RENDERED: JANUARY 13, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001054-MR

MARQUISA LAVANA PARTEE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 09-CR-002274

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

MOORE, JUDGE: The Jefferson County Grand Jury returned an indictment on August 6, 2009, charging Marquisa Lavana Partee with three counts of first-degree criminal abuse of a child under the age of twelve. These charges arise from alleged abuse of infant children that occurred from February 20, 2006 until May 6, 2009. At arraignment, the Jefferson Circuit Court ordered Partee released on her own recognizance.

Subsequently, pursuant to KRS 504.020, defense counsel requested the circuit court to order a "Criminal Responsibility Evaluation." The court granted this motion, and Dr. Dennis Wagner was authorized to conduct the examination. As Partee's trial date approached, defense counsel filed a notice of intent to assert mental illness or insanity at the time of offense pursuant to RCr 7.24 and KRS 504.070. This notice prompted the Commonwealth to file a motion to compel Partee to submit to an inpatient examination pursuant to KRS 504.070(2) to determine her criminal responsibility. Partee objected to the Commonwealth's motion.

Two hearings were held at which counsel for the parties made lengthy oral arguments. During these hearings, defense counsel objected to Partee being taken into custody for the purpose of being transported to the Kentucky Correctional Psychiatric Center (KCPC) and expressed concern regarding an inpatient examination because Partee had numerous physical health issues in need of immediate attention. Although the circuit court expressed reluctance to order Partee into custody because she had been released on her own recognizance, it ordered an inpatient examination. The court left the question of custody to be resolved by contacting KCPC to determine whether Partee could transport herself to the facility.

The following day the parties returned to court. A lengthy hearing was conducted at which defense counsel advised the court that he contacted KCPC and was informed by an admissions employee that there would be no difference in

the quality of the examination if performed outpatient. Counsel also informed the court that KCPC would not admit Partee on an inpatient basis unless she was transported by law enforcement personnel.

The Commonwealth continued its request for an inpatient examination. It argued that because there is an opportunity for twenty-four hour observation, there is a significant difference between an inpatient and an outpatient examination. Although both parties vehemently argued their positions and the circuit court openly deliberated the issue, no evidence was introduced at the hearing concerning the quality of an inpatient versus an outpatient examination.

On May 27, 2011, the Jefferson Circuit Court entered an order granting the Commonwealth's motion for Partee to submit to an inpatient evaluation to determine criminal responsibility pursuant to KRS Chapter 504. The May 27, 2011 order provided that the Commonwealth would advise the Court when space was available at KCPC and that Partee would be taken into custody for the purpose of being transported to KCPC for an inpatient evaluation. Upon completion of the evaluation, Partee was to be released on her own recognizance. With the exception of ordering Partee to submit to this evaluation at a future time, Partee remained released on her own recognizance-- as she has been throughout all of these proceedings.

On June 9, 2011, Partee filed an appeal to this Court from the May 27, 2011 order pursuant to RCr 4.43. On appeal, Partee argues that the conditions of her pretrial bond were erroneously changed when the Jefferson Circuit Court

ordered her to submit to an inpatient evaluation at KCPC at some future time. In response, the Commonwealth argues that this Court is without jurisdiction to consider this appeal pursuant to RCr 4.43 because the May 27, 2011 order is interlocutory because no change in the conditions of Partee's bond has yet occurred. The Commonwealth's argument is well taken.

RCr 4.43 permits an appeal from a circuit court decision by a defendant who is aggrieved by a decision of the circuit court on a motion to change the conditions of bail. However, in this matter, Partee was not released on bail, but on her own recognizance. Under RCr 4.00(f), release on personal recognizance means release of a defendant on personal recognizance when, having acquired control over the defendant's person, the court permits the defendant to be at liberty during the pendency of the criminal action or the proceeding upon the defendant's written promise to appear whenever his or her attendance before the court may be required and to render herself amenable to the orders and processes of the court. This interpretation is consistent with *Tindell v. Commonwealth*, 244 S.W.3d 126, 128 (Ky. App. 2008), wherein this Court recognized that KRS 27A.360 creates a distinction between release on bail and release on any other form of pretrial release. Until that release on recognizance status is changed to some other form of pretrial release, it is clear that no change in the conditions of bail has occurred. Thus, it is clear that a person can be released on recognizance and still be subject to orders of the court.

In this matter, the conditions of Partee's release were not changed by the May 27, 2011 order. Partee was released on her own recognizance and the circuit court has permitted her to remain free on her own recognizance with the exception of being remanded to custody only for the purpose of being transported to KCPC for a mental health evaluation. The order compelling Partee to submit to a mental health examination is an order which she has agreed to render herself amenable to pursuant to RCr 4.00(f). As there exists no change in the conditions

of Partee's pretrial release, this Court does not possess jurisdiction to consider the arguments Partee presents in an appeal taken pursuant to RCr 4.43.[1] Nothing in this order would prevent Partee from presenting her arguments to this Court in an original action pursuant to CR 76.36.

Therefore, having considered this matter and being otherwise sufficiently advised, this Court ORDERS that the above-styled appeal is hereby

[1] We pause to address the dissent's "final point [which] warrants comment" regarding how this case has proceeded at the appellate level. There is no dispute that RCr 4.43 cases are required to be expedited. Pursuant to RCr 4.43, the appeal was perfected by Partee on July 22, 2011, when her brief was filed. Thus under RCr 4.43, it should have been submitted for disposition within ten days thereof. The Commonwealth does not have to file a brief, but it *may* do so within ten days of the date the appellant's brief is filed. RCr 4.43 (1)(c). Herein, the Commonwealth did so, filing a brief on July 29, 2011. Had RCr 4.43 been followed, the case should have been--but was not--submitted to a panel of this Court within ten days of the date Partee perfected her appeal (*i.e.,* ten days after July 22, 2011) regardless of whether the Commonwealth filed a brief. The Court then should have "proceed[ed] immediately to a hearing thereof and complet[ed] the same as soon as practical." RCr 4.43(1)(d). Regretfully, this case inadvertently was not designated as submitted until October 7, 2011, and was not assigned to a panel of Judges until October 25, 2011. The record was then sent to the then-presiding Judge (now the dissent) and briefs were sent to the associate Judges (now the majority). Although the case was assigned to the present panel on October 25, 2011, it was not expedited in any manner. Rather, on November 11, 2011 the then-presiding Judge designated the case for oral argument, which was to take place on January 18, 2012. For reasons unknown, neither counsel for Partee nor the Commonwealth moved the Court to comply with RCr 4.43(1)(d) well after it should have become apparent to them that something was amiss with the timing of the disposition of this appeal, particularly after receiving notice that an oral argument was set to be heard on January 18, 2012, nearly six months after the appeal should have been disposed. We can empathize with counsel's reluctance to put the Court on notice of an error in its procedures, but we encourage counsel–particularly in a situation like the one presently under review–to do precisely that.

Once the emergency motion was filed on December 7, 2011, it became apparent to the (present) majority that this was an interlocutory appeal not properly taken under RCr 4.43, leaving the Court without jurisdiction over the case. Had RCr 4.43 been fully complied with, this appeal would have been disposed of several months ago. Counsel – for failing to move the Court to comply with RCr 4.43 – and the Court, including the dissenting Judge, share blame in the untimely disposition of this case. Fortunately, according to the records of the Jefferson Circuit Court, Partee has not undergone the evaluation at issue as of yet. As noted *supra*, nothing in this ruling precludes Partee from seeking relief through the appropriate channels of an original action pursuant to CR 76.36.

DISMISSED as interlocutory and as having been improperly taken under RCr 4.43.

The oral argument that has been scheduled for January 18, 2012, at the hour of 12:15 p.m. at the Jefferson County Judicial Center is hereby CANCELLED.

NICKELL, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ENTERED: January 13, 2012

/s/ Joy A. Moore
JUDGE, COURT OF APPEALS

THOMPSON, JUDGE, DISSENTING: I dissent based on fundamental constitutional law principles that have been preserved by our Rules of Criminal Procedure. With confidence, I state that the majority opinion is legally and logically unsound. I begin with the mandate of our criminal rules.

RCr 4.42 authorizes the court to order a defendant on pretrial release arrested if there has been a material change of circumstances or the defendant has not complied with the conditions of pretrial release. The rule further provides that the court "shall not change the conditions of his release or order forfeiture of the bail bond unless it finds by clear and convincing evidence that a material change in circumstances exists and that there is a substantial risk of nonappearance." RCr

4.42(4). Subsection 5 of the same rule requires that a due process hearing be held and that the court make specific findings of fact regarding a change in conditions. Because an appeal pursuant to CR 76.36 would be moot, RCr 4.43 provides that a defendant aggrieved by a decision of the circuit court on a motion to change conditions of bail may appeal to this Court and that the appeal is to be expedited.

The rules cited were not fortuitously written but premised on basic tenents of constitutional law: "The eighth amendment, made applicable to the states by the fourteenth amendment, prohibits excessive bail, while the fourteenth amendment itself protects every person from the deprivation of his liberty without due process of law." *In re Newchurch*, 807 F.2d 404, 408 (5th Cir. 1986). As stated by the United States Supreme Court, due process requires that when the government seeks to deprive an individual of liberty, it "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Aptheker v. Secretary of State*, 378 U.S. 500, 508, 84 S.Ct. 1659, 1665, 12 L.E.2d 992 (1964) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.E.2d 231 (1960)). "A person accused of a crime should not therefore be deprived of personal liberty unless his confinement is necessary to assure his presence at trial or to protect some other important governmental interest." *In re Newchurch*, 807 F.2d at 408-409.

Despite its constitutional significance, the majority concludes that RCr 4.43 does not apply because Partee was released on an ROR (release on own recognizance) bond and the court's order requiring her to surrender to law

enforcement for transport to KCPC for an inpatient evaluation was not a change in the conditions of her pretrial release. Under our pretrial release standards, a recognizance bond is awarded to the person with the least risk of failure to return to court. However, by determining that a recognizance bond is not a bond, the majority relegates those low risk individuals to a non-protected class not entitled to any of the protections afforded other pretrial releasees under RCr 4.42 and 4.43. If the law is as the majority states, it is wrong.

An ROR bond is a type of pretrial release. Although no monetary amount secures a defendant's appearance in court, her appearance is secured by the revocation of personal liberty should she fail to appear. In fact, when a defendant on ROR fails to appear for a scheduled trial date, the defendant may be charged with *bail-jumping*. *See Warren v. Commonwealth*, 2010 WL 4904917 (2010); *Bussell v. Commonwealth*, 2003 WL 1786938 (2003). The majority does not attempt to reconcile this obvious inconsistency with its opinion.

Finally, I address the intellectually exhausting holding that it is not a change of conditions of release to order a defendant on an ROR bond into official custody for transport to an institution for an inpatient evaluation. If there was any legitimate debate regarding the distinction between an ROR bond and being in law enforcement custody and institutionalized, it was quashed by the recent amendments to our penal code. Referred to as House Bill 463, the General Assembly enacted sweeping limitations on the trial court's discretion to order the terms of a defendant's pretrial release and codified the philosophy that an ROR

bond is to be ordered unless specific findings are made. Although the details of the entire statutory scheme are beyond the scope of this dissent, I point out that the General Assembly recognized a distinction between an ROR bond and placing a defendant in custody of a person or organization even if only for supervision. KRS 431.520. Yet, the majority insists that commitment to an inpatient mental institution is not a change in Partees' ROR bond. Although there is no published case law in this Commonwealth addressing the issue, the federal courts have unequivocally held that it does constitute a change of condition and explained that due process must be afforded.

In *Marcey v. Harris*, 400 F.2d. 772, 774, 130 U.S.App.D.C. 301, 303 (D.C.C.A. 1968), the Court observed that a pretrial inpatient commitment for a mental competency evaluation would be the equivalent of a pretrial bail denial. It held "that if a defendant so requests, his commitment shall be limited to examination on an outpatient basis. However, inpatient commitment shall be ordered if the court is advised by a report of the hospital authorities, setting forth reasonable grounds, that such inpatient commitment is necessary to assure an effective examination." *Id*.

Subsequently, in *In re Newchurch*, the Fifth Circuit Court of Appeals pointed out that pursuant to 18 U.S.C. § 4242 (part of the Insanity Defense Reform Act of 1984), after a notice of an insanity defense is filed and upon the government's motion, the court is required to order a psychiatric or psychological examination of the defendant in conformity with Section 4247(b). The court

continued with a detailed analysis of Section 4247(b), which provides in part that for the purposes of an examination pursuant to an order under § 4242, "the court *may* commit the person to be examined for a reasonable period, but not to exceed thirty days . . . to the custody of the Attorney General for placement in a suitable facility." *Id*. at 410. The Court concluded that an inpatient examination cannot be ordered and a defendant deprived of personal liberty unless evidence is introduced that an outpatient examination is inadequate and then can do so only under the least restrictive circumstances. It reasoned:

> Read in context, the statutory language commands the district court to order an examination but permits it either to commit the defendant to the custody of the Attorney General for that purpose or to order that the examination be made in some other manner. That the use of the permissive word "may" as to the manner of the examination was deliberate as compared to the use of the mandatory word, shall, in directing that an examination of some kind be made, is indicated by the Report of the Senate Committee on the Judiciary. This Report states: For purpose of the examination, the court is empowered to commit the defendant . . . to the custody of the Attorney General. . . . If, however, the court believes that the defendant's examination can be conducted on an outpatient basis, there need not be a commitment under this provision.

Id. (footnote omitted).

The Court continued:

> Congress has decided that the government is entitled both to notice that a defendant will admit that he committed an unlawful act but seek to escape criminal consequences by pleading his insanity at the time and to a fair opportunity to have experts examine him in order to contest his plea. This demands only a reasonable

> opportunity to make such an examination and a fair chance to rebut the defense. Incarceration for a month and a half or more should not be imposed unless it is demonstrably necessary.

Id. at 411.

The Kentucky General Assembly used similar language in KRS 504.080. I reiterate and highlight the pertinent language: "A court *may* commit a defendant to a treatment or forensic psychiatric facility for up to thirty days…, *except that if the defendant is charged with a felony and it is determined that inpatient examination or treatment is required, the defendant shall be committed to a forensic psychiatric facility*[.]" (emphasis added). Like its federal counterpart, KRS 504.080 contains the term "may" and additional language that an inpatient examination is to be ordered only if it is required for an effective examination. Therefore, a criminal defendant released on an ROR bond and who objects to the Commonwealth's request for an inpatient mental health examination, is entitled to an evidentiary hearing to determine if an inpatient examination is necessary to assure an effective examination under the least restrictive circumstances. A deprivation of liberty requires more than speculation that one examination is preferable over another.

It belies common sense to hold that involuntary commitment to police custody and to KCPC did not deprive Partee of her personal liberty that she enjoyed while released on an ROR bond. Moreover, in this case, the court only heard counsel's arguments on the reliability of an inpatient versus an outpatient examination. Because there was no evidence introduced at the hearings, the case

should be remanded to the circuit court for an evidentiary hearing. Unfortunately, the majority has stripped Partee of her right to have the injustice of the circuit court's order reversed and has no option but to lose her personal liberty and surrender to law enforcement. Her right to present the issue in an appeal from the judgment of conviction and sentence is truly a hollow one.

A final point warrants comment. As an appeal pursuant RCr 4.43, it should have been expedited and a hearing held by this Court "as soon as practicable." The appeal was perfected and submitted for disposition ten days after the Attorney General's brief was filed, yet submitted to this panel for a consideration on the merits. Months later, when Partee is imminently facing involuntary institutionalization and filed an emergency motion, this Court has dismissed her appeal. This Court and the circuit court have not complied with the requirements and obligations under RCr 4.42 and 4.43 resulting in injustice on both judicial levels.

BRIEF FOR APPELLANT: BRIEF FOR APPELLEE:

J. David Niehaus
Louisville Metro Public Defender
Louisville, Kentucky

Jack Conway
Attorney General

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky