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Commonwealth v Raiber

COMMONWEALTH OF PENNSYLVANIA v. ALBERT VICTOR RAIBER, JR., Defendant  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Criminal Action No. OTN T 134871-2

*Bail; In Criminal Prosecutions; Right to Release on Bail; In General*

*Criminal Law; Time of Trial and Continuance*

1. Under Pa. R. Crim. P. 600(A)(2), a defendant held in pre-trial incarceration must be brought to trial within 180 days from the date of the filing of the criminal complaint.
2. Under Subsection (E) of Rule 600, upon petition, a defendant must be released on nominal bail if held in excess of 180 days.
3. A defendant is entitled to pre-trial release where Rule 600(A)(2) has been violated, though the Court retains the power to impose any conditions it deems necessary to ensure compliance with the conditions of bail set forth pursuant to Rule 526(A).
4. The Pennsylvania Constitution provides for bail in all criminal cases except those pending trial for capital offenses, those subject to lifetime imprisonment, or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community.
5. Where the trial court deems a defendant too dangerous to be released even subject to consideration of conditions, the provisions of the Criminal Rules requiring release after 180 days are trumped by the Constitution.
6. Given all the facts and circumstances, including Defendant's prior criminal history involving escalating acts of sadistic child sex abuse, most of which occurred in his home, situated in a neighborhood full of children, despite other adults living there, the Court concludes the Defendant is simply too dangerous to release, without substantial monetary conditions, into the community, even subject to house arrest and electronic monitoring. Neither such measure would ensure the Defendant did not engage in further criminal activity in the location he has been demonstrated to prefer as the scene of his crimes.

Appearances:

Lauren E. Sulcove, Esq., *Assistant District Attorney*

Christopher L. Reibsome, Esq., *Counsel for Defendant*

OPINION

Van Horn, J., July 17, 2012

Memorandum

The Defendant, Albert Victor Raiber, Jr. [hereinafter "Raiber" or "Defendant"], stands accused of multiple sexual crimes allegedly perpetrated against J.W., a minor male child residing in his neighborhood. As a result of the minor's disclosure to law enforcement, Raiber was committed to the Franklin County Jail (FCJ) on January 13, 2012, to await preliminary hearing, which has not, as of the date of this Memorandum, yet occurred. In preparation for the preliminary hearing, the Commonwealth filed several motions, including a request for the victim to testify via closed circuit television, a tender years motion, and a motion to admit prior acts evidence. These motions remain pending before the Honorable Richard J. Walsh of this jurisdiction, and according to the Commonwealth require resolution prior to the preliminary hearing.

On June 19, 2012, the Defendant filed a Motion for Release on Nominal Bail pursuant to Pennsylvania Rule of Criminal Procedure 600. Because the Commonwealth admits that the Defendant has been incarcerated in excess of one hundred eighty (180) days as of July 11, 2012, and that the Motion for Release on Nominal Bail is ripe for decision, the Court need

not engage in any calculation of days pursuant to Rule 600. The Commonwealth admits that under the Rules of Criminal Procedure, the Defendant is seemingly entitled to immediate release on one dollar (\$1.00) bail pursuant to Section (E) of the Rule. Despite the fact, however, the Commonwealth requests the Court deny the Defendant release on bail, and further, prays that the Court revoke bail entirely based on its Petition for Bail Revocation filed July 6, 2012. The Commonwealth asserts that there are no conditions or any combination of conditions other than imprisonment which will reasonably assure the safety of the community if the Defendant is released.

Under Pa. R. Crim. P. 600(A)(2), a defendant held in pre-trial incarceration must be brought to trial within 180 days from the date of the filing of the criminal complaint. See Pa. R. Crim. P. 600(A)(2). Under subsection (E) of the Rule, upon petition, the defendant must be released on nominal bail if held in excess of this time period. See *id.* at (E) ("No defendant shall be held in pre-trial incarceration on a given case for a period exceeding 180 days excluding time described in paragraph (C) above. Any defendant held in excess of 180 days is entitled upon petition to immediate release on nominal bail.")

The Supreme Court has held that "in order for Rule [600(A)(2)] to have any force, Rule [600(E)] must be mandatory" such that "the trial court has no discretion under th[e] subsection; otherwise, a defendant could remain incarcerated in violation of [Rule 600(A)(2)]." *Commonwealth v. Abdullah*, 652 A.2d 811, 812-13 (Pa. 1995). Thus, under normal circumstances, a defendant is entitled to pre-trial release where Rule 600(A)(2) has been violated, though the Court retains the power to impose any conditions it deems necessary to ensure compliance with the conditions of bail set forth pursuant to Rule 526(A). See Pa. R. Crim. P. 526(A); *Commonwealth v. Sloan*, 907 A.2d 460, 468 (Pa. 2006) ("The mandatory remedy of nominal release after 180 days of incarceration is not the same as unconditional release.") Notably, these conditions include refraining from criminal activity or engaging in witness intimidation. See *id.* In *Sloan*, the Supreme Court specifically approved conditions not only to assure the accused will appear for each subsequent hearing, but also that "assures that victims, witnesses, and the community will be protected." *Sloan*, 907 A.2d at 468.

While the Rule seems to leave no judicial discretion to refuse nominal bail where a defendant has been held beyond 180 days, there is some leeway in cases where the safety of the community cannot be assured. Indeed, in 1998, the Pennsylvania Constitution was amended to expand the provisions related to bail, specifically denying bail in cases where no conditions could assure the safety of the community. See Pa. Const. art. I § 14. At present, the Constitution provides for bail in all criminal cases except those pending trial for capital offenses, those subject to lifetime imprisonment, or "unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of the any person or the community." See *id.*

In *Commonwealth v. Jones*, the defendant was held longer than 180 days, and the trial judge denied a request for nominal bail under the Rules. See *Commonwealth v. Jones*, 899 A.2d 353, 354 (Pa. Super. Ct. 2006). The Superior Court pointed out that prior to 1998, the Pennsylvania Constitution entitled a defendant to bail in all but capital cases. See *id.* After amendment, exceptions were added to provide the trial court with some discretion in cases of exceedingly dangerous individuals, bail for whom would jeopardize the safety of the community. See *id.* at 355 (quoting Pa. Const. art. I § 14). The Superior Court found that the provision requiring release after 180 days is "trumped" by the Constitution in cases where no conditions could assure the safety of the community. *Id.* In *Sloan*, the Supreme Court recognized that there might be cases where even subject to conditions such as house arrest and electronic monitoring, an individual might be too dangerous to reside in the community. See *Sloan*, 907 A.2d. at 468 n. 10 ("We note that there may be instances where a trial court deems a defendant too dangerous to be released even subject to consideration of conditions.")

The defense was sought to distinguish *Jones*, pointing out that the defendant in that case was a fugitive on prior rape charges at the time he was arrested and charged with additional sexual crimes. See *Jones*, 899 A.2d at 354. Indeed, a record of flight is one of the factors to be considered in determining release criteria, and contributed to the finding that Jones posed too great a danger to the community to countenance release, even subject to conditions. In all bail cases, the Court must consider the factors set forth under Pennsylvania Rule of Criminal Procedure 523, which include any history of escape or flight. See Pa. R. Crim. P. 523(A)(7). No case law has been cited for the proposition that Article I Section 14's dangerousness provision cannot be applied absent a prior history of avoiding prosecution. Here, consideration of all factors under Rule 523 lead this Court to the same conclusion as the trial court in *Jones*: this Defendant is a substantial danger to the community, and if granted nominal bail, there are no conditions to which he may be subjected to ameliorate this risk.

Judge Walsh has considered the factors under Rule 523 previously, refusing to modify bail conditions and place the Defendant on house arrest with electronic monitoring after concluding such conditions would not assure the safety of children in the proximity of the Defendant's residence. (See Order of Court, February 27, 2012.) No changes in circumstance have occurred since the full hearing on the Defendant's Petition to Modify Bail. As recounted in that Order,

the Defendant is not employed, collecting Navy pension, and has family in the area and a long history of residence. There is no history of alcohol or drug abuse, no record of mental illness, and no history of flight. Yet the offenses charged are heinous, characterized by the prosecution as sadistic child sex abuse. The Defendant has a prior criminal history involving sexual exploitation of children in their early teenage years, with escalating conduct accompanying each subsequent conviction or charge. Indeed, while in the past the Defendant used his hands to spank his victims, he is charged with utilizing specialized paddles and a whip with the minor victim in the instant case, implements recovered by law enforcement from the very residence to which the Defendant wishes to be released. The Defendant's past victims have included the family members to whom he points as a factor militating toward release. The Defendant has given false names to his victims in the past.

Perhaps most pertinently, the sexual crimes of which the Defendant has been convicted, and those with which he is currently charged, occurred in the Defendant's home, in his bedroom. Those adults with whom the Defendant resided prior to his incarceration, while he is alleged to have repeatedly victimized J.W., did not supervise him so as to produce any real impediment to his criminal behavior. The Defendant now asks the Court, in essence, to return him to the scene of his prior crimes, and to credit the assertion that restricting his movement to such area will assure the safety of the community. The victim's mother testified at hearing that there are many children in the neighborhood, who especially during the summer months roam the area from sun-up to sun-down. Children in the age group of the Defendant's typical victims are often given substantial freedom of movement and decision-making, their parents feeling they will be safe in the neighborhood near their homes. The Court will not release a convicted sexual abuser of children into their midst, especially one who currently faces charges involving the habitual use of the privacy of his home to commit crimes.

As on February 27, 2012, this Court again finds that available conditions, including house arrest and electronic monitoring, will not provide the necessary safety for those whom the Defendant has been convicted of victimizing in the past. The Defendant is simply too dangerous to release, without substantial monetary conditions, into the community, even to subject to house arrest and electronic monitoring. Neither such measure would ensure the Defendant did not engage in further criminal activity in the location he has been demonstrated to prefer as the scene of his crimes. The attached Order denies the request for release on nominal bail, and affirms the prior Order of Court of February 27, 2012.

#### Order of the Court

And now this 17th day of July, 2012, upon consideration of the Defendant's Motion to Release on Nominal Bail, and the Motion to Revoke Bail submitted by the Commonwealth, and for the reasons stated in the attached Opinion, it is hereby ordered that:

1. The Motion to Release on Nominal Bail is denied.
2. The Order of Court of February 27, 2012, confirming the bail determination of Magisterial District Judge Larry G. Pentz, is affirmed.