

Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rule of Appellate Procedure 1561 and to enact a new appellate rule, Pa.R.A.P. 1765. The proposed rule and suggested amendment are being submitted to the bench and bar for comments and suggestions prior to their submission to the Supreme Court.

Proposed new material is underlined while deleted material is bracketed.

All communications in reference to the proposed amendment should be sent no later than July 14, 2008 to:

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An Explanatory Comment precedes the proposed amendment and has been inserted by this Committee for the convenience of the bench and bar. It will not constitute part of the rule nor will it be officially adopted or promulgated.

By the Appellate Court Procedural Rules Committee

Honorable Jane Cutler Greenspan,
Chair

EXPLANATORY COMMENT

1. Introduction

The Appellate Court Procedural Rules Committee, with significant contributions by the Criminal Procedural Rules Committee, proposes that the Supreme Court amend Pa.R.A.P. 1561 and enact new Pa.R.A.P. 1765 to clarify that when the disposition of the post-conviction relief petition is on appeal, the petitioner has no right to bail and no right to appeal any denial of bail.

The Appellate Court Procedural Rules Committee has become aware that there is great confusion regarding a trial court's ability to act while a post-conviction appeal is pending, even in the case law, and the Appellate Court Procedural Rules Committee and the Criminal Procedural Rules Committee have concluded that the confusion may be attributed at least in part to the fact that the current Rules of Appellate Procedure do not adequately address this issue.

In developing this proposal, the Committees examined the Pennsylvania Constitution, pertinent statutes, case law and the current procedural rules.

Pennsylvania has recognized a right to bail pretrial, predicated upon three principles:

- (a) the importance of the presumption of innocence;
- (b) the distaste for imposition of sanctions prior to trial and conviction;
- (c) the desire to give the accused maximum opportunity to prepare a defense.

Commonwealth v. Fowler, 451 Pa. 505, 513, 304 A.2d 124, 128 (1973) (*discussing Commonwealth v. Truesdale*, 449 Pa. 325, 335-36, 296 A.2d 829, 834-35 (1972)).

As a criminal trial and appeal progresses, however, the presumptions against bail increase. In examining the *Truesdale* factors, the *Fowler* Court held that between conviction and sentence, one convicted of murder could not be released on bail – with the sole caveat that if delay was unreasonable and caused by the Commonwealth, the court could decide to grant bail. The *Fowler* Court reasoned that the first and third *Truesdale* factors are no longer implicated and the second minimized, while the public interest in detaining the defendant “becomes compelling.” *Id.* at 514-15, 304 A.2d at 129. *See also Commonwealth v. Cabeza*, 489 Pa. 142, 413 A.2d 1054 (1980) (applying the analysis to the then new rules of criminal procedure). Consistent with this analysis, the trial court has discretion to grant bail pending the disposition of all direct appeal proceedings, subject to the requirements of the Pennsylvania Rules of Criminal Procedure. Indeed, in a parole revocation hearing, the “appellant’s liberty interest...is not merely diminished from that which he held prior to trial, rather it is of a wholly different nature.” *Commonwealth v. McDermott*, 377 Pa. Super. 623, 637, 547 A.2d 1236, 1242-43 (1988).

[A]n individual's legitimate interest in remaining at large on bail diminishes, and the Commonwealth's legitimate interest in incarcerating the individual increases correspondingly, as the individual passes from suspect, to accused, to appellant, to allocatur petitioner, to certiorari petitioner, to PCHA petitioner. Accordingly, the availability of release on bail is subject to increased restrictions at each level.

Id. Moreover, a bail bond that is issued post-verdict remains effective until direct review of an appellant's conviction ends but not during any collateral proceedings. *Commonwealth v. McMaster*, 1999 PA Super. 111, ¶ 9, 730 A.2d 524, 527 (1999).

By statute, the trial court is afforded discretion to grant bail if it rules in favor of a post-conviction relief petitioner.

If the court rules in favor of the petitioner, it shall order appropriate relief and issue supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that are necessary and proper.

42 Pa.C.S. § 9546(a) (PCRA). In other words, if the PCRA court grants relief, it can also set bail. There is no provision, however, for a situation where a PCRA court denies relief and the Superior Court vacates and remands, but before the matter is returned to the trial court, the Commonwealth takes an appeal. This was the situation in *Commonwealth v. Bishop*, 829 A.2d 1170 (Pa. Super. July 22, 2003), where the trial court had no jurisdiction under Rule 1701(a) unless and until the appellate court decided or dismissed the appeal and remanded the record.

Consistent with the policy determinations set forth above, proposed Rule 1765 clarifies that during the pendency of appeal of the disposition of his or her petition a post-conviction relief petitioner may not apply for bail in the trial or appellate court and may not appeal a denial of bail. The proposed rule does not in any way limit the statutory authority of the trial court – who has had the opportunity to develop the factual record and observe the petitioner firsthand – to grant bail when granting a post-conviction relief petition. The Commonwealth has the right to appeal the grant of bail while its appeal of the petition determination is pending.

Rule 1561. Disposition of Petition for Review.

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(d) *Review of detention.*—Except as prescribed by Rule 1762(b)(2), which governs applications relating to bail when no appeal is pending, Rule 1765, which governs applications relating to bail when an appeal is pending, or [by] Rule 3331 (review of special prosecutions or investigations), review in the nature of criminal habeas corpus or post conviction relief may not be granted under this chapter.

Official Note: Subdivision (a) is based on 42 Pa.C.S. § 706 (disposition of appeals).

Subdivision (b) is based on 42 Pa.C.S. § 708(e) (single form of action) (which provides that 1 Pa.C.S. § 1504 (statutory remedy preferred over common law) does not limit the jurisdiction of a court over a petition for review proceeding, but to the extent applicable shall limit the relief available) and 42 Pa.C.S. § 5105(d)(2) (scope of appeal). Under 42 Pa.C.S. § 102 (definitions), statutory references to “appeal” include proceedings on petition for review. The subdivision is intended to make clear that the petition for review is a generic pleading which will permit the court to consider simultaneously all aspects of the controversy.

Subdivision (c) is intended to make clear that the petition for review does not encompass trespass or assumpsit actions, but that an appeal may reach tort or contract matters adjudicated by a government unit as contemplated by Section 2(h) of the Judiciary Act Repealer Act (42 P.S. § 20002(h)). As to ancillary statutory damages, see 42 Pa.C.S. § 8303 (action for performance of a duty required by law).

Subdivision (d) is intended to make clear that the scope of this chapter is essentially civil in nature. Although a Post-Conviction Relief Act proceeding is technically civil, it is quasi-criminal, and, by definition, it occurs following the entry of judgment and affirmation of that judgment on direct appeal. A court’s review in such instances is undertaken with a different presumption than applies in other civil or even criminal proceedings, because a court has found a defendant guilty and that determination has been affirmed on direct appeal. [The application of the petition for review to questions of release prior to sentence in criminal matters and in questions arising out of special prosecutions or investigations is merely a recognition of the technical need for a plenary filing to bring the question within the appellate jurisdiction of the appropriate court.] The limitations on petitions for review of bail determinations reflect the concerns unique to Post-Conviction Relief Act proceedings. See Rules 1762(b)(2) and 1765 regarding bail applications.

Rule 1765. Release in Post-Conviction Relief Act Matters.

(a) Other than as provided by statute, a Post-Conviction Relief Act petitioner may not make application for bail, or appeal the denial of bail, in any court while an appeal of a trial or appellate court's disposition of a Post-Conviction Relief Act petition is pending.

(b) The Commonwealth may appeal the grant of bail while an appeal of the disposition of a Post-Conviction Relief Act petition is pending.

Official Note: This rule should be read in conjunction with 42 Pa.C.S. § 9546, which provides in part that a court that rules in favor of a Post-Conviction Relief Act petitioner “shall order appropriate relief and issue supplementary orders as to...bail.” See also 42 Pa.C.S. § 5701; Pa.R.Crim.P. 908(D)(2).

This rule supersedes the practice described in *Commonwealth v. Kyle*, 582 Pa. 624, 628, 874 A.2d 12, 14 (2005), in which the Supreme Court observed in passing that the petitioner had applied to the Superior Court for bail (after the trial court had denied it) and the Superior Court had granted bail. It is consistent in part with *Commonwealth v. Bishop*, 829 A.2d 1170, 1172 (Pa. Super. 2003), in that this rule affirms that the trial court lacks jurisdiction to rule on a petitioner's application for bail during a pending appeal of the disposition of a Post-Conviction Relief Act petition. The new rule is consistent with Pa.R.A.P. 1561(d), because Pa.R.A.P. 1762 is limited in scope to a review of orders denying bail prior to sentence or pending direct appeal *unless* the appeal of a bail order is taken when no appeal of the disposition of the Post-Conviction Relief Act petition is pending.