In the Court of Appeals of the State of Alaska

De Anthony Harris, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-13844** **Order** Date of Order: **October 28, 2021**

Trial Court Case No. **3AN-16-09996CR**

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

De Anthony Harris appeals from the bail order issued in this case on May 26, 2021. For the reasons explained in this order, we remand this case for reconsideration of Harris's proposed third-party custodian and the amount of monetary bail.

Harris is charged, as principal or accomplice, with several counts of first- and second-degree murder and one count of first-degree robbery in connection with the shooting deaths of Christopher and Danielle Brooks in 2016. According to the complaint, Harris and three other men entered the Brooks's home with shirts covering their faces, intending to steal drugs and money. During a struggle with Christopher Brooks, one of the men shot and killed the couple while their young child was in the home. At the time of the underlying events in this case, Harris was nineteen years old. He has no prior criminal history.

In May 2021, Harris requested a bail hearing. At that point, according to the State, Harris's bail was set at a $250,000 cash performance bond and a $250,000 cash or corporate appearance bond, together with a court-appointed third-party custodian. It

appears that this was Harris's first bail hearing; CourtView does not reflect any prior bail hearings.

At the bail hearing, Harris's attorney proposed the following release plan: the appointment of two third-party custodians, electronic monitoring by the Department of Corrections Pretrial Enforcement Division (PED), a cash performance bond of $5,000, and an unsecured appearance bond. Under the proposed plan, Sheila Harry (Harris's mother) would serve as the primary third-party custodian, and when she was at work, Tadeija Harry (Harris's cousin) would serve as the back-up custodian.

Both proposed custodians testified at the bail hearing. Sheila Harry testified that Harris would be living with her and her other son, who had just turned eighteen years old. She explained that while she was at work, she would drop Harris off at the home of her niece, Tadeija Harry. Sheila also explained her five-day work schedule: she generally works from 11:00 a.m. to midnight on Tuesdays, Wednesdays, and Thursdays, and from midnight to 8:00 a.m. (the overnight shift) on Fridays and Saturdays. She testified that her work schedule is generally static, but that at the time of the hearing, she was working "a lot of overtime" because co-workers were on vacation. She expected to return to her regular schedule the following week, when everyone returned from vacation.

Sheila Harry also testified that, with the exception of work, she only leaves the house to go grocery shopping or to attend doctor's appointments, and that Harris could accompany her on those errands. She testified that she understood that there had to be face-to-face transfer of custodianship duties between her and her niece. She has no criminal history.

Tadeija Harry testified that she is twenty-four years old and resides with her two-year-old daughter and her daughter's father. Tadeija is a stay-at-home mother, and neither she nor her daughter's father has any criminal history.

Tadeija testified that she would take over custodial duties from Sheila Harry while Sheila was at work. She also affirmed that she understood there needed to be face-to-face transfer of custodianship duties. When asked by the prosecutor why the court should trust that she would report Harris if necessary, she responded, "I'm a mother. My child comes first before anything, and he knows that. And I'm not going to risk myself. And he already knows that he's going to be staying right next to me."

After hearing testimony from both proposed third-party custodians, the superior court approved Harris's mother, Sheila Harry, but declined to approve his cousin, Tadeija Harry. The court expressed concern about Tadeija's "ability to be a full-time third-party custodian, which appears to be what is being proposed, just because [Harris's] mother is going to be so busy working." In particular, the court was concerned about Tadeija's ability to serve as a third-party custodian while also taking care of her small child:

> So, I'm not going to approve Tadeija Harry, just because I think the proposal, as it's set, gives way too much . . . in essence, [she] is going to have him 24/7. And I don't see how she could do that with taking care of the child. So, I'm not going to approve her.

When Harris's attorney sought clarification as to whether the court was rejecting Tadeija Harry because she had a child, the court responded, "[W]hat I said is she has many things going on, including a child, but what I'm concerned about is, in essence, she . . . would be the sole third-party custodian because of the schedule of Sheila

Harry, the mother. And I don't think saddling her full time — I don't know how she could do it full-time, 24/7."

Harris now appeals the superior court's ruling, arguing that the court erred when it found that Tadeija Harry would essentially be a full-time, "24/7" custodian. Harris contends that this misstates his release plan because, under his proposed plan, Tadeija Harry would only serve as custodian when Harris's mother was working. Harris also argues that the superior court abused its discretion in rejecting Tadeija simply because she was a stay-at-home mother who was caring for a young child.

We agree with Harris that the court's finding that Tadeija Harry was going to be a full-time third-party custodian was clearly erroneous. Sheila Harry laid out her work schedule in detail for the court and explained that she expected it to become fairly stable after her co-workers returned from vacation. It was not a "24/7" work schedule, and there was no need for the court to determine "how [Tadeija] could [supervise Harris] full-time, 24/7."

We also fail to see anything in Tadeija Harry's testimony that suggests that the presence of her child alone would preclude her from serving as an effective third-party custodian. Parents routinely watch over multiple children everyday, sometimes all day. Here, Tadeija would serve as Harris's part-time custodian, and she lives with another adult — her daughter's father — who she said assists her with childcare. Additionally, we note that the court rejected Tadeija in part because "she has many things going on, including a child." But her testimony does not reflect that she was handling "many things" or that she was incapable of performing her duties as a third-party custodian while simultaneously caring for a child.

As we have previously stated, "The critical question [with respect to the approval of third-party custodians] is whether the proposed third-party custodians are willing and able to fulfill the supervisory duties that will be required of them."[1] The suitability of a third-party custodian should also be evaluated in the context of the bail release plan as a whole. Here, Harris proposed third-party custodians in addition to 24-hour PED electronic monitoring, and this factor needed to be taken into account. Accordingly, we remand this case to the superior court to reconsider whether to appoint Tadeija Harry as a third-party custodian.

Because we are remanding for reconsideration of the appointment of Tadeija Harry as a third-party custodian, we need not directly address Harris's arguments regarding his monetary bail. We nonetheless wish to make several observations.

At the bail hearing, the court rejected Harris's proposal to reduce his monetary bail to a $5,000 cash performance bond and an unsecured appearance bond. But the court was otherwise reluctant to provide any explanation for the amount of monetary bail that is currently imposed in this case. In particular, in response to the defense attorney's request for specific findings regarding the monetary bail, the court stated, "That bail was already set. That was set on March 9th, 2021. Bail continued at $250,000 cash performance." But we have listened to the March 9 status hearing, and bail was not addressed at that hearing.[2] Indeed, as we mentioned earlier, it appears that

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[1] *Francis-Fields v. State*, 2020 WL 9173374, at *1 (Alaska App. Dec. 17, 2020) (unpublished bail order).

[2] The court also stated that it believed bail was originally set at an August 3, 2020 hearing. But we have listened to that status hearing, and bail was similarly not discussed at that hearing.

the May 2021 bail hearing was the first time that bail had been meaningfully addressed after Harris's arraignment.

In *Torgerson v. State,* we held that the trial court "is required to conduct an independent assessment of the defendant's conditions of release" at a defendant's first bail review hearing.[3] "The court may not simply defer to the bail conditions imposed at a defendant's first court appearance."[4]

Even if the May 2021 hearing was not Harris's first bail review hearing, it is incumbent on the court, upon approval of appropriate third-party custodians or other monitoring conditions, to re-assess the monetary bail in light of the bail conditions as a whole. Here, Harris's attorney asserted that Harris was unable to afford more than a $5,000 bond. This does not mean that Harris's bail must be set at $5,000, and the court could certainly require Harris to present some evidence to support his assertion that his financial means are limited beyond this amount.[5]

But ultimately, the court must consider Harris's ability to pay when evaluating whether the bail conditions in their entirety (including any monetary

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[3] *Torgerson v. State*, 444 P.3d 235, 238 (Alaska App. 2019).

[4] *Id.*

[5] *See Gilbert v. State*, 540 P.2d 485, 486 n.12 (Alaska 1975) (citing *Reeves v. State*, 411 P.2d 212 (Alaska 1966)) (observing that criminal defendants do not have an absolute right to monetary bail that they can afford); *see also West v. State*, Court of Appeals File No. A-11993 (Order dated Aug. 18, 2014), at 3 (unpublished bail order) (agreeing with the Florida Court of Appeals that monetary bail exceeding the financial resources of a defendant is "tantamount to no bond at all" and that evidence of a defendant's financial resources should be heard and taken into consideration when bail is set) (quoting *Camara v. State*, 916 So. 2d 946, 947 (Fla. App. 2005)).

conditions) are the "least restrictive" means to fulfill the dual purposes of bail.[6] Moreover, if the court determines that the monetary bail should be set above the defendant's ability to pay, the court should provide case-specific reasons for why this amount of monetary bail is necessary in addition to whatever other supervision or protective measures may also be in place.[7] The court should also take care to differentiate between the findings needed to impose an appearance bond as compared to a performance bond.[8]

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[6] *See* AS 12.30.011(b) (requiring a judicial officer to impose the "least restrictive condition or conditions that will reasonably ensure the person's appearance and protect the victim, other persons, and the community"); AS 12.30.011(c) (requiring a court determining a defendant's conditions of release to consider, among other factors, the "assets available to the person to meet monetary conditions of release"); *see also* Alaska Const. art. I, § 12 (prohibiting excessive bail).

[7] *See Sergie v. State*, 2021 WL 3277199, at *3 (Alaska App. July 30, 2021) (unpublished bail order) ("[A] trial court that sets a monetary bail above the defendant's ability to pay must provide a 'particularized statement' that addresses how the monetary amount was calculated and that directly explains 'why no less restrictive conditions will suffice.'" (quoting *Francis v. State*, 2021 WL 1346285, at *2 n.10 (Alaska App. Jan. 15, 2021) (unpublished bail order); *see also Brangan v. Commonwealth*, 80 N.E.3d 949, 964-66 (Mass. 2017) (requiring a court, as a matter of due process, to provide a "particularized statement" as to why no less restrictive conditions will suffice); *United States v. Mantecon-Zayas*, 949 F.2d 548, 551 (1st Cir. 1991) (holding that when a court enters an order for pretrial release containing a financial condition that the defendant in good faith cannot fulfill, the court must explain why that particular requirement is an indispensable component of the conditions for release); *see generally* AS 12.30.006(f) (requiring a judicial officer to issue written or oral findings that explain the reasons for imposing or modifying bail).

[8] *See* Alaska R. Crim. P. 41(c)(1).

Accordingly, this case is REMANDED to the superior court for reconsideration of Harris's bail proposal, in light of the guidance provided here.

Entered at the direction of the Court.

Clerk of the Appellate Courts

/s/ R. Montgomery-Sythe

Ryan Montgomery-Sythe,
Chief Deputy Clerk

cc: Judge Marston
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