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Procedures for Bail—Appeals and Writs of Habeas Corpus

Jennifer Rossmeier Brown

Jennifer Rossmeier Brown
Bexar County District Attorney's Office
San Antonio, Texas
jennifer.rossmeier@bexar.org
210.335.1546

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I. INTRODUCTION

While there is a constitutional right to pretrial bail, there is no federal or state constitutional right to post-conviction bail. Rather, bail pending the disposition of an appeal or writ is a statutorily created right. The statutes which govern postconviction bail appear straightforward and for the most part, they are. Litigation concerning postconviction bail issues, however, does happen and helps to clarify the statutes' application. Accordingly, in addition to educating the reader on the statutes which confer the right to postconviction bail, this paper discusses case law which relevant the application and terms of the statute. Further, the paper will provide some practical considerations for both appellate and trial practitioners in securing or defending against a request for post-conviction bail.

II. BAIL PENDING DISPOSITION OF A CRIMINAL APPEAL

A. Eligibility—Consideration of the Defendant's Application for Bail

Where a defendant is eligible to be considered for postconviction bail, the trial court *must* consider her application for bail. *Ex parte Byers*, 612 S.W.2d 534, 537 (Tex. Crim. App. 1980) (overruled in part by State ex rel. Hill v. Court of Appeals for the Fifth Dist., 34 S.W.3d 924 (Tex. Crim. App. 2001)). Where a defendant requests bail, due process requires notice and a hearing to give the defendant a meaningful opportunity to be heard prior to the denial of bond pending appeal. *Shockley v. State*, 717 S.W.2d 922, 927 (Tex. Crim. App. 1986).

When either seeking or opposing the grant of bail pending appeal, remember that if a defendant is eligible for bail, the trial court must consider her application. To effectuate due process in postconviction bail issues, trial judges and attorneys should be sure not to confuse the perceived merits of an appeal with the right to bail pending appeal. In deciding whether to grant, deny, or set the amount of postconviction bail, substantive success on the appeal should not be a factor.

B. Eligibility—After the Imposition of Sentence in a Misdemeanor Case

A defendant is eligible for a bond pending the determination of a motion for new trial or an appeal in a misdemeanor case—regardless of the sentence imposed. Tex. Code Crim. Proc. Ann. art. 44.04(a) (West 2018).

C. Eligibility—After the Imposition of a Sentence in a Felony Case

Article 44.04(b), which governs the eligibility for bail pending appeal in felony cases, is written in terms of *ineligibility* for postconviction bail. That is, a defendant is ineligible for a bond pending the determination of an appeal, where either—

1. The defendant receives a sentence of confinement for ten years or more; or
2. The defendant has been convicted of one of the offenses enumerated under Article 42A.054(a) of the Code of Criminal Procedure¹—
 - a. Murder;
 - b. Capital Murder;
 - c. Aggravated Kidnapping;

¹ These offenses used to be called the “3(g) offenses.”

- d. Trafficking of Persons;
- e. Indecency with a Child;
- f. Sexual Assault;
- g. Aggravated Sexual Assault;
- h. First Degree Injury to a Child;
- i. Aggravated Robbery;
- j. First Degree Burglary of a Habitation With Intent to Commit a Felony Other Than Theft;
- k. Compelling Prostitution;
- l. Sexual Performance by a Child; and
- m. Drug Offenses Enhanced Either by Use of a Child in the Commission of the Offense or an Offense Occurring in a Drug Free Zone.

Where the defendant meets either (or both) of the above criteria, she is not eligible for bail. As such, the trial court cannot consider either a motion or application for bail and does not err in summarily denying any request for same. *Faerman v. State*, 966 S.W.2d 843, 847 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

“Confinement,” as used in the statute, refers to “actual physical confinement.” *Lebo v. State*, 90 S.W.3d 324, 327–28 (Tex. Crim. App. 2002). Accordingly, the statute does not prohibit the granting of bail pending appeal where a defendant appeals from a judgment assessing community supervision. *Id* at 330. A defendant who appeals from a probated sentence is not, however, required to seek an appeal bond. *Humphries v. State*, 261 S.W.3d 144, 146 (Tex. App.—San Antonio 2008, no pet.). A defendant may remain “at liberty under his appearance bond and the sureties remain obligated on that bond until the term of his probation commences.” *Id*. Regardless of whether a defendant who receives a probated sentence applies for an appellate bond, the terms of community supervision do not commence until the appellate mandate is issued. *Ross v. State*, 523 S.W.2d 402, 405 (Tex. Crim. App. 1975) (internal citations omitted); *Humphries*, 261 S.W.3d at 146. Accordingly, if you represent a defendant who could not make a pretrial bond but was sentenced to community supervision, that defendant is eligible to seek an appellate bond and be released from custody pending disposition of her appeal.

D. Eligibility—After Reversal of a Conviction in a Criminal Case

Pursuant to Article 44.04(h), where a defendant’s conviction is reversed by a court of appeals and the defendant is in custody, she is entitled to release on reasonable bail pending resolution of a petition for discretionary review by the Court of Criminal Appeals.² Tex. Code Crim. Proc. Ann. art. 44.04(h) (West 2018). There are no limitations under subsection (h)—a defendant is eligible for a bond after reversal of her conviction regardless of the nature of the conviction or length of the sentence received. Unlike 44.04(b), which refers to “confinement,” “custody” as used in this portion of the statute is a broader term which can include parole. *Werner v. State*, 445 S.W.3d 301, 304 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

The defendant’s right to release attaches immediately upon the “final ruling” of the court of appeals. Tex. Code Crim. Proc. Ann. art. 44.04(h). However, a ruling is not considered “final” until any pending motions for rehearing are disposed of. *Tissier v. Kegans*, 789 S.W.2d 680, 681 (Tex. App.—Houston [1st Dist.] 1990, no pet.). Accordingly, if the State has a pending

² For the rest of the paper, I will refer to the court as the “CCA.”

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