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Commonwealth v. Furry

COMMONWEALTH OF PENNSYLVANIA v. JAMES M. FURRY, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action Nos. 1441 and 1442 of 1999

Bail Pending Appeal of Sentence - Sex Offenses

1. Pursuant to Rule 4009(B)(2) of the Pennsylvania Rules of Criminal Procedure, a defendant may be released on bail pending appeal of his sentence of imprisonment of two or more years at the court's discretion.
2. In determining whether to allow a defendant's release on bail pending appeal of his sentence, the court must consider whether he presents a flight risk or danger to the victims, as well as the pre-release criteria contained in Rule 4002 of the Pennsylvania Rules of Criminal Procedure.
3. A defendant convicted on a total of thirty-eight counts of various sex offenses committed against his biological daughters may not be released on bail pending appeal of his sentence of lifetime governmental supervision despite his contacts to the community, as he may seek to exact revenge upon the victims in the interim and the long period of incarceration and probation makes him a significant flight risk.

Appearances:

Todd R. Williams, *Assistant District Attorney*

Gary Lysaght, Esq.

OPINION

Walker, P.J., February 21, 2001

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Factual and Procedural History

On July 21, 1999, Defendant James M. Furry was charged with various and several sex-related offenses for actions he allegedly performed upon his daughter, Amy Marie Furry, between the dates of December 23, 1994, and May 31, 1999. Defendant was not incarcerated pending trial, but granted bail set at twenty-five thousand dollars (\$25,000), with his father-in-law, Richard H. Mowen, acting as surety. Later, on October 4, 1999, defendant was also charged with another myriad of sex-related offenses against his other daughter, Lisa Marie Furry, for acts allegedly committed between the dates of February 14, 1995, and May 31, 1996. His bail was subsequently increased five thousand dollars (\$5,000), with Richard H. Mowen again acting as surety.

After a two-day jury trial, defendant was found guilty and convicted on six (6) counts of rape, three (3) counts of statutory sexual assault, five (5) counts of indecent assault, nine (9) counts of involuntary deviate sexual intercourse, twelve (12) counts of aggravated indecent assault, and three (3) counts of incest on September 15, 2000. He was accordingly sentenced on December 6, 2000, to a total of twenty (20) to forty (40) years incarceration, to be followed by forty (40) years probation.

Defendant filed a post-sentence motion on December 18, 2000, requesting that the court grant a new trial due to (1) ineffective assistance of pre-trial and trial counsel, (2) trial court error in allowing the Commonwealth to amend the dates on the informations and (3) error in allowing the Commonwealth to cross examine Rebecca Furry regarding her pending simple assault charge. He subsequently filed the instant motion for bail pending appeal on December 20, 2000, and a hearing was held on the matter on January 4, 2001. The Commonwealth and defendant's counsel have both submitted briefs to the court on the issues and the matter is now ripe for disposition.

Discussion

Because defendant has at this point been sentenced and is now awaiting final disposition of his post-sentence motion before this court, the applicable legal standard instantly is Rule 4009 of the Pennsylvania Rules of Criminal Procedure, which provides the following:

Rule 4009. Bail After Finding of Guilt

(A) Before Sentencing

(1) Capital and Life Imprisonment Cases. When a defendant is found guilty of an offense which is punishable by death or life imprisonment, the defendant shall not be released on bail.

(2) Other Cases

(a) The defendant shall have the same right to bail after verdict and before the imposition of sentence as the defendant had before verdict when the aggregate of possible sentences to imprisonment on all outstanding verdicts against the defendant within the same judicial district cannot exceed 3 years.

(b) Except as provided in paragraph (A)(1), when the aggregate of possible sentences to imprisonment on all outstanding verdicts against the defendant within the same judicial district can exceed 3 years, the defendant shall have the same right to bail as before verdict unless the judge makes a finding:

(i) that no one or more conditions of bail will reasonably ensure that the defendant will appear and comply with the conditions of the bail bond, or

(ii) that the defendant poses a danger to any other person or to the community or to himself or herself. The judge may revoke or refuse to set bail based upon such a finding.

(B) After Sentencing

(1) When the sentence imposed includes imprisonment of less than 2 years, the defendant shall have the same right to bail as before verdict, unless the judge, pursuant to paragraph (D), modifies the bail order.

(2) Except as provided in paragraph (A)(1), when the sentence imposed includes imprisonment of 2 years or more, the defendant shall not have the same right to bail as before verdict, but bail may be allowed in the discretion of the judge.

(3) When the defendant is released on bail after sentencing, the judge shall require as a condition of release that the defendant either file a post-sentence motion and perfect an appeal or, when no post-sentence motion is filed, perfect an appeal within the time permitted by law.

(C) Reasons for Refusing or Revoking Bail.

Whenever bail is refused or revoked under this rule, the judge shall state on the record the reasons for this decision.

(D) Modification of Bail Order After Verdict or After Sentencing

(1) When a defendant is eligible for release on bail after verdict or after sentencing pursuant to this rule, the existing bail order may be modified by a judge of the court of common pleas, upon the judge's own motion or upon motion of counsel for either party with notice to opposing counsel, in open court on the record when all parties are present.

(2) The decision whether to change the type of release on bail or what conditions of

release to impose shall be based on the judge's evaluation of the information about the defendant as it relates to the release criteria set forth in Rule 4002. The judge shall also consider whether there is an increased likelihood of the defendant's fleeing the jurisdiction or whether the defendant is a danger to any other person or to the community or to himself or herself.

(3) The judge may change the type of release on bail, impose additional nonmonetary conditions as provided in Rule 4006, or, if appropriate, impose or increase a monetary condition as provided in Rule 4007.

(E) Municipal Court.

Bail after a finding of guilt in the Municipal Court of Philadelphia shall be governed by the rules set forth in Chapter 6000.

Pa.R.Crim.P. 4009 (*italics and emphasis added*).

As is readily apparent, a court is given no express, categorical guidance when presented a petition for bail pending appeal of a sentence of over two years imprisonment. The applicable provision, Rule 4009(B)(2), simply directs the court to allow bail at its discretion. While the court's discretion in this matter appears to be unfettered and lacking authoritative criterion, other provisions of Chapter 4000 provide some assistance. First, Rule 4009(A)(2)(b)(i) and (ii) direct that, before sentencing to a term exceeding three (3) years, defendants shall have the same right to bail as they did pre-verdict unless the court finds (1) that bail will not reasonably ensure that defendant will appear or (2) defendant poses a danger.

Likewise, Rule 4009(D)(2) provides that when a court changes the bail amount or its conditions after verdict or sentencing, it must "consider whether there is an increased likelihood of the defendant's fleeing the jurisdiction or whether the defendant is a danger to any other person or to the community or to himself or herself." Pa.R.Crim.P. 4009(D)(2). Rule 4009(D)(2) further directs that the court's decision shall be based upon the information known about a defendant as it relates to the release criteria set forth in Rule 4002, which provides the following:

Rule 4002. Release Criteria

(A) To determine whether to release a defendant, and what conditions, if any, to impose, the bail authority shall consider all available information, as that information is relevant to the defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond, including information about:

- (1) the nature of the offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty;
- (2) the defendant's employment status and history, and financial condition;
- (3) the nature of the defendant's family relationships;
- (4) the length and nature of the defendant's residence in the community, and any past residences;
- (5) the defendant's age, character, reputation, mental condition, and whether addicted to alcohol or drugs;
- (6) if the defendant has previously been released on bail, whether he or she appeared as required and complied with the conditions of the bail bond;
- (7) whether the defendant has any record of flight to avoid arrest or prosecution, or of escape or attempted escape;
- (8) the defendant's prior criminal record;
- (9) any use of false identification; and
- (10) any other factors relevant to whether the defendant will appear as required and comply with the conditions of the bail bond.

(B) The decision of a defendant not to admit culpability or not to assist in an investigation shall not be a reason to impose additional or more restrictive conditions of bail on the defendant.

Truly, the court recognizes that defendant appears to be a favorable candidate for bail pending appeal in light of the Rule 4002 criterion. He was employed for six (6) years by Lehman's Carpet, before being discharged when charged with the instant offenses. Since then, he has worked for his father-in-law at a chicken house, and he and his father-in-law have assured the court that defendant would continue to work at the chicken house while his appeal is pending, should the court grant his request for bail. Defendant lives within Franklin County with his wife, and has been at the same residence for five (5) years. His in-laws live in Franklin County, as do defendant's parents, and he has testified that he will live at his residence in Franklin County should he be released on bail pending appeal.

Defendant does not appear to have a mental infirmity, nor has evidence of a diagnosed condition been presented to the court. Perhaps most importantly, defendant has already been released on bail in this matter pre-verdict and sentence, and has complied with all conditions and appeared for both the trial and sentencing. There is no record of flight whatsoever, indeed, no prior criminal record at all. He has not used false identification, nor does he own a passport. Richard H. Mowen, defendant's father-in-law, again expects to post bail for defendant, using his property valued at approximately six hundred fifty thousand dollars (\$650,000).

Ergo, defendant has significant contacts to this jurisdiction, and the logical inference from the above-detailed data is that he would not be disposed to flee the jurisdiction to start a new life far away. But the inquiry must not end there, for Rule 4002 was designed to apply to pre-verdict release on bail. Now, defendant has not only been convicted, but has also been given an appropriately lengthy sentence. There has been a trial during which the two daughters/victims testified against him, and there is now a possibility that defendant may wish to exact revenge upon either one. One would assume that because they are, after all, his own flesh and blood, defendant could not bring his daughters physical harm. But one would also have assumed, however, that he would not have had sexual intercourse with them.

Further, defendant has been convicted for sexual acts committed against his own daughters, when they were at a very young and fragile age. One may consider him to be a possible threat to other young children if released on bail given his demented history. Moreover, while defendant has not been clinically diagnosed with a mental disorder per se, he raped his own daughters. Certainly it would be unreasonable to suggest that such behavior is normal or that his pedophilic tendencies have automatically vanished now that he has been convicted. Of particular import is the fact that the presumption of innocence is now gone. See *Commonwealth v. Fowler*, 451 Pa.505, 515, 304 A.2d 124, 129 (1973). Indeed, defendant does not have to be free to prepare his defense because the trial is over. And while there is an appeal pending, his counsel may prepare the arguments based upon the transcript and record, without the assistance of defendant's factual accounts. Finally, as the Commonwealth suggests, the victims will likely live in fear should defendant be released from prison on bail, and justice requires that they be afforded closure to this dark chapter and be allowed to pursue a new, fulfilling life.

Taken together, the direction provided by Rule 4002 and Rule 4009(A) and (D) must all be weighed qualitatively as opposed to quantitatively. So while Rule 4002 provides a useful starting point for the court, it recognizes that the factors are tailored to the pre-verdict and pre-sentence stages of criminal proceedings. Both Rule 4009(A) and 4009(D)(2), which direct the court to look at the dangers to victims and risk of flight, however, are prudently fashioned to those defendants like Mr. Furry who have already been convicted. And once one is convicted, the risk of flight on bail looms large, as does the danger to victims for purposes of revenge. But when a defendant has been convicted AND sentenced, especially to a such a lengthy sentence as is the case instantly, reason mandates that both risks would be imminent since the defendant truly has nothing to lose.

This is not a first-degree murder case, but the penalty, given defendant's age, is nonetheless a lifetime of governmental supervision. Accordingly, the logic of our Supreme Court in *Fowler* is applicable. "To ignore such a strong possibility of flight for one in such a position would be a blatant illustration of ignoring reality. To minimize the potential danger that his freedom would cause to society in general and to the witnesses who brought about his conviction in particular would be the height of judicial irresponsibility." *Fowler*, at 451 Pa. 515, 304 A.2d 129.

Defendant's petition for bail must be denied, for any other course would unnecessarily tempt him to abscond or to harm the victims. While he may or may not be able to resist such a strong temptation if released on bail, the court will take no chances, particularly since defendant has not shown an ability to overcome his obscene allurements in the past.

ORDER OF COURT

February 21, 2001, the court having considered Defendant James M. Furry's petition for bail pending

appeal, the record and applicable legal standards, it is hereby ordered that the instant petition is denied at the court's discretion.