

Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rules of Appellate Procedure 1561, 1701, and proposes new rule, Pa.R.A.P. 1765. These amendments and new rule are being submitted to the bench and bar for comments and suggestions prior to their submission to the Supreme Court. This Committee has coordinated publication of this recommendation with the Criminal Procedural Rules Committee's publication of proposed new Rule of Criminal Procedure 911.

Proposed additions are underlined while deleted material is bracketed.

All communications in reference to the proposed amendment should be sent no later than July 3, 2009 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 Maureen E. Lally-Green,
Chair

EXPLANATORY COMMENT

The Appellate Court Procedural Rules Committee proposes that the Supreme Court amend Pa.R.A.P. 1561 and 1701(b) and enact a new Rule Pa.R.A.P. 1765 to permit the PCRA trial court, after an appeal has been taken, to “consider any petition for bail where post-conviction relief is granted or where an intermediate appellate court has reversed the denial of post-conviction relief,” as well as to permit review of a PCRA trial court’s bail determination while the disposition of the petition is on appeal.

In preparing this Recommendation, the Appellate Court Procedural Rules Committee appointed a subcommittee to work with a subcommittee of the Criminal Procedural Rules Committee. These proposed amendments and the new rule are the product of the joint subcommittee, as is proposed Criminal Rule 911, which is being published concurrently.

The Post-Conviction Relief Act, 42 Pa.C.S. § 9541, *et seq.*, limits its discussion of bail to what the trial court can do if the trial court *grants* the petition.

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). This is consistent with Pa.R.Crim.P. 908(D)(2), which permits a court to “issue any supplementary orders appropriate to the proper disposition of the case” at the conclusion of a PCRA hearing.

In other words, if the PCRA court grants relief, it can also set bail. There is no provision, however, for a situation in which a PCRA court *denies* relief and

the Superior Court vacates and remands, but before the matter is returned to the PCRA trial court, the Commonwealth takes an appeal. This was the situation in *Commonwealth v. Bishop*, 829 A.2d 1170 (Pa. Super. July 22, 2003), in which the trial court stated that it had no jurisdiction under Rule 1701(a) unless and until the appellate court decided or dismissed the appeal and remanded the record.

Pa.R.A.P. 1762 provides that “in criminal matters” applications for bail should “ordinarily” first be presented to the trial court, whether or not an appeal is pending. A post-conviction relief proceeding is a civil proceeding that is quasi-criminal in nature but is collateral to the original proceeding and is governed by the Rules of Criminal Procedure. However, some Rules of Criminal Procedure limit their application to proceedings prior to the conclusion of direct appeal. See, e.g., Pa.R.Crim.P. 534 (authorizing a bail bond only through direct appeal and expressly excluding post-conviction proceedings or other collateral attacks); see also Pa.R.Crim.P. 521 (describing the trial court’s ability to grant bail). This has given rise to confusion in the Courts of Common Pleas and Superior Court as to the scope of each court’s power to grant bail pursuant to a pending PCRA proceeding.

The trial court is generally the fact-finding tribunal. Accordingly, the Committee believes that Pa.R.A.P. 1701 should be amended to clarify that the trial court is the court to which a request for release on bail should be presented in the first instance following a vacation or reversal of the denial of post-conviction relief, even if the Commonwealth appeals the merits decision.

Another question that has arisen is whether a decision on bail by the PCRA trial court is reviewable by the appellate courts. In *Commonwealth v. Bonaparte*, 366 Pa. Super. 182, 530 A.2d 1351 (1987), a petitioner appealed a bail determination pending disposition of a PCHA petition. The trial court had considered the request under then - Pa.R.Crim.P. 4010. The Superior Court held that the question was instead governed by then - Pa.R.Crim.P. 1506(2) but nonetheless affirmed the trial court's determination. The Superior Court stated expressly that Pa.R.A.P. 1762 did not apply because it was limited to orders "denying bail prior to sentence or pending direct appeal."

That appears to be a correct reading of the Rules prior to this amendment. If the Superior Court reverses the denial of a PCRA petition *and no appeal is taken*, review of the bail determination would be governed by Pa.R.A.P. 1762(b) only because the failure to seek review would place the procedural posture of the case as "criminal" once again.

If an appeal is taken, however, the matter is still part of the post-conviction relief process and is not covered by Pa.R.A.P. 1762(a). We are thus recommending revisions of Pa.R.A.P. 1561 and the enactment of a new rule Pa.R.A.P. 1765 to fill this narrow gap. The right to review a bail determination under Pa.R.A.P. 1765 is limited to the time during which the substantive disposition is on appeal, in accordance with Pa.R.Crim.P. 910, which specifies that only "[a]n order granting, denying, dismissing, or otherwise finally disposing of a petition for post-conviction collateral relief shall constitute a final order for purposes of appeal." Pa.R.Crim.P. 910. That determination must be made by

the PCRA trial court in the first instance. Because the record will be in the appellate court, the PCRA trial court must hold an evidentiary hearing, and it must apply a standard that recognizes (1) that the petitioner has been tried and convicted, and the conviction upheld on direct appeal, and (2) that the petitioner has been granted relief by a panel or *en banc* sitting of an intermediate appellate court. To strike that balance, the three criteria that govern the right to pretrial bail have been balanced against the fact of the conviction and affirmance and the fact that the Commonwealth has appealed the intermediate appellate court's decision. Pretrial, courts must balance:

- (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.

See 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).) 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).

To the extent that the passing observation in *Commonwealth v. Kyle*, 582 Pa. 624, 874 A.2d 12 (2005), that the Superior Court “granted bail” can be read

as recognition that the Superior Court made the bail determination in the first instance rather than reversing a bail denial, it will be superseded, because the Superior Court would not have the right to grant bail without the petitioner's having first presented an application to the PCRA trial court.

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 affirmance 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 1701. Effect of Appeal Generally.

(a) General rule. Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter.

(b) Authority of a trial court or agency after appeal. After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may:

(1) Take such action as may be necessary to preserve the status quo, correct formal errors in papers relating to the matter, cause the record to be transcribed, approved, filed and transmitted, grant leave to appeal in forma pauperis, grant supersedeas, consider a [any] petition for bail except that, if the appeal is taken from a post-conviction relief determination, the trial court can consider a bail application only if (a) it has granted post-conviction relief or (b) an intermediate appellate court has reversed the denial of post-conviction relief, and take other action permitted by these rules or otherwise ancillary to the appeal or petition for review proceeding.

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Rule 1765. Release in Post-Conviction Collateral Proceedings.

(a) Other than as provided by statute or Rule of Appellate Procedure 1701, a petitioner seeking post-conviction collateral relief may not make application for bail in any court while petitioner's appeal of a trial or appellate court's disposition of the petition is pending.

(b) If an appellate court has reversed the denial of post-conviction relief, an application for bail may be made in the Post-Conviction Relief Act trial court. If the Commonwealth has appealed that decision on the merits, the trial court may grant an application for bail only after an evidentiary hearing as required in Pennsylvania Rule of Criminal Procedure 911.

(c) If the Post-Conviction Relief Act trial court has made a bail determination, and if the grant or denial of the merits of a Post-Conviction Relief Act Petition is pending, either party may seek review of the bail determination by filing an application pursuant to Pa.R.A.P. 123 that is ancillary to the appeal on the merits. Such application should be filed in the court in which the appeal of the disposition of the Post-Conviction Relief Act petition is pending.

Official Note: This rule should be read in conjunction with Pennsylvania Rule of Criminal Procedure 911 and 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 Pa.R.Crim.P. 908(D)(2); 42 Pa.C.S. § 5701; Pa.R.Crim.P. 521 (governing bail determinations generally). Because a Post-Conviction Relief Act matter is not criminal, the provisions of Pa.R.A.P. 1762 do not apply unless relief has been granted and no appeal taken.