State of Wisconsin: Circuit Court: Dane County:

State of Wisconsin,

Plaintiff,

v. Case No. 2010CT000136

Vladimir Sonin,

Defendant.

Motion for Release Pending Appeal

The defendant, Vladimir Sonin (hereinafter referred to as "Sonin") was convicted of operating under the influence of alcohol and was sentenced to 65 days in jail by the court. Sonin timely filed a notice of intent to pursue post-conviction relief. He now asks the court to stay his jail sentence pending appeal.

As will be set forth in more detail below, virtually every statutory factor weighs heavily in Sonin's favor (he is not likely to flee, he is not likely to commit a serious crime, etc.). Although the statute implicitly permits the court to consider Sonin's likelihood of success on appeal, in virtually every misdemeanor case, due process requires that the sentence be stayed pending appeal.

A. The statutory factors weigh heavily in Sonin's favor.

Sec. 969.01(2)(b), STATS., provides that, "In misdemeanors, release may be allowed upon appeal in the discretion of the trial court." Further, sec. 809.31, STATS., guides the trial court's discretion in that respect. That section provides:

> **809.31 Rule (Release on bond pending seeking postconviction relief).**
>
> (1) A defendant convicted of a misdemeanor or felony who is seeking relief from a conviction and sentence of imprisonment or to the intensive sanctions program and who

seeks release on bond pending a determination of a motion or appeal shall file in the trial court a motion seeking release.

(2) The trial court shall promptly hold a hearing on the motion of the defendant, determine the motion by order and state the grounds for the order.

(3) Release may be granted if the court finds that:

(a) There is no substantial risk the appellant will not appear to answer the judgment following the conclusion of postconviction proceedings;

(b) The defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice;

(c) The defendant will promptly prosecute postconviction proceedings; and

(d) The postconviction proceedings are not taken for purposes of delay.

(4) In making the determination on the motion, the court shall take into consideration the nature of the crime, the length of sentence and other factors relevant to pretrial release.

(5) The defendant or the state may seek review of the order of the trial court by filing a petition in the court. The procedures in s. 809.50 govern the petition.

(6) The court ordering release shall require the defendant to post a bond in accordance with s. 969.09 and may impose other terms and conditions. The defendant shall file the bond in the trial court.

Here, Sonin is a long-time resident of the Milwaukee area and he is employed full-time as an over-the-road trucker. He performed well while on pretrial release.

Further, there is no evidence that Sonin will fail to timely prosecute his appeal. He has timely filed his notice of intent to pursue post-conviction relief and he has retained counsel with experience in the appellate courts of Wisconsin.

Finally, there is no evidence that Sonin will commit a serious crime while the appeal is pending. The term “serious crime”, as used in Chapter 809, STATS., is not

defined. Certainly the term is open to personal interpretation. Generally, though, “serious crimes” are classified by the legislature as felonies. Sonin has no felony convictions on his record. His only record of criminal convictions are for operating under the influence of alcohol.

The statutory factor of whether the appeal is taken for the purpose of delay will be addressed in the following section insofar as it relates to the likelihood of success on appeal.

B. The failure to provide release pending appeal in a misdemeanor case will, in almost every case, violate the defendant’s due process rights where the denial is based upon the trial court’s assessment of the defendant’s likelihood of success on the merits.

Although not expressly stated by the statute, implicit in sec. 809.31, STATS., is the idea that the trial court may consider the merits of the underlying appeal.

That conclusion is . . . . . supported by an examination of the rationale underlying release on bail pending appeal. A person convicted of a felony has lost the presumption of innocence and, if imprisoned, his right to unfettered liberty. The possibility of release on bail pending appeal exists to protect against the risk that a defendant whose conviction is ultimately reversed will have been irreparably injured by imprisonment pending appeal. That injury only occurs, however, if the defendant's conviction is reversed. The likelihood that an appeal will be successful is, therefore, a necessary consideration in determining whether a defendant should be released on bail pending appeal. If the defendant is not likely to succeed on the merits of the appeal, the risk of irreparable injury is minimal and the justification for release on bail pending appeal is not present. (emphasis provided).

State v. Salmon, 163 Wis.2d 369, 373, 471 N.W.2d 286, 288 (Ct.App.1991). .

To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. It has been said that the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay. In other words, more of one factor excuses less of the other. Griepentrog, 945 F.2d at 153. However, the movant is always required to

demonstrate more than the mere "possibility" of success on the merits.
State v. Gudenschwager, 191 Wis.2d 431, 529 N.W.2d 225, 229 (Wis. 1995).

The first step in this part of the analysis, then, is to determine the “amount of irreparable injury” Sonin will suffer in the event of a reversal where no stay is granted. That “injury” was identified by the court in *Salmon* as being imprisonment for a conviction which is unmerited. This, of course, is the very evil our entire system of justice is designed to avoid. As early as 1859 the courts articulated in, *Carpenter v. County of Dane*, 9 Wis. 274 (1859), that “[S]urely the citizens of a county are vitally more interested in saving an innocent man from unmerited punishment than in the conviction of a guilty one.” This principle is rooted in the Fifth Amendment to the United States Constitution which provides that, “No person shall be . . . deprived of life, liberty, or property, without due process of law.”

Wisconsin has created the statutory right to appeal a criminal conviction-including the right to appeal a misdemeanor conviction. Because Wisconsin has created such a right, that procedure must comply with the requirements of due process. *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956).

The United States Supreme Court has consistently invalidated any practice, such as more severe sentencing after a successful appeal, which has the effect of discouraging a criminal defendant from exercising his right to appeal. For example, in, *North Carolina v. Pearce*, 395 U.S. 711 (1969) the Supreme Court emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725. The court emphasized that a "defendant's exercise of a right of appeal must be free and unfettered," even though the right to an appeal is purely statutory. *Pearce*, 395 U.S. at 724-726.

Here, if the court were to deny release to Sonin pending appeal, it would have a far more chilling effect upon the defendant’s exercise of his right to appeal than does the nebulous potentiality of vindictive prosecution in the event of a reversal. In virtually every misdemeanor case the defendant will have served his entire jail sentence by the time the appellate procedure is completed. This, of course, leads to the question: What

is the point of appealing if the defendant must serve his sentence anyway? Obviously, the vast majority of misdemeanor defendants will conclude that there is, in fact, no point in appealing regardless of the merits of their issues. This goes beyond a "chilling effect". It makes the "right" to appeal a misdemeanor conviction totally meaningless- a hollow right. Due process requires that the right to appeal not be rendered meaningless. *Griffin*, 351 U.S. at 18 (1956).

To be sure, the community has an interest in swift and efficient prosecution of persons who violate the law and it may not be efficient to release a defendant pending an appeal in a misdemeanor case; but speed and efficiency are not to be elevated over fundamental rights. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

Clearly, then, the only circumstance where a trial court would be justified in denying a misdemeanor defendant release pending appeal would be where the trial court could say with confidence that the defendant has virtually no chance of success on appeal (i.e. where the appeal is taken solely for the purpose of delay). This would be the situation where, for example, counsel is appointed by the State Public Defender and would be obligated to file a no merit brief. Appointed counsel may file a no merit brief only where a conscientious review of the record reveals that all issues are "wholly frivolous." *Anders v. California* 386 U.S. 738 (1967).

For these reasons, it is respectfully requested that the trial court grant Sonin release pending appeal.

Dated at Milwaukee, Wisconsin, this _____ day of _____. 2011:

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