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FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
)
Plaintiff,)
)
vs)
)
SANDY BERNARDO QUEMADO,)
)
Defendant.)
_____)

TRAFFIC CASE NO. 09-01399-TR
DPS CITATION NO. 72028

ORDER GRANTING STAY

THIS MATTER came before the Court on June 1, 2011 at 10:00 a.m. in Courtroom 220A for a restitution and post-trial motion hearing. The Government was represented by Assistant Attorney Generals Eileen Escudero-Wisor and Tiberius Mocu. The Defendant, Sandy B. Quemado, appeared out of custody with Assistant Public Defender Richard Miller and translator Ms. Viola Flor.

I. Restitution.

At the outset, the Commonwealth informed the Court that based on the information received from the victim's counsel, the victim would not be seeking restitution in this traffic case, but instead, would be pursuing her rights civilly. 6 CMC § 4109(f). Accordingly, no restitution amount was assessed in this case.

II. Defendant's Motion to Stay Execution of Sentence of Imprisonment and Fines.

Defendant Quemado was arrested on August 30, 2009, at the scene of the crash with Maria D. Agon.

*ACO
PDD*

He was released on that same day on his own recognizance. He has been on pretrial release throughout the pendency of this traffic case.

On March 31, 2011, the Court found the Defendant guilty of the offenses of reckless driving involving property and bodily injury, and driving while under the influence of alcohol (DUI) after a bench trial. The reckless driving conviction subjected the Defendant to a mandatory minimum sentence of thirty days imprisonment, and the DUI conviction subjected the Defendant to a mandatory minimum sentence of three days imprisonment. The matter was set for a sentencing hearing, and the Defendant remained out of custody on his own recognizance.

On May 18, 2011, the Court orally pronounced sentence as follows: For the offense of reckless driving, Defendant was sentenced to serve six months imprisonment, all suspended except for thirty days to serve, and ordered to pay a fine of \$100. For the offense of DUI, Defendant was sentenced to serve one year imprisonment, all suspended except for three days to serve, and ordered to pay a fine of \$500. Defendant was also ordered to pay the court assessment fee of \$25 within 30 days, and the probation fee of \$100 per annum. Defendant was placed on probation for a period of eighteen months, and ordered to perform certain conditions. Defendant was not remanded into custody after the trial or the pronouncement of sentence. At the conclusion of the pronouncement of sentence, Defendant made an oral motion to stay execution of sentence. The Court denied the motion without prejudice in order to allow a written motion to be filed. *See Commonwealth v. Martinez*, 4 NMI 18, 21-22 (1993). The matter was then set for a restitution hearing and a post-trial motion hearing.

On May 24, 2011, Defendant filed his written motion for stay of execution of sentence. The Commonwealth filed its opposition to the motion on May 26, 2011, and Defendant filed his reply on May 31, 2011. The notice of appeal was filed on May 26, 2011.

A. *Analysis*

Rule 38 of the Commonwealth Rules of Criminal Procedure entitled “Stay of Execution, and Relief Pending Review” provides for a stay of execution if an appeal is taken. It states:

(a) Stay of Execution.

...

- (2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken *and the defendant is released pending disposition of appeal*. If not stayed, the court may recommend to the Attorney General that the defendant be retained under conditions, and at a place, which permit the defendant to assist in the preparation of his/her appeal to the court of appeals.
- (3) Fine. A sentence to pay a fine or fine and costs, if an appeal is taken, may be stayed. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the trial court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to retrain the defendant from dissipating his/her assets.
- (4) Probation. An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed, the court shall fix the terms of the stay.

NMI R. Crim. P. 38(a)(2),(3),(4) (emphasis added). Defendant has moved for a stay of execution of the sentence of imprisonment and fines, but did not move to stay the sentence placing him on probation.

The Commonwealth opposes the motion to stay and asserts that Defendant has failed to satisfy the requirements of Rule 46(c) of the Commonwealth Rules of Criminal Procedure, which governs Defendant’s release from custody pending sentence and appeal. It contends that satisfaction of Rule 46(c) conditions of release is antecedent for a stay of relief under Rule 38(a)(2)¹ because Rule 38(a)(2) requires the showing that the defendant “is released pending disposition of appeal.”

¹ See “Motion to Oppose Stay of Execution of Sentence Pending Appeal” (May 26, 2011) (“Opposition”) at 1-2.

Rule 46(c) of the Commonwealth Rules of Criminal Procedure states as follows:

Pending Sentence and Notice of Appeal. A person who has been convicted of an offense and is either awaiting sentence or has filed an appeal shall be treated in accordance with the provisions of Rule 46(a)(1) through (6) above, unless the court has reason to believe that no one or more conditions of release will reasonably ensure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained.

NMI R. Crim. P. 46(c). Rule 46 in general dictates when a defendant may be released on bail while a case is pending. Rule 46(a)(1) through (6) apply to a person who is released prior to trial. Rule 46(b) determines when a person may continue to be on release during trial. Rule 46(c) applies to a person who has been convicted of an offense and is either awaiting sentence or has filed an appeal. A person, therefore, who has been convicted of an offense and is either awaiting sentence or has filed an appeal is to be released under the same conditions as if he were awaiting trial unless one of the four circumstances is present. *See Leary v. United States*, 431 F.2d 85, 87 (5th Cir. 1970).²

In its opposition, the Commonwealth argues that Defendant poses a danger to others and to the community, and that his appeal is frivolous in that it does not raise a substantial question of law or fact likely

² Our Commonwealth Supreme Court interpreted Rule 46(c) as containing three factors that determine whether a defendant is eligible for release pending appeal. *Commonwealth v. Blas*, 2004 MP 26. It stated that it is defendant's burden of establishing that:

- (1) he will not flee the jurisdiction or pose a danger to any other person or to the community;
- (2) the appeal is not taken for purpose of delay; and
- (3) the appeal raises a substantial question of law or fact likely to result in reversal or in an order for a new trial.

Blas at ¶ 5. As counsel for the Commonwealth noted at the motion hearing, the *Blas* Court was interpreting Com. R. App. P. 9(c), the Commonwealth's appellate rule. It provides the appellate court's criteria for determining whether to issue a stay of sentence pending appeal. It is based on the post-1984, Rule 9(c) of the Federal Rules of Appellate Procedure. *Blas* at ¶ 8 citing *United States v. Handy*, 761 F.2d 1279, 1282-1283 (9th Cir. 1985) ("In 1984 the more liberal standard was in turn abandoned. In its place Congress once again adopted a "substantial question" test. By reenacting the "substantial question" standard, the Bail Reform Act of 1984 reintroduced the stricter standard that had been applicable prior to the adoption, in 1956, of the "frivolous" test.) The Commonwealth's Rules of Criminal Procedure governing the trial court took effect on September 15, 1996. It is based on the post-1956 but pre-1984 version of the federal rules of criminal procedure and later title 18 U.S.C. § 3148. It has been interpreted as a "new standard [that] allowed for bail as long as an appeal presented a question that was not "frivolous." For a historical review of the federal standard for bail pending appeal, see *United States v. Austin*, 614 F.Supp. 1208 (D. N.M. 1985). This discrepancy in the court rules creates some confusion in reviewing the appropriate criteria, especially when the "frivolous" standard is a lesser burden to prove than the "substantial question of law or fact likely to result in reversal or in an order for a new trial."

to result in a reversal or in an order for a new trial. (Opposition at 4). The Commonwealth does not however assert that Defendant will flee to avoid sentence or that the appeal is taken for delay. (Opposition at 5).

In this case, Defendant Quemado was released from custody prior to trial, during trial, and after the trial. After the pronouncement of the prison sentence on May 18, 2011, Defendant remained released without a reporting date to the Department of Corrections to begin serving his prison sentence. This effectively was the Court's issuance of a brief stay to allow Defendant to perfect his motion to stay imposition of sentence.³ Additionally, the Commonwealth did not move to remand Defendant into custody.

At the conclusion of the motion hearing, the Court ordered that Defendant report to the Department of Corrections to immediately begin serving his prison sentence. This pronouncement was to perfect the imposition of the prison sentence to include a time certain to serve the unsuspended portion of the original sentence. At no point did the Court ever declare that Defendant be released pending disposition of appeal. Nevertheless, the Court thereafter addressed Defendant's motion, and after reviewing the briefs and listening to the arguments of counsel, GRANTED Defendant's motion to stay.

The Court finds that under Rule 46(c), Defendant is entitled to remain released pending appeal. The following facts support a finding that he will not flee or pose a danger to any other person or to the community.⁴ First, Defendant has made constant court appearances throughout the 18 months the case has been pending, and has received a relatively light prison sentence. Second, Defendant has been living in the Commonwealth for almost twenty years where he has a job and supports his four children. Third, Defendant does not pose a danger to the community merely from this traffic conviction. Defendant has not been charged with any new traffic or criminal case since the crash, and does not have an extensive history with the criminal justice system. Finally, Defendant's appeal is not seen as being frivolous or taken for delay.

³ See "Judgment and Commitment Order" at 2, fn. 1 (May 18, 2011).

⁴ The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant. *United States v. Austin*, 614 F.Supp. 1208 (D. N.M. 1985) *Gov't of the Virgin Islands v. Brown*, 1981 U.S. Dist. LEXIS 9332; 18 V.I. 469 (1981).

Although the Court is satisfied that the Commonwealth has met its burden of proving the two charges beyond a reasonable doubt, the Court cannot say that Defendant's appeal is necessarily frivolous. *Fiano v. United States*, 259 F.2d 135 (9th Cir. 1958). In particular, Defendant has consistently disputed the Commonwealth's ability to present evidence of the concentration of alcohol in his breath *at the time alleged* as determined by analysis of the person's breath. See 9 CMC §§ 7107(a) and 7105(a)(1) (emphasis added). Defendant contends, and the Court agrees, that the "time alleged" is the time Defendant was driving or in operation of his vehicle. The evidence received at trial, over Defendant's objection, was Defendant's B.A.C. nearly two hours after the crash. For these reason, the Court does not find Defendant's appeal to be frivolous. Accordingly, the Court finds Defendant is entitled to be released on bail (on his own recognizance) pursuant to Rule 46(c).

Given the fact that Defendant filed his notice of appeal on May 26, 2011, and has been on release continuously, the Court hereby GRANTS Defendant's motion to stay the sentence of imprisonment pursuant to NMI R. Crim. P. 38(a) pending appeal.

III. Conclusion.

Based on the foregoing,

1. Defendant's motion to stay execution of his prison sentence pursuant to NMI R. Crim. P. 38(a)(2) is GRANTED. Defendant shall remain released from custody pending his appeal pursuant to NMI R. Crim. P. 46(c).
2. Defendant's motion to stay the execution of sentence to pay a fine pursuant to NMI R. Crim. P. 38(a)(3) is granted with conditions. Defendant shall deposit the whole fine of \$600 to the Clerk of Court. He may pay this amount at partial payments of \$150 per month beginning June 30, 2011.
3. Defendant is ordered to report to the Office of Adult Probation no later than June 30, 2011 to begin performing all other conditions of his suspended sentence.
4. A review hearing is hereby set for October 3, 2011 at 1:30 p.m. Defendant is ordered to appear.

SO ORDERED this 15th day of June, 2011



RAMONA V. MANGLONA, Associate Judge