Morreno v. Brickner

Citation: Morreno v. Brickner, 416 P.3d 807 (Ariz. 2018).
Date Filed: May 2, 2018
Opinion's Author: Vice Chief Justice Pelander
Joined By: Chief Justice Bales, Justices Brutinel, Timmer, and Bolick.
Concurrence-in-part and dissent-in-part: Justice Gould, joined by Justice Lopez

Practitioners: For quick reference, please see the "Issue" and "Holding" sections.

Facts: James Morreno was indicted for possession of marijuana and possession of drug paraphernalia in March 2016. After an initial appearance, he was released on his own recognizance with the stipulation that he "refrain from committing any criminal offense."

In May 2016, police charged him with (and he admitted to) possession of marijuana and possession of drug paraphernalia for a separate instance. However, he failed to attend his initial appearance in July, and an arrest warrant was issued. Later in 2017, he was arrested and held without bail pursuant to Article 2, section 22(A)(2) of the Arizona Constitution ("the On-Release Provision").

Procedural History: The case is currently before the Arizona Supreme Court. Relying on *Simpson v. Miller*[1] *(Simpson II)*, Morreno moved to modify his release conditions. He contended that the On-Release Provision had denied the individualized determination of future dangerousness to which he was constitutionally entitled. The trial court disagreed and denied the motion.

Thereafter, Morreno filed a special action with the court of appeals, which the court stayed pending the Arizona Supreme Court's decision to grant review in a similar case. Morreno subsequently filed a petition for review to the Arizona Supreme Court, appealing the court of appeals' stay order.

The Arizona Supreme Court granted review to determine the facial validity of the On-Release Provision.

Issue: Article 2, section 22(A)(2) of the Arizona Constitution ("the On-Release Provision") provides that a defendant charged with a felony allegedly committed while "already admitted to bail on a separate felony charge" is ineligible for bail "where the proof is evident or the presumption great as to the [new] charge."[2] Is this rule facially invalid for not requiring an individualized determination of future dangerousness?

Holding: No, the On-Release Provision is not facially invalid because it is not unconstitutional in all circumstances.

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[1] Simpson v. Miller (*Simpson II*), 387 P.3d 1270 (2017).
[2] ARIZ. CONST. art. 2, § 22(A)(2).

Disposition: The constitutionality of the On-Release Provision is upheld, and the trial court's denial of bail is affirmed.

Rule: To survive a facial challenge, a pretrial detention scheme must

- Be used for "regulatory rather than punitive purposes,"[3] and
- Satisfy heightened scrutiny by being "narrowly tailored to achieve a compelling interest."[4]

Reasoning:

- **Facial challenge standard:** The court first addressed the Attorney General's contention that the *Simpson II* court misapplied the *Salerno* standard for evaluating facial challenges and erroneously pronounced a "heightened scrutiny standard for due process challenges to bail restrictions."[5] There, the court recognized that a party challenging a law as facially unconstitutional "must establish that it 'is unconstitutional in all of its applications.'"[6] The *Simpson II* court held that the offense of sexual misconduct with a minor requires a case-by-case analysis because that offense does not inherently predict future dangerousness to the victim or to others.[7] Contrapositively, *Salerno* had rejected a facial challenge to the 1984 Bail Reform Act because of its "extensive safeguards," which required not only a showing of probable cause for the charged offense, but also a showing "by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[8] Thus, because *Simpson II* court addressed a provision that lacked safeguards ensuring due process (unlike the extensive safeguards in *Salerno*) the *Simpson II* court did not deviate from *Salerno*.[9] The court then cited an analogous case where the United States Supreme Court likewise invalidated laws that categorically denied important, protected interests without regard to the individual circumstances.[10]

- ***Simpson II* and *Salerno*:** The court then argued that the dissent incorrectly asserted that *Simpson II* deviated from *Salerno* and mischaracterized *Simpson II* as applying an overbreadth analysis.[11] *Simpson II* did not deviate from *Salerno*.[12] *Simpson II* addressed a provision that did not provide for an individualized hearing or include a

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[3] Moreno v. Brickner, 416 P.3d 807, 811 (Ariz. 2018) (quoting *Simpson II*, 387 P.3d at 1275).
[4] *Id.* (quoting *Simpson II*, 387 P.3d at 1275).
[5] *Id.*
[6] *Id.* (quoting *Simpson II*, 387 P.3d at 1273–74).
[7] *Simpson II*, 387 P.3d at 1278.
[8] United States v. Salerno, 481 U.S. 739, 750, 752 (1987) (citing 18 U.S.C. § 3142(f)); *see also* City of Los Angeles v. Patel, 135 S. Ct. 2443, 2445–51 (2015) (dismissing a similar argument to the Attorney General's here that that a statute should not be subject to a facial challenge because in some circumstances the conduct it authorized would be constitutionally permissible).
[9] *Moreno*, 416 P.3d at 811.
[10] *Id.* at 812 (discussing Stanley v. Illinois, 405 U.S. 645, 646 (1972) (striking down a state law under which children of unwed fathers became wards of the state because it "viewed people one-dimensionally")).
[11] *Id.*
[12] *Id.*

convincing proxy for future dangerousness.[13] In *Salerno*, the court upheld a provision that did provide a convincing proxy for future dangerousness.[14] By applying *Salerno's* standard to a provision that did not meet that standard, *Simpson II* thus comports with *Salerno*'s analysis.[15]

- **Facial challenges and overbreadth analysis:** The court next contended that the dissent erroneously equated facial challenges and overbreadth challenges.[16] In essence, the dissent's quarrel with *Simpson II* is not with its application of *Salerno*'s standard for facial unconstitutionality, but with its application of *Salerno*'s "narrow focus" standard.[17] Even still, *Simpson II* follows this 'narrowing' standard, requiring "clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community" to deny bail.[18] Here, Morreno contends that it is never constitutionally permissible to detain a person without bail based merely on proof evident or presumption great that the person committed a felony while "on-release" from another felony charge.[19] As such, it is properly considered a facial challenge.[20]

- **Legislative intent; regulatory or punitive:** The court then addressed whether the pretrial detention scheme is regulatory or punitive by looking at the legislative intent.[21] The court before has found that the purpose of the provision was to "prevent those charged with felonies but released pending trial from committing additional crimes."[22] Because the number of people denied bail is not excessive for this regulatory goal, the On-Release Provision is regulatory, not punitive.[23]

- **The On-Release Provision and categorical denial of bail:** The court noted that the state must satisfy due process before restricting an accused pretrial liberty.[24] Morreno contends that the On-Release Provision does not survive the due process requirements from *Simpson II*.[25] He argues that a denial of bail requires an individualized showing of future dangerousness.[26] The court found this argument irrelevant because the On-Release Provision did not categorically deny bail to all defendants accused of committing enumerated crimes.[27] Thus, the issue is not whether the enumerated crime serves as an adequate proxy for future

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[13] *Id.*
[14] *Id.*
[15] *Id.* at 813.
[16] *Id.*
[17] *Id.*
[18] *Id.* (quoting *Salerno*, 481 U.S. at 751).
[19] *Id.*
[20] *Id.*
[21] *Id.* (citing *Simpson II*, 387 P.3d at 1276).
[22] *Id.* at 813-14 (quoting Heath v. Kiger, 176 P.3d 690, 694 (2008).
[23] *Id.* at 814.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

dangerousness.[28] Instead the issue is twofold: whether the state has a "legitimate and compelling" interest in preventing defendants from committing new felonies while on pretrial release from another felony charge, and whether denying bail to such a defendant (when the proof is evident or the presumption great he or she committed a new felony while on release from another felony charge) is "narrowly focuse[d]" on pursuing that goal.[29]

- **The narrow focus of the On-Release Provision:** Next, the court addressed whether the On-Release Provision is "narrowly focused on accomplishing the government's objective" of preventing defendants from committing new felonies while on pre-trial release. It is.[30] The On-Release Provision does not address all crimes indiscriminately, only those crimes that are felonies.[31] Moreover, it applies only when the "proof is evident or the presumption great" of the commission of a felony.[32] Morreno disagrees, arguing that not all felonies are inherently dangerous.[33] The court found that his argument missed the point.[34] The government has a legitimate interest in preventing crimes, not just those crimes that are inherently dangerous.[35] This interest increases when faced with a defendant on pretrial release.[36] Moreover a defendant on pretrial release has a reduced liberty interest because he had already been restricted by his arrest and release under conditions for the first charge.[37] Thus, the On-Release Provision is narrowly focused on a compelling government interest, satisfying due process.[38]

- **Other examples of anti-recidivism laws:** The court noted several other jurisdictions that have similar procedures to Arizona's On-Release Provision.[39]

- **Denying bail after *Simpson II* and *Chantry v. Astrowsky*:** Morreno asserts that the On-Release Provision is absurd because it views marijuana possession as inherently more dangerous than a person charged with molesting a child.[40] The court finds this

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[28] *Id.*
[29] *Id.* (quoting *Simpson II*, 387 P.3d at 1277).
[30] *Id.* at 15 (quoting *Simpson II*, 387 P.3d at 1277).
[31] *Id.*
[32] *Id.* (quoting ARIZ. CONST. art. 2, § 22(A)(2)).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 816. *See, e.g.*, TEX. CONST. art I, § 11a(a)(2) (denying bail to defendants "accused of a felony less than capital . . . committed while on bail for a prior felony for which he has been indicted"); UTAH CONST. art I, § 8(1)(b)(denying bail to "persons charged with a felony . . . while free on bail awaiting trial on a previous felony charge"; IOWA CODE § 811.1(1) (denying bail to "defendant[s] awaiting judgment of conviction" who commit "a second or subsequent offense" of various felonies, including those involving marijuana possession); State v. Burgins, 464 S.W.3d 298, 301 (Tenn. 2015) ("A defendant may forfeit her right to bail by subsequent criminal conduct.").
[40] *Morreno*, 416 P.3d at 816.

argument unpersuasive because the On-Release Provision is concerned with preventing crime, not with future dangerousness.[41]

[41] *Id.*