

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
LEVI MICHAEL	:	Case No. 2009 AP 11 0059
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 2009CR080216

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 8, 2010

APPEARANCES:

For Plaintiff-Appellee

AMANDA K. MILLER
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For Defendant-Appellant

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Farmer, J.

{¶1} On October 29, 2009, the Tuscarawas County Grand Jury indicted appellant, Levi Michael, on six counts of rape in violation of R.C. 2907.02(A)(1)(b). Said charges involved some of his own children under the age of thirteen.

{¶2} On November 2, 2009, the state of Ohio filed a motion to deny bail pursuant to R.C. 2937.222.

{¶3} On November 6, 2009, appellant issued subpoenas to the child-victims. A motion was filed on November 9, 2009 to quash the subpoenas. The trial court granted the motion which was journalized on November 12, 2009.

{¶4} A bond hearing was held on November 9, 2009. By judgment entry filed November 18, 2009, the trial court granted the state's motion and denied bail.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED WHEN IT DENIED THE SETTING OF BAIL WHEN THE STATE FAILED TO PROVE, BY CLEAR AND CONVINCING EVIDENCE, ALL OF THE FACTORS REQUIRED BY REVISED CODE SECTION 2937.222."

II

{¶7} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING THE DEFENDANT THE RIGHT TO PRESENT WITNESS."

I

{¶8} Appellant claims the trial court erred in denying him bail, as the state failed to prove by clear and convincing evidence that R.C. 2937.222 applied. We disagree.

{¶9} R.C. 2937.222 governs hearing to deny bail. Subsections (A), (B), and (C) state the following in pertinent part:

{¶10} "(A)**At the hearing, the accused has the right to be represented by counsel and, if the accused is indigent, to have counsel appointed. The judge shall afford the accused an opportunity to testify, to present witnesses and other information, and to cross-examine witnesses who appear at the hearing. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. Regardless of whether the hearing is being held on the motion of the prosecuting attorney or on the court's own motion, the state has the burden of proving that the proof is evident or the presumption great that the accused committed the offense with which the accused is charged, of proving that the accused poses a substantial risk of serious physical harm to any person or to the community, and of proving that no release conditions will reasonably assure the safety of that person and the community.

{¶11} "(B) No accused person shall be denied bail pursuant to this section unless the judge finds by clear and convincing evidence that the proof is evident or the presumption great that the accused committed the offense described in division (A) of this section with which the accused is charged, finds by clear and convincing evidence that the accused poses a substantial risk of serious physical harm to any person or to the community, and finds by clear and convincing evidence that no release conditions will reasonably assure the safety of that person and the community.

{¶12} "(C) The judge, in determining whether the accused person described in division (A) of this section poses a substantial risk of serious physical harm to any

person or to the community and whether there are conditions of release that will reasonably assure the safety of that person and the community, shall consider all available information regarding all of the following:

{¶13} "(1) The nature and circumstances of the offense charged, including whether the offense is an offense of violence or involves alcohol or a drug of abuse;

{¶14} "(2) The weight of the evidence against the accused;

{¶15} "(3) The history and characteristics of the accused, including, but not limited to, both of the following:

{¶16} "(a) The character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, and criminal history of the accused;

{¶17} "(b) Whether, at the time of the current alleged offense or at the time of the arrest of the accused, the accused was on probation, parole, post-release control, or other release pending trial, sentencing, appeal, or completion of sentence for the commission of an offense under the laws of this state, another state, or the United States or under a municipal ordinance.

{¶18} "(4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release."

{¶19} "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought

to be established." *Cross v. Ledford* (1954), 161 Ohio St.3d 469, paragraph three of the syllabus.

{¶20} Appellant was afforded a bail hearing on November 9, 2009. The charges pending against appellant were six counts of rape in violation of R.C. 2907.02(A)(1)(b), involving the forcible rape of some of his own children under the age of thirteen.

{¶21} In denying bail, the trial court found the following:

{¶22} "The State has shown by clear and convincing evidence that the proof is evident that the Defendant engaged in sexual conduct with at least two (2) of his biological children, when they were less than thirteen (13) years of age. R.C. 2907.01(A), R.C. 2907.02(A)(1)(b).

{¶23} "The State presented evidence that the Defendant admitted to the criminal conduct occurring in his home. The Defendant further discussed with the investigating officer that a neighbor girl, 'came on to him'. In addition, the Defendant believes his children's involvement was voluntary and that they were not hurt.

{¶24} "The exhibits submitted by the Defendant indicate that the Defendant's residence has been the subject of eviction proceedings. Thus, the Defendant would be transient upon his return to the community.

{¶25} "The Defendant's employment as a truck driver would take him outside the jurisdiction of the Court and provide him with a means to abscond.

{¶26} "The Defendant presents with no prior criminal history, but with a history of investigations by the Tuscarawas County Department of Jobs and Family Services for neglect or abuse of his children.

{¶27} "The Defendant's wife reported concerns to Jobs and Family Services that people were driving past the Defendant's home throwing things and yelling (Defendant's Exhibit '3'). Therefore, a release to the community may also pose a threat to the safety of the Defendant." Judgment Entry filed November 18, 2009.

{¶28} Cathy Bickford, a detective with the Tuscarawas County Sheriff's Office, testified at the bail hearing. Detective Bickford stated she spoke with the children and appellant regarding the allegations of sexual abuse. T. at 7-8. She testified about a report prepared by Michael LoPresti, a member of the investigative team. T. at 11-12; State's Exhibit A. The report included appellant's admissions of various acts of sexual conduct with one of his children which he signed to and indicated it was the truth. Id. An audio file of an interview of appellant conducted by Detective Bickford was played for the trial court. T. at 13; State's Exhibit B. Appellant admitted to certain incidents, some of which involved another child. T. at 14-16. Appellant also handwrote and signed a statement regarding his admissions. T. at 16-17; State's Exhibit C.

{¶29} Each child-victim indicated to Detective Bickford that appellant was physically abusive and hurt them. T. at 21.

{¶30} Although appellant did not have any previous criminal convictions, the state offered Exhibit D which was a report of an escape attempt by appellant from the county jail. T. at 28. The exhibit indicates appellant had a "homemade handcuff key" on his person which was found during a strip search at the jail. Another inmate had reported that appellant was planning an escape.

{¶31} Defense counsel argued appellant was a good risk for bond because he had a steady job as a truck driver and the record of ongoing investigations by the

Tuscarawas County Job and Family Services indicated "there is no markings whatsoever of anything remotely resembling sexual abuse." T. at 29, 30

{¶32} Upon review, we find the trial court's decision is clearly supported by clear and convincing evidence and the trial court did not err in denying bail.

{¶33} Assignment of Error I is denied.

II

{¶34} Appellant claims the trial court erred in quashing the subpoenas of the child-victims for the bond hearing. We disagree.

{¶35} Appellant argues "[d]ue process under the 14th Amendment and the right to adequate assistance of counsel under the 6th Amendment were violated" when he was denied the right to present witnesses. Appellant's Brief at 8.

{¶36} Section 10, Article I of the Ohio Constitution states the following in pertinent part:

{¶37} "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature of the cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed."

{¶38} The matter sub judice was an administrative bond hearing and not a trial on the merits. During a bond hearing, hearsay evidence is permitted:

{¶39} "Statements that 'might constitute inadmissible hearsay where stringent rules of evidence are followed must be taken into account in [administrative]

proceedings***where relaxed rules of evidence are applied.' *Simon v. Lake Geauga Printing Co.*, (1982), 69 Ohio St.2d 41, 44, 430 N.E.2d 468. In other words, hearsay is permitted in administrative hearings, but the "discretion to consider hearsay evidence cannot be exercised in an arbitrary manner." ' *Fox v. Parma Community Gen. Hosp.*, 160 Ohio App.3d 409, 2005-Ohio-1665, 827 N.E.2d 787, at ¶59, quoting *Menon v. Stouder Mem. Hosp.* (Feb. 21, 1997), Miami App. No. 96-CA-27, 1997 WL 71778." *Vinci v. Ohio State Board of Pharmacy*, Tuscarawas App. Nos. 2008 AP 08 0052 and 2008 AP 08 0053, 2010-Ohio-451, ¶118.

{¶40} Appellant admitted to sexual incidents involving his children to two investigators and signed statements of admission.

{¶41} It is clear that the sole purpose of the subpoenas was to intimidate and/or harass the child-victims. We concur with the trial court findings in granting the motion to quash:

{¶42} "The Court **FINDS** that the testimony of the children is not necessary for the R.C. 28937.222 proceedings.

{¶43} "The Court **FINDS** that the Defendant has copies of all recorded interviews with the children, and any question of access to the children for interviewing purposes is not currently before the Court." Judgment Entry filed November 12, 2009.

{¶44} Upon review, we find the trial court did not violate appellant's due process rights in quashing the subpoenas.

{¶45} Assignment of Error II is denied.

{¶46} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio
is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ John W. Wise

JUDGES

SGF/sg 601

