CAN LOCAL CRIMINAL COURTS GRANT BAIL OR RECOGNIZANCE FOR MULTI-PREDICATE FELONS CHARGED WITH NON-QUALIFYING FELONIES? …YES AND NO.

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INTRODUCTION

In *People ex rel. John H. Bradley* v Baxter (79 Misc3d 988 [Sup Ct, Monroe County 2023]), the court held that the statute preventing city, town or village courts from ordering bail or recognizance for defendants with two or more previous felony convictions (CPL 530.20 [2][a][ii]) who are charged by felony complaint with a FELONY only applies to defendants who are charged with QUALIFYING FELONY OFFENSES defined in CPL 510.10 (4).

In the court’s analysis, a statutory interpretation which permits local criminal courts to issue a securing order granting either recognizance release or release under the least restrictive, non-monetary conditions for predicate felons charged with NON-QUALIFYING FELONY OFFENSES (CPL 510.10 [3]) is consistent with the general scheme of bail reform, the intent of the Legislature (to eliminate pretrial detention for virtually all but the most serious offenses) and common sense.

THE CASE

The petitioner brought an Article 78 proceeding in the Fourth Department seeking a Writ of Habeas Corpus after the City Court declined to set bail or release him following his arraignment for Felony DWI, AUO 1st Degree, CPCS 7th degree and other V&T offenses. Instead, he was remanded per CPL 530.20 (2) pending bail review in Superior Court.

Since the defendant was released after filing the instant petition, the Appellate Division converted it to an action for Declaratory Judgment (203 AD3d 1576 [4th Dept 2022]).

The issue, as framed by Supreme Court, was whether the Qualifying Offense rule of CPL 510.10 could be reconciled with the Double Predicate Rule of CPL 530.20(2)(a) to permit either OR release or release on non-monetary conditions of a predicate felon charged with a non-qualifying felony offense upon the order of the local court.

The petitioner argued that the plain meaning of CPL 510.10(4) and 530.20(1((b) require a lower court to issue a securing order releasing a defendant charged with a NON-QUALIFYING FELONY OFFENSE (either on recognizance or on conditions) regardless of the number of prior felony convictions. Only if such a defendant is charged with a QUALIFYING FELONY OFFENSE must the court defer to the superior court for purposes of bail.

SUPREME COURT SAYS

The court noted that both CPL 510.10 (4) and 530.20 (1)(b) create a PRESUMPTION favoring OR release or release on the least restrictive type of NON-MONETARY CONDITIONS (if the defendant is deemed by the court to pose a risk of not returning to court), limits the MONETARY BAIL option to enumerated QUALIFYING OFFENSES, and permits REMAND where the QUALIFYING OFFENSE is also a felony. Absent a QUALIFYING OFFENSE, the only recourse available to the court is to grant one form of release or the other.

The court also noted that the QUALIFYING OFFENSE rule does not eliminate the DOUBLE PREDICATE rule but only limits it to interpret “felony” as one that constitutes a QUALIFYING OFFENSE under CPL 510.10. To do otherwise, in the courts view, would undermine the QUALIFYING OFFENSE rule by allowing a local court to detain a defendant in custody upon a NON-QUALIFYING offense for which a superior court could only grant an order of release either on recognizance or upon non-monetary conditions.

Allowing a lower court to issue a securing order for a predicate felon charged with a NON-QUALIFYING felony offense also serves the interest of judicial economy by obviating the need to schedule a separate proceeding in superior court which necessarily results in the defendant’s release pending a preliminary hearing anyway. To interpret “felony” in CPL 530.20 to include NON-QUALIFYING felony offenses, in the court’s estimation, not only exalts form over substance but invites a waste of time and judicial resources.

The court reasoned further that if the Legislature had intended CPL 530.20 to serve as an exception to CPL 510.10’s requirement for OR release or release on conditions for NON-QUALIFYING offenses, it could have so indicated. (On the other hand, one could argue that if the Legislature intended to replace “felony” in CPL 530.20 with QUALIFYING FELONY OFFENSE, it could have done so).

Nevertheless, the court determined that the overall legislative scheme and purpose of the bail statutes combined with practical considerations compel the conclusion that the statutory proscription against a local court’s authority to set bail on a FELONY charged against a defendant with two or more prior felony convictions is limited to QUALIFYING OFFENSES.

BUT SEE *PEOPLE V ARROYO*

In *People v Arroyo* (2023 NY Slip Op 50612 [Rochester City Court 6/23/23]) , the court rejected the Supreme Court’s statutory interpretation in *People ex rel. Bradley v Baxter*, supra, finding that the plain language and legislative history of CPL 530.20 supported the conclusion that it does not empower local criminal court judges to grant bail or recognizance release to two-time convicted felons charged with a felony (whether a qualifying or non-qualifying offense).

The defendant in *Arroyo*, a career burglar charged with Burglary 3rd degree, Criminal Mischief 2nd degree and Petit Larceny, moved in City Court for release on his own recognizance or on non-monetary conditions, arguing that CPL 530.20 only applies to QUALIFYING OFFENSES as defined in CPL 530.20(1)(b) and 510.10(4) (citing *Baxter v Baker*, supra).

The court concluded that the premise of the defendant’s argument that the Legislature inadvertently failed to modify “felony” to “qualifying felony offense” when the bail statutes were amended in 2020 (and again in 2022 and 2023), is belied by the text and legislative history of CPL 530.20.

The court noted that when this statute, originally enacted in 1979, was amended in January 2020 to create the QUALFYING and NON-QUALIFYING OFFENSE release structure, while certain language in subdivision 2(a)(ii) (to wit: that the defendant “appears to have” two previous felony convictions) was changed (to wit: “the defendant “has” two previous felony convictions), the introductory language of subdivision 2 (to wit: “When the defendant is charged by felony complaint with a FELONY,…”) remained the same.

As the court observed, “where a statute describes the particular situations in which it is to apply, and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (citing *Matter of Alonzo M. v NYC Dept of Probation*, 72 NY2d 662 [1988]).

From its review of the statute, the legislative history and Practice Commentaries to CPL 530.20, the court was satisfied that when a double predicate felon is charged with a felony (regardless of its status as qualifying or non-qualifying), the local court lacks authority to order bail or release on recognizance.

FINAL THOUGHT

Unless and until the Fourth Department has an opportunity to resolve the issue, defense counsel representing predicate felony offenders charged by felony complaint with a NON-QUALIFYING felony offense should not hesitate to ask the local criminal court to release the client on his/her own recognize or upon non-monetary conditions, citing *Bradley v Baxter*, supra as persuasive authority.

While *People v Arroyo*, supra is not “CONTROLLING legal authority…directly adverse to the position of the client” that counsel must disclose to the court (NY RPC 3.3[a][2]), it would be wise to do so and point out that a Supreme Court decision should carry more persuasive weight than that of a local criminal court.

If the local court does not deem itself bound by *Baxter,* then counsel should beat a hasty path to superior court and move for the appropriate release.

Thank you to Frank Longo Esq for providing *Bradly v Baxter*.