

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,266

KEN JENNE, as Sheriff of Broward County,
Florida, and **STATE OF FLORIDA**,

Petitioner,

vs.

BRIAN RIX,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENCE
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
Telephone: (561) 688-7759

Counsel for Appellant

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellant herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE i

TABLE OF CONTENTS ii

AUTHORITIES CITED iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

WHETHER A TRIAL COURT HAS DISCRETION AND INHERENT
AUTHORITY, INDEPENDENT OF SECTION 907.041(4),
FLORIDA STATUTES, TO DENY A SUBSEQUENT BOND
APPLICATION TO A DEFENDANT WHO VIOLATES A
CONDITION OF HIS ORIGINAL BOND BY COMMITTING A NEW
CRIMINAL OFFENSE. 6

CONCLUSION 16

CERTIFICATE OF SERVICE 17

AUTHORITIES CITED

Cases Cited

Ex. Parte McDaniel, 86 Fla. 145, 97 So. 317 (1923) 10

Gardner v. Murphy, 402 So. 2d 525 (Fla. 5th DCA 1981) . 5, 6, 10,
11, 15

Houser v. Manning, 719 So. 2d 307 (Fla. 3d DCA 1998) 4-6, 10-12,
14-16

Merdian v. Cochran, 654 So. 2d 573 (Fla. 4th DCA 1995) . . 12-15

Metzger v. Cochran, 694 So. 2d 842 (Fla. 4th DCA 1997) . . . 13

Middleton v. Polk, 399 So. 2d 1105 (Fla. 5th DCA 1981) . . . 11

Paul v. Jenne, 24 Fla. L. Weekly D581 (Fla. 4th DCA March 3,
1999) 3, 13-16

Rix v. Jenne, 24 Fla. L. Weekly D867 (Fla. 4th DCA March 30,
1999) 6, 13, 16

State v. Ajim, 565 So.2d 712 (Fla. 4th DCA 1990) 12

Statutes Cited

Section 903.046, Florida Statutes (1997) 7, 11

Section 903.047, Florida Statutes (1997) 11

Section 907.041, Florida Statutes 5, 9, 10, 12, 16

Section 907.041(1), Florida Statutes (1997) 10

Section 907.041(2), Florida Statutes (1997) 10

Section 907.041(4), Florida Statutes 6

Section 907.041(4)(b), Florida Statutes 6

Section 907.041(4)(b)(4), Florida Statutes (1997) . . 4, 6, 12-14

Other Authority Cited

Article I, section 14 of the Florida Constitution (1969) . . . 7
Article I, section 14 of the Florida Constitution (1982) . 7, 10
Florida Rule of Criminal Procedure 3.131(b)(3) 13
Florida Rule of Criminal Procedure 3.131(g) 11

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court and Respondent in the Fourth District Court of Appeal. Petitioner will be referred to herein as "the State". Respondent, Brian Rix, was the defendant in the trial court and Petitioner in the Fourth District Court of Appeal. He will be referred to herein as "Respondent" or "Defendant". An Appendix of the pertinent documents which are included in the record are attached and will be referred to by the symbol "Ex".

STATEMENT OF THE CASE AND FACTS

The record presented by Respondent in his petition for writ of habeas corpus consisted of the petition, the March 16, 1999 hearing transcript, and an undated copy of the motion to set bond. (Ex. 1). During the hearing on the motion, defense counsel requested the circuit court judge, now assigned to the Defendant's cases, to reconsider a prior trial judge's order which had denied bond. (Ex. 2, pgs. 2-3). As a result of the March 16, 1999 denial of bond, Respondent appealed to the Fourth District Court of Appeal ("Fourth District"). After the State responded (Ex. 3), the Defendant attempted to supplement the record. This was denied. (Ex. 4). The Defendant filed a reply (Ex. 5). The following facts are based upon the evidence presented at the March 16, 1999 hearing.

In 1995, Respondent was charged with driving under the influence, possession of cocaine, and battery on a police officer. ("95 case"). (Ex. 2, pgs. 2-3 and 5-6). Subsequently, Respondent was charged in 1997, with possession of cocaine and possession of drug paraphernalia ("97 case"). (Ex. 2, pgs. 2-3 and 5-6). Bond was granted in both cases. (Ex. 2, pgs. 2-3 and 5-6). While on pretrial release for those crimes, Defendant was arrested for possession of cocaine, driving under the influence, and driving with an expired license tag ("98 case"). (Ex. 2, pgs. 2-3 and 5-6). The Defendant was released on bond for the 98 case.

Following Defendant's arrest for the 98 case, the State moved to revoke bail and to detain Respondent without bond in the 95 and

97 cases. As represented to the trial court on March 16, 1999, a hearing had been held before Judge Lebow to determine whether Respondent should be detained without bond in the 95 and 97 cases. (Ex. 2, pgs. 3 and 6). It was admitted Judge Lebow found the Defendant a danger to the community. (Ex. 2, pg. 3). During the March 16, 1999 hearing, the State informed the trial judge:

Judge, while [Respondent] was out on bond on the 1995 case ... and while he was out on bond on the 1997 case, he then picked up a 1998 case which is a possession of cocaine and a new DUI, and I think that is why Judge Lebow felt he was a danger to society. And, while he was out on bond on this case, he went out and managed to pick up another DUI and continued his pattern of cocaine abuse.

(Ex. 2, pgs. 5-6).

While no witnesses were called, the parties argued the necessity for the new trial judge to reconsider Judge Lebow's decision to revoke Defendant's bond in the 1995 and 1997 cases and to deny pretrial release. Based upon argument of counsel, in which Respondent's numerous criminal charges were outlined, and his failure to appear for a September 18, 1995 hearing was noted, the trial court refused to grant a new bond. Hence, Respondent continued in pretrial detention.

On March 23, 1999, the Defendant filed an Emergency Petition for Writ of Habeas Corpus with the Fourth District Court of Appeal (Ex. 1) and the State responded. (Ex. 3). Relying upon Paul v. Jenne, 24 Fla. L. Weekly D581 (Fla. 4th DCA March 3, 1999), the Fourth District Court of Appeal found the State had not complied

with the dictates of section 907.041(4)(b)(4), Florida Statutes (1997). (Ex. 5). The case was remanded for further proceedings. Additionally, conflict was certified with the Third District Court of Appeal's ("Third District") opinion in Houser v. Manning, 719 So. 2d 307 (Fla. 3d DCA 1998). The State invoked the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal erred in finding pre-trial release on bond following the forfeiture of the original bond due to the commission of new criminal offenses is a matter of constitutional right. Once afforded pre-trial release following an initial arrest, a defendant's constitutional rights have been satisfied. When a defendant forfeits his bond by committing another crime, a new bond is not required automatically; a trial court has the discretion and inherent authority to deny bail. Houser v. Manning, 719 So. 2d 307 (Fla. 3d DCA 1998); Gardner v. Murphy, 402 So. 2d 525 (Fla. 5th DCA 1981). This Court should adopt the reasoning in Houser and Gardner and find that a defendant who has committed a crime while on pre-trial release is not entitled to new bond as a matter of right; the trial court has discretion, independent of section 907.041, Florida Statutes to deny a subsequent bond upon defendant's violation of a condition of the original pretrial release.

ARGUMENT

WHETHER A TRIAL COURT HAS DISCRETION AND INHERENT AUTHORITY, INDEPENDENT OF SECTION 907.041(4), FLORIDA STATUTES, TO DENY A SUBSEQUENT BOND APPLICATION TO A DEFENDANT WHO VIOLATES A CONDITION OF HIS ORIGINAL BOND BY COMMITTING A NEW CRIMINAL OFFENSE.

While a defendant has a constitutional right to have a reasonable bond following his initial arrest, the defendant who violates a condition of his pretrial release is not entitled to automatic readmission to bond. Once initially released on bond, a defendant's constitutional rights have been satisfied. When the defendant violates a bond condition, he forfeits that bond and the trial court has discretion to revoke it. Florida courts have held that requiring readmission to bond following a subsequent violation of the bond terms is not mandated under the constitution, but is left to the sound discretion of the trial judge. Houser v. Manning, 719 So. 2d 307 (Fla. 3d DCA 1998); Gardner v. Murphy, 402 So. 2d 525 (Fla. 5th DCA 1981).

In the instant matter, the Fourth District Court of Appeal found the dictates of section 907.041(4)(b), Florida Statutes must be met when pretrial release is denied, and because they were not met here, the writ was issued. Rix v. Jenne, 24 Fla. L. Weekly D867 (Fla. 4th DCA March 30, 1999). In so finding, the Fourth District Court of Appeal erred in granting the writ of habeas corpus and remanding Respondent's case to the trial court for consideration of a new bond under section 907.041(4)(b)(4), Florida Statutes after

Respondent had committed new offenses while on bail.

Prior to its 1982 amendment, Article I, section 14 of the Florida Constitution provided:

Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great.

As amended, Article I, section 14 of the Florida Constitution now provides:

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Consistent with this constitutional provision, the criteria to be followed when determining the propriety of bail are included in section 903.046, Florida Statutes (1997) which provides:

(1) The purpose of a bail determination in criminal proceedings is to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant.

(2) When determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the

court shall consider:

(a) The nature and circumstances of the offense charged.

(b) The weight of the evidence against the defendant.

(c) The defendant's family ties, length of residence in the community, employment history, financial resources, and mental condition.

(d) The **defendant's past and present conduct, including any record of convictions**, previous flight to avoid prosecution, or failure to appear at court proceedings. However, any defendant who previously had willfully and knowingly failed to appear and breached a bond as specified in s. 903.26, but who had voluntarily appeared or surrendered, shall not be eligible for a recognizance bond; and any defendant who willfully and knowingly failed to appear and breached a bond as specified in s. 903.26 and who was arrested at any time following forfeiture shall not be eligible for a recognizance bond or for any form of bond which does not require a monetary undertaking or commitment equal to or greater than \$2,000 or twice the value of the monetary commitment or undertaking of the original bond, whichever is greater.

(e) The **nature and probability of danger which the defendant's release poses to the community**.

(f) The source of funds used to post bail.

(g) **Whether the defendant is already**

on release pending resolution of another criminal proceeding or on probation, parole, or other release pending completion of a sentence.

(h) The street value of any drug or controlled substance connected to or involved in the criminal charge. It is the finding and intent of the Legislature that crimes involving drugs and other controlled substances are of serious social concern, that the flight of defendants to avoid prosecution is of similar serious social concern, and that frequently such defendants are able to post monetary bail using the proceeds of their unlawful enterprises to defeat the social utility of pretrial bail. Therefore, the courts should carefully consider the utility and necessity of substantial bail in relation to the street value of the drugs or controlled substances involved.

(i) **The nature and probability of intimidation and danger to victims.**

(j) **Any other facts** that the court considers relevant.

Thus, it would appear this statutory provision gives trial judges discretion in granting or denying pretrial release.

Even in enacting section 907.041, Florida Statutes (1997), the legislature made its intent clear that while there is a presumption that an accused should be granted pretrial release, it is not mandatory.

(1) Legislative intent.--It is the policy of this state that persons committing serious criminal offenses, posing a threat to the

safety of the community or the integrity of the judicial process, or failing to appear at trial be detained upon arrest. However, persons found to meet specified criteria shall be released under certain conditions until proceedings are concluded and adjudication has been determined. The Legislature finds that this policy of pretrial detention and release will assure the detention of those persons posing a threat to society while reducing the costs for incarceration by releasing, until trial, those persons not considered a danger to the community who meet certain criteria. It is the intent of the Legislature that the primary consideration be the protection of the community from risk of physical harm to persons.

(2) Rules of procedure.--Procedures for pretrial release determinations shall be governed by rules adopted by the Supreme Court.

Section 907.041(1) and (2), Florida Statutes (1997) Clearly, pretrial release is contemplated, but such release is not unconditional or unrestricted. Gardner, 402 So. 2d at 526. In fact, this Court, recognized "there are circumstances under which the right to bail in otherwiseailable causes would be forfeited by breach of prior bonds." Ex. Parte McDaniel, 86 Fla. 145, 97 So. 317, 318 (1923). Considering the 1982 version of Article I, section 14, Florida Constitution, the Third District determined the trial court's power to enforce the conditions of the pretrial release or to order revocation of bail was not reduced by the amended constitution. Houser, 719 So. 2d at 310-11. While a trial court must set a reasonable bail for a defendant's initial arrest, the judge has inherent authority to deny bail when his orders are

disregarded. Middleton v. Polk, 399 So. 2d 1105 (Fla. 5th DCA 1981)(where a defendant's conduct "evinces a flagrant disregard of the court's authority or effort of process" the defendant's constitutional right to pretrial release may be forfeited).

A person granted release on bond must abide by certain reasonable conditions, some imposed by statute, and others imposed at the discretion of the trial court. See sections 903.046 and 903.047, Florida Statutes (1997). Should the defendant fail to abide by the conditions of his bail, it may be revoked pursuant to Florida Rule of Criminal Procedure 3.131(g). Hence, pre-trial release is a right which may be forfeited by the subsequent actions of the defendant. As noted by the Fifth District Court of Appeal, "...it is constitutionally permissible to revoke for cause a reasonable bail already granted and to then deny subsequent applications..." Gardner, 402 So. 2d at 526.

Consistent with these provisions, the Third District held that "[o]nce a defendant's bond has been properly revoked for a violation of a bond condition, the question whether to grant any further bond is addressed to the sound discretion of the trial court." Houser, 719 So. 2d at 309. Following Gardner, the court in Houser agreed "[t]here is no reason why a defendant who has committed a new criminal offense while released on bond should then be conditionally released again in a revolving door fashion." Houser, 719 So. 2d at 310 (citation omitted).

The defendant in Houser argued he must be granted bond unless

the State proves the need for pretrial detention under section 907.041. Id. Rejecting this, the Houser court opined:

There is not the slightest indication that the 1982 enactments were intended to cut back on the court's power to enforce bond conditions, and revoke bond where bond conditions have been breached. Indeed, it has been explicitly held that section 907.041 is complementary to, and does not replace, a trial court's already-existing power to deny bail. See State v. Ajim, 565 So.2d 712 (Fla. 4th DCA 1990).

Houser, 719 So. 2d at 310-11. As a result, the Third District found a new bond need not be granted when a defendant's prior bond was revoked due to a violation of the conditions of the pretrial release.

Respondent was on pretrial release in the 95 and 97 cases involving driving under the influence, battery on a law enforcement officer, possession of cocaine, and possession of drug paraphernalia. (Ex. 2, pgs. 2-3 and 5-6). Respondent was charged in the 98 case with driving under the influence and possession of cocaine. (Ex. 2, pgs. 2-3 and 5-6). This criminal history evinces Respondent's disregard for public safety; he is a danger to the community. Based upon this proof, the trial judge had the authority to conclude Respondent should not be on pretrial release.

Relying upon its decision in Merdian v. Cochran, 654 So. 2d 573 (Fla. 4th DCA 1995), the Fourth District Court of Appeal found the State did not comply with section 907.041(4)(b)(4), and as a result, limited the trial court's authority to deny pretrial

release except as provided by that statutory provision. Rix, 24 Fla. L. Weekly at D867. See also, Paul, 24 Fla. L. Weekly at D583. In Merdian, the court was faced with a challenge to the denial of bond where the trial court had not made "any finding that no conditions would protect the community from the risk of physical harm and assure the presence of the petitioner at trial." Merdian, 654 So. 2d at 575. The Fourth District Court of Appeal "Only where no conditions of release can reasonably protect the community from the risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, may the accused be detained. Id. Because there was no proof produced, the order revoking bond was vacated and the matter returned to the trial court. Id. at 576.

In rendering its decision in Metzger v. Cochran, 694 So. 2d 842 (Fla. 4th DCA 1997), the Fourth District found that a determination that a defendant is a danger to the community when he violates his bond conditions was not a sufficient basis for denying pretrial release under Florida Rule of Criminal Procedure 3.131(b)(3), but that section 907.041(4)(b)(4) must also be considered. As a result, Metzger adds an additional burden upon the State, and affords a Defendant more protection than contemplated by either the Florida Rules of Criminal Procedure or the constitution.

In the instant case, the trial court relied upon the prior judge's determination that the Defendant was a danger to the

community due to his continuous criminal activity and did not warrant a bond. (Ex. 2, pgs. 7). Further, the trial court heard the unrefuted statement of the prosecutor that the Defendant had missed a prior court appearance. (Ex. 2, pg. 6). Hence, the trial court concluded correctly Respondent should not be admitted to bond. (Ex. 2, pg 7). Thus, it would appear the order denying bond in this case should have been affirmed under the Merdian line of cases as well as Houser.

Under Houser, a Defendant, on bail at the time he committed a new offense, re-admission to bail would be left to the sound discretion of the trial court. The Fourth District's opinion in the instant case certified conflict with Houser, ordered the trial court to conduct further proceeding consistent with the instant opinion and with Paul v. Jenne, 24 Fla. L. Weekly D581 (Fla. 4th DCA March 3, 1999) in which it had been determined the State must prove always that the defendant meets the criteria of section 907.041(4)(b)(4) before pretrial detention is proper.

In Paul, the Fourth District agreed with Houser that bond may be revoked when a defendant violates his bond, and opined it:

disagree[d] that a trial court has the absolute discretion to deny bond unless a defendant meets the criteria for detention without bond under the pretrial detention statutes. By breaching a condition of the bond originally set by the court, a defendant forfeits the right to continued release under the terms of *that* bond. However, the defendant does not forfeit his or her constitutionally guaranteed right to bail

altogether; a refusal to readmit a defendant to any bail at all must be subjected to the limitations of the pretrial detention statute.

Paul, 24 Fla. L. Weekly at D583 (emphasis in original).

The conclusion drawn in Merdian, its progeny, and reaffirmed in Paul, restricts and reduces the inherent authority of the court to enforce its orders of pretrial conditions, expands the constitutional right of the defendant to pretrial release, and permits the defendant to obtain bail in an ever "revolving door fashion" as cautioned against in Houser. This Court should find, as did the Third District in Houser, and the Fifth District Court of Appeal in Gardner, that a trial court has inherent authority to deny a defendant re-admission to bail when the defendant violates his pretrial release by committing another criminal offense.

CONCLUSION

Wherefore, based on the foregoing, Petitioner requests respectfully this Court approve the reasoning in Houser v. Manning, 719 So. 2d 307 (Fla. 3d DCA 1998), quash Rix v. Jenne, 24 Fla. L. Weekly D867 (Fla. 4th DCA March 30, 1999) and Paul v. Jenne, 24 Fla. L. Weekly D581 (Fla. 4th DA March 3, 1999), and find the trial court may order pretrial detention independent of section 907.041 when a defendant violates a condition of his bond by committing a new criminal offense.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENCE
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Appellant" has been furnished by U.S. Mail to: Steven J. Hammer, Esq., Law Offices of Steven J. Hammer, P.A., 400 South Andrews Avenue, Florida Lauderdale, FL 33301 on this _____ day of April, 1999.

CELIA TERENCE
Assistant Attorney General
Bureau Chief, West Palm Beach

LESLIE T. CAMPBELL
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,266

KEN JENNE, as Sheriff
of Broward County,
Florida, and
STATE OF FLORIDA,

Petitioner,

vs.

BRIAN RIX,

Respondent.

_____ /

INDEX TO APPENDIX

1. Emergency Petition for Writ of Habeas Corpus
2. Transcript of March 16, 1999 hearing
3. Response in Opposition to Emergency
Petition for Writ of Habeas Corpus
4. Order denying Petitioner's request to
supplement the record
5. Opinion