SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. PHILIP DESGRANGES, ESQ.
ON BEHALF OF CHRISTOPHER KUNKELI,

Petitioner,

-against-

ADRIAN BUTCH ANDERSON, Dutchess County Sheriff,

Respondent.

DECISION, ORDER AND JUDGMENT

Index # 90/2018

The following papers were read and considered on this habeas corpus proceeding and action seeking a declaratory judgment, which papers were supplemented by oral argument heard on January 19, 2018:

VERIFIED PETITION
EXHIBITS 1 - 31
AFFIDAVIT OF MICHELE SHAMES IN SUPPORT
EXHIBITS A - G
MEMORANDUM OF LAW IN SUPPORT

VERIFIED ANSWER
EXHIBITS 1 - 41
RESPONDENT'S MEMORANDUM OF LAW

REPLY MEMORANDUM OF LAW
AFFIRMATION OF THOMAS ANGELL, ESQ.
AFFIRMATION OF MIKAEL COHN, ESQ.
AFFIDAVIT OF CHRISTOPHER KUNKELI

This matter was commenced in the Appellate Division Second Department as an Article 70 petition for a writ of habeas corpus and an action for a declaratory judgment. Petitioner claimed he was being unlawfully held as a result of bail, or excessive bail, having been set by Town Judge Paul Sullivan upon petitioner's arraignment on a charge of petit larceny. The Appellate Division referred the matter to this court fixing an appearance date of January 19, 2018. On January 19, 2018 the undersigned heard oral argument from both sides. Respondent submitted answering papers. Petitioner requested and was given one week to reply.

It is undisputed that on October 11, 2017, the petitioner was represented at his arraignment by an attorney from the Public Defender's Office of Dutchess County and that he did not subsequently challenge the bail either by objecting to it at the arraignment, or by a subsequent proceeding before the Town Judge or before a County Court Judge. However, exhaustion of remedies is not a condition to the right to bring a petition for habeas corpus, (CPLR Article 70), nor for a declaratory judgment. Further, on the record presented Mr. Kunkeli did not waive his constitutional rights to due process and equal protection. Brady v. the United States, 397 U.S. 742 (1970).

On January 19, 2018 counsel for both sides advised that the petitioner had been released that morning as a result of a plea bargain. The respondent claims that this matter is therefore moot. The petitioner contends that there are constitutional claims regarding the setting of bail in this case and in many other cases affecting members of the public under the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution which warrant this court's determination in the form of a declaratory judgment. Petitioner relies on a Court of Appeals case, People ex rel. McManus v. Horn, 18 NY3d 660 (2012). In McManus, the accused argued that his pretrial incarceration was unlawful because the judge ordered cash-only bail. While the habeas corpus proceeding was pending, Mr. McManus pled guilty. The Court of Appeals found and applied an exception to mootness since "the propriety of cash-only bail is an important issue that is likely to recur and which typically will evade our review." Id. at 664. The court considered the matter as an action for declaratory judgment in that case, and this court finds it appropriate to do so here. See also Hearst Corp. v. Clyne, 50 NY2d 707 (1980) where the Court of Appeals outlined a three prong test for recognition of an exception to mootness when (1) the case raises a substantial or novel issue, (2) that has a "likelihood of repetition, either between the parties or among other members of the public", (3) and yet, because of the fleeting nature of the dispute, the issue will typically evade judicial review. Id. at 714-715.

Across our State, between sixty percent on average, and in New York City as much as seventy five percent, of inmates have not been convicted of a crime but are awaiting arraignment or trial. (criminaljustice.ny.gov/crimnet/ojsa/jail_pop_y.pdf) "In my experience in the Dutchess County Public Defender's Office, judges in Dutchess County normally set bail in a defendant's case without inquiring into whether the defendant has the ability to pay the bail amount." (Dutchess County Public Defender Thomas Angell, affirmation of January 25, 2018.) "In my experience as the conflict defender in Dutchess County, I have rarely, if ever, heard a judge in Dutchess County inquire whether a defendant has the ability to pay the bail. Typically, judges presiding in the Justice (Town

and Village) Courts of Dutchess County set the bail amount requested by the District Attorney's Office without regard to the defendant's ability to pay that bail amount...bail often results in a pre-trial incarceration of indigent defendants solely because they are without financial resources to afford bail." (Michael Cohn, Esq., Ulster County Public Defender's Office, affirmation of January 24, 2018).

The petitioner asks this court to mandate that judges setting bail consider a defendant's ability to pay. The respondent claims through its representation by the District Attorney's Office that the petitioner's constitutional challenges and requested relief are more properly directed at the legislature. The respondent points out that there is no statutory requirement that ability to pay be considered by a judge setting bail, although it is a consideration that may be made.

While it is clear that the legislature must act, it is undisputed that the earliest such action could occur would be 2019. In the interim, thousands of individuals will be in a similar situation as the petitioner was at his arraignment. It is clear to this court that a lack of consideration of a defendant's ability to pay the bail being set at an arraignment is a violation of the equal protection and due process clause of the Fourteenth Amendment and of the New York State Constitution. Clearly, $5000.00 bail to someone earning $10,000.00 per year, like the petitioner, without significant assets, is much more of an impediment to freedom than $5000.00 bail would be to a defendant earning substantially more and/or with significant assets. Setting that sum as to both such individuals would not be equal treatment. Yet, the Fourteenth Amendment and the New York State Constitution both require that individuals under such circumstances be treated equally. "No person shall be denied the equal protection of the laws...because of race, color, creed or religion...". (New York State Constitution Article 1 Section 11). Perhaps it needs to be said that discrimination on any basis, including on the basis of how much money someone has, is a violation of the equal protection clauses and due process clauses of the New York State and United States Constitutions. Freedom should not depend on an individual's economic status. Bearden v. Georgia, 461 US 660 (1983); People ex rel. Wayburn v. Schupf, 39 NY2d 682 (1976).

In Bearden, the defendant had been sentenced to three years of probation conditioned upon his payment of a fine and restitution. After he lost his job and stopped paying his fine and restitution, probation was revoked and the trial court sentenced him to incarceration for the balance of the probationary period. The United States Supreme Court reversed the trial court's decision explaining that where one class of defendants is denied a substantial benefit (like freedom) which is available to another class of defendants, that violates the principles of the equal protection clause and due process clause. The U.S. Supreme Court found that these constitutional principles were violated by depriving Mr. Bearden of his freedom on the basis that he could not afford to pay the fine and restitution despite good faith efforts. A pre-trial detainee has an even stronger liberty interest since he hasn't been convicted. If a statute hinders a fundamental interest such as one's liberty, while invoking a "suspect" classification, for example race or religion, strict scrutiny is applied to determine whether there is a compelling governmental objective. McKinney's Constitution Article 1 Section 11; USCA Constitution Amendment Fourteen; U.S. v. Carolene Products Company, 304 U.S. 144, 153 (1938).

Protection against discrimination is never more important than when a person's freedom is at stake. Since one accused of a crime in the United States is presumed innocent until proven guilty, the setting of bail is supposed to be limited to those defendants who are either a danger to a specific individual or to the public or who pose a flight risk. There are conflicting allegations as to Mr. Kunkeli's work and living situations and his record of prior court appearances. This court is not ruling upon whether or not it was appropriate for Judge Sullivan to set bail in this case, or even to have knowingly set bail the defendant could not afford, but only as to the propriety of the failure to consider whether Mr. Kunkeli had the ability to pay the sum of bail set.

It is the bail sections of the New York Criminal Procedure Law at Article 510 which are under scrutiny. The validity of the law is not being challenged on the basis of any stated classification. The law is being challenged for its failure to recognize that by its omission people are being treated differently and unfairly based upon their indigent status which may be considered an inadvertent classification. A constitutional analysis as to the appropriate level of scrutiny necessary to measure the resultant classification is thus appropriate.

Unquestionably, liberty is a fundamental interest. Even if indigence is not a suspect classification, the curtailing of the right to freedom must be based on at least a rational relationship to a legitimate governmental interest, if not on a compelling governmental objective. Heller v. Doe, 509 U.S. 312, 319-321 (1993). Even intermediate scrutiny requires a classification to be substantially related to an important governmental objective. Clark v. Jeter, 486 U.S. 456, 461 (1988). While imposing bail under appropriate circumstances clearly serves an important and perhaps even compelling governmental objective, the failure to consider the economic status of a defendant does not serve that interest nor does the consideration of economic status impede that interest. Therefore, applying any of the above tests, the failure to consider a defendant's financial situation when imposing bail violates that defendant's right to equal protection under the United States and New York State Constitutions.

On the basis of all of the above, it is hereby

ORDERED AND ADJUDGED that the failure of a court imposing bail as a condition of pre-trial detention to consider an individual's ability to pay that bail, as occurred in this case, is a violation of the due process and equal protection clauses of the New York State Constitution and the United States Constitution. Therefore, it is

ORDERED AND ADJUDGED that when imposing bail the court must consider the defendant's ability to pay and whether there is any less restrictive means to achieve the State's interest in protecting individuals and the public and to "reasonably assure" the accused returns to court. Pugh v. Rainwater, 572 F2d 1053, 1057 (1978).

The foregoing constitutes the decision, order and judgment of this Court.

Dated: January 31, 2018
Poughkeepsie, New York

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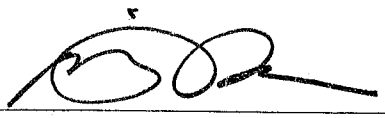

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.