

State v. Wein

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Opinion's Author: Justice Timmer

Joined By: Chief Justice Bales, Vice Chief Justice Brutinel, and Justice Pelander.

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

Facts: In 2017, Guy Goodman was charged with sexually assaulting a victim in 2010. The victim claimed that Goodman touched her vaginal area beneath her under garments while she was asleep and without her consent. DNA testing confirmed the contact, and Goodman admitted digital penetration. Goodman did not have a recent felony criminal history and there was no evidence of criminal offenses between this alleged offense in 2010 and the time of his individualized bail hearing.

Pursuant to the Arizona Constitution, all persons charged with crimes shall be bailable subject to specified exceptions.¹ These exceptions were originally limited to capital offenses, felony offenses committed while the accused is on bail for a separate felony charge, and felony offenses when the person charged poses a substantial danger to the public and no conditions of release reasonably assure safety. Arizona voters added to these exceptions by passing Proposition 103, which amended article 2, section 22(A)(1) to prohibit bail when the proof is evident or the presumption great that an accused committed sexual assault, sexual conduct with a minor under 15 years of age, or molestation of a child under 15 years of age ("Prop 103 offenses"). Proposition 103 was codified in A.R.S. section 13-3961(A)(2)-(4). However, in *Simpson v. Miller*² ("*Simpson II*"), the Arizona Supreme Court held that both article 2, section 22(A)(1), and A.R.S. section 13-3961(A)(3) were facially unconstitutional regarding charges of sexual assault with a minor under 15 years of age. Following *Simpson II*, the superior court required individualized bail determinations in accord with A.R.S. section 13-3961(D) for all persons charged with Prop 103 offenses. Pursuant to A.R.S. section 13-3961(D), a person is not eligible for bail if the person is charged with a felony offense, and the state certifies by motion and the court finds after a hearing on the matter that there is clear and convincing evidence that the person charged poses a substantial danger to the public or engaged in conduct constituting a violent offense, that no condition or combination of conditions of release may be imposed to reasonably assure public safety, and that the proof is evident or the presumption great that the person committed the offense.

Procedural History: This case is currently before the Arizona Supreme Court. The trial court conducted a section 13-3961(D) hearing and ruled that although there was proof evident or a presumption great that Goodman committed the offense, the State did not meet its burden of clear and convincing evidence to show that Goodman posed a substantial danger to the public. Accordingly, the trial court set bail at \$70,000, required that Goodman's movements be monitored by GPS upon release, and imposed other conditions.

¹ ARIZ. CONST. art. 2 § 22(A).

² 387 P.3d 1270, 1278 (Ariz. 2017).

The court of appeals vacated the bail order and held that a section 13–3961(D) hearing was not required for the state to prove the inherent dangerousness of defendants because sexual assault remained a non-bailable offense after *Simpson II*.³ The court reasoned that a charge of sexual assault “fulfills the requirement for finding inherent dangerousness” and thus, a section 13–3961(D) hearing need not be held.⁴

Issue: Article 2, section 22(A)(1) of the Arizona Constitution and A.R.S. section 13–3961(A)(2) categorically forbid bail for all arrestees charged with sexual assault if the proof is evident or the presumption great that the accused committed the crime. Are these provisions facially unconstitutional?

Holding: Yes, while the constitutional and statutory prohibitions on bail for arrestees charged with sexual assault, when proof is evident or the presumption great as to the charge, are regulatory provisions and do not constitute per se due process violations, the categorical prohibitions of bail, on their face, violate substantive due process.

Disposition: The trial court’s bail order following the section 13–3961(D) bail hearing is affirmed. The court of appeals opinion holding that sexual assault is a non-bailable offense is vacated.

Rule: The categorical prohibitions on bail for all persons charged with sexual assault are facially unconstitutional because these provisions deprive arrestees of their substantive-due-process right to an individualized determination of future dangerousness or a valid proxy for it.

Reasoning:

- **The state constitutional and statutory prohibitions on bail for persons charged with sexual assault are regulatory.** While the Due Process Clause generally prohibits the government from punishing an accused by jailing him before the trial, pretrial detention is appropriate when it is regulatory rather than punitive.⁵ In *United States v. Salerno*, the United States Supreme Court set forth a two-step standard to determine whether a provision permitting pretrial detention constituted punishment or regulation.⁶ This distinction “turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.”⁷ Relying on *Simpson II*, in which the Arizona Supreme Court held that Proposition 103’s categorical prohibition of bail for a person charged with sexual conduct with a minor under 15 years of age when the proof is evident or the presumption great regarding the charge

³ State v. Wein, 395 P.3d 1111, 1114 (Ariz. Ct. App. 2017).

⁴ *Id.*

⁵ See *United States v. Salerno*, 481 U.S. 739, 748, 750 (1987).

⁶ *Id.* at 747.

⁷ *Id.*

was regulatory, the court held that the state constitutional and statutory prohibitions on bail for arrestees charged with sexual assault are also regulatory.⁸

- **The state constitutional and statutory prohibitions of bail for persons charged with sexual assault violate substantive due process.** When a provision is determined to be regulatory, a two-step “heightened scrutiny” standard is used to determine whether the provision violates the due-process restriction on pretrial detention.⁹ Pretrial detention does not violate the Due Process Clause if the government has a “legitimate and compelling” purpose for restricting an accused’s liberty, and the restriction is “narrowly focuse[d] on a particularly acute problem.”¹⁰ The court found that the legitimate and compelling purpose prong of the *Salerno* standard was satisfied because the government has a legitimate and compelling purpose in ensuring that an accused is present for trial and in protecting victims and the public from persons who could commit sexual assault while on pretrial release.¹¹ The court then discussed whether the provisions were narrowly focused. The categorical prohibition of bail for persons charged with sexual assault is narrowly focused so long as the proof is evident or the presumption great regarding the charge, and a sexual assault charge either presents an inherent flight risk or inherently demonstrates the person charged will likely commit a separate dangerous crime while awaiting trial.¹² The court held that a sexual assault charge does not present an inherent flight risk.¹³ Furthermore, the court held that a sexual assault charge alone does not inherently demonstrate that the accused person will commit a new dangerous offense if released pending trial for three reasons.¹⁴ First, the provisions provide no procedures to determine whether a person charged with sexual assault poses a danger if granted pretrial release.¹⁵ Second, the court found that nothing showed that a person charged with sexual assault is likely to commit another sexual assault or dangerous crime if released on bail.¹⁶ Last, the court found that alternatives exist that serve the state’s objectives at a lower cost to individual liberty.¹⁷ Specifically, the court stated that a court can set bail and impose restrictions—such as GPS monitoring—to preserve public safety.¹⁸ Thus, while the provisions have legitimate and compelling purposes, the categorical prohibition of bail for persons charged with sexual assault violates substantive due process because the provisions are not narrowly focused on achieving those purposes.¹⁹

⁸ State v. Wein, 417 P.3d 787, 792 (Ariz. 2018).

⁹ *Salerno*, 481 U.S. at 748–50.

¹⁰ *Id.* at 749–50.

¹¹ *Wein*, 417 P.3d at 792.

¹² *Simpson II*, 387 P.3d at 1277–78.

¹³ *Wein*, 417 P.3d at 792.

¹⁴ *Id.* at 793.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 795.

¹⁸ *Id.*

¹⁹ *Id.* at 796.

- **The state constitutional and statutory prohibitions of bail for persons charged with sexual assault are facially unconstitutional.** The U.S. Supreme Court explained that to succeed on a facial challenge, “the challenger must establish that no set of circumstances exists under which the [provision] would be valid.”²⁰ The Arizona Supreme Court held that the categorical prohibition of bail for all persons charged with sexual assault “deprives arrestees of their substantive-due-process right to either an individualized determination of future dangerousness or a valid proxy for it.”²¹ Because the prohibitions lack these feature in every application of the provisions, there is no set of circumstances under which the prohibitions would be valid.²² Thus, the court held that article 2, section 22(A)(1), and A.R.S. section 13-3961(A)(2) are facially unconstitutional.²³
- **The Due Process Clause does not require individualized determinations in every case.** Specifically, the court reaffirmed its view in *Simpson II* that there are instances when individualized determinations regarding bail are not required.²⁴ For example, the court held that bail is legitimately precluded for a felon already on bail for a separate felony charge.²⁵ The court distinguished the categorical prohibition on bail for persons charged with sexual assault from the separate felony offense in *Morreno* because unlike the offense in *Morreno*, it is not categorically demonstrated that a sexual assault charge inherently predicts that the accused will commit another dangerous offense pending trial.²⁶

²⁰ *Salerno*, 481 U.S. at 745.

²¹ *Wein*, 417 P.3d at 796.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 795.

²⁵ *Morreno v. Hon. Brickner/State*, 416 P.3d 807, 817 (Ariz. 2018).

²⁶ *Wein*, 417, P.3d at 796.