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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JOSEPH G. TUNCAP,
Defendant-Appellant.

Supreme Court Case No. CRA11-006
Superior Court Case No. CF0643-10

OPINION

Cite as: 2011 Guam 24

Appeal from the Superior Court of Guam
Argued and Submitted October 31, 2011
Hagatna, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice, KATHERINE A. MARAMAN, Associate Justice

MARAMAN, J.

[1] Defendant-Appellant Joseph G. Tuncap appeals the Superior Court’s Decision and Order denying his request to use real property in lieu of a \$10,000.00 cash bail. Tuncap argues that the Superior Court abused its discretion by requiring an environmental impact evaluation before the property can be accepted in lieu of cash. Tuncap also argues that the Superior Court failed to consider any non-financial release conditions. For the reasons set forth below, we affirm the Superior Court’s decision.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Tuncap was indicted on the following charges: (1) Three Counts of Burglary (as a second-degree felony) in violation of 9 GCA §§ 37.20(a) and 37.20(b); (2) Two Counts of Attempted Theft of Property (as a third-degree felony) in violation of 9 GCA §§ 43.20(a), 43.30(a), and 13.10; and (3) One Count of Theft of Property (as a third-degree felony) in violation of 9 GCA §§ 43.20(b) and 43.30(b). On November 1, 2010, Tuncap was committed to the Guam Detention Facility pending posting of the \$10,000.00 cash bail.

[3] On July 1, 2011, Tuncap filed a Motion for Release on His Personal Recognizance. On August 1, 2011, he additionally filed a Motion for Bail Hearing. On August 17, 2011, a hearing was held to consider both of Tuncap’s motions. The court took these motions together as a Motion for Modification of Bail Conditions. At the hearing, Tuncap requested the court accept Cadastral Lot No. 1343-1-3, New Agana, as surety in order to secure his appearance instead of \$10,000.00 cash. Tuncap offered documents stating the property’s assessed value was

¹ This opinion supersedes the Order issued by this court *nunc pro tunc* to November 28, 2011.

\$114,390.00 and that taxes on the property had been paid. After considering the arguments from Tuncap's attorney and the People, the court orally denied Tuncap's motion. The court then issued a written Decision and Order articulating the legal and factual basis for denying Defendant's Motion for Modification of Bail Conditions.

[4] In its Decision and Order, the Superior Court found that the original determination imposing a secured bond of \$10,000.00 cash and other specified conditions of release continue to be appropriate with regard to Tuncap. The court noted that burglary is a severe crime against the community. It added that the "community needs to be able to feel safe within their (sic) homes and businesses," and that "Defendant's release would pose a substantial risk of harm to the community." ER at 29 (Dec. & Order, Aug. 19, 2011). The court was persuaded that release would pose a substantial risk of harm to the community, citing to Tuncap's extensive criminal record dating back to the 1970s. The court also referred to Tuncap's voluntary plea agreement in a previous case, in which after only three months, he allegedly violated probation in that case by failing to make payments towards fines and restitution, and failing to perform community service. The court further noted that Tuncap has a pending matter in federal court. Ultimately, the court determined that Tuncap's violations demonstrated an unwillingness to comply with the court's orders, and concluded that he continues to pose a substantial risk of harm to the community.

[5] The Superior Court also denied Tuncap's request to use Cadastral Lot No. 1343-1-3, New Agana, owned by Tuncap and his sister, as surety in order to secure his appearance. The court relied upon 8 GCA § 40.20(c), which gives it discretion to require cash or allow other property as bail conditions. The court recognized that the value of the property exceeded the value of the cash bail amount by \$100,000.00, but was concerned that Tuncap did not include adequate

information about the status of the real property. In particular, the court was concerned with whether an environmental impact evaluation had been conducted on the property. The court thus denied Tuncap's request to use Cadastral Lot No. 1343-1-1, New Agana, as surety for Tuncap's release, and continued to require the original cash bail set at \$10,000.00.

II. JURISDICTION AND STANDARD OF REVIEW

[6] This court has jurisdiction over appeals from determination of bail pursuant to 8 GCA §§ 40.80(a) and 130.15(d) (2005). The Superior Court's determination of bail conditions is reviewed for an abuse of discretion. *People v. Bruneman*, 1996 Guam 3 ¶ 7. Statutory interpretation of Guam's Code of Criminal Procedure is subject to *de novo* review. *See People v. Anastacio*, 2010 Guam 18 ¶ 10.

III. ANALYSIS

[7] Tuncap argues that the Superior Court abused its discretion by imposing a new legal requirement that a defendant submit an environmental impact evaluation when offering real property to secure release. Appellant's Br. at 6 (Oct. 3, 2011). Tuncap also argues that the Superior Court abused its discretion when it failed to consider any non-financial release conditions. *Id.* at 12. Although Tuncap raises these two issues on appeal, he does not complain about the amount of cash bail required. In response, the People argue that pursuant to 8 GCA § 40.20(c), it is the lower court's duty to make such inquiries when deciding to accept property in lieu of cash bail and that the court acted properly and clearly within its discretion. Appellee's Br. at 9 (Oct. 12, 2011).

[8] The People correctly point out that it is within the trial court's discretion to make the determination as to whether to accept the proffered property in lieu of cash bail. Accordingly, for the reasons set forth herein, we find that the Superior Court did not abuse its discretion when

requiring further information about the property before accepting it in lieu of cash bail or in denying Tuncap's release on either his own recognizance or any non-financial conditions.

A. The Superior Court did not abuse its discretion by requiring an environmental impact evaluation.

[9] Tuncap cites the Ninth circuit case, *United States v. Frazier* to substantiate his argument that requiring an environmental impact evaluation is an abuse of discretion. Appellant's Br. at 5; see *United States v. Frazier*, 772 F.2d 1451 (9th Cir. 1985). In *Frazier*, the district court required a bond of \$25,000.00, with no cash deposit, secured by real property. *Id.* at 1452. The court then increased the bond to \$75,000.00 and added the condition that the property used to secure the bond be unencumbered. *Id.* The defendant moved for reconsideration of the requirement that the property used to secure the bond be unencumbered. *Id.* The Ninth Circuit concluded that the "restrictive condition was [not] reasonably necessary to ensure [the defendant's] appearance." *Id.* It also found that the government's purported inability to protect its lien interest in the event of a default judgment is simply a matter among creditors and that the concern was not a proper basis for imposing the restrictive condition. *Id.*

[10] In Guam, we have stated that in determining proper bail, the test for excessiveness is whether "bail is set at an amount higher than reasonably calculated to assure the presence of the accused." *People v. Bruneman*, 1996 Guam 3 ¶ 9 (citing *United States v. Salerno*, 481 U.S. 739, 752 (1987); *Stack v. Boyle*, 342 U.S. 1, 5 (1951)). Furthermore, we have found that "[d]eterminations as to bail conditions and amounts are not to be driven by the goal of keeping the accused incarcerated, but should rather be reached in consideration of the only authorized interests, *to wit*, ensuring the appearance of the accused and the safety of others." *People v. Song*, 2011 Guam 19 ¶ 11 (citing 8 GCA §§ 40.10, 40.15, 40.20 (2005); *Stack v. Boyle*, 342 U.S.

1, 4 (1951)). Lastly, Guam law states: “[T]he judge shall impose the least onerous . . . condition . . . reasonably likely to assure the person’s appearance as required and the safety of any other person and the community, or, if no single condition gives that assurance, the least onerous combination of . . . conditions.” 8 GCA § 40.20 (2005). Guam law regarding bail is explicit—bail is meant to ensure the appearance of the accused and not meant to “assure that a defendant will not gain his freedom.” *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (citing *Stack v. Boyle*, 342 U.S. 1 (1951)).

[11] The case law cited by Tuncap as well as case law elsewhere support the argument that requiring an environmental impact evaluation may be an abuse of discretion. Courts elsewhere have found imposition of conditions on property to be used as bail that prevents a defendant’s release from jail excessive. *See, e.g., Campbell v. Johnson*, 586 F.3d 835, 843 (11th Cir. 2009) (finding excessive the requirement that only property within the county be used for bail); *United States v. Frazier*, 772 F.2d 1451 (9th Cir. 1985) (holding that a district judge committed error when issuing a requirement that only unencumbered property can be used for bail).

[12] On the contrary, other courts have held that there is no established right to a certain type of bond. *See, e.g., Walden v. Carmack*, 156 F.3d 861, 874 (8th Cir. 1998) (“[A]ssuming . . . that [the] Sheriff . . . refused to accept a property bond in lieu of a cash bond, appellees fail to establish any constitutional right to a certain type of bond.”); *United States v. James*, 674 F.2d 886, 891 (11th Cir. 1982) (“As long as the primary reason in setting bond is to produce the defendant’s presence, the final amount, type, and other conditions of release are within the sound discretion of the releasing authority . . .”).² Furthermore, a detainee’s inability to post bail does

² At one point, the Northern District Courts of Florida and the Southern District Courts of Florida made it a general policy to refuse to accept property bonds as bail except under “very extraordinary circumstances.” *United States v. Price*, 773 F.2d 1526, 1527 (11th Cir. 1985). Although the Eleventh Circuit stated it “would have difficulty

not inherently make bail excessive. See *Bruneman*, 1996 Guam 3 ¶ 9; see also *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir.1988) (“[B]ail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement.”); *Pugh v. Rainwater*, 572 F.2d 1053, 1069 (5th Cir.1978) (Coleman, J., concurring) (“[P]eople may not be denied reasonable bail inailable cases, but they are not entitled to bail on their own terms If reasonable bail is set and the defendant cannot make it the Constitution does not command that he shall be released.”).

[13] Tuncap argues that “[t]he trial court abused its discretion by imposing a new legal requirement that defendants submit environmental impact evaluations when using real property to secure their release.” Appellant’s Br. at 6. The Superior Court, however, simply requires an environmental impact evaluation from Tuncap; it does not require them from all future defendants as Tuncap argues.³ Furthermore, it is within the discretion of the Superior Court to determine the value of the property. 8 GCA § 40.20(c) (2005). Factors such as the condition of

with upholding the legality of denying or altering a property bond solely because of a stated policy against those bonds,” it looked to the facts of the case, rather than the legality of the policy. See *United States v. James*, 674 F.2d 886, 890-91 (11th Cir. 1982) (affirming district court’s acceptance of only cash or corporate security bonds); see also *Price*, 773 F.2d at 1527-28 (refusing to decide case on the basis of the policy until after the district court interprets the policy).

At oral argument, Tuncap argued that cash and real property are somewhat interchangeable. Digital Recording at 10:28:02 – 10:28:05 (Oral Argument, Oct. 31, 2011) (“If you have a valuable property, it’s easy to say that the equivalent will be cash.”). However, many jurisdictions will only accept real property if the value is more than the cash bail amount. The following is a list of states that require the value of real property used in lieu of bail to be more than cash bail amount: States that require real property value be triple the cash bail amount - Indiana, Ind. Code § 35-33-8-3.2(a)(1)(C)(West 2011); Double the bail amount - California, Cal. Penal Code § 1298 (West 2011), Georgia, Georgia Uniform Superior Court Rule (Ga. Unif. Super. Ct. R.) 27.4 (2011), Illinois, 725 Ill. Comp. Stat. 5/110-8(2) (2011), Michigan, Mich. Comp. Laws § 780.67(b) (2011); Montana, Mont. Code Ann. § 46-9-401(1)(b) (2011), New York, N.Y. Crim. Proc. Law. § 500.10(17)(b) (McKinney 2011); One and one-half the bail amount, Colorado, Colo. Rev. Stat. § 16-4-104 (2011), Tennessee, Tenn. Code Ann. § 40-11-122(1) (2011).

³ In the absence of specific information suggesting that a potentially hazardous environmental condition exists on real property offered as security for a release bond, we believe it would be a burden on a defendant if the court requested a formal Environmental Impact Statement or expert report as a precondition to accepting property in order to secure a person’s appearance as required. However, in this case, the trial court only asked for an evaluation, which we believe was the trial court’s attempt to simply request more information on the environmental status of the property.

the buildings, signage or other structures on the property, the property's location, its accessibility and proximity to hazardous sites, etc., are all within the parameters of reasonable information the Superior Court may need in order to ascertain the property's value. Moreover, Guam law provides a cause of action against negligent maintenance of toxic substances. *See* 10 GCA § 41104(1)(b) (2005). Therefore, hazardous materials on the property may affect the property's value and the government's liability if clean up or disposal is necessary. Tuncap did not proffer any evidence about the property's environmental condition, but appears to have expected the Superior Court to conduct that inquiry. Moreover submission of the tax assessments alone does not conclusively establish the value of the property which Tuncap offers in lieu of a cash bond.⁴ The burden of proof remains with Tuncap and he did not meet his burden. For these reasons, we find that the Superior Court did not abuse its discretion in requesting an environmental impact evaluation.

B. The Superior Court did not abuse its discretion by refusing to release Tuncap on his own recognizance or under non-financial conditions.

[14] Tuncap argues that the Superior Court abused its discretion by refusing to release Tuncap on his own recognizance or on any non-financial condition. Appellant's Br. at 9. Tuncap cites *United States v. Alston* to support his argument. *Id.*; *see United States v. Alston*, 420 F.2d 176 (D.C. Cir. 1969). In *Alston*, bail was set at \$5,000.00, and the federal district court for the

⁴ It should be noted that Tuncap argues the Superior Court had no basis for challenging the Government of Guam's determination that the real property was worth over \$110,000.00. Appellant's Reply Br. at 3 (Oct. 17, 2011). He states that "Tuncap submitted several tax documents showing the assessed value of the real property." *Id.* However, many jurisdictions do not accept tax evaluations as evidence of a property's value. *See, e.g., Ark. Power & Light Co. v. Jennings*, 529 S.W.2d 866 (Ark. 1975) (finding that determination of value by someone other than owner for different purposes is not fair criterion of market value); *Moran v. Flach*, 752 S.W.2d 956 (Mo. Ct. App. 1988) (finding that valuations for tax assessments are made for special purposes and are incompetent as evidence of value); *Ibey v. Ibey*, 55 A.2d 872 (N.H. 1947) (finding that tax valuations are not admissible as evidence of value in proceedings other than those relating directly to tax assessment); *Dallas Cnty. Bail Bond Bd. v. Black*, 833 S.W.2d 247 (Tex. App. 1992) (finding that value placed upon real property for tax assessment purposes, without participation of landowner, is not evidence of its value for purposes other than taxation).

District of Columbia refused to reduce the cash bond amount and refused to establish non-financial conditions. *Alston*, 420 F.2d at 177. In denying defendant's request for a modification of bail, the district court relied on past convictions in order to show the defendant's tendency of flight. *Id.* at 179. The district court also focused on the severity of the crime and the potential life sentence attached. *Id.* The D.C. Circuit "reluctantly" reversed the district court and established its own set of conditions for release. *Id.* at 177-78.

[15] Although this case supports Tuncap's argument, Tuncap fails to review its procedural history. In *Alston*, the D.C. Circuit "reluctantly" reversed only after it had first remanded the case to the district court to consider evidence of employment upon release, defendant's opportunity to reside at a residence house, and evidence of enrollment in an Alcohol Rehabilitation clinic. *Id.* at 177. The first time the D.C. Circuit reviewed the case, it ordered the district court to explain why non-financial conditions would be inadequate, and why the financial conditions were superior. *Id.* Furthermore, in *Alston*, it seems that the district court unfairly took past convictions into account in showing tendency of flight, without making "inquiry into whether in the prior proceedings the accused had failed to comply with bail, release, or other orders." *Id.* at 179.

[16] In this case, Tuncap did not provide evidence to the Superior Court that he took steps to minimize his potential harm to the community as the defendant in *Alston* had. Tuncap never provided evidence such as his entry into any sort of rehabilitation program, plan to live in a home in which strict rules and regulations would be enforced, or his employment and willingness to surrender part of his wages, as seen in *Alston*. Furthermore, the District Court in *Alston* did not discuss prior release violations in its decision as the Superior Court in this case did. Here, there is evidence that Tuncap violated probation in a recent case and has a pending federal matter. Tr.

at 21 (Bail Hr'g, Aug. 17, 2011). Lastly, the D.C. Circuit court only reversed after an initial remand to the district court, upon which the district court failed to justify its decision to require cash bail.

[17] Additionally, in determining whether there is a “substantial risk of nonappearance,” 8 GCA § 40.15(c)(2)(viii) and (ix) provide that the Superior Court may consider the defendant’s history of compliance with court orders and whether, at the time of the offense, the defendant was on probation. Title 8 GCA § 40.15(c)(4) adds that the Superior Court may also consider the nature and seriousness of the danger the person would pose to the community. The Superior Court took note of the fact that Tuncap has a prior criminal case before the court in criminal case no. CF0321-07, is on probation and has violated the terms of probation by failing to make payments towards fines and restitution and failing to perform community service. The court added that Tuncap violated probation “a mere three months after judgment was entered.” ER at 32-33 (Dec. & Order, Aug. 19, 2011). The court further noted the fact that Tuncap also has a pending matter with the District Court and is currently on federal hold. Based on these facts, the court determined that Tuncap demonstrated an unwillingness to comply with the court’s orders and continues to pose a substantial risk to the community.

[18] At the hearing and in his motions, Tuncap requested release on his own recognizance or that real property is used in lieu of cash; he never requested of the Superior Court to establish any other non-financial conditions. On appeal, Tuncap argues that the “trial court . . . failed to discuss why nonfinancial (sic) conditions, such as house arrest, curfew, reporting requirements, stay-away orders, could not reasonably assure Tuncap’s compliance.” Appellant’s Br. at 11-12. The transcripts do not show that Tuncap ever requested any of these conditions. The record also shows that Tuncap provided no evidence of actions he would be willing to take to assuage the

court's concerns, which would have otherwise justified Tuncap's request for release on personal recognizance or other conditions. It is Tuncap's burden to provide the court with alternatives to cash bail. He failed to meet his burden, and we therefore affirm the Superior Court's decision to deny Tuncap release on non-financial conditions.

IV. CONCLUSION

[19] For the reasons set forth above, we **AFFIRM** the Superior Court's decision to require additional information regarding the status of the property. This decision is not meant to prevent Tuncap from renewing his motions and presenting evidence to the Superior Court such as an environmental impact evaluation regarding the property or information that the Superior Court may find sufficient to establish its value as security. Further, this decision is not meant to prevent Tuncap from renewing his motion for release on non-financial conditions provided he presents a motion specifying which release conditions he requests and evidence supporting his motion.

Original Signed : **Robert J. Torres**
By

ROBERT J. TORRES
Associate Justice

Original Signed : **Katherine A. Maraman**
By

KATHERINE A. MARAMAN
Associate Justice

Original Signed : **F. Philip Carbullido**
By

F. PHILIP CARBULLIDO
Chief Justice