Court of Appeals in State v. Townsend Beefs Up Prejudice Required for Relief under Knoll

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[*Author's note: State v. Townsend was withdrawn and replaced by a subsequent opinion, available* here*. The portion of the opinion discussed below was unchanged by the subsequent opinion.*]

No one gets relief any more under *State v. Knoll*—at least not from the court of appeals. State v. Townsend, decided today, is the latest in a series of post-*Knoll* cases in which the defendant failed to establish that he was prejudiced by a magistrate's alleged statutory violations in setting conditions of pre-trial release, and, thus, failed to establish a basis for dismissal of the charges.

Facts. The defendant in *Townsend* was arrested at a DWI checkpoint in Charlotte around 11:30 p.m. Forty-five minutes later, he submitted to breath testing in the Breath Alcohol Testing vehicle located at the scene, registering a 0.10 on his first test and a 0.09 on his second. The defendant called his wife to tell her he had been arrested. He told her that he or someone would call her later to come pick him up. The arresting officer then took the defendant to the Mecklenburg County Jail, where he was admitted at 12:56 a.m.

The record of events gets a bit more confusing from here. While the opinion states that the defendant appeared before a magistrate at 2:54 a.m. (some two hours after arriving at the jail), it also adopts the trial court's finding that the defendant signed an implied consent offense notice (form AOC-CR-271) in front of the magistrate at 2:34 a.m., listing his wife's name and phone number. The implied consent notice form contains a certification from the magistrate that an initial appearance has been held, so it is odd that the form apparently was signed before the initial appearance.

In any event, the magistrate imposed a secured bond—of sorts. The conditions of release form stated that the defendant was subject to a $1,000 secured bond, but also stated that the bond "may be unsecured to sober responsible adult with ID." The court of appeals called this an "option bond," as good a label as any since no such condition is defined in or authorized by statute.

A jail official called the defendant's wife, who came to the jail. The defendant was released to the custody of his wife at 4:45 a.m., more than five hours after he was arrested and about four hours after he arrived at the jail.

Procedural History. The defendant moved to dismiss the charges pursuant to State v. Knoll, 322 N.C. 535 (1988), arguing that he was denied the right to communicate with counsel and friends and that this denial resulted in substantial prejudice. The defendant specifically complained that the magistrate ordered him held under a $1,000 secured bond without justification, prior to meeting with him, and without making written findings as to why that condition was necessary. The trial court denied the defendant's motion, and the court of appeals affirmed.

Holding. Though conceding that the magistrate "may have committed a technical statutory violation," by not making written findings as to its reason for imposing a secured bond, the court of appeals held that the defendant failed to demonstrate how he was prejudiced by that violation. The court noted that the defendant was not in fact required to post a secured bond. Instead, he was released on an unsecured bond to his wife's custody. Ergo, said the court, he cannot show prejudice. Moreover, the court said that the defendant had several opportunities to call counsel and

friends to observe him and help him to obtain an independent chemical analysis, but failed to do so. Thus, he was not "denied his rights pursuant to *Knoll*."

Food for Thought. Probably because I regularly teach magistrates about the procedures they must follow in setting conditions of release in impaired driving cases, my reaction to the facts is less sanguine than the court of appeals. For starters, "option bonds" are not a statutory option. Instead, G.S. 15A-534 requires that a magistrate impose at least one of the following conditions of release.

1. Release the defendant on his written promise to appear.
2. Release the defendant upon his execution of an unsecured appearance bond in an amount specified.
3. Place the defendant in the custody of a designated person or organization agreeing to supervise him.
4. Require the execution of a secured appearance bond in a specified amount.
5. House arrest with electronic monitoring.

A magistrate must impose condition (1), (2), or (3) above unless he or she determines that such release will not reasonably assure the appearance of the defendant as required, will pose a danger of injury to any person, or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. Upon making the determination, the magistrate must then require a secured bond instead of condition (1), (2), or (3), and must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge.

Furthermore, the "option bond" imposed in *Townsend* essentially functioned as an impaired driving hold. It was not, however, accompanied by findings to support such a hold. One could infer that the magistrate imposed the bond to prevent the defendant from gaining immediate release–unless the defendant was released to the custody of a sober, responsible adult. If, however, the magistrate found clear and convincing evidence that the defendant was impaired to the extent he was a danger, the appropriate action would have been to impose an impaired driving hold pursuant to G.S. 15A-534.2 rather than an optional bond. Impaired driving holds are properly recorded on form AOC-CR-270, which contains a place for magistrates to record their findings.

It isn't clear to me whether there was evidence in *Townsend* to support such a hold. The defendant's alcohol concentration was near the per se level, and he was stopped at a checkpoint. Perhaps his alcohol concentration when combined with the signs of intoxication that the officer observed during the field sobriety tests were sufficient to render him dangerous more than three hours after his arrest, but I am somewhat doubtful.

Had the magistrate imposed a written promise or an unsecured bond at the initial appearance, the *Townsend* defendant would have been released nearly two hours earlier, a difference that may not have affected his ability to gather evidence in any meaningful way. In another case, however, the difference could be significant. A defendant might be held for several hours on an "option bond" when there is no evidence that she is impaired to the extent she is a danger. Conversely, a highly impaired defendant could post bond and gain release without supervision.

Why? I continue to be surprised by the perseverance and prevalence of option bonds. Perhaps they are used to avoid the additional paperwork associated with an impaired driving hold. Perhaps magistrates have decided that statutory procedures must be skirted to protect the public. Or perhaps old habits just die hard. In any event, *State v. Townsend* again emphasizes that a defendant must prove far more than a misstep by a magistrate to be entitled to dismissal of impaired driving charges under *Knoll*.