

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent.

v.

VINCENT PORTOMENE,

Appellant.

No. 81264-5-I

DIVISION ONE

UNPUBLISHED OPINION

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PER CURIAM – Vincent Portomene appeals from a judgment and sentence entered on February 24, 2020 after his guilty plea for one count of felony violation of a domestic violence no-contact order. Portomene is currently serving a 22-month sentence at the Washington Corrections Center in Shelton. At the close of day on April 20, 2020, he filed an emergency motion objecting to the trial court’s denial of bail pending appeal under RAP 8.2(b). He argues that the trial court applied incorrect legal standards in denying bail. Citing a declaration of a county jail doctor, which was not presented to the trial court at the time of the bail decision, he requests an immediate release due to the current COVID-19 pandemic and his medical conditions (multiple sclerosis) and immune-suppressing medication making him vulnerable to COVID-19. As directed by this Court, the State filed a response on an expedited basis, and Portomene filed a reply. As explained below, we order a limited remand for the trial court to conduct a hearing, with supplemental

briefing and information, to determine whether Portomene should be released pending appeal under RCW 9.95.062(1) and make appropriate findings.

A defendant in a criminal case may file a motion in the appellate court to challenge the trial court's denial of release pending review. RAP 8.2(b). Both parties cite RCW 9.95.062(1) as setting forth the correct legal standards for the trial court to decide whether to stay a sentence and release a defendant pending review. The statute provides:

Notwithstanding CrR 3.2 or RAP 7.2, an appeal by a defendant in a criminal action shall not stay the execution of the judgment of conviction, if the court determines by a preponderance of the evidence that:

- (a) The defendant is likely to flee or to pose a danger to the safety of any other person or the community if the judgment is stayed; or
- (b) The delay resulting from the stay will unduly diminish the deterrent effect of the punishment; or
- (c) A stay of the judgment will cause unreasonable trauma to the victims of the crime or their families; or
- (d) The defendant has not undertaken to the extent of the defendant's financial ability to pay the financial obligations under the judgment or has not posted an adequate performance bond to assure payment.

RCW 9.95.062(1).<sup>1</sup> The trial court's decision whether to stay a sentence and release a defendant pending appeal under RCW 9.95.062 is discretionary. State

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<sup>1</sup> RAP 7.2(f) and CrR 3.2(h) incorporate RCW 9.95.062. See RAP 7.2(f) ("In a criminal case, the trial court has authority, subject to RCW 9.95.062 and .064, to fix conditions of release of a defendant and to revoke a suspended or deferred sentence."); CrR 3.2(h) ("After a person has been found or pleaded guilty, and subject to RCW 9.95.062, 9.95.064, 10.64.025, and 10.64.027, the court may revoke, modify, or suspend the terms of release and/or bail previously ordered."). RCW 9.95.064 allows the trial court to impose certain conditions on release.

v. Swiger, 159 Wn.2d 224, 227, 149 P.3d 372 (2006). Portomene argues that the trial court did not apply the factors set forth in RCW 9.95.062. But he did not brief or refer to the statute below.

At the March 19, 2020 bail hearing, the trial court allowed Portomene to represent himself with a standby counsel. Portomene requested to do so after the trial court denied his motion to withdraw his guilty plea, when the motion was based in part on his claims that his former counsel coerced him into taking a plea and failed to advise him about an exceptional sentence below the standard range. During the hearing, his standby counsel argued that the court was obligated to set an appeal bond under RCW 10.73.040.<sup>2</sup> The trial court did not agree with counsel but invited additional briefing if needed because “no briefing was provided on this specific point ahead of today’s hearing.” It does not appear that Portomene took up the trial court on that invitation.

Portomene argues that the trial court based its decision on its misunderstanding that he did not have a right to appeal his judgment and sentence. He argues he has a right to appeal the denial of his motion to withdraw his guilty plea. But the trial court did not appear to disagree with him. The court

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<sup>2</sup> The statute provides: “In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant.” RCW 10.73.040.

Our Supreme Court has held that to the extent RCW 10.73.040 conflicted with former CrR 3.2(h), the latter governed the trial court’s authority to decide whether to grant bail pending review because “the right to bail is essentially procedural in nature.” State v. Smith, 84 Wn.2d 498, 502, 527 P.2d 674 (1974); State v. Miller, No. 48672-5-II, 2019 WL 5190934, at \*22 (Oct. 15, 2019) (unpublished) (“[Smith] held that to the extent RCW 10.73.040 conflicted with former CrR 3.2(h) (1973), it was superseded by former CrR 3.2(h) because the right to bail is procedural and within the province of the court rules.”).

stated that Portomene “may well have a right to appeal the denial of his motion to withdraw his plea.”

Portomene argues that the trial court erroneously based its bail decision on the merits of his appeal. The State disputes this claim and argues that the trial court denied bail “under the circumstances” of the case. The State points out that Portomene, while on a \$4,000 bail in this case, repeatedly violated the domestic violence no-contact order (a condition of release), resulting in a new charge and the revocation of the bail. The State argued below that Portomene, if released, was “likely to violate the provisions of the no contact order once again and place the victim in danger.” The State points out that the trial court was familiar with the history of this case where Portomene had prior convictions for domestic violence offenses, including assault and harassment.

On this record, we are unable to determine the basis of the trial court’s bail decision. In denying Portomene’s request to set a \$5,000 appeal bond, the court stated:

But from my perspective I know I went through a colloquy on the record and one of the things that I said is you understand you are waiving your right to appeal, and he answered yes to that, all of those questions. And so maybe the Court of Appeals will see things differently, but from this court’s perspective, somebody entering a plea is a serious moment. There is a reason we go through that colloquy, and, under the circumstances, I don’t think that an appeal bond is appropriate. He has been sentenced in this matter. I did see to the - - him not sending him off to DOC while his other matter is pending because I don’t want him yo-yoing between here and the Department of Corrections and it would make it very difficult for you to represent him, but that’s my decision, Mr. Portomene. I am denying your request for an appeal bond.

The trial court’s comments suggest the court did consider the merits of Portomene’s appeal. But the court also stated that an appeal bond was not

appropriate “under the circumstances.” The trial court did not have the benefit of the parties’ briefing under RCW 9.95.062. Nor did the court have the benefit of the new information presented to this Court in Portomene’s emergency motion and the State’s response.

In requesting an immediate release, Portomene relies on a declaration of Dr. Stuart Andrews, M.D., dated March 26, 2020, after the trial court’s March 19 bail decision at issue. Dr. Andrews, a doctor for Whatcom County jail, states Portomene is “very vulnerable to COVID-19, because of his MS-related compromised immune system, and should be a prime candidate for compassionate release.” Dr. Andrews states that Portomene’s risk is increased by his medication that suppresses his immune system, opining that “incarceration in any correctional facility is inherently a risk factor for contracting infection.” Dr. Andrews’ declaration was not before the trial court at the time it made its bail decision. The parties appear to dispute the safety and sufficiency of the COVID-19 safeguards provided by the Washington Corrections Center in Shelton where Portomene currently resides. The parties also dispute the public safety risk presented by Portomene’s release.

In his reply brief, Portomene argues that this Court may order a defendant placed on conditional release pending review under RCW 9.94A.585(3). But he did not cite RCW 9.94A.585(3) in his opening motion. In any event, although we may order Portomene on conditional release pending review under RCW 9.94A.585(3), the trial court is better suited to evaluate the parties’ factual disputes related to the factors for release under RCW 9.95.062. Both parties present information and declarations not provided to the trial court below. Both parties

appear to agree that an appropriate remedy may be a remand for the trial court to consider the statutory factors under RCW 9.95.062 and new information.

Under these circumstances, a limited remand is appropriate for the trial court to conduct a new hearing on bail, with supplemental briefing addressing RCW 9.95.062 and supplemental information to be provided by the parties, and make appropriate findings. In light of the urgency presented by Portomene's emergency motion, the trial court should conduct a hearing within 10 days of this order.

Now, therefore, it is hereby

ORDERED that this case is remanded to the trial court to conduct a new hearing to decide whether release pending review is appropriate under RCW 9.95.062 and make appropriate findings. The hearing should occur within 10 days of this order. At least three days before the hearing, the parties shall provide the trial court with supplemental briefing and information. This appeal is stayed pending the trial court's decision on remand. The parties shall file a status report within seven days of the trial court's decision.

Andrus, A.C.J.

Duyn, J.

Luppelwick, J.