
SEAL OF THE TENNESSEE JUDICIARY
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ALL THINGS BAIL, BOND AND BONDING COMPANIES

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TENNESSEE CONSTITUTION
ART. I §15

- That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great. And the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.

U. S. CONSTITUTION AMENDMENT VIII

- Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Bail Reform Act

- Mandates that courts must impose the least onerous conditions on a defendant to assure appearance in court. Those conditions must be based on the strength of different factors that the court must consider when setting bail.

Bail

- Remember, bail is an insurance policy to assure that the defendant will appear. It is based on risk. Just like any insurance, the higher the risk the higher the bond. Unlike in federal court, Tennessee courts cannot hold anyone without bond unless for a capital crime where proof evident or the presumption is great.

T.C.A. § 40-11-102

Before trial, all defendants shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. After conviction, defendants are bailable as provided by § 40-11-113, § 40-11-143 or both.

WALLACE vs. STATE
245 S.W. 2d 196 (Tenn. 1952)

- A person has a state constitutional right to bail unless charged with a capital crime where proof evident and presumption great. If a person is on bond and forfeits bond or is arrested for another crime, the court may find that the person has forfeited his or her right to bond and can be held in custody.

STATE v. BERGINS

464 S.W. 3d 298(Tenn. 2015)

- Most recent case on bail that affirms *Wallace v. State*. Sets up procedure to determine if the defendant has forfeited the right to bond.

§ 40-11-104. Release of defendants;

- (a) Any magistrate may release the defendant on the defendant's own recognizance pursuant to § 40-11-115 or § 40-11-116 or admit the defendant to bail pursuant to § 40-11-117 or § 40-11-122 at any time prior to or at the time the defendant is bound over to the grand jury.

The trial court may release the defendant on the defendant's own recognizance pursuant to § 40-11-115, admit the defendant to bail under § 40-11-116, § 40-11-117 or § 40-11-122, or alter bail or other conditions of release pursuant to § 40-11-144 at any time prior to conviction or thereafter, except where contrary to law.

T.C.A. §40-11-105

- (a)(1) When the defendant has been arrested or held to answer for any bailable offense, the defendant is entitled to be admitted to bail by the committing magistrate, by any judge of the circuit or criminal court, or by the clerk of any circuit or criminal court; provided, that if admitted to bail by the clerk of any circuit or criminal court, the defendant has a right to petition the judge of the circuit or criminal court if the defendant feels that the bail set is excessive, and shall be given notice of this fact by the clerk.

T.C.A §40-11-106

- a) If bail has been set, any sheriff, any magistrate or other officer having authority to admit to bail in the county where the defendant is arrested, confined or legally surrendered may take bail in accordance with the provisions of §§ 40-11-101 -- 40-11-144 and release the defendant to appear as directed by the officer setting bail. The sheriff or peace officer shall give a numbered receipt to the defendant to mandate an accounting for the bail so taken and within a reasonable time deposit the bail with the clerk of the court having jurisdiction of the offense.

c) Before the sheriff, magistrate or other officer admits to bail and releases a defendant who is arrested for any kidnapping offense involving a hostage or victim, the releasing authority shall make all reasonable and diligent efforts to notify the hostage or victim of the alleged offense that the defendant has been admitted to bail and is being released. If the hostage or victim is under the age of eighteen (18) or otherwise unavailable, the releasing authority shall make all reasonable and diligent efforts to notify the family, if any, of the hostage or victim that the defendant is being released.

§ 40-11-115. Recognizance or unsecured bond

- a) Any person charged with a bailable offense may, before a magistrate authorized to admit the person to bail, be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the magistrate.

(b) In determining whether or not a person shall be released as provided in this section and that a release will reasonably assure the appearance of the person as required, the magistrate shall take into account:
(1) The defendant's length of residence in the community;
(2) The defendant's employment status and history, and financial condition;
(3) The defendant's family ties and relationships;
(4) The defendant's reputation, character and mental condition;
(5) The defendant's prior criminal record, including prior releases on recognizance or bail;

(6) The identity of responsible members of the community who will vouch for defendant's reliability;
(7) The nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and
(8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

Recognizance Bond

- Just because a defendant is indigent does not create a right to a recognizance bond. There is no legal authority that requires a court to set a recognizance bond just because a defendant in indigent. A court must take into account the defendant's financial status but that is not a controlling factor, it is one of many factors to consider.

Recognizance Bond

- There is currently legislation pending the Tennessee General Assembly that would create a presumption of ROR bond if the offense charged is expungible. That would be any Class “E” “D” or “C” felony and most misdemeanors unless excluded from expuntion. This would be a rebuttable presumption.

§ 40-11-116. Release; conditions

- (a) If a defendant does not qualify for a release upon recognizance under § 40-11-115, then the magistrate shall impose the **least onerous conditions** reasonably likely to assure the defendant's appearance in court.

(b) If conditions on release are found necessary, the magistrate may impose one (1) or more of the following conditions:
(1) Release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court. This supervisor shall maintain close contact with the defendant, assist the defendant in making arrangements to appear in court, and, where appropriate, accompany the defendant to court. The supervisor shall not be required to be financially responsible for the defendant, nor to forfeit money in the event the defendant fails to appear in court. The department of correction and its officers are not to be considered an appropriate qualified organization or person under this section;

(2) Impose reasonable restrictions on the activities, movements, associations and residences of the defendant; and/or

(3) Impose any other reasonable restriction designed to assure the defendant's appearance, including, but not limited to, the deposit of bail pursuant to § 40-11-117.

T.C.A. §40-11-117

- Absent a showing that conditions on a release on recognizance will reasonably assure the appearance of the defendant as required, the magistrate shall, in lieu of the conditions of release set out in § 40-11-115 or § 40-11-116, require bail to be given.

T.C.A §40-11-118

- (a) Any defendant for whom bail has been set may execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money in cash equal to the amount of the bail. Upon depositing this sum, the defendant shall be released from custody subject to the conditions of the bail bond. Bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required.

(b) In determining the amount of bail necessary to reasonably assure the appearance of the defendant while at the same time protecting the safety of the public, the magistrate shall consider the following:

(1) The defendant's length of residence in the community;

(2) The defendant's employment status and history and financial condition;

(3) The defendant's family ties and relationships;

(4) The defendant's reputation, character and mental condition;
(5) The defendant's prior criminal record, record of appearance at court proceedings, record of flight to avoid prosecution or failure to appear at court proceedings;
(6) The nature of the offense and the apparent probability of conviction and the likely sentence;
(7) The defendant's prior criminal record and the likelihood that because of that record the defendant will pose a risk of danger to the community;

(8) The identity of responsible members of the community who will vouch for the defendant's reliability; however, no member of the community may vouch for more than two (2) defendants at any time while charges are still pending or a forfeiture is outstanding; and

(9) Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear.

(d)(1) When the court is determining the amount and conditions of bail to be imposed upon a defendant, if the defendant is charged with a violation of § 55-10-401, and has one (1) or more prior convictions for the offense of driving under the influence of an intoxicant under § 55-10-401, vehicular assault under § 39-13-106, aggravated vehicular assault under § 39-13-115, vehicular homicide under § 39-13-213(a)(2), aggravated vehicular homicide under § 39-13-218, or a prior conviction in another state that qualifies under § 55-10-405(b), the court shall consider the use of special conditions for the defendant, including, but not limited to, the conditions set out in subdivision (d)(2).

(2) The special conditions the court shall consider pursuant to subdivision (d)(1) are:
(A) The use of ignition interlock devices;
(B) The use of transdermal monitoring devices or other alternative alcohol monitoring devices. However, if the court orders the use of a monitoring device on or after July 1, 2016, and determines the defendant is indigent, the court shall order the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund, established in § 55-10-419;
(C) The use of electronic monitoring with random alcohol or drug testing; or
(D) Pretrial residency in an in-patient alcohol or drug rehabilitation center.

(e) After an inquiry pursuant to § 40-7-123 into the citizenship status of a defendant who is arrested for causing a traffic accident resulting in either the death or serious bodily injury, as defined in § 55-50-502, of another while driving without a valid driver license and evidence of financial responsibility as required by § 55-12-139, if it is determined that the defendant is not lawfully present in the United States, when determining the amount of bail, the defendant may be deemed a risk of flight.

(a) When a defendant has been admitted to and released on bail for a criminal offense, whether prior to or during trial or pending appeal, and the defendant is charged with the commission of one (1) or more bailable offenses while released on bail, the judge shall set the defendant's bail on each new offense in an amount not less than twice that which is customarily set for the offense charged.

(2) The special conditions the court shall consider pursuant to subdivision (b)(1) are:
(A) The use of an ignition interlock device;
(B) The use of a transdermal monitoring device or other alternative alcohol monitoring devices. However, if the court orders the use of a monitoring device on or after July 1, 2016, and the court determines the defendant to be indigent, the court shall order that the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund, established in § 55-10-419;
(C) The use of electronic monitoring with random alcohol or drug testing; or
(D) Pretrial residency in an in-patient alcohol or drug rehabilitation center.

Appeal

- §40-11-144
- If a defendant appeals a bond decision from a trial court, the appeal lies with the Court of Criminal Appeals and Supreme Court.
- If a defendant appeals a bond decision from an inferior court, the appeal lies with the trial court as a writ of certiorari.

T.C.A. §40-11-148

- (a) When a defendant has been admitted to and released on bail for a criminal offense, whether prior to or during trial or pending appeal, and the defendant is charged with the commission of one (1) or more bailable offenses while released on bail, the judge shall set the defendant's bail on each new offense in an amount not less than twice that which is customarily set for the offense charged.

T.C.A §40-11-148(B)(1)
Bail for DUI committed while on bond

- …the court shall consider the use of special conditions for such defendant, including, but not limited to, the conditions set out in subdivision (b)(2), if the offense for which bail is being set was committed while the defendant was released on bail for a prior charge of violating any offense listed in this subdivision (b)(1).

T.C.A. §40-11-150

Effective January 1, 2019

- (a) In addition to the factors set out in § 40-11-118, in making a decision concerning the amount of bail required for the release of a defendant who is arrested for the offense of child abuse, child neglect, or child endangerment, as defined in § 39-15-401, the offense of aggravated child abuse, aggravated child neglect, or aggravated child endangerment, as defined in § 39-15-402, the offense of stalking, aggravated stalking or especially aggravated stalking, as defined in § 39-17-315,

- any criminal offense defined in title 39, chapter 13, in which the alleged victim of the offense is a victim as defined in § 36-3-601(5), (10) or (11), or is in violation of an order of protection as authorized by title 36, chapter 3, part 6, the magistrate shall review the facts of the arrest and detention of the defendant and determine whether the defendant is:

- (1) A threat to the alleged victim;
- (2) A threat to public safety; and
- (3) Reasonably likely to appear in court.

- (b) Before releasing a person arrested for or charged with an offense specified in subsection (a), or a violation of an order of protection, the magistrate shall make findings on the record, if possible, concerning the determination made in accordance with subsection (a), and shall impose one (1) or more conditions of release or bail on the defendant to protect the alleged victim of any such offense and to ensure the appearance of the defendant at a subsequent court proceeding.

- (1) An order enjoining the defendant from threatening to commit or committing specified offenses against the alleged victim;
- (2) An order prohibiting the defendant from harassing, annoying, telephoning, contacting or otherwise communicating with the alleged victim, either directly or indirectly;
- (3) An order directing the defendant to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be;
- (4) An order prohibiting the defendant from using or possessing a firearm or other weapon specified by the magistrate;
- (5) An order prohibiting the defendant from possession or consumption of alcohol, controlled substances or controlled substance analogues;
- (6) An order requiring the defendant to carry or wear a global positioning monitoring system device and, if able, pay the costs associated with operating that device and electronic receptor device provided to the victim, pursuant to § 40-11-152; and
- (7) Any other order required to protect the safety of the alleged victim and to ensure the appearance of the defendant in court.

- (c) Concurrent with the imposition of one (1) or more conditions of release, the magistrate shall:
- (1) Issue a written order for conditional release containing the conditions of the release on a form prepared by the administrative office of the courts, in consultation with the Tennessee task force against domestic violence, and distributed to judges and magistrates by the administrative office of the courts;
- (2) Immediately distribute a copy of the order to the law enforcement agency having custody of the defendant, which agency shall file and maintain the order in the same manner as is done for orders of protection; and

- (3) Provide the law enforcement agency with any available information concerning the location of the victim in a manner that protects the safety of the victim.
- (d) The law enforcement agency having custody of the defendant shall provide a copy of the conditions to the defendant upon the defendant's release. Failure to provide the defendant with a copy of the conditions of release does not invalidate the conditions if the defendant has notice of such conditions.

Bonding Companies

- Trial courts with criminal jurisdiction have supervisory authority over bonding companies doing business in their judicial district. The decisions made by the trial court on what bonding company can conduct business, who can write bonds and the procedures dealing with the business are binding on the inferior courts in the district.

§ 40-11-124

- (a) The clerk, sheriff, municipal courts and other inferior courts shall have available a list of professional bondsmen or other sureties approved and qualified as solvent by the courts of record with criminal jurisdiction within the county. These approved lists shall be provided by the judges of those courts. No undertaking shall be accepted unless the professional bondsman or other surety is so certified as approved.

§ 40-11-124

- (b) In counties having a population of seven hundred seventy thousand (770,000) or more, according to the 1980 federal census or any subsequent federal census, the rules concerning the qualifications of bail bond companies as established by the criminal court of record shall be applicable in any inferior court in the county. The clerk of any such inferior court shall have the duty and the responsibility to enforce the rules.

The Trial Court Has Inherent Power Over Bonding Companies

- Apart from statute, trial courts possess the inherent power to administer the affairs of bonding companies. *Memphis Bonding Co. v. Criminal Court*, 490 S.W.3d 458, 463 (Tenn. Crim. App. 2015). In their authority to regulate bonding companies, they have "wide discretion" which won't be overturned absent a showing that the regulation was arbitrary, capricious or illegal. A trial court may withhold approval of a professional bondsman if one of the following appears to be true:

If a Bonding Company Agent

- 1) has violated any state law regarding bonds,
- 2) has a judgment entered on a forfeiture that remains unsatisfied,
- 3) has been deemed guilty of professional misconduct as listed in 40-11-126,
- Has two Class A or B misdemeanors within 5 years of applying, or
- 4) has been discharged in bankruptcy leaving unsatisfied outstanding forfeitures with any court. *In Re A Way Out Bonding*, 2013 WL 2325276, at *2 (Tenn. Crim. App, 5/28/13)

Summary Suspension

- If any of these violations occur, the Bonding Company can be immediately suspended without prior notice, but the judge must give them notice and a hearing after the order suspending within a reasonable time. 40-11-125(b). *State v. AAA Bail Bonds*, 993 SW2d 81 (Tenn. Crim. App. 1998). The weighing test and procedural requirements are set out in that case. If the Bonding Company doesn't get proper notice and a hearing and appeals the suspension, the trial court loses jurisdiction over the case as soon as the notice of appeal is filed, and can't give them a hearing.

Authority to Make Local Rules for Bonding Companies

- Local rules are authorized under Sup. Ct. Rule 18, and the legislature's enactment of statutes addressing bonding does not remove the trial court's inherent powers of regulation. *In re Hitt*, 910 S.W.2d 900, 904 (Tenn. Crim. App. 1995). However, local rules are not allowed to be inconsistent with rules promulgated by a higher court. §16-3-407. Tenn. R. Sup. Ct. 18.

Source Hearings

- As one example, Shelby County has a Local Rule that “If the amount of the bond is One Hundred Thousand ($100,000.00) or more, the bond cannot be made unless notice is provided to the District Attorney General and a hearing is conducted in open court pursuant to T.C.A. §39-11-715 regarding the source of the bond.”

- §39-11-715 states that “Any criminal court or general sessions court may conduct such hearings and enter such orders, injunctions, restraining orders, prohibitions, or issue any extraordinary process for the purpose of ensuring that any defendant does not use any proceeds directly or indirectly derived from a criminal offense for the purpose of securing an appearance bond or to pay the premium for the bond.”

- It continues to explain that “Any court may require the defendant or bonding agent to prove in open court the source of such bond or premium before accepting the bond, and the burden of proof shall be upon the party seeking the approval or acceptance of the bond.” As this Local Rule is supported by sound reasoning and statutory authority, it is neither arbitrary, capricious or illegal.

- In *In re International Fid. Ins. Corp*., 989 S.W.2d 726 (Tenn. Crim. App. 1998), a local rule had been passed that an applying company had to first deposit $50,000 with the clerk before being allowed to apply to make bonds. A company was denied a hearing on its petition because that had not been done, even though it was solvent, had witnesses and financial documents ready for the hearing, and had been given permission by the State Commissioner of Commerce and Insurance to do business and had deposited the statutory $100,000 with the State. The local rule was found to be "arbitrary and capricious," the judge was reversed, and the case was remanded for a hearing on the merits of the application.

On The Other Hand …

- In *In re Cumberland Bail Bonding*, 599 S.W.3d 17 (Tenn. 2020), Local Rule 26.05(B) in Van Buren County stated that an agent of the Bonding Company had to appear at every court appearance when any defendant on bond with them had to appear, and when Cumberland missed an appearance, it was suspended. It asserted on appeal that the local rule was inconsistent with state statutes and was "arbitrary and capricious," and the Court of Criminal Appeals agreed. The Supreme Court reversed the Court of Criminal Appeals, however, approving of the local rule, reasoning as follows:

- They held that if a defendant did not appear in court that day because of a mental or physical disability, or evidence of other incarceration was furnished to the court by the bonding company agent, judicial resources would be conserved, and so the local rule "serves multiple conceivable rational purposes" in having the agent appear on the defendant's court dates as well. They found the local rule "valid and enforceable."

Who Is Not Allowed to Make Bail?

- § 40-11-128 controls, forbidding jailers, attorneys, police officers, convicted felons, magistrates, judges clerks, deputy clerks, sheriffs or their deputies, constables and anyone with the power to arrest or control federal, state, county or municipal prisoners from being agents or owners, Nor can they indirectly receive any benefit (for instance, by being married to an agent or owner).
- A convicted felon can't be a bonding company agent even if citizenship rights have been restored. *In Re Cox*, 389 S.W.3d 794, 798 (Tenn. Crim. App. 2012).

When Are They Exonerated by Law?

- The bonding company is exonerated as soon as the defendant is placed on pretrial, post-plea or judicial diversion, probation or fined. §40-11-130(b). If the judge orders a new bond when placed on diversion or probation, it is not terminated until the diversion or probation expires or is revoked, and the judge may order the bonding company to surrender the defendant if a revocation warrant/petition is filed.

- It is also exonerated if the the defendant is surrendered for good cause, including
- 1) violating the contract provisions,
- 2) they have good cause to believe the defendant will not appear as ordered by the court
- 3) a forfeiture has been taken, or
- 4) the defendant has failed to appear.

- If a defendant is arrested on a capias, the bonding company is automatically exonerated. §40-11-139(a). This can lead to some injustice, particularly if the attorney gave the defendant the wrong date, etc., and the bonding company refuses to stay on the bond.

Granting Relief From a Forfeiture Pursuant to §40-11-204

- A trial court's discretionary authority to relieve, or partially relieve, sureties from a forfeiture is limited to "extreme cases, such as death of the defendant or some other condition making it impossible for sureties to surrender the defendant; the good faith effort made by the sureties or the amounts of their expense are not excuses. … only when performance is rendered impossible by a supervening act of God, act of the State … or act of the law." *Sanford & Sons Bail Bonds*, Inc., 96 S.W.3d 199, 201-05 (Tenn. Crim. App. 2002).

Partial Refunds

- If the court finds the bonding company exhibits a lack of supervision, sloppy records, waits 6 months before trying to find the defendant, etc., it can only give back a partial refund once the defendant is returned, in accordance with its "conception of justice and right." *State v. Scarbrough*, 72 S.W.3d 667, 669 (Tenn. Crim. App. 2001). "The good faith effort made by the sureties or the amounts of their expense are not excuses." *In re Paul's Bonding Co*., 62 S.W.3d 187, 194 (Tenn. Crim. App. 2001).

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