S T A T E O F N E W Y O R K

2608

2009-2010 Regular Sessions

I N S E N A T E

February 25, 2009

Introduced by Sens. FLANAGAN, ALESI, GOLDEN, LIBOUS, MAZIARZ, MORAHAN, PADAVAN, SEWARD, SKELOS, VOLKER -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to denial of recognizance or bail in certain cases

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 500.10 of the criminal procedure law is amended by adding a new subdivision 21 to read as follows:

21. "PERSON WHO MUST BE COMMITTED TO THE CUSTODY OF THE SHERIFF" MEANS A PERSON WHO:

(A) IS CHARGED BY FELONY COMPLAINT OR INDICTMENT WITH ONE OR MORE OF THE FOLLOWING CRIMES. MURDER IN THE FIRST DEGREE, MURDER IN THE SECOND DEGREE, ARSON IN THE FIRST DEGREE, ARSON IN THE SECOND DEGREE, AGGRAVATED ASSAULT UPON A POLICE OFFICER OR A PEACE OFFICER, CRIMINAL USE OF A FIREARM IN THE FIRST DEGREE, CRIMINAL USE OF A FIREARM IN THE SECOND DEGREE, RAPE IN THE FIRST DEGREE, SODOMY IN THE FIRST DEGREE, ATTEMPT TO COMMIT ANY OF THE FOREGOING CRIMES, MANSLAUGHTER IN THE FIRST DEGREE, ROBBERY IN THE FIRST DEGREE, BURGLARY IN THE FIRST DEGREE, ROBBERY IN THE SECOND DEGREE AS DEFINED BY SUBDIVISION TWO OF SECTION 160.10 OF THE PENAL LAW, OR BURGLARY IN THE SECOND DEGREE AS DEFINED BY SUBDIVISION ONE OF SECTION 140.25 OF THE PENAL LAW; AND

(B) EITHER (I) PREVIOUSLY HAS BEEN CONVICTED OF ONE OR MORE OF THE CRIMES SPECIFIED IN PARAGRAPH (A) OF THIS SUBDIVISION, OR (II) PREVIOUSLY HAS BEEN CONVICTED OF ANY FELONY IN THIS STATE, OR ANY OFFENSE COMMITTED IN ANOTHER JURISDICTION THAT WOULD BE A FELONY IF COMMITTED IN THIS STATE, PROVIDED SUCH CRIME WAS COMMITTED WITHIN FIVE YEARS PRECEDING THE DATE THE CRIME FOR WHICH A SECURING ORDER IS TO BE MADE IS ALLEGED TO HAVE BEEN COMMITTED, OR (III) IS SUBJECT TO AN ORDER OF RECOGNIZANCE OR BAIL MADE BY A COURT OF THIS STATE IN THE COURSE OF ANOTHER CRIMINAL ACTION BASED UPON A CHARGE OF FELONY, OR HAD ESCAPED

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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FROM A DETENTION FACILITY IN THIS STATE, AND THE CRIME PRESENTLY CHARGED IS ALLEGED TO HAVE BEEN COMMITTED WHILE THE DEFENDANT WAS AT LIBERTY PURSUANT TO SUCH ORDER OR AS A RESULT OF SUCH ESCAPE.

S 2. Section 510.20 of the criminal procedure law is amended by adding a new subdivision 3 to read as follows:

3. WHERE IT APPEARS THAT A DEFENDANT IS A PERSON WHO MUST BE COMMITTED TO THE CUSTODY OF THE SHERIFF AS DEFINED IN SUBDIVISION TWENTY-ONE OF SECTION 500.10 OF THIS TITLE, THE DEFENDANT MUST BE GIVEN AN OPPORTUNITY TO BE HEARD FOR THE PURPOSE OF CONTROVERTING ANY FACTOR SPECIFIED IN PARAGRAPH (B) OF SUCH SUBDIVISION RELIED UPON TO SUPPORT SUCH APPEARANCE. IF THE DEFENDANT DOES CONTEST ANY SUCH FACTOR, THE BURDEN OF PROOF SHALL BE UPON THE PEOPLE TO PROVE THE CONTESTED FACTOR BY A PREPONDERANCE OF THE EVIDENCE AND THE COURT MAY RECEIVE ANY RELEVANT EVIDENCE NOT LEGALLY PRIVILEGED. FOR THE PURPOSES OF ANY SUCH HEARING THE DATE SHOWN ON THE FINGERPRINT REPORT AS THE DATE OF ARREST FOR A PRIOR CRIME SHALL BE DEEMED PRIMA FACIE EVIDENCE OF THE DATE ON WHICH THAT CRIME WAS COMMITTED.

S 3. Subdivision 3 of section 510.30 of the criminal procedure law is renumbered subdivision 4 and a new subdivision 3 is added to read as follows:

3. (A) WHERE AN APPLICATION FOR RECOGNIZANCE OR BAIL HAS BEEN DENIED SOLELY ON THE GROUND THAT THE DEFENDANT IS A PERSON WHO MUST BE COMMITTED TO THE CUSTODY OF THE SHERIFF, AS DEFINED IN SUBDIVISION TWENTY-ONE OF SECTION 500.10 OF THIS TITLE, AN APPLICATION FOR RECOGNIZANCE OR BAIL MAY BE GRANTED BY A JUDGE OF A SUPERIOR COURT PURSUANT TO SECTION 530.30 OF THIS CHAPTER IF THE DEFENDANT HAS NOT BEEN INDICTED, OR PURSUANT TO SECTION 530.40 OF THIS TITLE IF AN INDICTMENT HAS BEEN FILED, IN ANY CASE WHERE THE COURT DETERMINES THAT:

(I) AN ORDER OF RECOGNIZANCE OR BAIL SHOULD BE ISSUED PURSUANT TO SUBDIVISION TWO OF THIS SECTION; AND

(II) THE RELEASE OF THE DEFENDANT IS IN FURTHERANCE OF THE INTERESTS OF JUSTICE BASED SOLELY UPON ONE OR MORE OF THE FOLLOWING FACTORS: (1) MITIGATING CIRCUMSTANCES THAT BEAR DIRECTLY UPON THE MANNER IN WHICH THE PRESENT CRIME WAS COMMITTED; (2) NO SERIOUS HARM WAS CAUSED OR THREATENED BY THE PRESENT CRIME; (3) WHERE THE DEFENDANT WAS NOT THE SOLE PARTICIPANT IN THE PRESENT CRIME, THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR, ALTHOUGH NOT SO MINOR AS TO CONSTITUTE A DEFENSE TO THE PROSECUTION; OR

(III) THE DEFENDANT HAS NOT BEEN AFFORDED AN OPPORTUNITY FOR TRIAL WITHIN SIXTY DAYS FROM THE DATE OF ARREST COMPUTED AFTER EXCLUDING THE NUMBER OF DAYS THE CRIMINAL PROCEEDING HAS BEEN DELAYED PURSUANT TO REQUEST OR CONSENT OR THE CONDITION OF THE DEFENDANT OR BY REASON OF MOTIONS MADE OR OTHER ACTION ON THE PART OF THE DEFENDANT; OR

(IV) THE PEOPLE HAVE NOT PROCEEDED WITH DUE DILIGENCE AT ANY STAGE OF THE CRIMINAL ACTION AND THE PEOPLE ARE UNABLE TO SHOW GOOD CAUSE FOR SUCH FAILURE TO PROCEED, BUT GOOD CAUSE FOR THE PURPOSE OF SUCH SHOWING SHALL NOT INCLUDE THE LACK OF JUDICIAL OR NONJUDICIAL PERSONNEL OR THE LACK OF AN AVAILABLE COURTROOM OR ADEQUATE PROSECUTORIAL STAFF.

(B) IF THE COURT DETERMINES TO GRANT AN ORDER OF RECOGNIZANCE OR BAIL PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION, IT SHALL STATE ON THE RECORD THE FACTORS UPON WHICH ITS DETERMINATION IS BASED AND THE COURT SHALL GIVE ITS REASONS IN DETAIL, NOT IN CONCLUSORY TERMS.

(C) FOR THE PURPOSE OF MAKING A DETERMINATION PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION, THE COURT MAY MAKE SUCH INQUIRY AS IT DEEMS NECESSARY. ANY EVIDENCE WHICH IS NOT LEGALLY PRIVILEGED MAY BE INTRODUCED. IF THE DEFENDANT TESTIFIES, HIS OR HER TESTIMONY MAY NOT BE

INTRODUCED AGAINST HIM OR HER ON THE TRIAL OF ANY CRIME ARISING OUT OF THE CRIMINAL TRANSACTION UPON WHICH THE PENDING CHARGE IS BASED, EXCEPT TO IMPEACH HIS OR HER TESTIMONY AT SUCH TRIAL AS INCONSISTENT WITH PRIOR TESTIMONY.

S 4. Section 530.10 of the criminal procedure law is amended to read as follows:

S 530.10 Order of recognizance or bail; in general.

Under circumstances prescribed in this article, a court, upon application of a defendant charged with or convicted of an offense, is required or authorized to order OR TO DENY bail or recognizance for the release or prospective release of such defendant during the pendency of either:

1. A criminal action based upon such charge; or

2. An appeal taken by the defendant from a judgment of conviction or a sentence or from an order of an intermediate appellate court affirming or modifying a judgment of conviction or a sentence.

S 5. Section 530.20 of the criminal procedure law, as amended by chapter 531 of the laws of 1975, subparagraph (ii) of paragraph (b) of subdivision 2 as amended by chapter 218 of the laws of 1979, is amended to read as follows:

S 530.20 Order of recognizance or bail; by local criminal court when action is pending therein.

When a criminal action is pending in a local criminal court, such court, upon application of a defendant, must or may order recognizance or bail as follows:

1. When the defendant is charged, by information, simplified information, prosecutor's information or misdemeanor complaint, with an offense or offenses of less than felony grade only, the court must order recognizance or bail.

2. When the defendant is charged, by felony complaint, with a felony, the court may, in its discretion, order OR DENY recognizance or bail except as otherwise provided in this subdivision:

(a) A city court, a town court or a village court may not order recognizance or bail when (i) the defendant is charged with a class A felony, or (ii) THE DEFENDANT IS CHARGED WITH THE CRIME OF AGGRAVATED ASSAULT UPON A POLICE OFFICER OR A PEACE OFFICER, OR (III) it appears that the defendant has two previous felony convictions;

(b) NO LOCAL CRIMINAL COURT MAY ORDER RECOGNIZANCE OR BAIL WHEN IT APPEARS THAT THE DEFENDANT IS A PERSON WHO MUST BE COMMITTED TO THE CUSTODY OF THE SHERIFF AS DEFINED IN SUBDIVISION TWENTY-ONE OF SECTION 500.10 OF THIS TITLE.

(C) No local criminal court may order recognizance or bail with respect to a defendant charged with a felony unless and until:

(i) The district attorney has been heard in the matter or, after knowledge or notice of the application and reasonable opportunity to be heard, has failed to appear at the proceeding or has otherwise waived his right to do so; and

(ii) The court has been furnished with a report of the division of criminal justice services concerning the defendant's criminal record if any or with a police department report with respect to the defendant's prior arrest record. If neither report is available, the court, with the consent of the district attorney, may dispense with this requirement; provided, however, that in an emergency, including but not limited to a substantial impairment in the ability of such division or police department to timely furnish such report, such consent shall not be required if, for reasons stated on the record, the court deems it unnecessary. When the court has been furnished with any such report or

record, it shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant.

3. WHERE A LOCAL CRIMINAL COURT LACKS AUTHORITY TO ORDER RECOGNIZANCE OR BAIL BY REASON OF THE FACT THAT IT APPEARS THE DEFENDANT IS A PERSON WHO MUST BE COMMITTED TO THE CUSTODY OF THE SHERIFF, AS DEFINED IN SUBDIVISION TWENTY-ONE OF SECTION 500.10 OF THIS TITLE AND AFTER A HEARING FINDS THERE IS REASONABLE CAUSE TO BELIEVE THE DEFENDANT COMMITTED A FELONY BUT THERE IS NOT REASONABLE CAUSE TO BELIEVE THE DEFENDANT COMMITTED ONE OF THE CRIMES SPECIFIED IN PARAGRAPH (A) OF SUCH SUBDIVISION, THE COURT SHALL CONVERT THE FELONY COMPLAINT INTO ONE THAT DOES NOT CHARGE A CRIME SPECIFIED IN SUCH PARAGRAPH BY MAKING APPROPRIATE NOTATIONS UPON OR ATTACHED THERETO AND THE COURT MAY THEN PROCEED TO DETERMINE AN APPLICATION FOR BAIL OR RECOGNIZANCE IN THE SAME MANNER AND IN ACCORDANCE WITH THE SAME CRITERIA AS IT WOULD WITH RESPECT TO A DEFENDANT OTHER THAN ONE WHO MUST BE COMMITTED TO THE CUSTODY OF THE SHERIFF.

S 6. Section 530.30 of the criminal procedure law, subdivision 2 as amended by chapter 762 of the laws of 1971, is amended to read as follows:

S 530.30 Order of recognizance or bail; by superior court judge when action is pending in local criminal court.

1. [When] EXCEPT AS PROVIDED IN SUBDIVISION TWO OF THIS SECTION, WHEN a criminal action is pending in a local criminal court, other than one consisting of a superior court judge sitting as such, a judge of a superior court holding a term thereof in the county, upon application of a defendant, may order recognizance or bail when such local criminal court:

(a) Lacks authority to issue such an order, pursuant to paragraph (a) of subdivision two of section 530.20 OF THIS ARTICLE; or

(b) Has denied an application for recognizance or bail; or

(c) Has fixed bail which is excessive. In such case, such superior court judge may vacate the order of such local criminal court and release the defendant on his own recognizance or fix bail in a lesser amount or in a less burdensome form.

2. WHEN A CRIMINAL ACTION IS PENDING IN A LOCAL CRIMINAL COURT AND SUCH COURT LACKS AUTHORITY TO ORDER RECOGNIZANCE OR BAIL PURSUANT TO PARAGRAPH (B) OF SUBDIVISION TWO OF SECTION 530.20 OF THIS ARTICLE BY REASON OF THE FACT THAT IT APPEARS THAT THE DEFENDANT IS A PERSON WHO MUST BE COMMITTED TO THE CUSTODY OF THE SHERIFF AS DEFINED IN SUBDIVISION TWENTY-ONE OF SECTION 500.10 OF THIS TITLE, A JUDGE OF A SUPERIOR COURT HOLDING A TERM THEREOF IN THE COUNTY, UPON APPLICATION OF A DEFENDANT, MAY ORDER RECOGNIZANCE OR BAIL, BUT ONLY IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION THREE OF SECTION 510.30 OF THIS TITLE.

3. Notwithstanding the provisions of [subdivision] SUBDIVISIONS one AND TWO OF THIS SECTION, when the defendant is charged with a felony in a local criminal court, a superior court judge may not order recognizance or bail unless and until the district attorney has had an opportunity to be heard in the matter and such judge has been furnished with a report as described in subparagraph (ii) of paragraph [(b)] (C) of subdivision two of section 530.20 OF THIS ARTICLE.

[3] 4. Not more than one application may be made pursuant to this section.

S 7. Subdivision 4 of section 530.40 of the criminal procedure law, as amended by chapter 762 of the laws of 1971, is amended and a new subdivision 5 is added to read as follows:

4. Notwithstanding the provisions of subdivision two OF THIS SECTION, a superior court may not order recognizance or bail when the defendant is charged with a felony unless and until the district attorney has had an opportunity to be heard in the matter and such court has been furnished with a report as described in subparagraph (ii) of paragraph [(b)] (C) of subdivision two of section 530.20 OF THIS ARTICLE.

5. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION TWO OF THIS SECTION, A SUPERIOR COURT MAY NOT ORDER RECOGNIZANCE OR BAIL WHEN IT APPEARS THAT THE DEFENDANT IS A PERSON WHO MUST BE COMMITTED TO THE CUSTODY OF THE SHERIFF AS DEFINED IN SUBDIVISION TWENTY-ONE OF SECTION 500.10 OF THIS TITLE UNLESS IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION THREE OF SECTION 510.30 OF THIS TITLE.

S 8. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.