

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 31,947

STATE OF NEW MEXICO

CLERK

OCT 15 2009

Attorney for Plaintiff-Respondent

STATE OF NEW MEXICO,

Plaintiff-Respondent.

vs.

WAYNE BENT,

Defendant-Petitioner.

STATE OF NEW MEXICO'S RESPONSE TO

PETITION FOR WRIT OF CERTIORARI

(FOLLOWING THE DENIAL OF AN APPEAL BOND BY THE STATE
DISTRICT COURT AND THE NEW MEXICO COURT OF APPEALS)

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October 15, 2009.

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INTRODUCTION

The State of New Mexico, by Margaret McLean, Assistant Attorney General, hereby files this response to the petition for writ of certiorari (Petition) filed on September 4, 2009. This response is timely filed on or before October 19, 2009. Order, October 6, 2009.

The State of New Mexico respectfully asks this Court to deny any relief. The granting or denial of an appeal bond is governed by statute and rule. Both the state district court and the New Mexico Court of Appeals properly interpreted and applied the statute and rule in determining whether Petitioner Bent was entitled to an appeal bond. The evidence was sufficient to deny an appeal bond. No factual ground or legal argument has been presented to revisit the rulings made by the two lower courts.

REVIEW OF STATE DISTRICT COURT PROCEEDINGS

Petitioner Bent was charged with two counts of criminal sexual contact of a minor and two counts of contributing to a delinquency of a minor in State of New Mexico v. Wayne Bent, Eighth Judicial District, No. CR-2008-0025. The docket sheet is attached. The charges involved two minor female victims.

After a jury trial, Petitioner Bent was convicted of one count of criminal sexual contact of a minor and two counts of contributing to the delinquency of a minor. Petitioner Bent was sentenced to the term of fifteen years for the criminal

sexual contact of a minor; and eighteen months for each count of contributing to the delinquency of a minor. A copy of the judgment and sentence is attached.

Petitioner filed a motion for an appeal bond. (Attached). This motion included numerous affidavits. The State of New Mexico filed a response. (Attached). After a hearing, the appeal bond was denied. A copy of the order is attached.

REVIEW OF DIRECT APPEAL PROCEEDINGS

Petitioner filed a notice of appeal on January 5, 2009. Following the filing of the docketing statement, the New Mexico Court of Appeals placed the appeal on the general calendar. A copy of the docket sheet in No. 29,227 is attached.

Nine issues were raised in the docketing statement. (Attached). As of today's date, the record on appeal has been filed and the brief-in-chief is due on or before November 2, 2009. Order, October 8, 2009. Additional issues may be raised in the brief-in-chief. See State v. Salgado, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991).

On July 22, 2009, Petitioner Bent also filed a motion for an appeal bond and a memorandum in support of the motion in the New Mexico Court of Appeals. (Attached). No response was requested by the State of New Mexico and a response was not filed. On August 13, 2009, the New Mexico Court of Appeals issued an order denying an appeal bond. (Attached).

REVIEW OF CERTIORARI PROCEEDINGS

The Petition was filed pursuant to Rule 12-205 NMRA and Rule 12-502

NMRA. Two grounds are raised and may be phrased:

1. Whether the New Mexico Court of Appeals erred in denying Petitioner's motion for appeal bond because the Petitioner's uncontested memorandum and the record established overwhelming evidence that he is not a flight risk, is not a danger to society and he has raised substantial, non-frivolous questions in his appeal which could result in reversal of the conviction for which he is incarcerated?
2. Whether the New Mexico Court of Appeals erred in failing to make findings and conclusions in support of the basis for denying Petitioner's motion?

Petition, at 1.

RESPONSE AND REQUEST TO DENY PETITION

The State disputes the factual background provided by Petitioner and relies on the facts presented in the State's response filed in the state district court. The State disputes any contention that Petitioner's memorandum and the record are "uncontested" or that there is "overwhelming evidence" that Petitioner is not a flight risk, is not a danger to society and has raised substantial, non-frivolous questions in the appeal which could result in reversal of the convictions. Petition,

at 1. The record contradicts the first question presented by Petitioner. A review of the issues raised in the docketing statement does not support any finding that a “substantial question of law or fact likely to result in reversal or an order for a new trial” is presented.

The second question is also without merit. The New Mexico Court of Appeals is not required to make findings and conclusions in support of the order denying the motion. Petitioner had the opportunity to request a clarification of the order but did not. Rule 12-309 NMRA. If, assuming arguendo, this Court grants review of this second issue, the remedy is limited to a remand to the New Mexico Court of Appeals for the findings and conclusions in support of the denial.

Rule 12-205 NMRA permits release pending appeal in criminal matters. The Petition is properly before this Court after a review by the state district court and the New Mexico Court of Appeals. Rule 12-502(B). The only remedy is the granting of the Petition; a motion to review the modification of conditions of release may be filed if the Petition is granted. Rule 12-502(B). The direct appeal is not stayed. Rule 12-502(B).

Rule 12-205 refers to Rule 12-502 NMRA for the filing of certiorari review. Rule 12-502(B). Rule 12-502 limits certiorari review based on an adequate showing of one of four grounds. Rule 12-502(C)(2)(d)(i-iv).

An appeal bond is governed by NMSA 1978, Section 31-11-1 (1988). State

v. Rivera, 2004-NMSC-001, 134 N.M. 769, 82 P.2d 939; State v. House, 1996-NMCA-052, 121 N.M. 784, 918 P.2d 1996, cert. denied, 121 N.M. 676, 916 P.2d 1343 (1996).

The applicable section for guidance in granting or denying an appeal bond is Section 31-11-1(C):

C. If a defendant is convicted of a noncapital offense other than a violent offense and is sentenced to a term of imprisonment not suspended in whole, he shall not be entitled to release pending appeal unless the court finds:

- (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released; and
- (2) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

(Emphasis added).

The plain language of this statute creates a legislative presumption that a convicted offender is not entitled to an appeal bond: "...he shall not be entitled to release pending appeal." The exception to this general directive is if the two elements are met. Section 31-11-1(C)(1) and (2).

The New Mexico Legislature used the phrase, “clear and convincing evidence.” “Clear and convincing evidence” is defined: “Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.” Black’s Law Dictionary 596 (8th ed. 2004).

The state district court properly denied the appeal bond after considering evidence and argument by both parties. The state district court impliedly found that the two prerequisites for an appeal bond were not met. The evidence was not “clear and convincing” to establish that Petitioner was “not likely to flee or pose a danger to the safety of any other person or the community if released.” Section 31-11-1(C)(1). The state district court did not make the second finding that Petitioner’s appeal raised a “substantial question of law or fact likely to result in reversal or an order for a new trial.” Section 31-11-1(C)(2). This evaluation of the evidence and arguments of the respective parties was within the discretion of the state district court. See State v. Lucero, 81 N.M. 578, 469 P.2d 727 (Ct. App. 1970)(determination of what bond is appropriate pending appeal is particularly within the discretion of the trial court).

The State of New Mexico submits that the record supports the ruling of the state district court and is consistent with Section 31-11-1.

Petitioner sought an appeal bond in the New Mexico Court of Appeals. The motion and memorandum in support of an appeal bond raise similar arguments as presented in the Petition. The New Mexico Court of Appeals reviewed the filings made by Petitioner and denied the motion. The fact that the State of New Mexico did not file a response is not dispositive.

Similar to the state district court, the New Mexico Court of Appeals also evaluated the motion and supporting pleadings and found that the two mandatory conditions for an appeal bond were not met. Section 31-11-1(C). This evaluation may have considered the issues raised in the docketing statement as well as the state district court record. Petitioner has not established that the order of the New Mexico Court of Appeals was an abuse of discretion based on a wrong interpretation of the facts or applicable law.

No reason exists to revisit the determinations whether Petitioner should be granted an appeal bond. Two lower courts have made the determinations based on a sufficient record and a lack of evidence to support Petitioner's claim that an appeal bond should be granted. The determinations were consistent with the legislative intent of Section 31-11-1 and the special circumstances of Petitioner including his age, health, religious beliefs and his perception of the events.

This Court has not been presented with any compelling facts or argument to meet the threshold for the granting of the Petition. Rule 12-502(C)(2)(d).

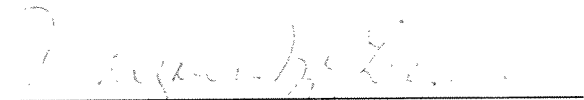
This Court should also recognize and acknowledge the impact of any appeal bond on the minor victim. See generally NMSA 1978, Section 31-26-1 (1994), Victims of Crime Act. The crime of criminal sexual contact of a minor is a part of this law. NMSA 1978, Section 31-26-3(B)(12)(1999). The female minor victim is entitled to the Act's protections.

CONCLUSION

The State of New Mexico respectfully requests this Court deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I mailed a true and correct copy of this pleading, by first-class mail, postage prepaid, to:

John McCall
Attorney at Law
823 Gold Avenue SW
Albuquerque, New Mexico 87102

on this 15th day of October, 2009.

[Handwritten Signature]
Assistant Attorney General

ATTACHMENTS

STATE DISTRICT COURT:

Docket sheet, State v. Bent

Judgment and Sentence

Motion for Appeal Bond (without affidavits)

State of New Mexico's Response

Order, denying appeal bond

NEW MEXICO COURT OF APPEALS:

Docket sheet, New Mexico Court of Appeals, No. 29,227

Docketing Statement

Motion for Appeal Bond

Memorandum in Support of Appeal Bond (without attachments)

Order, denying appeal bond