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FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
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DEBORAH M. YOUNG
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Cause No. 14-24-00053-CR

In the

Fourteenth Court of Appeals

of Texas

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
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DEBORAH M. YOUNG
Clerk of The Court

Ex Parte Jonathan Lopez, ***Applicant***

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause Numbers 1817225, 1844859

APPELLANT'S BRIEF

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Oral Argument Requested

NOTICE OF ALL INTERESTED PARTIES

Pursuant to Tex. R. App. Proc. 38.1(a), the following persons are interested parties:

Appellant

Mr. Jonathan Lopez
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701 N. San Jacinto
Harris County Jail
Houston, TX 77002

Trial Judge

The Honorable Danilo Lacayo
182nd District Court
1201 Franklin
Houston, Texas 77002

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TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

STATEMENT OF THE CASE

Applicant is currently charged with the felony offense of Capital Murder (Cause 1817225 / Writ of Habeas Corpus 1844859 / Appellate Case 14-2-00053-CR) pending in the 182nd District Court of Harris County, Texas. This is an appeal of the trial judge's denial of relief in the Writ of Habeas Corpus seeking Applicant's release, either through personal bond or through setting of an affordable bond. (C.R. 20). The current bond amount is $300,000.00 for the Capital Murder charge. (C.R. 13). Applicant has been in custody continually since April 28, 2023, exclusively because of the Capital Murder charge in cause no. 1817225. (3 R.R. 108).

Applicant timely filed a written notice of appeal in this case. (CR 22). The trial court certified the defendant's right of appeal in each case. (CR 26). This court has jurisdiction pursuant to Tex. R. App. P. 26.2. Applicant requests oral argument in this case.

POINT OF ERROR PRESENTED

The trial court abused its discretion by refusing to release Applicant, pursuant to Article 17.151, either on personal bond or by reducing bond after the State announced it was not ready for trial and Applicant had been detained for over 90 days. Tex. Code Crim. Proc. art. 17.151.

STATEMENT OF FACTS

Applicant is presently incarcerated in the Harris County Jail on a $300,000 bond in Cause Number 1817225. (C.R. 28; 3 R.R. 108). Applicant has been continually incarcerated since April 28, 2023, exclusively because of the Capital Murder charge in cause no. 1817225. (3 R.R. 108). In his first writ (Cause 1840740), Applicant sought to reduce his bond under the generalized bond criteria of Texas Code of Criminal Procedure art 17.15. (3 R.R. 63). The court heard argument on that writ on November 2, 2023, 188 days after Applicant's incarceration began. (3 R.R. 80) In the hearing on November 2, the following colloquy was heard on the record:

> MR. HOCHGLAUBE: I -- and with respect to the State, I would like them to make an answer to are they ready. Can they say in good faith that they are ready for trial right now?
> MR. KOUTANI: I mean, at this time, no, Judge, because the outstanding evidence I think is both -- could be either exculpatory or inculpatory. And, I mean, for purposes of determining whether or not this is a righteous case and how -- what our offer would be on the case, how we would dispose of the case, whether it would include a lesser included or an offer on the capital, that firearms evidence and then as well as the DNA testing of the firearm I believe is extremely important. 3 R.R. 97.

Applicant argued to the trial court that since the State was not ready, regardless of any Art. 17.15 complaints, Applicant should be given relief based on Article 17.151. 3 R. R. 23. The trial court denied Applicant's first writ requesting relief under Art. 17.15. The trial court refused to analyze Applicant's Art. 17.151 claim because that

statute was not cited in Applicant's first application. (3 R.R. 51). So Appellant filed a new writ in Cause 1844859 requesting relief under both Arts. 17.15 and 17.151. (C.R. 4). The trial court heard argument on January 8, 2024 and again denied relief. (2 R.R. 18).

SUMMARY OF ARGUMENT

The trial court abused its discretion and reversibly erred by denying Applicant's Pretrial Writ of Habeas Corpus relief under Tex. Code Crim. Proc. art 17.151. The State announced it was not ready for trial after Applicant had already been detained for over 90 days. Applicant must be released on an affordable bond.

APPLICANT'S POINT OF ERROR NO.1 and ARGUMENT

Applicable Law

Generally, a ruling on a pretrial writ of habeas corpus is reviewed for abuse of discretion, viewing the facts in the light most favorable to the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006). Under this standard, an appellate court may not disturb the trial court's decision if it falls within the zone of reasonable disagreement. *Ex parte Castillo-Lorente*, 420 S.W.3d 884, 887 (Tex.App. –Houston [14th Dist.] 2014, no pet.); *Ex parte Beard*, 92 S.W.3d 566, 573 (Tex.App.–Austin 2002, pet. ref'd). The decision of a trial judge at a habeas proceeding regarding the imposition or reduction of bail "will not be disturbed by this Court in the absence of an abuse of discretion." *Ex parte Gill*, 413 S.W.3d 425,

428 (Tex. Crim. App. 2013)(quoting *Ex parte Spaulding*, 612 S.W.2d 509, 511 (Tex.Crim.App.1981)).

Article 17.151 of the Texas Code of Criminal Procedure provides:

> A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within 90 days from the commencement of his detention if he is accused of a felony. Tex. Code Crim. Proc. art 17.151.

The Court of Criminal Appeals has held that under 17.151, a court may only consider the factors explicitly listed in 17.151: 1) the length of confinement; and 2) the State's readiness. *Gill*, 413 S.W.3d at 427.

When a defendant complains under 17.151, the State bears the burden of making a prima facie case that it was ready for trial within 90 days of confinement. *Jones v. State*, 803 S.W.2d 712, 717 (Tex. Crim. App. 1991). The State may accomplish this either by announcing within the allotted time that it is ready, or by announcing retrospectively that it had been ready within the allotted time. *Id.* It is not enough that the State appear in open court after the running of the applicable period and declare itself at that time ready for trial. *Id.* Where it is undisputed that the State was not ready for trial ninety days after an accused's arrest, a judge has only two options under article 17.151: either release the accused upon personal bond or reduce the bail amount. *Rowe v. State*, 853 S.W.2d 581, 582 (Tex. Crim. App.

1993). If the court chooses to reduce the amount of bail, it must be reduced to an amount that the record reflects the accused can make. *Id.* at 582 n. 1.

Analysis

On November 2, 2023, the State stated that it was not then presently ready for trial. 3 R.R. 97. The relevant portion of the record is as follows:

> MR. HOCHGLAUBE: I -- and with respect to the State, I would like them to make an answer to are they ready. Can they say in good faith that they are ready for trial right now?
> MR. KOUTANI: **I mean, at this time, no**, Judge, because the outstanding evidence I think is both -- could be either exculpatory or inculpatory. And, I mean, for purposes of determining whether or not this is a righteous case and how -- what our offer would be on the case, how we would dispose of the case, whether it would include a lesser included or an offer on the capital, that firearms evidence and then as well as the DNA testing of the firearm I believe is extremely important. 3 R.R. 97 (emphasis added).

Under the standard set out by *Jones,* the burden that the State must meet for its prima facie case is that it *was* ready within 90 days of confinement. *Jones*, 803 S.W.2d at 717. Here, 188 days since confinement began, not only did the State fail to announce retrospectively that it was ready within 90 days, it stated that even on November 2nd, 98 days after the time limit, it still was not ready.

The trial court conducted a hearing on the present writ on January 8th, 2024. (2 R.R.). At that hearing, the State attempted to further elaborate on its continuing state of (un)readiness.

> MR. KOUTANI: So, just in response to defense's filing of the Writ of Habeas Corpus based on 17.151, the State of Texas had asserted that under the

> circumstances that were still pending analysis for both firearms and DNA in this case. And for clarification and purposes of the record, when I responded to Counsel's question as to whether or not the State was ready for trial, it is my belief that it wouldn't have been ideal to proceed with that testing or analysis still pending, especially because we don't know the value of the evidence and it would prove difficult to dispose of the case pretrial under those circumstances, but if the Court so chooses to set the case for trial, the State will be ready when the Court would like for the State -- for the trial date to be selected by the Court. The State is ready to proceed under these circumstances at this time. 2 R.R. 15.

Applicant urges this Court to take the State at their word as of November 2nd, that it was not ready for trial at that time. But even considering the more careful explanation of the prosecutor from the second writ hearing on January 8th, it is clear that the State remains presently "not ready" for trial. The prosecutor's announcement before the trial court was a promise that the State "will be ready" to proceed "for the trial date to be selected by the Court." 2 R.R. 15. This is different from being ready prior to the 90 day cutoff—as required by Art. 17.151. Further, it is important to note that, at the January 8th writ hearing, the State conceded its evidence had "not changed" since the first writ hearing on November 2nd. 2 R.R. 17. And, in addition to the State's initially candid acknowledgement that was it was not ready on November 2nd, the record demonstrates that the State's evidence (which they agree continues be unchanged) has been legally insufficient for conviction all along.

Specifically, as the prosecutor acknowledged, the present evidence inculpating the Applicant is based upon co-defendant statements and a conviction cannot be had

upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed. Tex. Code Crim. Proc. Art. 38.14. By the State's recounting of its own evidence, there is nothing else that tends to connect the Applicant with the offense. The closest thing to "other evidence tending to connect the defendant" that the State could cite was a video of the suspects robbing the gameroom. (3 R.R. 90-94; 3 R.R. 28). Applicant would encourage this Honorable Court to review it. Although a robbery is obviously taking place on the video, all of the assailants are masked and covered in black with their identities concealed. But even if the assailants had been undisguised, the distance and video quality is such that any sort of identification—even a weak or tentative one-- would be impossible.

The State's apparently corroborating evidence is that a police officer from the Applicant's school who had been familiar with Applicant prior to the capital murder told the investigating officer that "this defendant's physical stature is the same of one of the gunmen that he identifies in the video." (3 R.R. 94). This is legally insufficient corroboration for a conviction. A less than positive witness identification can be enough to corroborate accomplice witness testimony. *Turner v. State*, 571 S.W. 283, 288 (Tex.App. –Texarkana 2019, pet. ref'd.); *Griffin v. State*, 486 S.W.2d 948, 950 (Tex. Crim. App. 1972); *In re C.M.G.*, 905 S.W.2d 56, 59 (Tex. App.—Austin 1995, no pet.). But in the present case, no such "less than

positive" identification exists. At most, the supposedly corroborating evidence is merely a "vague description of a body type" that could match "hundreds or thousands of other men." Caselaw holds such potentially identifying evidence to be legally insufficient for corroboration of accomplice witness testimony. *Fernandez v. State*, 989 S.W.2d 781, 786 (Tex. App.—San Antonio 1998, pet. ref'd). Without any change in this insufficient evidence, Applicant maintains that State remains unready.

Additionally, it should be noted that the State's announcement as of January 8th, even assuming it established the State's present readiness, failed to satisfy the prima facie requirement of 17.151. *Jones* held that "it is not enough that the State appear in open court after the running of the applicable period and declare itself at that time ready for trial." *Jones*, 803 S.W.3d at 717. The only ways for the State to satisfy the requirements of 17.151 are to (1) announce ready before 90 days, or (2) announce that it was retrospectively ready within 90 days. *Id.* Here, the State did neither. Even allowing the State's "no" to become a "yes," the State has only announced that as of November 2nd it was ready for trial. The State never stated that it *was* ready prior to the lapsing of the 90 day cutoff. The State did not meet its prima facie burden and the trial court therefore abused its discretion in denying Appellant's writ. Applicant is entitled to release under 17.151.

PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Appellant prays that this Honorable Court reverse the judgment of the trial court and grant relief by ordering the trial court to release him on a personal recognizance bond or reducing Applicant's bond to an affordable amount.

/s/ *Mark Hochglaube*

_____

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CERTIFICATE OF COMPLIANCE

I, Mark Hochglaube, do certify that this brief is in compliance with Rule 9 since the entire document consists of 2,199 words and is typed using 14-point font.

/s/ *Mark Hochglaube*

_____

Mark Hochglaube
Counsel for Appellant

CERTIFICATE OF SERVICE

I, Mark Hochglaube, do certify that a true and correct copy of this Appellant's Brief was delivered to the Harris County District Attorney's Office, via service through e-file.

/s/ *Mark Hochglaube*

_____

Mark Hochglaube
Counsel for Appellant

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