

Franklin County Legal Journal
Vol. 31, No. 31, pages 171 - 175
Commonwealth v. Drake

**Commonwealth of Pennsylvania v.
Charmar Desmond Drake, Defendant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Criminal Action
No. 912-2013

HEADNOTES

Constitutional Law: Right to Bail

1. All prisoners have a right to bail, except those charged with crimes carrying a sentence of death or life in prison without parole or where no condition or combination of conditions can reasonably secure the safety of the community. Pa. Const. art. I § 14.

Constitutional Law: Constitutional Supremacy

1. The Pennsylvania Constitution is the supreme law of Pennsylvania, except as otherwise provided by the United States Constitution or federal law.
2. The Pennsylvania Constitution is superior to procedural rules.
3. The Pennsylvania Supreme Court cannot promulgate a rule of procedure that is inconsistent with the Constitution.

Criminal Law: Speedy Trial: Nominal Bail

1. Except in cases where a defendant is not entitled to bail, a defendant cannot be held in pretrial incarceration for more than 180 days after the criminal complaint is filed.
2. A defendant otherwise entitled to bail who is held in pretrial incarceration for more than 180 days is entitled to release on nominal bail.
3. The Commonwealth failed to show that the defendant was too dangerous to be released on nominal bail under Rule 600 where, though the defendant was charged with serious crimes, the Commonwealth failed to show that no condition or combination of conditions could reasonably ensure the safety of the community.

Appearances:

Steven T. Smith, Esq., Assistant District Attorney

Ian M. Brink, Esq., Counsel for Defendant

MEMORANDUM OPINION

Before Walker, S.J.

The Defendant, Charmar Desmond Drake, moves for nominal bail under Rule 600 because he has been incarcerated for more than 180 days while awaiting trial. The Commonwealth concedes that Drake has been jailed more than 180 days, but argues that the Court should deny bail because Drake is too dangerous to be released on bail. Pa. Const. art. I § 14. Because the Commonwealth has not proved that no conditions other than incarceration would ensure the safety of the community, the Court grants the motion.

Drake is charged with criminal attempt to commit criminal homicide, rape by forcible compulsion, aggravated assault, simple assault, terroristic threats, kidnapping, and false imprisonment.¹ The charges related to an incident between Drake and a former female companion, T.M., that occurred on March 16-17, 2013 at her house in Franklin County.

“Except in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of 180 days from the date on which the complaint is filed[.]” Pa. R.

¹ In order, 18 Pa. C.S. §§ 901 and 2501, 3121(a)(1), 2702(a)(1), 2701(a)(1), 2706(a)(1), 2901(a)(2), 2903(a).

Crim. P. 600(B)(1) (*see* former Rule 600(E)).² A defendant held in pretrial incarceration for more than 180 days is entitled to release on nominal bail. Pa. R. Crim. P. 600(D)(2) (former Rule 600(E)). Under Pennsylvania law, all prisoners are entitled to bail except those (1) charged with a crime that carries a possible sentence of death or life without parole; or (2) where “no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community.” Pa. Const. art. I § 14. Thus, a court may refuse to release a defendant entitled to nominal bail if no conditions other than incarceration would protect the public. *Commonwealth v. Jones*, 899 A.2d 353, 356 (Pa. Super. 2006).

For instance, in *Jones*, the defendant was charged with rape and other sex crimes. He was a fugitive on another rape charge at the time of his arrest, was accused of sexually assaulting a woman who was five months pregnant, and had an “extensive” prior criminal record. *Id.* at 356. The Superior Court held that the trial court properly refused release on nominal bail, noting that “the evidence more than supports the trial court’s conclusion” that only incarceration could protect public safety. *Id.*

Here, the Commonwealth argues that Drake is too dangerous to be released on bail. It argues that Drake is charged with serious crimes. It also provided an “Application for Statement of Charges” from a five-year-old Maryland case in which Drake pleaded guilty to simple assault after being accused of assaulting his girlfriend. Drake argues that Article I § 14 does not supersede Rule 600’s nominal-bail provisions. He also argues that he is not too dangerous to be released on bail.

The Court rejects Drake’s first argument. The Pennsylvania Constitution is the supreme law of this Commonwealth, *see, e.g., Cali v. City of Philadelphia*, 177 A.2d 824, 826 (Pa. 1962), and is therefore superior to the Rules of Criminal Procedure. Just as the General Assembly cannot pass a law that violates the State Constitution, the Supreme Court cannot promulgate a rule of procedure that supersedes a state constitutional provision. Both the old and new Rule 600 implicitly recognize constitutional supremacy. The Rules’ comments state that prisoners ineligible for release under Article I § 14 cannot be released on nominal bail.

The Court accepts Drake’s second argument and agrees that the Commonwealth has not shown that no condition or conditions of bail will reasonably ensure public safety. The Court realizes that Drake is charged with very serious crimes. But the charges are mere accusations—until a guilty plea or conviction at trial. And these charges alone are insufficient grounds to deny bail. Although serious, none of them carries a possible sentence of death or life without parole.

In contrast to *Jones*, the Commonwealth has failed to show that Drake is too dangerous to be bailed. The defendant in *Jones* was a fugitive in another case when arrested. Drake was not. In *Jones*, the prosecution presented evidence that the defendant was dangerous. Here, the Commonwealth has presented only argument and the charging document from the Maryland case. In *Jones*, the defendant had an extensive criminal record which included crimes of violence. Here, the Commonwealth provided evidence of only one prior conviction—and that conviction is not of a crime of violence.³

Nothing in that charging document from the Maryland case shows that bail is insufficient to ensure public safety. The Commonwealth would have the Court rely on the allegations in that case—to which Drake never admitted and which were never proved. The Court takes the *conviction* into account—but not the allegations. (The Maryland case and this one could tend to show that Drake is a danger to his former paramours, but the Court can reasonably ensure the protection of the alleged victim with a no-contact order⁴ and GPS or electronic monitoring.) The evidence from the Maryland case that Drake attempted to flee is speculative at best, and inadmissible hearsay at worst. The Commonwealth has presented no evidence that Drake absconded or missed court dates in this case. Additionally, the Court has reviewed the preliminary hearing transcript, and the victim appears to have serious credibility issues.

Finally, the inability to afford bail is the only thing keeping Drake in prison. If he is too dangerous to be released on \$1.00 bail, then he should have been too dangerous to be released on \$250,000.00 bail. The Commonwealth didn’t ask the magisterial district judge to deny bail, and once bail was set, it never moved to revoke bail in this Court.⁵ Only after enough time passed to entitle Drake to release on a bail-amount he can presumably afford has the Commonwealth raised dangerousness as a ground to deny release.

Drake’s motion to be released on nominal bail under Rule 600 is granted. The Commonwealth has failed to

² Rule 600 was rescinded and re-adopted effective July 1, 2013. The changes are immaterial to this case.

³ Jones was convicted only of the equivalent of simple assault, and simple assault is not a crime of violence. *See* 42 Pa. C.S. § 9714(g).

⁴ The Court will trust Defense counsel to advise his client if the victim continues to have contact with Drake. This case is different from *Commonwealth v. Raiber*, 30 Frank. 235 (2012). There, the defendant was accused of sexually abusing the minor victim inside his own home, ruling out house-arrest as a possible condition of release. Here, the alleged crime occurred inside the victim’s house.

⁵ Compare with *Jones*, in which the Commonwealth petitioned to revoke bail. *Jones*, 899 A.2d at 354.

show that Drake is so dangerous that no condition or combination of conditions can reasonably ensure public safety. Indeed, no evidence suggests that Drake is a danger to the community at large—as opposed to his ex-girlfriend. Of course, the Court will condition release on certain conditions. *See* Pa. R. Crim. P. 600(D)(2) (subjecting nominal-bail release to any lawful non-monetary conditions); *Commonwealth v. Sloan*, 907 A.2d 460, 465-66 (Pa. Super. 2006) (interpreting former Rule 600 to allow imposition of non-monetary conditions when a defendant is released on nominal bail). The conditions of release are set forth in the order.

An order follows.

ORDER OF COURT

AND NOW THIS 23rd DAY OF December, 2013, upon consideration of the Defendant's Motion for Nominal Bail filed November 1, 2013, the letter briefs of the Parties, the record, and the law,

IT IS HEREBY ORDERED THAT the Motion is **GRANTED** as follows.

1. Defendant shall be released on \$1.00 nominal bail;
2. Defendant shall be placed on pretrial release and shall comply with all conditions thereof;
3. Defendant shall be placed under house arrest and GPS monitoring;
4. Defendant may not leave his place of residence except for work, medical appointments, or court appearances;
5. Defendant shall pay any hookup fee and any costs and fees associated with monitoring;
6. Defendant shall have no contact with the alleged victim, Tabitha Martinez;
7. As a condition of release, Defendant is prohibited from possessing, owning, using, controlling firearms or attempting to do the same;
8. Costs of transporting the Defendant from the Jail to the Courthouse to execute the bail bond shall be borne by Franklin County and added to the costs; and
9. All other costs shall be borne by the County and taxed to the Defendant.

Defendant may be refused release unless and until he is able to comply with all of the above conditions. Violation of any of the conditions of bail is grounds for revocation of bail.

Pursuant to Pa. R. Crim. P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.