

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003072-MR

TIM DONOVAN

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 96-CR-1668

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

* * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and GARDNER, Judges.

GUDGEL, CHIEF JUDGE: On June 6, 1996, appellant Tim Donovan was arrested on a warrant issued on June 4 charging him with the felony offense of first-degree rape. Prior to his arraignment, Donovan's bond was reduced by a district judge to \$20,000/10% and, after a third party deposited the necessary \$2,000, he was released from custody. Donovan was represented by a private attorney during his June 7 arraignment, and a preliminary hearing was scheduled for June 28. Donovan was allowed to remain free on his previously posted bond.

On June 28, the case was ordered transferred to the Jefferson County Grand Jury. On July 23, Donovan was indicted by

the grand jury on one count of first-degree rape. He was arraigned on the charge on July 29 and, once again, he was allowed to remain free on the \$20,000/10% bond posted earlier. On June 9, 1997, after the continuance of at least two scheduled trials, the court permitted Donovan's private attorney to withdraw from the case. After Donovan failed to appear for a scheduled status conference fifteen days later, the court issued a bench warrant for his arrest and fixed his bond in the amount of \$50,000 full cash. Donovan was subsequently arraigned on the warrant, and his bond was again fixed at \$50,000 full cash. Moreover, the public defender's office was appointed to represent him, and a \$40 administrative fee was assessed against him.¹

Next, on July 24 an assistant Jefferson Public Defender filed a motion seeking an order reducing Donovan's bond. On July 29, after a hearing, the court ordered the reinstatement of the \$20,000/10% bond posted by Donovan's surety at the time of his initial arrest, and Donovan once again was released from custody.

A jury trial finally commenced on October 30, 1997. At the trial's conclusion the jury returned a not guilty verdict, and the court thereafter entered a final judgment. Without conducting a hearing, the court also ordered Donovan to pay the public defender's office a \$2,000 recoupment fee (later reduced to \$1,250), to be deducted from the \$2,000 deposited by Donovan's

¹Although the court apparently based its order appointing the public defender upon its review of an affidavit of indigency, neither the affidavit nor a copy thereof was filed in the record.

surety as money bail pending further orders of the court. This appeal followed, raising the sole issue of whether a recoupment fee may be assessed, pursuant to KRS 31.120(4), against a defendant who is represented by the public defender and acquitted of the charged offense.

At the outset, we note that the court exceeded its authority by ordering \$1,250 of the ten percent bail, posted by Donovan's surety, to be held in escrow for payment of the recoupment fee adjudged against Donovan. It is clear that a bail order automatically terminates if, as here, a principal is acquitted. RCr 4.54(2). Moreover, bail money may be applied for collateral purposes only if it was posted by the defendant. RCr 4.46(1). See also KRS 431.530(5); KRS 431.532(4). Hence, Donovan's surety was entitled, upon Donovan's acquittal, to an immediate refund of the entire \$2,000 which he earlier posted on Donovan's behalf. The court had no authority to continue holding \$1,250 of that amount in escrow pending further orders.

Moreover, the court erred by summarily entering an order imposing a recoupment fee without providing notice or conducting a hearing to determine, as of the date of his acquittal, whether Donovan was still a needy person as required by KRS 31.120(1) or whether he had the ability to pay a recoupment fee as required by KRS 31.120(4). Clearly, no citation of authority is needed to support the proposition that before Donovan could be ordered to pay a recoupment fee, he was entitled to all of his procedural due process rights, including

but not limited to notice and an evidentiary hearing regarding his ability to pay such a fee. It is clear, therefore, that the court's summary order must be vacated.

On remand, the court should provide notice to Donovan and conduct a hearing to determine whether he has the ability to pay a recoupment fee and, if so, to determine the amount and terms of such payment. At the hearing, Donovan should be afforded his full procedural due process rights including the assistance of counsel. At the conclusion of the hearing, the court should make the necessary written findings and should enter an appropriate order based thereon.

It is possible that, after a hearing on remand, the court will conclude that Donovan does not have the ability to pay a recoupment fee and will not order him to do so. If that occurs, the principal issue raised on appeal, regarding whether an acquitted defendant may constitutionally be required to pay a recoupment fee, will be rendered moot. Sound principles of judicial restraint dictate that we should refrain from addressing that issue until such other time as it is properly before us on appeal from a valid order imposing such a fee.

For the reasons stated, the order appealed from is vacated, and this matter is remanded to the trial court for further proceedings consistent with our views.

ALL CONCUR.

BRIEF FOR APPELLANT:

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