IN THE COURT OF APPEALS OF IOWA

No. 9-1050 / 09-0574
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LOREN GLEN HUSS JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

Loren Glen Huss Jr. appeals an order setting his bond on the grounds that the amount is unconstitutionally excessive. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant Appellate Defender, for appellant.

Loren G. Huss Jr., Oakdale, pro se.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Loren G. Huss Jr. appeals the district court's order setting his bond at $50,000 cash after he was convicted of operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2007), an aggravated misdemeanor. Huss's only argument is that the court's order violates Article I section 17 of the Iowa Constitution, which provides that "[e]xcessive bail shall not be required." Because Huss has not demonstrated the bond order is unconstitutional as applied to him, we affirm.

Huss has a history of both criminal conduct and mental illness, which includes the "horrifying" and "shocking" acts summarized in *State v. Huss*, 666 N.W.2d 152, 153 (Iowa 2003). After being discharged from a lengthy period of confinement, Huss was convicted in early 2007 of OWI first offense. On July 5, 2008, Huss wrecked his car on I-235. When the officers approached, they detected a strong odor of alcohol and suspected Huss was impaired. Huss refused to provide his address and just kept saying, "Take me to jail." At the same time, Huss resisted efforts to remove him from his vehicle. Eventually, Huss was taken to jail, as he had requested, and was subsequently charged with OWI second offense. The district court set a cash bond of $5000, which Huss posted.

On January 7, 2009, Huss was found guilty of OWI second offense. Acting on the State's request to revoke Huss's bond, the district court instead increased it to $50,000 cash. Huss applied for bond review, and on February 17, 2009, the district court held a lengthy hearing. Following that hearing, the district court issued a detailed order explaining why it was maintaining the bond at

$50,000 cash. Among other things, the court noted that Huss had been living internationally and in another state, and his living arrangements in Iowa were unclear, so he "still presents as a moderate risk of flight." Turning to the question of the safety of the community, the court observed that based on the supreme court's 2003 decision, it is appropriate to conclude that Huss still suffers from bipolar disorder and experienced at least one manic episode in the past. After mentioning several other points, the court went on:

> The Court has to take all of this into consideration, that Mr. Huss:
> - Has been found guilty by a jury of an aggravated misdemeanor after committing the same offense less than two years prior, and who is awaiting argument on post trial motions and sentencing (should that stage of the proceeding be reached);
> - Is a person with mental illness that is in remission, whereby at least a statement by a medical professional indicates a 90% likelihood of recurrence;
> - Is a person who has committed and been convicted of two brutal and awful felonies when he was a much younger man quite a long time ago;
> - Is a person who committed a horrifying act as a result of his mental illness, again, a long time ago when he was a much younger man;
> - Is a person who is currently not monitored at all by any trained professional as it relates to his mental illness that is in remission;
> - Is a person who on at least two recent occasions used alcohol in significant amount and made dangerous decisions for himself and others after so using it; and
> - Is a person, who for present purposes, the Court cannot find has exhibited bizarre behavior or shown signs that his mental illness is active again, but he is not acting fully consistently with his previous assertion and plea that he would do whatever it takes "so everyone is safe."

The district court concluded that Huss's bond should be maintained at $50,000 cash.

On March 6, 2009, the court conducted its sentencing hearing, following which it imposed a two-year prison sentence on Huss, with credit for the sixty-two days already served. The district court also maintained the $50,000 cash bond as the appeal bond. Huss now appeals the $50,000 cash only bond, asserting that it violates Article I section 17 of the Iowa Constitution. He does not appeal his underlying criminal conviction or sentence.

Huss's constitutional challenge to his bond is reviewed de novo. *State v. Kellogg*, 534 N.W.2d 431, 434 (Iowa 1995).

The State first urges us to reject Huss's appeal as moot. Huss did not appeal his bond before sentence was imposed, although Iowa Code section 811.2(7)(b) authorized him to do so. After sentence was imposed, Huss did appeal, but he did not challenge the underlying conviction or sentence. Thus, regardless of what we do in this case, Huss would remain incarcerated for the term of his sentence.

Huss argues that his constitutional challenge to the $50,000 cash only bond is an issue of broad public importance which is likely to recur and therefore reviewable by this court. *State v. Briggs*, 666 N.W.2d 573, 576 (Iowa 2003); *State v. Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002). The State responds that Huss did not appeal his bond prior to sentencing, although he could have done so, and that his post-sentence challenge to the bond is purely an artifice. The bond would not be necessary if he were not appealing, but his only appeal concerns the bond.

Regardless of our views on mootness, we believe the *Briggs* decision settles this dispute in Huss's favor. Procedurally, *Briggs* is somewhat similar to

this case. There, Briggs was arrested for prostitution, and a cash bond of $6500 was ordered. *Briggs*, 666 N.W.2d at 574. When Briggs's application for bond review was denied, she did not appeal, but instead stipulated to a court trial on the minutes of testimony. *Id*. at 575. Briggs was found guilty, and then appealed, apparently raising the bond as her only issue. *Id*. Nonetheless, the supreme court declined to hold the appeal moot. It explained:

> Questions resting on the nature and propriety of cash only bail are of a pressing public interest. The imposition of cash only bail is a regular occurrence in our district courts. The constitutional implications of this form of bail are of great relevance for members of the public, the bar, and the judiciary. The need to provide guidance on this issue is manifest. Moreover, in the absence of authoritative guidance, it is highly likely this issue will recur, potentially resulting in varied and inconsistent interpretations of important constitutional provisions. Finally, although it is conceivable that this issue could reach us under circumstances that would not involve a moot controversy, we believe this issue is highly likely to recur yet evade our review. For all of these reasons, we believe this is one of the exceptional circumstances in which our review is proper even in light of the mootness of the underlying controversy.

Id. at 576-77. Accordingly, with *Briggs* in mind, we decline to hold Huss's appeal moot.

We now turn to the merits of Huss's appeal. We emphasize first what Huss does *not* argue. Huss does not contend the bond he received violated chapter 811, or that the district court abused its discretion. *State v. Formaro*, 638 N.W.2d 720, 726 (Iowa 2002) (reviewing bond for abuse of discretion); *Kellogg*, 534 N.W.2d at 433-35 (same). We believe these arguments, in any event, would have encountered serious difficulties. Our review of the record convinces us that the district court made a careful, fair-minded, and thorough evaluation of Huss's

situation, taking into account factors and considerations set forth in Iowa law. *See* Iowa Code § 811.2(2).[1]

Huss's only argument on appeal, rather, is that his bond is unconstitutional. But even this constitutional argument is limited. Huss does not claim he cannot post a $50,000 cash bond, or that he is indigent. Instead, Huss simply maintains that a $50,000 cash only bond is unconstitutionally high because it is twenty-five times the scheduled bond for his offense in the judicial council's 2007 supervisory order.[2] We disagree.

The bond amounts in the supervisory order have no applicability when the court fixes the bond. The order states, "This bond schedule does not apply when court is in session. Judicial officers shall exercise discretion in establishing bond in accordance with the factors set forth in Iowa Code section 811.2(2)." Supervisory Order Amending the Uniform Bond Schedule, Iowa Judicial Council (Aug. 2, 2007).

In other words, the supervisory order simply provides a default to be used when the court is not available. But here, there is no dispute that bond was established by a judicial officer. We cannot conclude that a bond is

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[1] Iowa Code section 811.2(2) provides:

> In determining which conditions of release will reasonably assure the defendant's appearance and the safety of another person or persons, the magistrate shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the defendant's family ties, employment, financial resources, character and mental condition, the length of the defendant's residence in the community, the defendant's record of convictions, including the defendant's failure to pay any fine, surcharge, or court costs, and the defendant's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

[2] When the court is not in session, the bond amount to be used for an aggravated misdemeanor is $2000, according to the Judicial Council's supervisory order.

unconstitutional simply because it is much higher than a particular reference point without some further explanation for why that disparity leads to unconstitutionality.

Huss furnishes no other explanation. In effect, he is asking this court to invalidate any cash only bond established by a judicial officer that exceeds the supervisory order amount by more than a given ratio. As he puts it, "If a bond, 25 times the recommended amount set by the Iowa Judicial Council, is not unconstitutional under Art. I, Sect. 17, what other amount would be? 50 times? 100 times? 1,000 times?"

We believe this argument is insufficient to carry the day. It is true that in *Briggs*, the supreme court left open the possibility that, in a particular case, "the use of a cash only bail could violate the excessive bail clause." 666 N.W.2d at 584. However, in analyzing whether the defendant's $6500 cash only bond in that case violated the excessive bail clause of the Iowa Constitution, the supreme court focused on the statutory factors set forth in Iowa Code section 811.2(2), ultimately concluding that "the district court considered the purpose of bail and the interests the government sought to protect. Moreover, the method by which the state protected that interest-bail set at $6500 cash-was reasonably related to those interests." *Id*. at 584-85.

In short, *Briggs* suggests that the constitutional inquiry should track the statutory factors set forth in section 811.2(2). It does not suggest that the supervisory order has any relevance to this inquiry, let alone that it can be a controlling consideration. In fact, it appears that Briggs's $6500 bond on prostitution charge was *also* well in excess of the amount set forth in the

supervisory order. *See* Iowa Code § 725.1 (stating that prostitution is an aggravated misdemeanor). Nonetheless, the court denied her as-applied constitutional challenge.

For the foregoing reasons, we decline to accept Huss's argument that his $50,000 cash only bond violates the Iowa Constitution simply because it is twenty-five times the amount that would have been initially set if the court were not in session. The judgment below is affirmed.

AFFIRMED.