

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON,	)	No. 12345-1-II
Respondent,	)	
	)	MOTION OBJECTING TO
vs.	)	DENIAL OF RELEASE PENDING
	)	APPEAL AND MOTION TO
JOHN SMITH,	)	ACCELERATE REVIEW OF
Appellant.	)	APPEAL BOND ISSUE
_____	)	

I. IDENTITY OF MOVING PARTY

Appellant John Smith, by and through counsel of record, Nielsen, Broman & Koch, requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 8.2(b), Smith objects to the trial court’s ruling denying his requests for an appeal bond. Smith requests that this court reverse the trial court’s ruling and remand for further consideration using the correct legal standard. Pursuant to RAP 18.12, Smith further requests that this motion be decided on an accelerated basis so that it actually is capable of affording Smith relief.

III. FACTS RELEVANT TO MOTION

Smith was released on bond pending trial. See Appendix (various orders to appear, listing court dates). He was ultimately found guilty of assault in the first degree. CP 40. The trial court refused to release him pending sentencing, citing a generalized “concern for potential violence” and “it is an assault of a violent nature. It counts as a strike offense, so

there's [sic] concerns about that." RP<sup>1</sup> 578-79. The trial court failed to analyze release pending sentencing under RCW 10.64.025(1), which requires the defendant be detained pending sentencing "unless the court finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released."

The trial court sentenced Smith to 120 months of confinement on March 25, 2019. RP 590; CP 52. Defense counsel requested an appeal bond. RP 591-92. The trial court ruled on the appeal bond as follows:

As far as the issue of the appellate bond, so the appellate bond takes a look at a couple different things. One is potential risk that Mr. Nguyen [the prosecutor] has enunciated. The other is whether there's any complex or challenging evidentiary issues or legal issues in the case.

On the first account, I don't know, I don't know what the risks are. It's been reported that there's something, but I don't know, I don't really know about that.

The issue as far as any complex evidentiary, legal or evidentiary issues, I didn't find that there were any really particularly challenging or large or complex issues, so I'm going to deny the request for an appellate bond.

RP 592-93.

Smith again moved for an appeal bond in August 2019 and an ex parte hearing between the trial court and the prosecutor on the issue followed. SRP 3. The trial judge at this hearing was different than the sentencing judge but indicated she "reviewed part of the record from his request for the appellate bond at sentencing. I also spoke with Judge Daniels [the sentencing judge]." SRP 3. The trial court indicated there was not a

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<sup>1</sup> Smith uses "RP" to refer to the consecutively paginated multivolume transcript that ends with sentencing on March 25, 2019. He uses "SPR" to refer to the supplemental transcript from a hearing dated August 19, 2019.

“substantive different request . . . for an appeal bond than that heard by Judge Daniels. So based on all of that, I am going to deny the request for the appeal bond in this case.” SRP 3-4.

#### IV. GROUND FOR RELIEF

1. The trial courts’ denials of Smith’s requests for an appeal bond were not predicated on a valid legal standard and must be reversed

RAP 8.2(b) provides, “A party may object to a trial court decision relating to release of a defendant . . . or relating to a stay of execution of sentence, during a review of a criminal case . . . by motion in the appellate court.”

Release pending appeal is conditioned on securing an appeal bond. RCW 10.73.040 states in pertinent part,

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[.]

“The object of bail is to guarantee the appearance of the accused before the court at such times as the court may direct.” State v. Darwin, 70 Wn. App. 875, 877, 856 P.2d 401 (1993).

Under 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.” Under RCW 9.95.062, “a trial court may, in its discretion, stay the execution of a defendant’s sentence and release the defendant pending appeal.” State v. Swiger, 159 Wn.2d 224, 227, 149 P.3d 372 (2006).

RCW 9.95.062 sets forth the parameters of the court’s decision-making authority on release pending appeal:

(1) 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.

A trial court's denial of a motion for release pending appeal is reviewed for abuse of discretion. State v. Cole, 90 Wn. App. 445, 447, 949 P.2d 841 (1998). A trial court's discretionary decision is based on untenable grounds or made for untenable reasons "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (internal quotation marks omitted) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995))). It necessarily constitutes an abuse of discretion when the court's decision is based on an erroneous view of the law or involves application of an incorrect legal standard or analysis. Id.; Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Under RCW 9.95.062(1), the trial court must find one of the factors supporting denial of release pending appeal by a preponderance of the evidence. The first trial court in Smith's case to consider the appeal bond request failed to identify one of the RCW 9.95.062(1) factors. Although risks of violence might generally be a valid basis to deny an appeal bond pursuant to RCW 9.95.062(1)(a) or (1)(c), the court explicitly stated it did not

know if there were any risks of releasing Smith or what such risks consisted of. RP 593. Thus, the trial court neither identified nor relied on any risk posed by Smith's release in denying the appeal bond.

The trial court also denied the appeal bond because "I didn't find that there were any really particularly challenging or large or complex issues . . ." RP 593. The existence of challenging, large, or complex issues, however, is not a basis to deny bail under any RCW 9.95.062(1) factor.

The trial court abused its discretion, applying the wrong legal standard to the issue before it. Its role was to analyze release pending appeal under the RCW 9.95.062(1) factors and determine whether to grant or deny a bond based on one or more of the RCW 9.95.062(1) factors. The record is clear that the trial court failed to do so, applying an incorrect legal standard to the appeal bond request. Accordingly, Smith is entitled to remand to the trial court to address his motion for an appeal bond under RCW 9.95.062(1), the applicable legal standard.

When Smith again requested an appeal bond in August 2019, the second trial court merely repeated the first trial court's errors. The second trial court did not consider any of the factors under RCW 9.95.062(1)—it did not even invoke them. SRP 3-4. Rather, the second trial indicated it spoke to the first trial judge, reviewed the record, and concluded "there was not substantive different request for -- within this request for an appeal bond than that heard by Judge Evans." SRP 3-4. In other words, rather than providing the analysis that RCW 9.95.062(1) requires, the second trial court denied Smith's request because Judge Evans had denied the request. A trial court abuses its discretion when it gives no reason for its discretionary decision. State v. Hampton. 107 Wn.2d 403, 409, 728

P.2d 1049 (1986). The second trial court's failure to analyze the question of release pending appeal pursuant RCW 9.95.062(1) was an abuse of discretion that also merits reversal of the denials of the appeal bond and remand for a new hearing wherein the trial court applies the correct legal standards. Smith therefore requests that the Court of Appeals remand the appeal bond issue to the trial court for further consideration.

2. This issue should be decided on accelerated review

There is no reason why this appeal bond motion should delay the briefing schedule and consideration of the appeal on the merits, which should continue in its normal course. However, RAP 18.12 provides for accelerated review upon motion of a motion and grants broad discretion to the appellate court to "set any review proceeding for accelerated disposition."

Smith requests accelerated disposition of the appeal bond issue. He asks that the court require the parties to adhere to the timing established for answers and replies to motions set forth in RAP 17.4(e), which provides 10 days to file an answer and three days to file a reply to the answer. He also requests that the Court of Appeals decide this motion on an accelerated basis thereafter. Waiting to decide this motion until the decision on the merits would unfairly render this motion moot and convert RAP 8.2(b) into a meaningless and hollow procedural right.

V. CONCLUSION

For the reasons stated, Smith requests that the trial court's ruling denying an appeal bond be reversed and that this matter be remanded for further proceedings on an accelerated basis.

DATED this 24th day of September, 2019.

Respectfully submitted,

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