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SJC-12774

FREDERICK PINNEY vs. COMMONWEALTH.

February 21, 2020.

Bail. Practice, Criminal, Findings by judge.

The defendant, Frederick Pinney, is charged with murder in the first degree. After his first trial ended in a mistrial, he filed a motion to dismiss the indictment on the basis that a second trial would violate the guarantee against double jeopardy. A judge in the Superior Court denied the motion; a single justice of this court denied Pinney's G. L. c. 211, § 3, petition seeking review of that ruling; and we affirmed the single justice's judgment. See Commonwealth v. Pinney, 479 Mass. 1001 (2018) (Pinney I). While Pinney's appeal was pending here, he moved for bail in the Superior Court. After a hearing, bail was set in the cash amount of $250,000 with certain conditions.

After our decision in Pinney I, and in the course of proceedings in the trial court related to retrial, Pinney, who has been unable to pay the cash bail and remains in prison, filed a motion to suppress, which was allowed in part. Both Pinney and the Commonwealth sought and received leave to appeal from that ruling. Those appeals are currently pending in the Appeals Court, and the trial court proceedings have been stayed pending their outcome.[1] Pinney then filed a motion in the Superior Court for bail review, which a second judge (not the judge who had set bail previously) denied. Pinney subsequently filed a petition in the county court pursuant to G. L. c. 211,

[1] Oral argument in those appeals was held on February 4, 2020.

§ 3, for bail review. A single justice denied the petition, and Pinney appeals. We affirm.

Background. Pinney has been held in pretrial custody since he was arrested in March 2014, prior to his first trial without bail and now, pending retrial, because he cannot pay the cash bail. In setting bail at $250,000, the first judge set forth some of his reasons from the bench at the bail hearing:

> "Many times, the Commonwealth takes the position that, presumptively, first degree murder cases are no bail, no right of bail, and there's some basis for that, where . . . the Court isn't limited to a traditional assessment under [G. L. c. 276, § 58]. . . . That's the position they're taking here. But, this is unusual, in that the Defendant presents with no record, a circumstantial case, which actually made it to trial and didn't result in a conviction. Granted, it's on appeal, and there's two ways that this [argument can] go.
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> "He's got a work record. I do take into account the finances, but they're not predominant. He's got . . . extended family, although they're not in the area. On balance, I will . . . make the determination that he should be given a right to bail, although it should be a significant cash bail. In my mind, that means $250,000.00 cash. If that amount is posted, he is to be under [global positioning system (GPS)] observation at all times with home confinement to a Commonwealth address."

The judge also completed a "Findings and Order Regarding Bail" form on which he indicated that Pinney had the ability to pay "$0 cash," and noting Pinney's "long work history including his own business."

The judge also noted that he had considered the following factors in setting bail: that the charged offense is murder in the first degree, for which the Commonwealth alleges a strong case, although the case is on appeal pending retrial; that Pinney has a large family in Connecticut who all work; that Pinney "has [a] Chelmsford residence" that is available; that Pinney has no prior criminal record, but he has been the subject of previous restraining orders; that, as to Pinney's risk of flight, the Commonwealth reports suicidal ideation by him; that Pinney has already been incarcerated for four years; that the Commonwealth alleges new deoxyribonucleic acid (DNA) evidence (since the first trial); that Pinney alleges that the victim's

boyfriend committed the murder; and that the first jury deliberated for three days. Finally, the judge indicated that if Pinney does post bail, certain conditions would apply, including GPS monitoring and home confinement.

As noted supra, when Pinney sought review of the bail determination and to have the amount of cash bail reduced, a different judge denied the petition. That judge did so from the bench at the bail review hearing, stating, "This is a first-degree murder case. Given the DNA representations and the strengths of the Commonwealth's case, the petition to reduce the bail is denied."

Discussion. Pinney raises two arguments in his appeal to this court: first, that Mass. R. Crim. P. 15 (e), as amended, 476 Mass. 1501 (2017), mandates his release on personal recognizance pending disposition of the interlocutory appeals currently in the Appeals Court; and second, that his due process rights were violated by the judge who set bail in the amount of $250,000, and by the judge who subsequently denied his petition for bail review, because each judge knew that Pinney could not pay that amount and each failed to explain the basis for his respective decision as required by Brangan v. Commonwealth, 477 Mass. 691 (2017), and Vasquez v. Commonwealth, 481 Mass. 747 (2019). We address each issue in turn.

1. Mass. R. Crim. P. 15 (e). Rule 15 (e) provides, in relevant part, that where, as here, the Commonwealth takes an interlocutory appeal from a suppression ruling, the trial court proceedings shall be stayed pending the outcome of the appeal and, furthermore, that "the defendant may be released on personal recognizance during the pendency of the appeal" (emphasis added). Pinney urges the court to interpret this provision to make release on personal recognizance pending appeal mandatory or, at the very least, presumptive.

He recognizes, as he must, that the word "may" generally indicates judicial discretion. See, e.g., Commonwealth v. Dalton, 467 Mass. 555, 558 (2014) ("The use of the word 'may' in a statute is generally permissive, reflecting the Legislature's intent to grant discretion or permission to make a finding or authorize an act"). He suggests, however, that the subject of the discretion is unclear. In his view, the word "may" could mean either that a judge has the discretion whether to release a defendant at all or that a judge has the discretion to release a defendant on personal recognizance. We are not persuaded.

Among other reasons, the use of the word "may" in the final provision of rule 15, the whole of which is set out in the margin,[2] contrasts with the use of the word "shall," which appears several times earlier in the same rule. If the intent of the rule were that a defendant always be released in these circumstances, the word "shall," rather than the word "may," could easily have been used in the final provision. Furthermore, reading the word "may" to mean "shall" is counter to the general proposition that the exercise of the power to grant bail is highly discretionary, particularly in a case such as this, involving a charge of murder in the first degree. See Vasquez, 481 Mass. at 752 (for defendant charged with murder in first degree, bail "is not a matter of right but is discretionary with the judge" [citation omitted]). See also, e.g., Commonwealth v. Bautista, 459 Mass. 306, 312 (2011) (Massachusetts has "long followed the common-law rule allowing the courts discretionary power in granting bail").

We have also considered Pinney's arguments based on the history of rule 15 and the corresponding provisions, and legislative history, of G. L. c. 278, § 28E. We do not find anything there that compels an interpretation of rule 15 (e) that requires release as a matter of right, on personal recognizance or otherwise, in the circumstances presented here.

2. Due process. We turn now to Pinney's argument that his due process rights were violated because the bail judges failed to sufficiently explain the bases for their decisions. As a starting point, we note that it is well settled that bail for a defendant charged with murder in the first degree is not a

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[2] Rule 15 (e) of the Massachusetts Rules of Criminal Procedure, as amended, 476 Mass. 1501 (2017), provides in full:

> "Stay of the Proceedings. If the trial court issues an order which is subject to the interlocutory procedures herein, the trial of the case shall be stayed and the defendant shall not be placed in jeopardy until interlocutory review has been waived or the period specified in [rule 15 (b) (1)] for instituting interlocutory procedures has expired. If an appeal is taken or an application for leave to appeal is granted, the trial shall be stayed pending the entry of a rescript from or an order of the appellate court. If an appeal or application therefor is taken by the Commonwealth, the defendant may be released on personal recognizance during the pendency of the appeal."

matter of statutory right; it exists only as a matter of a judge's discretion. See Vasquez, 481 Mass. at 752-753, and cases cited (G. L. c. 276, §§ 57 and 58, do not apply in capital cases).

That discretion, however, is not unlimited. If, in his or her discretion, a judge decides to admit a defendant to bail and sets a cash bail in an amount that the defendant cannot afford to pay, thus effectively imposing pretrial detention, the judge must set forth the reasoning justifying the decision (just as the judge would be required to do in other types of cases). See id. at 753-754 (setting forth types of factors judges should consider). See also Brangan, 477 Mass. at 705-710 (discussing bail considerations in noncapital cases). Here, in Pinney's view, both judges failed to meet this requirement.

As set forth supra, the first judge, who set bail in the amount of $250,000, provided some of his reasoning from the bench and at the bail hearing, and he followed that up with findings on a written bail form. Taken together, the judge's findings and reasons are sufficient to satisfy the due process considerations. It is clear that the judge gave consideration to various relevant factors and engaged in the required individualized bail determination, again in the context of a charge of murder in the first degree. He weighed, among other things, Pinney's finances and work history, the fact that Pinney does not have family in Massachusetts, and the nature of the charges and the strength of the Commonwealth's case. He also took into account the fact that Pinney has already been incarcerated for a number of years. While the judge could have better detailed some of his findings, which we have said we expect judges to do, see, e.g., Vasquez, 481 Mass. at 759-760, his over-all consideration and treatment of the issue was sufficient.

As to the second judge, who denied Pinney's petition for bail review in a short statement from the bench, if that alone had been the basis for an initial bail determination, it would not have been sufficient. As it was, however, the judge was not acting on a blank slate. The first judge's findings and reasoning, which we have indicated were sufficient, remained relevant and applicable, forming the backdrop for the second judge's decision.[3] We are satisfied that any shortcomings in his

[3] There is, furthermore, no impropriety stemming from the fact that the judge did not reduce his findings and reasoning to writing. See Vasquez v. Commonwealth, 481 Mass. 747, 760 n.11

explanation do not rise to the level of a deprivation of Pinney's due process rights.

As we noted in the Vasquez case, a judge's exercise of discretion when considering bail for a defendant charged with murder in the first degree "should not rest solely on a presumption against bail, but should be based on a careful review of the specific details of the case and the defendant's history." Vasquez, 481 Mass. at 748. No such presumption against bail was made here, where a cash bail was set, and the setting of that bail, in turn, involved an adequate consideration of the circumstances and details of this particular defendant and this particular case.

Conclusion. Where the bail determinations were properly made and no violation of Pinney's rights has occurred, the single justice did not err or abuse her discretion in denying Pinney's G. L. c. 211, § 3, petition, seeking review of the bail determination.

Judgment affirmed.

John M. Thompson (Linda J. Thompson also present) for the defendant.

Shane T. O'Sullivan, Assistant District Attorney, for the Commonwealth.

(2019) (recognizing that "it is often not realistic for the judge to reduce his or her findings to writing . . . . Oral findings in most instances are not only permissible, but also to be expected").