

In the Court of Appeals of the State of Alaska

Jake Wagner,

Appellant,

v.

State of Alaska,

Appellee.

Court of Appeals No. **A-13769**

Order

Date of Order: **1/14/2021**

Trial Court Case No. **2NO-20-00090CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Jake Wagner appeals the bail order in this case. For the reasons explained here, we remand this case to the trial court and direct the court to hold a new bail hearing at which it approves electronic monitoring and reconsiders the amount of monetary bail.

Wagner is charged with three counts of first-degree sexual abuse of a minor, one count of attempted first-degree sexual abuse of a minor, and two counts of third-degree misconduct involving a controlled substance for conduct involving M.O., a seventeen-year-old foster child in his care. He is accused of engaging in sexual penetration with M.O. and providing her with alcohol and marijuana. Wagner is fifty-six years old. He has no prior convictions.

At the time of the charged offenses, M.O. was living in Nome with Wagner; Wagner's wife of over two decades, Sandra Wagner; Sandra Wagner's twenty-seven-year-old daughter and her young daughter; and M.O.'s three younger siblings. According to the complaint, M.O. disclosed the sexual relationship to Sandra Wagner's daughter; M.O. also stated that she liked Wagner and enjoyed their sexual interactions. Wagner's daughter told her mother about the alleged abuse, and Sandra Wagner confronted Wagner and then made a report to the Office of Children's Services. M.O. was subsequently interviewed by a multi-disciplinary team, including law enforcement;

she described several sexual encounters with Wagner and reported that Wagner had told her not to disclose their sexual relationship.

When Sandra confronted Wagner, he denied that he had engaged in any sexual conduct with M.O., and he left town and flew to Oregon. Sandra asked him to return to Nome and turn himself in, and Wagner agreed. When Wagner arrived in Anchorage and was awaiting his connecting flight to Nome, he notified the Nome police of his forthcoming arrival — and law enforcement arrested Wagner on the plane in Anchorage.

At Wagner's felony first appearance in Anchorage, bail was set at a \$50,000 cash performance bond. The court ordered Wagner not to have any contact with M.O.

Wagner remains in custody.

Wagner has had two bail hearings. At the first bail hearing (prior to Wagner's indictment), Wagner proposed a release on his own recognizance to a residence in Anchorage, with his wife, Sandra, as his primary third-party custodian. A magistrate judge denied this proposal, finding that Sandra was likely to be called as a witness by the State at trial and was therefore disqualified from serving as a third-party custodian under AS 12.30.021(c)(5). Wagner does not appeal this ruling.

At Wagner's second bail hearing (which occurred post-indictment), Wagner again proposed to reside in Anchorage with Sandra Wagner, this time on house arrest with real-time GPS electronic monitoring, and a reduction in bail from a \$50,000 cash performance bond to a \$50,000 unsecured appearance bond. (Wagner proposed residing at an extended stay hotel.) Wagner also proposed a bail condition precluding him from leaving Southcentral Alaska.

A representative from Alaska Pretrial Services (APS), an electronic monitoring company, testified that an inclusion zone would be established around the unit in which Wagner resided, and that he would not be permitted to leave the residence (which the representative described as a “monthly leased apartment”) without a pre-authorized pass and a specified route to and from medical or legal appointments. The representative also testified that an exclusion zone would be set up for Anchorage International Airport; if Wagner entered the airport without prior authorization, the GPS monitor would send an alert, the police would be notified, and Wagner would be taken into custody.

In response, the prosecutor stated that the proposal “addresses appearance issues,” but argued that it did not sufficiently address “all the potential performance issues.” The prosecutor did not take an explicit position on electronic monitoring, but said that — whether or not the court approved electronic monitoring — the court should not reduce the bail to zero.

The superior court orally denied Wagner’s proposal. The court’s primary reason for rejecting the proposal was its concern that ankle monitoring could not detect, and therefore could not protect against, Wagner “having intercourse with an underage person in his hotel room.”

Although the court candidly stated that it did not necessarily believe in monetary bail, the court nevertheless found that cash bail was better suited to meet its performance concerns since it would force Wagner to “internalize” the need to follow his bail conditions.¹

¹ The court ruled that it was not relying on the rebuttable presumption set out in AS 12.30.011(d)(2) — that there is a substantial risk that a person charged with certain offenses will not appear and poses a danger to the victim, other persons, or the community

The court subsequently issued a written order. In its order, the court found that Wagner’s proposal did “not adequately ensure either appearance or protection of the public.”

With respect to appearance, the court found that, “even accepting that Wagner voluntarily returned to Alaska” from Oregon, the court noted that “Wagner would not have had to return to Alaska had he not fled in the first instance.” The court therefore concluded that “appearance has a very real significance in setting bail here.”

With respect to performance, the court reiterated its concern over the “amount of protection an ankle monitor can afford given the allegations here,” finding that “an ankle monitor . . . affords absolutely no pretrial protections to the youth of any Alaskan community.”

Wagner now appeals the bail order. He argues that, by maintaining bail at \$50,000 cash performance and declining to approve electronic monitoring, the trial court failed to impose the least restrictive conditions necessary to reasonably ensure the twin purposes of bail.

Under Article I, Section 11 of the Alaska Constitution, criminal defendants facing trial are entitled to have reasonable bail conditions set.² Although criminal defendants do not have an absolute right to monetary bail in an amount they can post,³

— and was instead making specific findings regarding Wagner’s risk of non-appearance and danger to the community.

² *Hamburg v. State*, 434 P.3d 1165, 1165 (Alaska App. 2018) (citing *Martin v. State*, 517 P.2d 1389, 1393-95 (Alaska 1974)). Article I, Section 11 of the Alaska Constitution entitles criminal defendants “to be released on bail, except for capital offenses when the proof is evident or the presumption great[.]”

³ *Gilbert v. State*, 540 P.2d 485, 486 n.12 (Alaska 1975).

both the United States and Alaska Constitutions prohibit the imposition of “excessive” bail.⁴ Excessive bail is that which goes beyond the amount actually necessary to fulfill the purposes of bail — *i.e.*, to reasonably assure the defendant’s appearance and the safety of the community.⁵ Accordingly, a court setting bail conditions must impose “the least restrictive condition or conditions that will reasonably ensure the [defendant’s] appearance and protect the victim, other persons, and the community.”⁶ A court may not, consistent with the Alaska Constitution, impose bail simply to keep a defendant confined until trial, and “[pretrial] release is heavily favored.”⁷

In this case, Wagner proposed electronic monitoring with house arrest in Anchorage. Under his proposal, he would be confined to his residential unit, except for medical and legal passes specifically approved by APS, and he would be precluded from leaving Southcentral Alaska.

The trial court suggested that electronic monitoring would not be of any value in protecting the community, since it would not provide any notification if Wagner was “having intercourse with an underage person in his hotel room.” But the current bail order — a \$50,000 cash performance bond — similarly does not provide this protection.

⁴ United States Const. amend. VIII; Alaska Const. art. I, § 12.

⁵ See *Torgerson v. State*, 444 P.3d 235, 237 (Alaska App. 2019) (recognizing that “a judge may not set bail in an amount that goes beyond that which is necessary to fulfill the purposes of bail — *i.e.*, to reasonably assure the defendant’s appearance and the safety of the alleged victim, other persons, and the community”).

⁶ AS 12.30.011(b).

⁷ *Doe v. State*, 487 P.2d 47, 51 (Alaska 1971) (quoting *Bandy v. United States*, 81 S.Ct. 197, 198 (1960)).

Indeed, under the current bail order, Wagner could live anywhere, without any monitoring conditions.⁸

Moreover, the trial court's concern that Wagner might have sex with other minors while on bail release was no more than speculation. Wagner is charged with exploiting his position of trust and sexually abusing another household member, his seventeen-year-old foster child, while she was in his care. There is nothing in the record to support the notion that Wagner — who has no prior convictions — would begin sexually abusing other (younger) minors if placed on house arrest and electronic monitoring.⁹ To the extent the court has concerns about Wagner having any contact with minors, that concern can be addressed through a condition precluding him from having contact with minors. Wagner is already precluded from contacting M.O., and there is no evidence in the record that Wagner has attempted to do so. Indeed, M.O. resides in Nome, while Wagner proposes to reside in Anchorage, with a condition not to leave Southcentral Alaska and a proposed exclusion zone around the Anchorage airport.

Ultimately, under the circumstances of this case, it is difficult to see how a high monetary bail — without *any* monitoring — is more protective of the community

⁸ We are not suggesting that monitoring is required in all cases. We are simply noting that, under the circumstances of this case, the rejection of electronic monitoring left in place a bail order that had fewer protections than what Wagner himself was proposing.

⁹ We note that the age of consent in Alaska is generally sixteen. M.O. was seventeen years old at the time of the events in this case. Wagner is charged with sexual abuse of a minor based on the fact that he was the legal guardian for M.O. AS 11.41.434(a)(2) (providing, in relevant part, that a person commits the crime of first-degree sexual abuse of a minor if, being eighteen years or older, the offender engages in sexual penetration with a person who is under eighteen years of age, and the offender is the victim's legal guardian).

than the electronic monitoring proposed by Wagner paired with some lesser amount of money that is closer to what Wagner can afford.

We addressed a similar situation in *Ingham v. State*.¹⁰ In *Ingham*, the thirty-seven-year-old defendant — who had a single prior conviction for DUI — was charged with two counts of first-degree sexual assault and one count of second-degree sexual assault for an incident involving his half-sister’s twenty-three-year-old adopted daughter, who was working as a babysitter for Ingham. Pending trial, Ingham was released to the custody of a third-party custodian, along with a \$10,000 cash or corporate appearance bond and a \$3,000 performance bond. Shortly thereafter, Ingham proposed to substitute positional electronic monitoring for his live third-party custodian, so that he could return to his job. The trial court denied Ingham’s proposal, opining that electronic monitoring was inadequate because it would “do nothing to prevent similar assaults within Defendant’s radius of movement” but rather “provide Defendant with a perimeter of permissible assault.”¹¹

We held that the district court abused its discretion in denying Ingham’s proposal, concluding that the district court’s reasons for denying Ingham’s electronic monitoring proposal “were speculative at best.” We noted that “there is absolutely nothing in the record to support the district court’s prediction that Ingham would begin sexually assaulting random other women as soon as he was placed on electronic monitoring and he no longer had a third-party custodian.”¹²

¹⁰ *Ingham v. State*, Court of Appeals File No. A-12322 (Order dated July 6, 2015).

¹¹ *Id.* at 1-2.

¹² *Id.* at 3.

We reach a similar conclusion here. The trial court made no findings as to why Wagner, who proposed release to house arrest, posed a risk to other children. Instead, the court essentially found that ankle monitoring did not provide sufficient protections in all cases of this type. But our decision in *Ingham* demonstrates that when a court sets bail, it must engage in a case-specific analysis of the particular case and the particular defendant.¹³ The critical question is whether the bail conditions are the least restrictive necessary to reasonably assure the defendant's appearance in court and the safety of the victim, other persons, and the community.

Here, there is no basis for assuming that Wagner would not abide by the conditions set by the court or the terms of his electronic monitoring. Indeed, the judge at Wagner's first bail hearing justified the continued imposition of a high all-cash performance bond in part *because* there was no pretrial supervision monitoring available in Nome. But under Wagner's proposal, he would be residing in Anchorage under house arrest and subject to 24-hour GPS monitoring.

In addition, although the court expressed concern that Wagner posed both a risk of non-appearance and a risk to the safety of the community, the court did not apportion the monetary bail into an appearance bond and a performance bond. Instead, the court maintained an all-cash performance bond of \$50,000, even though such a bond cannot be used to enforce appearance.¹⁴ Because we are remanding this case to the trial court with directions to approve electronic monitoring, as proposed by Wagner, the court

¹³ See *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (noting that the standards governing the fixing of bail must "be applied in each case to each defendant").

¹⁴ Alaska R. Crim. P. 41(c)(1).

should reconsider whether monetary bail is necessary and if so, whether that monetary bail should be apportioned between a performance and appearance bond.

Lastly, we note that, at the first bail hearing, Sandra Wagner testified that her husband has diabetes and high blood pressure — conditions that make him more vulnerable to the effects of COVID-19. On remand, the court should consider the impacts of these health conditions when reconsidering bail.¹⁵

For these reasons, we REVERSE the superior court’s bail decision, and we REMAND this case to the superior court. On remand, the superior court shall hold a new bail hearing in Wagner’s case in which it approves electronic monitoring and lowers the amount of monetary bail after reconsideration of the factors set out in AS 12.30.011(c), including the assets available to Wagner to meet any monetary bail condition.

Entered at the direction of the Court.

Clerk of the Appellate Courts

A handwritten signature in black ink that reads "Joyce Marsh". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Joyce Marsh, Deputy Clerk

cc: Judge DiBenedetto
Trial Court Clerk

¹⁵ See *Karr v. State*, 459 P.3d 1183, 1186 (Alaska App. 2020) (noting that, in light of the COVID-19 pandemic, “courts must now balance the public health safety risk posed by the continued incarceration of pre-trial defendants in crowded correctional facilities with any community safety risk posed by a defendant’s release” — and evaluate “the flight risk and safety risk posed by releasing a defendant into a community which now has fewer open businesses, fewer opportunities for travel, and more people staying at home”).

Wagner v. State, File No. A-13769
January 14, 2021 — p. 10

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