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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of :)
)
Amendment of Rules 4.2, 7.2,) SUPREME COURT
7.4, 27.7, and 31.6, Rules of) No. R-07-0003
Criminal Procedure)
) COMMENT
_____)

The Arizona Prosecuting Attorneys' Advisory Council, by and through its Executive Director, Edwin M. Cook, files the following comment to the proposed amendment of Rules 4.2, 7.2, 7.4, 27.7, and 31.6, Rules of Criminal Procedure. The Council supports efforts to clarify the procedures to be followed in determining whether bail should be allowed and the roles and responsibilities of the various participants during the initial appearance hearing and subsequent proceedings. However, the Council opposes the imposition of a new burden of proof by way of a criminal rule that is applicable to the state's evidence offered to determine whether a person has entered or remained in the United States unlawfully.

Burden of Proof

Specifically, the proposed amendment to Rule 7.2, new subsection (b), requires the state to prove that a person entered or remained in the United

States illegally by a standard of proof evident, presumption great. That standard of proof does not appear in the amendment to the Arizona Constitution recently enacted by the voters in Proposition 100, nor does it appear in the related statute, A.R.S. § 13-3961(A)(5). That standard of proof also differs from the “clear and convincing” standard required for the narrow category of persons who pose “a substantial danger to another person or the community or engaged in conduct constituting a violent offense, that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community.” See, A.R.S. § 13-3961(C).

Moreover, a careful reading of Article II, Section 22 of the Arizona Constitution and A.R.S. § 13-3961, reveals clear legislative and voter direction about the requirement of “proof evident, presumption great” in cases where a person may not be admitted to bail. The “proof evident, presumption great” standard is only used with respect to the proof of the elements of the crime committed. For the three subsections that require proof of circumstances in addition to the elements of the offense, both the Arizona Constitution and A.R.S. § 13-3961 are silent as to the standard of proof for the additional circumstances for two of the subsections and articulate a different standard of proof, the standard of clear and convincing, for the third subsection:

- 1) Felony offenses committed when the person charged is already admitted to bail on a separate felony charge *and were the proof is evident or the presumption great as to the present charge*

[emphasis added]. A.R.S. Const. Art.2, § 22(A)(2).

2) For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally *and if the proof is evident or the presumption great as to the present charge* [emphasis added]. A.R.S. Const. Art.2, § 22(A)(4).

A serious felony offense if the person has entered or remained in the United States illegally. For the purposes of this paragraph, 'serious felony offense' means any class 1, 2, 3 or 4 felony or any violation of A.R.S. § 28-1383. A.R.S. § 13-3961(A)(5).

3) Felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community *and if the proof is evident or the presumption great as to the present charge* [emphasis added]. A.R.S. Const. Art.2, § 22(A)(3).

A person who is in custody shall not be admitted to bail if the person is charged with a felony offense and ... the court finds after a hearing on the matter *that there is clear and convincing evidence*

that the person charged poses a substantial danger to another person or the community or engaged in conduct constituting a violent offense, that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the of the person or the community *and that the proof is evident or the presumption great that the person committed the offense for which the person is charged* [emphasis added]. A.R.S. § 13-3961(C).

Despite the fact that the legislature had the opportunity to designate a specific standard of proof for all of the subsections that required evidence in addition to evidence of the elements of the offense, as illustrated above, the legislature chose not do so except for the subsection that describes a narrow category of accused persons in A.R.S. § 13-3961(C). The court should not, on its own, adopt a rule that creates a new burden of proof that is higher than the standard set forth in *Riverside v. McLaughlin*, 500 U.S. 44 (1991). Unless expressly stated otherwise, the *Riverside* standard of proof for evidence to hold a person in custody is the standard of probable cause. *Id*; see also, Rule 4.2(a)(4), Rules of Criminal Procedure.

Therefore, until the Legislature expressly adopts a different standard of proof, the correct standard of proof to prove that a person entered or remained in the United States illegally or to prove that a person charged was already admitted to bail on a separate felony – is the standard of probable cause.

Rule 4.2

Based on the argument above that admission to bail must be determined by the provisions of both the Arizona Constitution and any related statutes, the Council takes the position that the reference to A.R.S. § 13-3961 be deleted as unnecessary or be supplemented with a reference to Article 2, Section 22 of the Arizona Constitution.

Also of concern is the nature of the evidence to be presented at the Initial Appearance hearing. Historically, magistrates have relied upon information contained in the Form IV, both the section completed by law enforcement and the section completed by the magistrate or pretrial services agency. That information, along with information provided in person or in writing by others including defense attorneys, prosecutors, and victims has been sufficient to assist the magistrate in making an appropriate decision about release. Requiring that information to meet formal foundational and hearsay standards would preclude a defense attorney from advising the court about a possible third party release candidate or a prosecutor from advising the court about a threat made against the victim during booking unless testimony or documentation could be located in support.

The Initial Appearance hearing is not an adversarial proceeding. *State v. Cook*, 150 Ariz. 470, 74 P.2d 556 (1986). To make it so would result in release decisions based on insufficient information to the detriment of the court, the defendants, the victims, and the community.

Rule 7.2

Again, the Council takes the position that any reference to admission to bail pursuant to A.R.S. § 13-3961 should be deleted or be supplemented with a reference to Article 2, Section 22 of the Arizona Constitution.

As outlined above, the Council disagrees with the proposed burden of proof in the proposed Rule 7.2(b) and asks that the standard be revised to the correct legal standard of probable cause.

Rule 7.4

The Council agrees with the change to proposed Rule 7.4 that expressly allows any party to move for reexamination of the conditions of release. The outdated language referring only to a person remaining in custody has been the source of confusion for prosecutors attempting to assert rights on behalf of victims.

The Council also appreciates the expansion of the deadline for a hearing to reexamine a decision to hold a defendant without bail. Recognition of a victim's right to adequate notice of release hearings is an important component of victims rights.

Finally, the proposal to require the party who desires a reexamination of release conditions to file a motion in writing recognizes the resource issues and impracticality of attempting to automatically require a hearing within twenty-four hours of the Initial Appearance Hearing. Unnecessary hearings were scheduled for defendants who would have been released a short while later after the prosecutor's office declined to file charges. Hearings were also scheduled for

persons whose high bonds would have kept them in custody anyway and, given a choice, might not have requested a hearing. In fact, the proposed rules do not prevent magistrates at the Initial Appearance hearings from saving additional resources by setting bonds in the alternative for persons who are initially held non-bondable. That way, defendants can better gauge whether to ask for a reexamination hearing pursuant to Rule 7.4.

Rules 27.7 and 31.6

The Council has no comment about the proposed changes to Rules 27.7 and 31.6. Those changes appear to be technical and conforming in nature.

Respectfully submitted this 12th day of June, 2007.

EDWIN M. COOK
Executive Director
Arizona Prosecuting Attorneys' Advisory Council

Copies of the foregoing have
been hand delivered this
12th day of June, 2007, to:

Clerk of Supreme Court
Arizona Supreme Court

David K. Byers, Director
Administrative Office of the Courts

EXHIBIT A

ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 4. Initial Appearance and Arraignment

Rule 4.2. Initial appearance

a. In General. At the suspect's initial appearance, the magistrate shall:

(1) Ascertain the suspect's true name and address and, if necessary, amend the formal charges to reflect it, and instruct the suspect to notify the court promptly of any change of address;

(2) Inform the defendant of the charges;

(3) Inform the defendant of the right to counsel and the right to remain silent;

(4) Determine whether probable cause exists for the purpose of release from custody. If no probable cause is found, the defendant shall immediately be released from custody;

(5) Appoint counsel if the suspect is eligible for and requests appointed counsel under Rule 6;

(6) Consider comments offered by the victim concerning the conditions of release. The magistrate shall permit the victim to comments, orally or in writing, on the issue of the suspect's release;

(7) Determine the conditions of release in accordance with Rule 7.2 including a determination of whether the defendant is non-bailable pursuant to A.R.S. § 13-3961 and Article 2, Section 22, Arizona Constitution; and

(8) For summoned defendants charged with a felony offense, a violation of Title 13, Chapter 14, or Title 28, Chapter 4, or a domestic violence offense as defined in § 13-3601 the court shall order that the defendant be fingerprinted at a designated time and place if it appears that the defendant was not previously fingerprinted.

b. Misdemeanors: Felonies Charged by Indictment. When a suspect charged with a misdemeanor or indicted for a felony is brought before a magistrate for defendant's initial appearance, defendant may, in addition to the procedures set forth in Section (a), be arraigned in the manner prescribed by Rule 14, if counsel is present or waived. If the appearance is before a magistrate without jurisdiction to try the offense, the magistrate shall transfer the case to the proper court for

arraignment. If the court finds that delay of the arraignment is indispensable to the interests of justice, the court shall provide sufficient time for notice pursuant to Rule 39 (b) (2) when setting a date and time for the continued arraignment.

c. Felonies Charged by Complaint. When a suspect is charged in a complaint, the magistrate shall, in addition to the procedures required by Section (a);

(1) Inform the suspect of the right to a preliminary hearing and the procedures by which that right may be waived; and

(2) Unless waived, set the time for a preliminary hearing in accordance with Rule 5.1.

Rule 7. Release

Rule 7.2. Right to release

a. Before Conviction; Persons Charged With an Offense Bailable as a Matter of Right. Any person charged with an offense bailable as a matter of right shall be released pending or during trial on the person's own recognizance, unless the court determines, in its discretion, that such a release will not reasonably assure the person's appearance as required. If such a determination is made, the court may impose the least onerous condition or conditions contained in Rule 7.3 (b) which will reasonably assure the person's appearance.

b. Before Conviction; Persons Charged With an Offense Not Bailable as a Matter of Right. A person shall not be released on bail if the court finds the person is not bailable pursuant to A.R.S. § 13-3961 or Article 2, Section 22, Arizona Constitution. The court must find proof evident, presumption great that the person committed the crime charged. If the allegation also involves A.R.S. § 13-3961 (A) (5), or Article 2, Section 22(A)(2) or (A)(4) the person shall not be considered bailable if the court finds probable cause that ~~the proof is evident or the presumption great that~~ the person committed a serious offense and ~~that the proof is evident or the presumption great~~ that the person entered or remained in the United States illegally or that the person committed a felony offense while already admitted to bail on a separate charge.

Comment

This subsection may need to be revised if legislation is adopted changing the standard of proof in A.R.S. § 13-3961.

b c. After Conviction

(1) Superior Court. After a person has been convicted of any offense for which the person will in all reasonable probability suffer a sentence of imprisonment, the person shall not be released on bail or on ~~his or her~~ the person's own recognizance unless it is established that there are reasonable grounds to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in any post-conviction proceeding. The release of a person pending appeal shall be revoked if the person fails to prosecute the appeal diligently.

(2) Limited Jurisdiction Courts.

(A) Conditions of Release Upon Appeal. After a defendant has been convicted of any offense for which a sentence of incarceration has been imposed, upon filing of a timely notice of appeal, the defendant shall remain, pending appeal, under the same release conditions imposed at or subsequent to the time of the defendant's initial appearance or arraignment, except as provided in this subsection ~~(b)~~ (c) (2). The release of the defendant pending appeal shall be revoked if the defendant fails to prosecute the appeal diligently. A defendant held in custody pending appeal shall be released in the event the defendant's sentence is completed before the appeal has been decided.

(B) Motion to Amend Conditions of Release. Upon the filing of a timely notice of appeal, the state, or the court on its own motion, may move to amend the conditions of release when it appears there is a substantial risk that:

(i) the defendant presents a danger to any person or the community; or

(ii) the defendant is unlikely to return to court if subsequently ordered to appear on the particular matter.

(C) Hearing. The court shall set a hearing on such an application within three days of the filing of the motion. Such hearing may be continued for good cause shown. The defendant may be detained pending the hearing. At the hearing, which shall be on the record, the defendant is entitled to representation by counsel. Any testimony of the defendant shall not be admissible in other proceedings except as it may relate to compliance with prior conditions of release, perjury, or impeachment.

(D) Findings. Based on findings stated on the record, the court may amend the conditions of release in accordance with Rule 7.3. In determining the method of release or the amount of bail, the judicial officer shall, on the basis of available information, consider the nature and circumstances of the offense, family or local ties, employment, financial resources, character and mental condition, the length of residence in the community, the record of arrests, convictions, and appearances at court proceedings, views of the victim, weight of the evidence, results of any drug tests, whether the accused has entered or remained in the

United States illegally, whether the accused's residence is in this state, in another state or outside the United States, and any other factor provided by law.

(E) Superior Court Review. If the trial court enters an order setting a bond or requiring incarceration while the appeal is taken, the defendant may petition the superior court, at any time after such order is entered, to stay the execution of sentence and to allow the defendant to be released without bond or to require a lower bond.

e d. Burden of Proof. Issues under Rules 7.2 (a) and ~~(b)~~ (c) shall be determined by the preponderance of the evidence. Issues under Rule 7.2 (b) shall be determined by the burden of proof set forth in that paragraph. The prosecutor shall bear the burden of establishing factual issues under Rule 7.2 (a), (b) and ~~(b)~~ (c) (2), ~~†~~The defendant shall bear the burden of establishing factual issues under Rule 7.2 ~~(b)~~ (c) (1).

Rule 7.4. Procedure

a. Initial Decision. At the initial appearance before a magistrate, a determination of the conditions of release shall be made. The court shall issue an order containing the conditions of release and shall inform the accused of the conditions, the possible consequences of their violation, and that a warrant for his or her arrest may be issued immediately upon report of a violation.

b. Subsequent Review of Conditions. Any ~~person remaining in custody~~ party may in writing move for reexamination of the conditions of release whenever the ~~person's~~ case is transferred to a different court or the motion alleges the existence of material facts not previously presented to the court. The court may, on motion of the ~~defendant~~ party, or on its own initiative, reexamine or modify the conditions of release after giving the parties an opportunity to respond to the proposed modification. The motion shall comply with the requirements of this rule, Rule 35 and Rule 39. If the motion involves whether the person shall be held without bail, a hearing on the motion shall be held on the record before a magistrate as soon as practicable but no later than seven days after filing of the motion.

c. Evidence. Release determinations under this rule may be based on evidence not admissible under the rules of evidence.

d. Review of Bond. The court before which a misdemeanor is pending shall, no more than 10 days after arraignment, review the case file concerning the conditions of release of any defendant held in custody on bond for the purpose of determining the propriety of amending the conditions of release.

Rule 27.7. Initial appearance after arrest

When a probationer is arrested on a warrant issued under Rule 27.5 (b), his or her probation officer, if any, shall be notified immediately, and the probationer shall be taken without unreasonable delay before the court from which the warrant was issued, who shall advise the probationer of his or her rights to counsel under Rule 6, inform the probationer that any statement he or she makes prior to the hearing may be used against him or her, set the date of the revocation hearing, and make a release determination under Rule 7.2 ~~(b)~~ (c).

Rule 31.6. Stay of execution of sentence and credit pending appeal

A sentence of imprisonment shall be stayed pending appeal when the defendant is released in accordance with Rule 7.2 ~~(b)~~ (c). A defendant who remains in custody during the pendency of an appeal shall receive the same benefits as if no appeal has been taken.

A sentence to pay a fine or restitution shall be stayed pending appeal.