

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY**

STATE OF OREGON,)	Case No. 20-CR-50067
)	DA 2350268-1
Plaintiff,)	
)	
vs.)	STATE'S MEMORANDUM IN
)	OPPOSITION TO THE DEFENDANT'S
)	RELEASE MOTIONS
ALAN SWINNY,)	
)	
Defendant.)	

INTRODUCTION

Defendant has filed two motions asking the Court to make various findings that his bail in unconstitutional and he should be released on his own recognizance or on a nominal \$250 bail. As an initial matter, these motions are duplicative and do not constitute a valid basis to address release after he has had at least two opportunities prior. Notwithstanding, the various arguments against the propriety of bail in this case are not tailored to Mr. Swinney and do not warrant findings that either the bail as applied to him or Oregon's system of secured release on the whole are unconstitutional. Lastly, the facts of this case make it clear that significant bail is required in order to secure the defendant's appearance as he remains a flight risk.

FACTS

On August 15, 2020 Defendant Alan Swinney came to a downtown Portland protest armed with a knife, paintball gun, and mace. Defendant is a self-proclaimed member of the "Proud Boys" and has "Proud Boy" tattooed on his forearm. He is well known among social media circles and across the ideological spectrum for his persona. He is originally from Texas

1 and has travels across the country to engage in violence related to protests. He wears similar
2 garb during each event including. a tactical vest and multiple weapons. He has made hundreds
3 of social media posts, despite having been banned from some major social media networks,
4 where he encourages violence.

5 On August 15, 2020, Victim 1 was downtown filming the protests. While filming, he
6 saw Defendant holding a paintball gun and standing with a group of men wearing clothing with
7 American flags. That group was known to Victim 1 as the "Patriot Prayer" group. As Victim 1
8 filmed, Defendant pointed his paintball gun at Victim 1 and fired, shooting Victim 1 in the face
9 near the corner of his left eye. Defendant aimed his paintball gun at numerous other protesters
10 and fired multiple shots into the crowd in addition to the shot that hit Victim 1. Defendant
11 shouted at Victim 1 that he would "shoot him with a real gun" and that he "had one and will
12 open fire." Defendant and the other "Patriot Prayer" members also sprayed mace at various
13 protesters. Victim 1 suffered damage to his retina as a result of the shot to his face. Photos and
14 video collected during the incident show Defendant pointing and shooting his paintball gun,
15 including the shot that struck Victim 1.

17 Defendant again came to Portland armed on August 22, 2020. That day, protesters had
18 gathered in Chapman Square. Victim 2 was at Chapman Square observing the protests. As she
19 walked through the park, she spotted Defendant and made eye contact with him. Suddenly,
20 Defendant raised his paintball gun and shot her once in the chest, striking the bottom of her
21 right breast. The shot left a large bruise and caused lasting pain. She moved away from
22 Defendant and went to the area of SE 3rd and Madison. Later, Defendant approached her area.
23 He pepper-sprayed two people near Victim 2. He then turned to Victim 2 and sprayed her
24 directly in the face. Victim 2 reported that it took an hour before she was able to open her eyes
25

1 without excruciating pain. Other witnesses to the events on the 22nd described seeing
2 Defendant pointing an actual firearm at protesters. When interviewed Defendant admitted that
3 he'd drawn his Ruger 357 Magnum Revolver and aimed it at protestors. Photos collected of the
4 incident show Defendant drawing his handgun and holding his finger on the trigger.
5

6 The Grand Jury indicted Defendant for twelve crimes as a result of his actions on
7 August 15 and 22, two of which are Ballot Measure 11 offenses. His charges include two counts
8 of Assault in the Second Degree, Unlawful Use of a Weapon with a Firearm, two counts of
9 Unlawful Use of a Weapon, Attempted Assault in the Second Degree, Pointing Firearm at
10 Another, two counts of Unlawful Use of Mace in the Second Degree, Assault in the Fourth
11 Degree, Attempted Assault in the Fourth Degree, and Menacing. His bail on all twelve charges
12 is set at the presumptive bail amount, a collective \$534,000, including \$250,000 on each count
13 of Assault in the Second Degree.
14

15 LAW AND ARGUMENT

16 **I. Defendant has not shown that new circumstances warrant subsequent release** 17 **hearing.**

18 ORS 135.285 states that “[i]f circumstances concerning the defendant's release change,
19 the court, on its own motion or upon request by the district attorney or defendant, may modify
20 the release agreement or the security release.” The clear implication of this statute is that it is
21 only appropriate to re-review a bail setting or release decision when there are new
22 circumstances that *concern the defendant's release*. Without this understanding, defendants
23 would be entitled to an infinite number of release hearings in front of an infinite array of judges.
24 Such an interpretation would be an extreme waste of judicial resources, throw the ability of the
25 court and litigants to predict which cases are highest priority for trial based on 60-day

1 considerations into a state of chaos, and impose impossible burdens on victims and community
2 members who are stakeholders in cases like this. Victims have a right not to live in constant fear
3 that last week's decision to deny a defendant's release or reduction of bail will be overturned
4 this week on the same set of facts. Lastly, if a subsequent release hearing can be held on the
5 same set of facts and circumstances, then the system would be vulnerable to judge-shopping by
6 defendants or prosecutors. In order for defendants, victims, and the community to trust that a
7 judicial determination is truly valid, it cannot be open to being overturned without more than
8 simply a new day, a new judge, or a new lawyer.

9
10 In this case, Defendant has already had two hearings after arraignment to address bail
11 and release – first on October 19, 2020 with Judge Ryan and again on November 3, 2020 with
12 Judge Silver. Nowhere in his motion does Defendant explain what facts or circumstances have
13 changed since those hearings that warrant new review. He states that his request is “to fix
14 security, not reduce it.” But this ignores the history of this case. Bail was set by Judge Oden-Orr
15 at his arraignment on October 1, 2020. Judge Ryan heard his arguments and denied him
16 conditional release or release on his own recognizance. Judge Silver then denied his subsequent
17 request to reduce bail. As such, to the extent that a defendant is entitled to separate or
18 subsequent hearings to “fix bail” and then “reduce bail,” Mr. Swinney has had an opportunity to
19 do each and those requests were heard and denied. Nothing in law or fact entitles him to a third
20 bite at the apple.

21
22 **II. Bail as set is constitutional.**

23 Defendant makes a variety of constitutional arguments in his motions ranging from bail
24 being unconstitutional as applied to him all the way to a broader argument that imposition of
25 bail under Oregon's statutory scheme for secured release is wholly unconstitutional, or at least

1 when he cannot afford the precise amount of bail set. As discussed above, these arguments do
2 not constitute new circumstances and do not warrant a third hearing to review the decision to
3 impose bail in this case. However, to the extent that the Court considers these arguments, the
4 State asks the Court to find that bail does not violate Defendant's constitutional rights.

5 **A. Multnomah County's Security Schedule not unconstitutional**

6 Defendant argues in his motion that the bail schedule employed by Multnomah County
7 courts for setting customary security amounts for the various levels of felonies and
8 misdemeanors is unconstitutional. This is not the case. He has made no showing that the
9 security schedule overrides or inhibits the inherent authority and mandate that a judge has at
10 arraignment or in a release hearing to set bail that is appropriate and specific to the defendant
11 and his charges. More importantly however, this argument is moot. As discussed above, bail
12 was set by Judge Oden-Orr and then has been reviewed by two separate judges and deemed
13 appropriate and specific to him. Thus, it is not the security schedule that set his bail but the
14 judges who have heard his argument's and the State's before setting the appropriate bail.
15

16 **B. Oregon's system of setting security not unconstitutional**

17 The Defendant spends many pages in his motions arguing essentially that the entire
18 system of security release that is employed by courts across this state is unconstitutional. This is
19 a matter of settled law. Oregon's statutory scheme for determining when a person can be
20 released conditionally, on their own recognizance, or upon posting security has been reviewed
21 by higher courts and found to be valid under both the US and Oregon constitutions. *See Burton*
22 *v. Tomlinson*, 19 Or App 247, 249-53, 527 P2d 123 (1974); *Schilb v. Kuebel*, 404 US 357, 359-
23 60, 92 S Ct 479, 30 L Ed 2d 502 (1971). This Court has no power to overturn established
24
25

1 precedent and Defendant has made no showing that the law has changed such that this
2 precedent is no longer applicable.

3
4 **C. Bail constitutional as applied to Defendant**

5 Article I, section 16 of the Oregon Constitution, provides that “[e]xcessive bail shall not be
6 required.” In *State v. Sutherland*, 329 Or 359 (1999), the Oregon Supreme Court upheld the
7 constitutionality of the statutory release provisions of ORS 135.240(5). The court held that “any
8 defendant who wishes to make an ‘as applied’ challenge to the propriety of imposing the
9 specified security release amount of \$50,000 *or higher* under ORS 135.240(5) has a
10 constitutional right to a hearing to address that question.” (emphasis added). *Id.* at 367.

11 The amount of security is within the sound discretion of the court and the burden of
12 proof is on the defendant to establish that the security amount set by the court is excessive. *See*
13 *Delaney v. Shobe*, 218 Or 626, 628 (1959). In that case, the defendant was unable to give bail of
14 \$3,000 in a charge of assault with intent to commit rape. When a notice of appeal was filed, the
15 trial court set bail at \$15,000. The Supreme Court noted that “it is settled law that the
16 determination of the amount of bail is committed to the sound discretion of the court and its
17 decision will not be disturbed except in a clear abuse of discretion.” The court went on to
18 conclude that “...unless it appears plainly on the face of the particular case that the bail is
19 excessive, the *plaintiff has the burden of establishing such abuse by evidence.*” *Delaney v.*
20 *Shobe*, 218 Or at 628 (emphasis added). Accordingly, the defendant must put forth evidence
21 that the bail is excessive.
22

23 In his motions, Defendant primarily argues that bail is unconstitutional as applied to him
24 because it is set at an amount that he cannot afford. However, the *Delaney* court noted that the
25 “mere fact of inability to give bail in the amount set is not sufficient reason for holding the

1 amount excessive.” *Id.* Defendant relies on holdings that it is unconstitutional to set bail “so as
2 to make it impossible, as a practical matter, for a prisoner to secure release.” *Gillmore v.*
3 *Pearce*, 302 Or 572, 580, 731 P2d 1039 (1987). However, he misconstrues this holding. This
4 line of holdings stands for the proposition that the Court cannot set a high bail with the specific
5 intent to make it practically impossible for the Defendant to post bail and be released. *See*
6 *Owens v. Duryee* 285 Or 75, 80, 589 P2d 1115 (1979) (holding that bail may not be set at an
7 amount *chosen in order to make it impossible*, as a practical matter, for a prisoner to secure his
8 release”) (emphasis added). Defendant has made no showing that the bail amount was
9 specifically chosen to prevent his release.
10

11 Besides the broad and unsubstantiated argument that bail was set to be unattainable, the
12 Defendant makes almost no effort to show how his particular circumstances warrant an as-
13 applied finding of unconstitutionality of bail¹. Indeed the only reference in his motions to facts
14 specific to his release is a the conclusory statement, “Defendant is not a flight risk, and he has a
15 place to stay while in Oregon.” Def. Release Motion at 8. This is neither compelling, nor is it
16 evidence that overrides the presumption of constitutionality of bail as set by multiple judges
17 throughout the course of this case.
18

19 **III. Facts in this case warrant high bail amount.**

20 As has been noted, the factors relevant to Defendant’s release have been judicially
21 reviewed twice during the pendency of this case. As such, we will not repeat in full the facts
22

23
24 ¹ In fact, Defendant’s “Article I, § 43 Release Motion” appears to be identical or nearly identical
25 to motions that have been filed in several other defendants’ cases: *State v. Tyviant Mancilla*, 20-
CR-64264; *State v. Jorge Herenandez Barajas*, 21-CR-17345; and *State v. Erich Afleje*, 21-
CR-01307. In the last of these, it appears that Judge Skye summarily denied the similar motion,
while reducing bail for that defendant to \$50,000.

1 that weigh against Defendant's release and ask the Court to refer to our Memorandum in
2 Opposition to Release or Bail Reduction filed on October 16, 2020. A few facts bear
3 highlighting, however. Defendant has no longstanding ties to the Portland area. He travelled
4 from his home state of Texas to engage in his criminal behavior here. He has previously
5 expressed contempt for the courts and local government, stating "lefty judges, DAs, city council,
6 and mayors can get bent" and he won't "let them govern me anymore."

7
8 After his last bail reduction hearing, Defendant stated in no uncertain terms that he
9 would not follow the courts orders if released or if he bailed out. During a jail call, Defendant
10 affirmed his belief that he was engaged in a "civil war" and proclaimed that he would only
11 follow the orders of former President Donald Trump. He stated, "If he (President Trump) says
12 go get them, I am going to go get them." The defendant went further and state that he would
13 not follow the orders of the court if released:

14 I'm not gonna let the Left strip anything from me. . . I agreed to [not come into
15 Portland]. I don't know why my lawyer was saying "he agrees to all the pretrial
16 release – the ankle monitor." I don't agree to that. I don't agree to not carry a
17 weapon. Because people are trying to kill me. . . They want to take away all the
18 ways I can defend myself, so the next time I'm attacked then they'll be successful.
19 Screw that! I'm not doing that. . . Constitution says they can make me pay bail to
20 get out of here. Constitution doesn't say anything about me wearing a GPS
21 monitor. Constitution doesn't say anything about me posting on Facebook and
22 losing my freedom of speech when I get out of here. So, they're just coming up
23 with a whole bunch of shit that I'm not willing to accept. So, they're just going to
24 have to leave me in here . . . If I had \$54,000 tomorrow and I could make bail, the
25 judge is going to say "well you can make bail, but you're going to have to
immediately report to that Close Street Supervision and you're going to have a
curfew, and if you even hold a pocket knife" – That's all bullshit. I'm not
agreeing to any of that. I'll just stay in jail. I'll just stay here. Because I'm not
giving up my rights . . . I'm walking out of here with all my rights intact or just
leave me in here. I might as well be in here.

24 The defendant's nomadic residential history and his ardent refusal to follow the court's
25 orders are the best indicator of whether or not he will attend future court dates. The defendant

1 believes that the orders of the court and the laws of Oregon do not apply to him and that he can
2 disregard them as he pleases.

3
4 **CONCLUSION**

5 For the reasons stated above, the State respectfully requests that the Court DENY the
6 defendant's motions. Further, Defendant's radical beliefs and stated refusal to follow court
7 orders indicate the necessity to increase bail. The State respectfully request the court increase
8 bail to \$1,000,000.
9

10
11
12 Respectfully submitted,

13 Dated this 11th day of May, 2021.

14 By: Reid Schweitzer
15 Reid C. Schweitzer, OSB 191962
16 Deputy District Attorney

17
18 By: [Signature]
19 Nathan Vasquez, OSB 014437
20 Senior Deputy District Attorney
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22
23
24
25

1 **CERTIFICATE OF SERVICE**

2 I, Nathan Vasquez, hereby certify that I have served a true copy of the State's
3 Memorandum in Opposition to the Defendant's Release Motions on the following:

4
5 Joseph Westover, Attorney for Defendant
6 Multnomah Defenders, Inc.
7 522 S.W. 5th Avenue, Suite 1000
8 Portland, OR 97204
9 jwestover@multnomahdefenders.org
10 *Via email*

11
12 Dated this 11th day of May, 2021.

13
14 By:  _____

15 Nathan Vasquez, OSB 014437
16 Senior Deputy District Attorney
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