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ATTORNEY GENERAL OF TEXAS

September 24, 2019

The Honorable Mark A. Gonzalez
105th Judicial District Attorney
Nueces County Courthouse
901 Leopard, Room 206
Corpus Christi, Texas 78401-3681

Opinion No. KP-0270

Re: Authority of the State to obtain an arrest warrant for a defendant previously released on pretrial bond conditions if credible evidence exists he violated those conditions (RQ-0283-KP)

Dear Mr. Gonzalez:

You ask “[w]hether the State may seek and the trial court may, without a hearing, sign an arrest warrant for a defendant who has been released on pre-trial bond conditions, upon credible evidence that he has violated one or more of those conditions[.]”¹

Chapter 17 of the Code of Criminal Procedure governs arrest, commitment, and bail. TEX. CODE CRIM. PROC. arts. 17.01–.49. “‘Bail’ is the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond.” *Id.* art. 17.01. A “trial court has great discretion when setting bond for a person accused of a crime.” *Liles v. State*, 550 S.W.3d 668, 669 (Tex. App.—Tyler 2017, no pet.). However, a court may exercise discretion to make bail determinations only within the parameters of the Code of Criminal Procedure. *Ex parte Cardenas*, 557 S.W.3d 722, 729–30 (Tex. App.—Corpus Christi 2018, no pet.). A defendant released on bail has a liberty interest in remaining free absent an order for rearrest authorized by law. *Robinson v. State*, 700 S.W.2d 710, 712–13 (Tex. App.—Houston [14th Dist.] 1985, no pet.). A defendant who has given bail “shall not be required to give another bond in the course of the same criminal action except” as provided by the statute. TEX. CODE CRIM. PROC. art. 17.09, § 2; *see Ex parte Coker*, 319 S.W.2d 120, 121 (Tex. Crim. App. 1958).

Several provisions authorize a court to impose conditions on the bond. *See* TEX. CODE CRIM. PROC. arts. 17.40–.41, .43–.47, .49. You ask specifically about article 17.40, which provides:

¹Letter and Brief from Honorable Mark A. Gonzalez, Dist. Att’y, 105th Jud. Dist., Nueces Cty., to Op. Comm., Office of the Att’y Gen. at 1 (Apr. 16, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter” and “Brief”).

(a) To secure a defendant's attendance at trial, a magistrate may impose any reasonable condition of bond related to the safety of a victim of the alleged offense or to the safety of the community.

(b) At a hearing limited to determining whether the defendant violated a condition of bond imposed under Subsection (a), the magistrate may revoke the defendant's bond only if the magistrate finds by a preponderance of the evidence that the violation occurred. If the magistrate finds that the violation occurred, the magistrate shall revoke the defendant's bond and order that the defendant be immediately returned to custody. . . .

Id. art. 17.40 (a), (b). Subsection (b) authorizes a magistrate to revoke bond for violation of a bond condition, but only after a hearing limited to that purpose, at which "the magistrate finds by a preponderance of the evidence that the violation occurred." *Id.* art. 17.40(b). When a magistrate makes such a finding at the hearing, the statute authorizes the magistrate to order that the defendant be taken into custody. *Id.* But the statute does not address a magistrate's authority to issue an order prior to this determination to rearrest the defendant to secure the defendant's presence at the revocation hearing.

You assert that article 17.09 provides a basis for securing the defendant's attendance for a revocation hearing. Brief at 1–2. Article 17.09 governs a trial court's "ongoing authority to manage a defendant's bond and terms of release." *Hernandez v. State*, 465 S.W.3d 324, 326 (Tex. App.—Austin 2015, pet. ref'd); see TEX. CODE CRIM. PROC. art. 17.09 ("Duration; original and subsequent proceedings; new bail"). Section 3 addresses the circumstances authorizing a court to order the rearrest of a defendant to set new bail:

Sec. 3. Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pending *finds that the bond* is defective, excessive or *insufficient in amount*, or that the sureties, if any, are not acceptable, or *for any other good and sufficient cause*, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested, and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody.

TEX. CODE CRIM. PROC. art. 17.09, § 3 (emphasis added). Thus, article 17.09, section 3 authorizes a court to order the rearrest of a defendant when the court finds the bond is insufficient in amount or "other good and sufficient cause." *Id.*

A leading authority states that violation of a bond condition may authorize a court to reset bail under article 17.09, section 3: "Upon proof that a defendant has violated conditions on bond, a magistrate might properly find that the risk of nonappearance has increased, the amount previously set no longer is sufficient to assure appearance, and therefore the amount previously set has become 'insufficient.'" George E. Dix & John M. Schmolesky, 41 TEX. PRACTICE: CRIM.

PRACTICE & PROCEDURE § 21.69 (3d ed. 2011) (“Dix”). A court also could issue an order affecting bond for other good and sufficient cause. “No precise standard exists for determining what constitutes ‘good and sufficient cause’ under Article 17.09.” *Miller v. State*, 855 S.W.2d 92, 93–4 (Tex. App.—Houston [14th Dist.] 1993, pet. ref’d); *accord Ex parte Marcantoni*, No. 14-03-00079-CR, 2003 WL 1887883, at *2 (Tex. App.—Houston [14th Dist.] Apr. 17, 2003, no pet.) (mem. op., not designated for publication). What constitutes good and sufficient cause for increasing bail in a particular case must be determined on the particular facts. *Miller*, 855 S.W.2d at 93–4; *Marcantoni*, at *2. One court determined that article 17.09 impliedly allows the trial court to find good and sufficient cause for reasons “such as a reevaluation of the circumstances and the adequacy of a defendant’s bond.” *Hernandez*, 465 S.W.3d at 326–27. Other courts have determined that a violation of a bond condition can be a basis for requiring a bond in a higher amount under article 17.09, section 3. *See Miller*, 855 S.W.2d at 94; *Marcantoni*, at *2. Thus, article 17.09 could be used in conjunction with article 17.40 as a vehicle for securing a defendant’s presence at a revocation hearing.

Your specific question is whether article 17.09 authorizes a court to order the rearrest of a defendant without a hearing, based on a probation officer’s sworn affidavit showing probable cause that the defendant violated a condition of the bond, to secure the defendant’s presence at a bond revocation hearing. *See Request Letter at 1; Brief at 1–2.* Article 17.09, section 3 requires the court to “find” a bond insufficient or “other good and sufficient cause” for ordering the defendant’s rearrest and imposing a new bond. TEX. CODE CRIM. PROC. art. 17.09, § 3. Article 17.09 does not, however, specify the procedure for making the finding nor have judicial opinions established procedural requirements:

The case law does not develop what might constitute the necessary “cause” for increasing bail nor does it address the procedure that is to be used. Most likely, a defendant is entitled to an opportunity to be heard on whether existing bond is “insufficient” or in some manner “excessive” before a more burdensome bond is set. It is less likely that he is entitled to this opportunity before being taken into custody; presumably, at least a preliminary showing can be made by the State to the judge *ex parte*, and this can justify the issuance of a *capias* or arrest warrant for the defendant.

Dix, § 21.51. Thus, while we cannot definitively answer your question, we agree that a court likely has such authority in appropriate circumstances. *See id.* To begin with, a *capias* is a specific type of warrant to arrest a defendant after commitment or bail and before trial, in circumstances set forth in chapter 23. TEX. CODE CRIM. PROC. arts. 23.01–18. Chapter 23 does not constitute an exclusive list of circumstances in which a *capias* may issue. *Ballard v. State*, 33 S.W.3d 463, 465 (Tex. App.—Houston [1st Dist.] 2000, pet. ref’d). For example, a common-law *capias* may issue to arrest a defendant after mandate has issued; also, a *capias* is an appropriate means for bringing a parole violator before the court. *Id.* at 465–66. Issuance of *capias* generally requires probable cause determined by a neutral magistrate. *Sharp v. State*, 677 S.W.2d 513, 517 (Tex. Crim. App. 1984); *but see Ballard*, 33 S.W.3d at 467 (holding that because of the status of parolees, a *capias* to arrest a parolee need not be based on probable cause). For a bond revocation hearing, the relevant cause is whether the defendant has violated the court’s order setting bond conditions.

TEX. CODE CRIM. PROC. art. 17.40(b). Although no court has addressed the issue, probable cause that a bond condition violation occurred likely would constitute “good and sufficient cause” authorizing the court’s issuance of *capias* to secure the defendant’s attendance at a revocation or bond-increase hearing. *See* Dix, § 21.51.

Article 17.09 does not specify a procedure for a court to find insufficient bond or other good and sufficient cause. TEX. CODE CRIM. PROC. art. 17.09. Moreover, a court may not conduct a hearing if it would constitute a “pretrial proceeding” at which a defendant must be present under article 28.01. *See id.* art. 28.01, § 1. However, a traditional arrest warrant may be based on an officer’s sworn affidavit showing probable cause that the accused has committed a criminal offense. *Horhn v. State*, 481 S.W.3d 363, 369 (Tex. App.—Houston [1st Dist.] 2015, pet. ref’d); *see also* TEX. CODE CRIM. PROC. arts. 15.01–.05. Also, article 16.16 authorizes trial court judges to rearrest a defendant:

Where it is made to appear by affidavit . . . that the bail taken in any case is insufficient in amount, or that the sureties are not good for the amount, or that the bond is for any reason defective or insufficient, [the judge] shall issue a warrant of arrest, and require of the defendant sufficient bond and security, according to the nature of the case.”²

TEX. CODE CRIM. PROC. art. 16.16. And appellate courts have upheld decisions under article 17.09 initiated on the court’s *sua sponte* motion or the State’s motion. *See, e.g., Liles*, 550 S.W.3d at 671 (court’s order revoking bond following indictment alleging aggravated circumstances that seriously increased the gravity of the crime charged); *Ex parte Anunobi*, 278 S.W.3d 425, 427 (Tex. App.—San Antonio 2008, no pet.) (ordering arrest and setting a hearing on State’s motion to increase bail and impose conditions). Thus, a court likely may, without a hearing, order a defendant’s rearrest to secure the defendant’s presence at a bond-revocation hearing, based on an officer’s sworn affidavit showing probable cause that the defendant has violated bond conditions.

²An early opinion determined that the predecessor statute of article 16.16 applies only to preliminary or examining trials and does not authorize imposing additional bail after indictment. *See Jenkins v. State*, 77 S.W. 224, 224 (Tex. Crim. App. 1903).

S U M M A R Y

A court likely may, without a hearing, order a defendant's rearrest to secure the defendant's presence at a bond-revocation hearing, based on an officer's sworn affidavit showing probable cause that the defendant has violated bond conditions.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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