

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0893-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID AMEEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

SNYDER, P.J. David Ameen appeals from an order denying his § 974.06, STATS., motion to reinstate his probation on revoked sentences because the trial court erred in failing to grant a stay of his misdemeanor probation terms during appeal. He reasons that because the trial court violated § 969.01(2), STATS., his probation status during the appeal process was unlawfully imposed

and he was wrongly incarcerated after it was revoked. We disagree and affirm the order.

On August 7, 1996, Ameen was sentenced on four misdemeanor convictions.¹ Sentences totaling twenty-one months in jail were imposed and stayed on three of the convictions² and Ameen was placed on consecutive terms of probation totaling nine years. On the fourth misdemeanor conviction (Count 8), knowingly violating a domestic abuse order contrary to § 813.12(8)(a), STATS., Ameen was sentenced to nine months in the county jail to commence on August 11, 1996.

At sentencing, Ameen requested that “bail continue pending appeal.” The trial court granted the request with the understanding that Ameen would file a timely notice of intent to appeal. Ameen filed a notice of intent to pursue postconviction relief on August 8, 1996, and was not required to report for his jail term on August 11.³ He never filed a direct appeal from the judgments of conviction and sentence.

Concurrent with the August 8, 1996 filing of Ameen’s notice of intent to appeal, the trial court signed an order for bail pending appeal, citing to § 969.01(2)(b), STATS., and requiring that the “bail currently on deposit with the

¹ Ameen pled no contest to four counts pursuant to a plea agreement and four other charges were dismissed.

² The convictions included criminal damage to property contrary to § 943.01(1), STATS., nine months; disorderly conduct contrary to § 947.01, STATS., ninety days; and knowingly violating a domestic abuse order contrary to § 813.12(8)(a), STATS., nine months.

³ Upon Ameen’s request, the trial court vacated the jail stay on Count 8 on April 21, 1997, and Ameen completed the nine-month jail sentence prior to filing his § 974.06, STATS., postconviction motion concerning Counts 1, 3 and 5. Count 8 is not a part of this appeal.

Clerk of Courts shall be continued.”⁴ In response to a probation and parole inquiry as to whether Ameen had commenced his probation terms on August 7, 1996, the trial court conducted a hearing on August 15, 1996. At that hearing Ameen requested that the relief include a stay of probation as well as jail, but the trial court denied that request and directed that probation orders be instituted. Thereafter, Ameen was on probation until March 25, 1997, when he was arrested on new charges resulting in his probation being revoked on May 7, 1997.⁵

On February 17, 1998, Ameen filed a § 974.06, STATS., motion to correct the sentence imposed on August 7, 1996, relating that:

It is the position of the defendant that the [trial] court’s August 15, 199[6] ruling denying the stay of the probation terms was in error. There is nothing in section 969.01(2), which mandates bond on appeal for misdemeanor appellants, to allow for continuation of probation. The court’s ruling in this absence is a violation of Wisconsin law. In the absence of this violation, the defendant would not have been on probation in March, 1997 and the Department would not have had the jurisdiction to revoke the probation and impose the sentence the defendant is presently serving.

The trial court denied the motion, concluding that “[it] has authority to order a probation term to proceed ... during the misdemeanor appellate process while the defendant is on release on bond pursuant to sec. 969.01(2)(b).”

⁴ The full text of the order, drafted by Ameen’s defense counsel, states that:

IT IS HEREBY ORDERED, upon the motion of the defendant, and the records and proceedings in this case, that the defendant is granted bail, pending the outcome of his appeal in the instant case, pursuant to sec. 969.01(2)(b). Said bail currently on deposit with the Clerk of Courts shall be continued.

⁵ Ameen was charged with one count of disorderly conduct and two counts of resisting arrest.

As we understand Ameen’s appellate argument, he contends that because the trial court released him on bond during the appellate process, both jail and probation were stayed as a matter of law under § 969.01(2)(a) and (b), STATS. We disagree.

The question of whether § 969.02(2), STATS., requires release from probation during appeal of a misdemeanor conviction presents a question of law which we review without deference to the trial court’s ruling. *See Michael T. v. Briggs*, 204 Wis.2d 401, 407, 555 N.W.2d 651, 654 (Ct. App. 1996). However, we value a trial court’s decision in spite of our de novo review. *See Scheunemann v. City of West Bend*, 179 Wis.2d 469, 475, 507 N.W.2d 163, 165 (Ct. App. 1993).

We first confess some confusion in regard to the terms “release” and “bail” as used in the context of an appellate stay after a misdemeanor conviction. The trial court’s order releasing Ameen referred to § 969.01(2)(b), STATS., and to the continuance of “bail.” The term “bail” means monetary conditions of release. *See* § 969.001(1), STATS. While § 969.01(2)(b) had originally used the term “bail,” in 1981 the legislature changed the statute by substituting the term “release” for the term “bail.”⁶ The term “release” has been interpreted to mean “a nonmonetary condition of release.” *State v. Firkus*, 119 Wis.2d 154, 158, 350 N.W.2d 82, 84 (1984).

However, this court has held that a trial court may impose a monetary condition of release under subsec. (2)(b), *see State v. Barnes*, 127 Wis.2d 34, 36-37, 377 N.W.2d 624, 625 (Ct. App. 1985), as long as the cash bond is not

⁶ Laws of 1981, ch. 183, § 5 (effective April 15, 1982).

imposed upon an indigent, *see State v. Lipke*, 186 Wis.2d 358, 368, 521 N.W.2d 444, 448 (Ct. App. 1994). While Ameen places some emphasis on the fact that bond had been posted during the pendency of the criminal proceeding and had been continued after conviction, we do not see that as a factor in this appeal. Ameen never asserted indigency, he did not object to the monetary condition of release, the jail stay was lifted at his request on April 21, 1997, and the bond was released as directed by Ameen on or before July 31, 1997.

While not a factor here, the confusion as to release and bail apparently contributed to the probation authorities requesting a clarification of Ameen's probation status. At an August 15, 1996 hearing, the trial court resolved the confusion by specifically denying Ameen's request that he be released from probation during his appeal, a ruling acknowledged in Ameen's January 16, 1998 modification of sentence motion as follows:

[A] hearing was had before this court on August 15th, 1996, indicating that the defendant still intended to take the appeal. That this court, at that time, denied him a stay of the order for probation, which he was entitled to, pursuant to Wis. Stats. Sec. 969.01(2)

We first review Ameen's contention that § 969.01(2)(b), STATS., entitles him to release from probation during appeal. Section 969.01(2)(b) has been deemed to address when a convicted misdemeanant is entitled "to release *from custody* pending a resolution of the case in the court of appeals." *Firkus*, 119 Wis.2d at 155, 350 N.W.2d at 83 (emphasis added). In addition, the supreme court has construed subsec. (2)(b) to avoid an interpretation that will require "a person *sentenced to incarceration* for a short term of necessity to serve his sentence" during an appeal. *Firkus*, 119 Wis.2d at 156, 350 N.W.2d at 83 (emphasis added). We are satisfied that § 969.01(2)(b) mandates release from

custody or incarceration, does not speak to release from probation and that Ameen's contention that the trial court violated subsec. (2)(b) fails.

We now turn to the merits of Ameen's appellate argument concerning release from probation during appeal under § 969.01(2)(a), STATS. Section 969.01(2)(a) states in relevant part:

Release pursuant to § 969.02 ... may be allowed in the discretion of the trial court after conviction and prior to sentencing or the granting of probation.

We read § 969.01(2)(a), STATS., to allow a trial court the discretion to release a convicted misdemeanant from probation during appeal. To do otherwise would render the disjunctive language "or the granting of probation" superfluous. *See State v. Bodoh*, ___ Wis.2d ___, ___, 582 N.W.2d 440, 443 (Ct. App. 1998). The State contends that Ameen's argument still fails because he was already on probation when he requested the release. We are not persuaded. Ameen's request for release pending appeal was made at the sentencing hearing, and the relief granted was not clarified as to the ordered probation until August 15, 1996. We will, therefore, consider the release request to be made prior to the granting of probation for purposes of this appeal.

However, the release from a probation order under subsec. (2)(a), unlike the release from jail under subsec. (2)(b), is discretionary and may be granted without bail, on an appearance bond, or by the deposit of cash in lieu of an appearance bond. *See* § 969.02(1), (2)(b), STATS.⁷ We review the trial court's

⁷ Release from jail on a misdemeanor conviction during an appeal is now discretionary. *See* 1997 Wis. Act 232, § 2 (effective May 14, 1998). Ameen's release from jail during an appeal of a misdemeanor conviction occurred on August 7, 1996, and was mandated under subsec. (2)(b).

discretionary determination of release from the consequences of a misdemeanor conviction during an appeal to ascertain whether the trial court erroneously exercised its discretion. *See State v. Whitty*, 86 Wis.2d 380, 388, 272 N.W.2d 842, 846 (1978). A trial court reasonably exercises its discretion where it examines relevant facts, applies proper standards of law, and, using a rational process, reaches a conclusion that a reasonable judge could reach. *See State v. Sinks*, 168 Wis.2d 245, 255, 483 N.W.2d 286, 290 (Ct. App. 1992).

We are satisfied that the record supports the trial court's proper exercise of discretion during the August 15, 1996 hearing sought by the probation authorities. During that hearing, Ameen requested and the trial court denied a stay of the probation orders pending appeal. In considering Ameen's request, the trial court held that convicted misdemeanants "have a right not to be incarcerated while they appeal" and that the statute "does not say that they have a right not to be on probation." We agree with that interpretation of § 969.01(2), STATS. The trial court then directed that the probation authority be informed that Ameen was on probation and subject to the provisions of probation. Contrary to Ameen's position, the trial court was not obligated to grant a stay of the probation orders during appeal.

In sum, we conclude that § 969.01(2)(b), STATS., does not apply to release from probation during appeal and that the trial court properly exercised its discretion under § 969.01(2)(a) in denying Ameen's request that he be released from probation during the appeal period.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

