

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 216 CR 2010
	:	592 CR 2010
JOSEPH WOODHULL OLIVER, JR.,	:	
Defendant	:	

Criminal Law - Bail Eligibility - Pretrial versus Post-Verdict
Standard - Court Discretion - Detention Pending
Gagnon Proceedings for New Criminal Charges -
Habeas Corpus - Inherent Judicial Authority -
Exceptional Circumstances

1. Prior to conviction in a non-capital case in Pennsylvania, an accused has a constitutional right to bail which is conditioned upon the giving of adequate assurances that he or she will appear for trial. In contrast, once a defendant's guilt has been established, there exists no state or federal constitutional right to bail, the granting of bail being discretionary with the court.
2. Neither a parolee nor probationer against whom a detainer has been lodged for violating the terms of supervision has a right to bail pending revocation proceedings.
3. In the context of a habeas corpus proceeding, a trial court has the inherent authority to grant bail while awaiting the outcome of pending probation revocation proceedings for new criminal charges when exceptional circumstances exist, such as when the probationer establishes a high probability of success on a substantial constitutional challenge. This authority arises from the power vested in the trial court by virtue of habeas corpus jurisdiction and is not a right vested in the probationer.
4. Release on bail pending the resolution of probation revocation proceedings for a new criminal offense is not only discretionary with the court, but limited to a showing of exceptional circumstances and for compelling reasons.

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Defendant	:	
Sarah E. Modrick, Esquire		Counsel for Commonwealth
Assistant District Attorney		
George T. Dydynsky, Esquire		Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. - April 11, 2014

Whether an individual who is detained for criminal acts allegedly committed while serving a probationary sentence has a *right* to bail pending revocation hearings and, if not, whether the court nevertheless has the discretionary authority to grant bail and under what circumstances, are issues not previously addressed by our appellate courts which we now consider.

FACTUAL AND PROCEDURAL BACKGROUND

On February 24, 2014, Defendant was charged with driving under the influence¹ for an incident which occurred on February 5, 2014. At the time of the incident, Defendant was on probation pursuant to two separate sentences previously imposed by this court on unrelated charges. On May 7, 2012, Defendant

¹ 75 Pa.C.S.A. § 3802 (a) (1).

pled guilty to one count of possessing an instrument of crime² and was immediately sentenced to two years of county probation. Eight months later, on January 4, 2013, Defendant pled guilty to two counts of recklessly endangering another person³ for which he was sentenced to a total of four years' county probation, concurrent to the sentence imposed on May 7, 2012.

Both sentences Defendant received included as a condition of continued probation that Defendant not violate any state or federal criminal law.⁴ As a result of the new criminal charges filed against Defendant, the Carbon County Probation Department ("Department") arranged with Defendant's counsel for Defendant's detention in the Carbon County Correctional Facility on February 28, 2014, and further filed on the same date a petition to revoke Defendant's probation claiming Defendant violated the terms of his probation when he drove under the influence.⁵ Also

² 18 Pa.C.S.A. § 907 (a).

³ 18 Pa.C.S.A. § 2705.

⁴ The Conditions of Supervision that Defendant signed at the time he was placed on probation advised Defendant that in the event of any violation of the conditions of his probation, the County's Probation Department had the authority "to cause [his] detention in a correctional facility pending appropriate hearings." These conditions further advised Defendant that if he was arrested while on probation and committed to prison, the Department was authorized to place a detainer against him which would, in effect, prevent his release from prison if he posted bail on the new criminal charges; also that if he was arrested while on probation and posted bail or was granted ROR bail, the Department was authorized to issue a warrant for his arrest and have him committed to prison pending appropriate revocation hearings or other specific court action.

⁵ It is the practice of the County's Probation Department to immediately arrest and detain an individual who, while on probation or parole under the Department's supervision, is arrested and charged with a new criminal offense. The Department has the authorization to detain as an agent of the

on this date, Defendant filed a "Motion for Habeas Corpus Relief/Motion to Set Bail" requesting that he be released on bail pending the disposition of the probation revocation proceedings.

A hearing on Defendant's Motion was held on March 6, 2014. At this hearing, Defendant denied he was driving under the influence, argued that the granting of bail was discretionary with the court, and asked that bail be set. In opposing the Motion, the Commonwealth contended Defendant was not legally entitled to bail and alternatively requested that if the issue involved an exercise of our discretion, we deny bail. At the hearing on Defendant's Motion, Defendant additionally waived his right to a Gagnon I hearing; this hearing had been previously scheduled for March 10, 2014.⁶

Court. *Commonwealth vs. Kelly*, 931 A.2d 694, 697-98 (Pa.Super. 2007), *appeal denied*, 945 A.2d 168 (Pa. 2008).

Following detention, as occurred here, a petition for revocation identifying the new charges as the basis for revocation is filed. This filing prompts the scheduling of a Gagnon I hearing. In the instant petition filed by the Department against Defendant, the Department further requested the issuance of a warrant to keep Defendant detained pending a revocation hearing. This petition was later amended on March 5, 2014 to include failure to pay court costs and complete required community service as additional bases for violation. Pending disposition of the revocation proceedings, the individual is generally considered not eligible for bail.

⁶ In *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the United States Supreme Court held that due process requires a two step process for revocation of probation or parole: first, a probable cause hearing at or near the time of the initial detention (Gagnon I); and later a final determination hearing (Gagnon II).

By waiving the Gagnon I proceeding, Defendant conceded probable cause existed to detain him for violating the terms of his probation. To date, Defendant's Gagnon II hearing has not been held.

DISCUSSION

To begin, we first distinguish between Defendant's new arrest for driving under the influence and his detention for a claimed violation of the terms of his probation. "Prior to conviction, in a non-capital case in Pennsylvania, an accused has a constitutional right to bail which is conditioned only upon the giving of adequate assurances that he or she will appear for trial." Commonwealth v. McDermott, 547 A.2d 1236, 1242 (Pa. Super. 1988).⁷ Here, following his arrest on February 5, 2014, Defendant was released pursuant to Pa.R.Crim.P. 519 (B) and is awaiting a preliminary hearing on April 23, 2014, at which time bail will be set. See Pa.R.Crim.P. 510 (B)(2).

⁷ Article I, Section 14, of the Pennsylvania Constitution provides:

All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

Accordingly, with the exception of capital offenses and those for which a sentence of life imprisonment is a possibility, every person charged with a crime in this Commonwealth has a right to bail. In Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964), cert. denied, 376 U.S. 965 (1964), cited with approval in Commonwealth v. Fowler, 304 A.2d 124, 126 (Pa. 1973), the Court stated:

While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail.

Id. at 710. See also Carlson v. Landon, 342 U.S. 524, 545-46 (1952) (holding that the language "[e]xcessive bail shall not be required," which appears in the Eighth Amendment to the United States Constitution, does not create an absolute right to bail).

In contrast, once guilt has been determined, "a defendant has no state or federal constitutional right to bail." McDermott, 547 A.2d at 1242 (citing Commonwealth v. Fowler, 304 A.2d 124, 127 n. 6 (Pa. 1973)); Commonwealth vs. Keller, 248 A.2d 855, 856 (Pa. 1969). Whereas the right to release on bail before conviction is fundamental because it promotes the presumption of innocence, avoids the infliction of punishment prior to trial and conviction, and provides the accused the maximum opportunity to prepare his defense, Commonwealth v. Truesdale, 296 A.2d 829, 834-35 (Pa. 1972), "an individual's legitimate interest in remaining at large on bail diminishes, and the Commonwealth's legitimate interest in incarcerating the individual increases correspondingly, as the individual passes from suspect, to accused, to appellant, to *allocator* petitioner, to *certiorari* petitioner, to [PCRA] petitioner." McDermott, 547 A.2d at 1243. Even further removed from the presumption of innocence is a proceeding for parole revocation where the validity of the original conviction and sentence are not in issue, but only the import of subsequent collateral events. *Id.* As such, "when a parolee is properly held on a detainer for parole violations, the parolee has no right to bail." *Id.* at 1243.⁸

⁸ In McDermott, the Superior Court expressly held that the Rules of Criminal Procedure applicable to pre-sentence and post-sentence bail on direct appeal

Though parole and probation are different, as are the consequences and options available to the court when a violation is found and revocation granted, the validity of both the original conviction and sentence is presupposed when a detainer is issued for violation of the terms of either parole or probation. Likewise, an accused's liberty interests while on probation, as is the case with parole, are severely circumscribed by the conditions of supervision and are of a wholly different nature than an accused's liberty interests prior to trial.⁹ Consequently, although we have found no appellate case stating so expressly, absent any constitutional provision or statute creating a right to bail pending resolution of probation revocation proceedings, and relying directly upon those authorities from other jurisdictions cited in McDermott which address proceedings to revoke probation, as well as parole, we conclude there exists no *right* to bail for a

are inapplicable to parole revocations. 547 A.2d 1236, 1243 (Pa.Super. 1988). See also Commonwealth v. McMaster, 730 A.2d 524, 526-27 (Pa. Super. 1999) (interpreting rules governing bail for post-verdict release as allowing bail pending appeal after a finding of guilt, so long as an avenue of direct appeal is open), *appeal denied*, 757 A.2d 930 (Pa. 2000) and Pa.R.Crim.P. 521 (relating to bail after finding of guilt). The Pennsylvania Supreme Court in Fowler further noted that the Rules of Criminal Procedure do not confer substantive rights and that such rights must arise from the statutory or decisional law of this Commonwealth, independent of the Rules. 304 A.2d at 127.

⁹ In Morrissey v. Brewer, speaking with reference to a defendant supervised on parole, the United States Supreme Court stated: "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." 408 U.S. 471, 480 (1972).

probationer who is being detained for probation violations. McDermott, 547 A.2d at 1243; see also United States v. Sample, 378 F.Supp. 43 (E.D.Pa. 1974) ("There exists no constitutional right to bail pending revocation of probation.").¹⁰

Absent such right, the question remains whether and under what circumstances bail may nevertheless be granted by the court, not as a matter of right, but as an exercise of the court's inherent discretion under the common law. Again, as noted in McDermott, the courts which have considered this issue are divided. 547 A.2d at 1244. These jurisdictions differ between allowing bail pending formal revocation of probation or parole, except in exceptional cases, Martin v. State, 517 P.2d 1389, 1398 (Alaska 1974); to denying any legal authority in the courts to grant bail, unless expressly permitted by statute, State v. Garcia, 474 A.2d 20, 21-22 (New Jersey 1984) and People ex rel. Calloway v. Skinner, 300 N.E.2d 716, 720 (New York 1973); to prohibiting bail for a felon parolee whose alleged violation is the commission of a felony, while allowing bail, at

¹⁰ Defendant's right to bail on the driving under the influence charge is not violated if notwithstanding the setting of bail on this charge, he is ineligible for release based on the Department's detainer for the pending probation revocation. See Whitest vs. Pennsylvania Bd. Of Probation and Parole, 395 A.2d 314, 316 (Pa.Cmwlth. 1978) (holding defendant's constitutional right to bail for a pending criminal charge is not violated if defendant remains detained based on pending parole revocation).

the trial court's discretion, of other alleged parole violators. Miller v. Toles, 442 So.2d 177, 180 (Florida 1983).

While this precise issue has not been decided in Pennsylvania, in Commonwealth v. Bonaparte, 530 A.2d 1351, 1354-55 (Pa. Super. 1987), the Superior Court held that in exceptional cases the trial court has the discretion to release a PCHA¹¹ petitioner on bail pending disposition of the post-conviction petition pursuant to the court's inherent common-law powers in habeas corpus proceedings.¹² See also United States v. Stewart, 127 F.Supp.2d 670, 671 (E.D.Pa. 2001) ("[B]ail pending post-conviction habeas corpus review is available only when the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective."). Consequently, notwithstanding the diminished liberty interest enjoyed by a probationer, which is nevertheless often greater than that of a PCRA petitioner, we similarly conclude that in

¹¹ At the time Bonaparte was decided, the Post Conviction Hearing Act, 42 Pa.C.S.A. §§9541 et seq., was in effect. This Act has since been replaced by the Post-Conviction Relief Act. 42 Pa.C.S.A. §§ 9541-9546. We also note that while Bonaparte is non-precedential, having been decided by one judge, with two judges concurring in the result, its reasoning has been accepted by other panels of the Superior Court. See, e.g., Commonwealth v. McDermott, 547 A.2d 1236, 1242 (Pa. Super. 1988).

¹² The Court specifically noted that this discretion emanated from the power vested in the trial court by virtue of habeas corpus jurisdiction and not a right vested in the petitioner. Commonwealth vs. Bonaparte, 530 A.2d 1351, 1354-55 (Pa. Super 1987).

the context of a habeas corpus proceeding we retain the inherent authority to grant bail pending resolution of probation revocation proceedings, at least in exceptional cases, such as when the probationer establishes a high probability of success on a substantial constitutional challenge or when extraordinary or exceptional circumstances make the grant of bail necessary.¹³ *Cf. Siegel vs. U.S. Parole Com'n*, 613 F.Supp. 127, 128 (S.D.Fla. 1985) (recognizing the court's inherent power to grant bail pending review of a parole revocation provided a showing of exceptional circumstances is made).

We narrow release to exceptional circumstances, in part because, having been found guilty, a probationer no longer enjoys the presumption of innocence; in part because of the nature of the violation alleged, a new criminal offense, which militates against the successful rehabilitation of the offender while on probation; and in part because of the constitutional due process requirement that the Gagnon I hearing "be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while

¹³ The Commonwealth does not dispute that Defendant's request for habeas corpus relief is the proper vehicle by which Defendant may obtain judicial review of the detainer. See 42 Pa.C.S.A. §6503; see also Commonwealth ex rel. Johnson vs. Myers, 169 A.2d 319, 321 (Pa.Super. 1961) ("Habeas corpus is a writ of liberty and not of error and it will issue not for the purpose of correcting errors in a proceeding of court of competent jurisdiction but rather is for the purpose of determining the legality of the restraint.")

information is fresh and sources are available." Morrissey, 408 U.S. at 485; Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (extending Morrissey's two step process for revocation of parole to revocation of probation). The Court in Morrissey made clear that although it contemplated that a parolee would be confined from the time of his arrest as an alleged violator until the parole revocation hearing, as a procedural due process guarantee, the time before a probable cause hearing was held before an independent officer would be relatively short. *Id.* It is also not without significance in limiting release to a showing of exceptional circumstances that, as in the present case, a *prima facie* violation has been determined to exist at either an earlier Gagnon I hearing, or its equivalent, waiver.

CONCLUSION

Although the right to bail in a criminal proceeding is constitutionally guaranteed an accused pretrial, no constitutional right to bail exists for a defendant who has been previously found guilty and sentenced pending a probation revocation hearing whose purpose is to adjudicate neither the defendant's guilt or innocence of the underlying offense. Instead, absent statutory or decisional law to the contrary, release on bail pending the resolution of probation revocation

proceedings for a new criminal offense is not only discretionary with the court, but limited to a showing of exceptional circumstances and for compelling reasons.

BY THE COURT:

P.J.