W.2d 786; Mr. Casarez is seeking this Supervisory Writ before trial and after two-hundred eighty-four (284) days, or nine (9) months, one (1) week, and three (3) days of pretrial detention on an unchanged \$100,000.00 cash or surety bond.

[¶ 27] A bond which was originally based on certain injuries to the victim (which were subsequently disproven), then was based on the threat to the victim (which was negated by the victim’s relocation outside of North Dakota, in addition to a no contact order, and a domestic violence protection order), and is now based on a “public safety” concern, despite no such showing, nor argument by the State regarding such a concern.

[¶ 28] CONCLUSION

[¶ 29] This Court needs to exercise its supervisory jurisdiction under the N.D. Const., the N.D.C.C., and the N.D.R.App.P. and instruct the district court to follow the N.D.R.Crim.P. when establishing bond. Furthermore, abide by the United States and North Dakota Constitutions if it becomes necessary to set a monetary or bond, so as to not set an excessive bond amount.

[¶ 30] The district court has violated Mr. Casarez's Constitutional due process rights for over the last nine months by ignoring the rules of criminal procedure and setting a monetary bond at an unconstitutionally excessive amount. Mr. Casarez has exhausted his district court remedies and is now seeking relief from this Court to issue a Writ addressing these Constitutional violations.

[¶ 31] Petitioner respectfully requests that this Court issue a Writ ordering the district court to immediately release Mr. Casarez on a personal recognizance bond, as it has never been argued or shown that Mr. Casarez will not reasonably appear as required. In the alternative, this Court should issue a Writ and order the district court to reduce Mr. Casarez's bond amount to one that is commensurate with his status as an indigent.

Respectfully submitted this Friday, September 21, 2018.

/s/ Samuel A. Gereszek
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)	

CERTIFICATE OF SERVICE

I, Samuel A. Gereszek, attorney for the Defendant/Petitioner, and officer of the court, hereby certify that a true and correct copy of the following:

1. *Petition for Supervisory Writ; (.pdf and word formats),*
2. *Petitioner's Appendix.*

was filed **electronically through email and USPS** on this Friday, September 21, 2018, and served upon:

**Clerk of the North Dakota
Supreme Court**

**Honorable Judge Mark
Jason McCarthy
Judge of the District Court**

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Dated this Friday, September 21, 2018.

HAMMARBACK & SCHEVING, P.L.C.

/s/ Samuel A. Gereszek

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