

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

FELONY DIVISION: V
CASE NO.: 50-2022-CF-001136-BXXX-MB

STATE OF FLORIDA,

vs.

TIMOTHY DUNNE FERRITER,
Defendant.

**ORDER DENYING
DEFENDANT'S MOTION TO SET BOND**

THIS MATTER came before the Court on October 19, 2023, upon Defendant's Motion to Set Bond (the "Motion"), and after reviewing and considering the matter, and being otherwise fully advised in the premises, the Court finds and concludes as follows:

Statement of Facts and Prior Proceedings.

1. The State filed an Information in this matter on March 1, 2022.
2. On October 12, 2023, Defendant Ferriter was found guilty by a jury of all counts, including aggravated child abuse, false imprisonment, and child neglect. Following the receipt of the jury verdict, the Court adjudicated the Defendant guilty on all counts and immediately thereafter remanded Defendant to the custody of the Palm Beach County Sheriff's Office. The Court set sentencing in this matter for November 16, 2023.
3. At the time of the Court's adjudication of Defendant, Defendant's counsel *ore tenus* requested release of Defendant. This Court denied Defendant's request without prejudice to renew by written motion. Thereafter, on October 13, 2023, Defendant filed the instant Motion (D.E. 668) seeking post-conviction release pending sentencing.

4. In his Motion, Defendant asserts entitlement to post-conviction release pending sentencing for the following reasons:

- a. he has never violated a condition of bond since the State filed an Information in this matter;

- b. he does not have custody of any of the children and there are orders in the dependency case that govern contact. In short, any contact is at the discretion of the children;
- c. he is not a flight risk, as he has appeared for every hearing in this matter either in person or by Zoom; and,
- d. though the conduct for which he was convicted is serious, Dr. Rapa would testify it is situational. There are no allegations of abuse towards the other children in the home and, absent this case, Defendant Ferriter has no criminal record.

5. Although Defendant did not present any testimony or evidence at the hearing on the Motion, his attorney did represent to the Court that, as part of any post-conviction release the Court may consider, Defendant would be agreeable to posting a \$100,000 bond (twice the amount posted for pretrial release), wearing a GPS ankle monitor, and surrendering his passport.

6. The State of Florida opposes any post-conviction release pending sentencing, pointing out that such type of release is extremely rare and that in this instance the Motion should be denied because of the seriousness of the charges as to which the Defendant has been adjudicated and the fact that Defendant presents as a flight risk.

7. Although the State, also, did not present any testimony or evidence, Ms. Coakley, the Assistant State Attorney in this matter, did make certain factual representations in support of the State's position that were not disputed by the Defendant. In this regard, the State represented that the minimum guideline score reflected by the Criminal Punishment Code Scoresheet for Defendant is seventy-five (75) months and that the maximum sentence to which Defendant may be sentenced is forty (40) years. The State asserts that the severity of this penalty makes Defendant a flight risk.

8. The State also represented to the Court that during the pendency of these proceedings the Defendant sold his home in Jupiter, Florida, and thus no longer owns property in this county. This fact was confirmed by Defendant's counsel during the hearing. Ms. Coakley

further represented to the Court that Defendant lived in Spain with his family for awhile and has friends throughout the world, one of whom is from Australia and testified in Defendant's behalf during trial.

9. The State also represented to the Court that any financial risk to Defendant by being required to post a substantial bond was offset significantly by the fact that Defendant was not posting the bond himself, but rather was having someone else post the bond.

Governing Legal Standard.

10. As stated in *Kraft v. State*, 156 So.3d 1116, 1118 (Fla. 4th DCA 2015), "a trial court has discretion to consider releasing a defendant on bail following conviction and pending sentencing." *See also* Fla. R. Crim. P. 3.550 ("If the defendant is at large on bail, the defendant may be taken into custody and committed to the proper official or remain at liberty on the same or additional bail as the court may direct."); *see also Harbaugh v. Cochran*, 688 So.2d 1020, 1021 (Fla. 4th DCA 1997) (en banc). To be clear, however, *Kraft* expressly provides that "[a]fter conviction, release on bond pending sentencing is not a matter of right but is discretionary with the court. *Id. citing Younghans v. State*, 90 So.2d 308, 309 (Fla. 1956) (setting forth factors a judge might consider in determining whether a defendant should be imprisoned during the pendency of an appeal). It bears mentioning that post-conviction release pending sentencing does differ from post-conviction release pending appeal in that pursuant to the rules, a defendant cannot be released from custody on bond pending appeal until a notice of appeal is filed. Fla. R. App. P. 9.140(h)(1).

11. While the consideration of post-conviction release pending sentencing is subject to the sound discretion of the Court, as *Kraft* notes:

A court's ability to consider release pending sentencing is particularly appropriate where a defendant was previously on pretrial release, presents no risk of flight or danger to the community, and where the defendant is not facing any mandatory prison term. A court has discretion to grant a furlough pending sentencing, and likewise, the court continues to have discretion to

consider release on reasonable conditions pending a sentencing hearing.

Kraft v. State, 156 So.3d at 1118.

12. In regard to the Court's determination in this matter, further guidance is provided by the Fourth District in its opinion in *Baptiste v. State*, 134 So. 3d 1025 (Fla. 4th DCA 2013), in which the Court explained that in exercising its discretion:

A trial judge does not satisfy this requirement by merely making conclusory findings unsupported by the record. Rather, Rule 3.691 "and the *Younghans* decision on which it is based embody the supreme court's determination that decisions regarding posttrial release must be reasoned." Therefore, as this Court has recognized, "a mere verbatim recital of the considerations of *Younghans* will not suffice to fulfill the requirements" of Rule 3.691 and Rule 9.140(h)(3).

Baptiste v. State, 134 So.3d at 1026 (citations omitted).

13. Although addressing post-conviction release pending appeal, the facts addressed by the Fourth District in *Baptiste* are analogous to the matter *sub judice*. In that case, the Fourth District granted defendant's motion for rehearing and, in the process, withdrew its previous order denying appellant's motion to review an order denying post-trial release. In issuing its opinion on rehearing, the Fourth District noted that previously it reversed the circuit court's denial of post-trial release and "remanded to the trial court to reconsider post-trial release and to make the necessary findings." *Id.* (citing *Baptiste v. State*, 87 So.3d 1260, 1261 (Fla. 4th DCA 2012)). On remand, the trial court again denied post-trial release, pointing to the "lengthy five year prison sentence imposed" and "the fact that the Defendant did not articulate any legitimate good faith basis for an appeal." On these facts, the Fourth District again reversed the trial court, because the court's findings did not comply with the requirements imposed by the Florida rules of criminal and appellate procedure.

14. In so holding, the Fourth District drew guidance from the Second District's opinion

in *Coolley v. State*, 720 So.2d 598, 598 (Fla. 2d DCA 1998) in stating:

This case is similar to [*Coolley*], where the trial court denied the defendant's motion for post-trial release because it "feared that [the defendant] would not appear for any future court dates if released on bail." Finding that the original order was deficient, the second district reversed and provided the trial court an additional opportunity to produce "a second supplemental order with facts supporting the conclusion that [the defendant] constituted a flight risk." *Id.* at 599. The trial court responded with the addition that the "mandatory sentence makes this Defendant a flight risk." *Id.*

In again reversing, the second district recognized that flight risk is a "factor that in and of itself would support the denial if supported by sufficient facts." *Id.* However, in that case, "[t]here [wa]s no evidence in the record before [them] that [the defendant] was likely to flee because he faced a minimum mandatory sentence." *Id.* This reasoning therefore implied that additional evidence in the record could have warranted affirming, even though it was not specifically found by the trial judge. *Id.*

Baptiste v. State, 134 So.3d at 1026.

15. In following the lead set forth in *Coolley*, the *Baptiste* court noted that the trial court referred to the five-year sentence in that case as weighing against bail, but nonetheless pointed out that the defendant's serving a "lengthy five year prison sentence" is not conclusive of whether she presents a flight risk. *Id.* (noting that "[T]he legislature has made no provision for automatically denying appeal bonds to all those defendants who face mandatory terms of imprisonment."). Ultimately, the *Baptiste* court granted the same relief as in *Coolley* and directed the trial court to set a reasonable bond, because "the court failed to explain, or set forth a factual basis for, its findings that the appeal is frivolous and not based on grounds that are fairly debatable." *Id.*

16. So, *Kraft* and *Baptiste* teach that the Court's exercise of discretion in this matter cannot be arbitrary or capricious, but must be driven by conclusions based on and supported by evidence and facts. While it is premature to consider whether any appeal is taken in good faith on grounds not frivolous but fairly debatable (i.e., one factor in a post-conviction motion for release pending appeal), the Court in the exercise of its discretion in the context of post-conviction release

pending sentencing may nonetheless consider the other factors set forth in *Younghans v. State*, including:

(1) the habits of the individual as to respect for the law, (2) his local attachments to the community, by way of family ties, business, or investments, (3) the severity of the punishment imposed for the offense, and any other circumstances relevant to the question of whether the person would be tempted to remove himself from the jurisdiction of the court. In a case where the term of imprisonment imposed is short, the trial court might also consider whether the denial of bail would render nugatory the right to appeal from the judgment of conviction.

90 So.2d at 309; *see also* *Cheatham v. Novell*, 382 So.2d 361 (Fla. 4th DCA 1980) (“*Younghans*, of course, deals with the appropriate considerations for review of a motion for bond pending appeal. Its general principles, however, have equal application to a motion for release on bond pending the disposition of a motion for new trial. *Younghans* ‘four criteria should be considered together with a determination of whether the motion for new trial is filed “in good faith, on grounds not frivolous but fairly debatable”’”).

Analysis and Conclusions of Law.

17. As noted above, post-trial release at this stage in the proceedings is governed under Florida Rule of Criminal Procedure 3.550. Importantly, the Court’s exercise of discretion is not unlimited and “must be exercised within guidelines established by case law and adopted by court rule.” *Baker v. State*, 213 So. 2d 285, 287 (Fla. 4th DCA 1968).

18. With respect to Defendant’s Motion *sub judice*, a determination to be made is whether the Court is persuaded that Defendant is not a flight risk. In this regard, the Defendant concedes that he bears the burden of demonstrating evidence sufficient to support Defendant’s post-conviction release pending sentencing as requested in the Motion. *See Roberson v. Junior*, 338 So. 3d 341, 345 (Fla. 3d DCA 2022) (“We are mindful of the principle that, even when the State makes a strong demonstration of guilt evident or presumption great, it merely establishes that

the defendant has no constitutional right to pretrial release on reasonable conditions, and shifts the burden to the defendant, who still has the option of proving certain facts that permit the court to use its discretion to grant pretrial release under sufficient conditions.”).

19. The Court notes that Defendant failed to submit any testimony, documents, or other evidence during the hearing, but rather relied on representations and conclusions of Defendant’s counsel to provide the Court with facts Defendant believes sufficient to establish that Defendant is not a flight risk. Similarly, the State also failed to present any testimony or other evidence, but again related to the Court facts the State believes demonstrate the Defendant is a flight risk. Ordinarily, where the Court is required to make factual findings and there is no testimony or evidence presented by the party that bears the burden, such relief would be denied forthwith for want of sufficient evidence to enable the Court to make a reasoned determination that the moving party is entitled to the relief requested. Here, given the issues presented the Court has nonetheless endeavored to give consideration to the matter as best it can limiting its consideration to those facts that appear undisputed or as to which the Court can take judicial notice from the Court file in this matter.

20. To be sure, the Court’s job is made more difficult by the fact that neither side submitted any evidence in the traditional sense, and the Court would suggest that given the admonitions from the appellate courts regarding conclusions unsupported by evidentiary support the better practice in litigating these types of motions would be for both sides to approach such hearings with a healthy dose of evidentiary and factual submissions. It is not lost on the Court the burden this places on both sides and the additional work required usually coming on the heels of a trial, nonetheless for the Court to do its job as directed by the appellate courts there must be evidence submitted to support the legal conclusions as to which the Court is being asked to draw. The foregoing being said, the Court as indicated above has attempted to work with and consider

certain facts represented by the State that were undisputed and confirmed by the Defendant during the hearing. Although this is not the same as stipulated facts presented to the Court, it is close since there is no reasonable dispute and the Court is inclined to accept them as true for purposes of the pending Motion.

21. Though limited, these facts have been considered by the Court in rendering its decision and have been evaluated in light of the *Youghans* factors. Notably, the Court has not viewed any particular factor or fact in isolation to be dispositive in its determination, but rather has consider all factors holistically in arriving at a conclusion based on the available facts and circumstances as to whether the Defendant constitutes a flight risk such that post-conviction release pending sentencing should be denied.

22. First, the Court considered the Defendant's conduct as to respect for the law. Here, Defendant's counsel pointed out that Defendant never missed a hearing pre-trial and that there is no reason for him to do so now. Moreover, as held in *Waller v. State*, 208 So.2d 147, 149 (Fla. 2d DCA 1968), on this factor, bail cannot not be refused to a defendant, pending appeal in a noncapital case, because of lack of respect for the law, unless lack of respect related to tendency of defendant to remove himself from the jurisdiction of the court. While this point weighs somewhat in favor of Defendant's position, at its core it is nothing more than a reflection that Defendant complied with what he was supposed to do to maintain his release pre-trial. As such, on the issue of its probative value or not on Defendant's conduct post-conviction, the Court is not inclined to give it great weight, especially where as here it does not account for the impact of Defendant's conduct that led to his adjudication to begin with or that Defendant's circumstances have now changed significantly such that his conduct pre-trial is not necessarily a strong or probative indicator of his conduct post-conviction. Still, on this point, the Court has considered this factor to weigh in favor of pretrial release pending sentencing.

23. Second, the Court considered the Defendant's local attachments to the community, by way of family ties, business, or investments. Again, there was no significant evidence presented by Defendant demonstrating any long-term connection to this community or business or professional attachments that would ordinarily serve as a significant anchor to the community militating against a flight from the jurisdiction. To the contrary, it was raised by the State and undisputed by Defendant that since the commencement of these proceedings, Defendant has in fact sold the home in which the abuse occurred. Thus, in the Court's view, with the selling of Defendant's home, a significant local attachment to the community no longer exists. This fact, coupled with the fact that Defendant only returned to Florida from Arizona shortly before the abuse occurred in Florida, leaves the Court with the significant concern that nothing exists to prevent Defendant from making a quick exit from the community having sold his one significant real property asset that anchored him to the community.

24. Moreover, as a result of proceedings involving the Defendant's children, the Defendant no longer has custody or rights with respect to the children, with the parental rights as to the two adopted children having been terminated, one child having been adopted by a family member, and the remaining child still in foster care. The import of this to the Court is that the normal strong incentive to remain close to one's children that would exist with an intact family no longer exists here, adding to the Court's concern of there being nothing to incentivize Defendant not to flee the jurisdiction. On this factor, the Court concludes that Defendant failed to submit substantial, competent evidence to persuade the Court that Defendant's local attachments to the community by way of family ties, business, or investments is sufficient to demonstrate that Defendant is not a flight risks. To the contrary, the undisputed facts presented to the Court on this factor lead the Court to conclude that Defendant, in the absence of such local contacts, is more likely than not to be a greater flight risk.

25. Third, the Court considered the potential severity of the punishment that could be imposed for the offenses for which Defendant was found guilty and adjudicated. As represented by the State and not contested by the Defendant's counsel, based on the Criminal Punishment Code Scoresheet, Defendant scores under the guidelines for a minimum sentence of seventy-five (75) months with a potential maximum legally permissible sentence of up to forty (40) years. Although Defendant's counsel argues that this is not a minimum mandatory sentence under the strictest sense, there can be no dispute that it represents the lowest sentence that the Court can impose under the law unless a sufficient case is made for a downward departure at the time of sentencing. To be clear, at this stage, Defendant has not provided any evidence demonstrating any entitlement to a downward departure. Give the guidelines score and the potential maximum of forty years, the Court concludes that the risk of a substantial and severe sentence poses a powerful incentive for Defendant to flee the jurisdiction and represents a substantial change in circumstances the Defendant faced pre-trial versus the circumstances and reality he now faces post-conviction and adjudication. On this factor, the Court concludes that the facts and circumstances weigh strongly against release post-conviction pending sentencing.

26. Fourth, the Court considered any other circumstances relevant to the question of whether Defendant would be tempted to remove himself from the jurisdiction of the court. In this regard, the Court notes that Defendant's counsel suggested that a bond of \$100,000, a surrender of his passport, and his wearing an ankle bracelet would adequately guard against any risk of flight by Defendant from this jurisdiction. While these points may support an argument that risk of flight is lessened, they do not in the Court's view reduce the risk of flight to an acceptable level of risk given Defendant's current legal posture in this matter and the other facts and circumstances attendant to this matter. Defendant has shown the ability to raise substantial amounts in having bond posted pretrial and has made arrangements apparently for a bond to be posted for a \$100,000

by someone else if the Court permits post-conviction release. While as noted by the State this creates a concern that Defendant is not personally undertaking any financial risks by posting bond (and therefore is not disincentivized to flee), the larger concern for the Court is the fact that Defendant apparently has individuals able to provide significant financial support that in the Court's view could also be resorted to as a means of support for exiting the jurisdiction.

27. Further, the Defendant has lived in other states and in other countries, including specifically Arizona and Spain. This demonstrates to the Court that Defendant is an experienced traveler, both domestically and internationally, which again drives the Court's concerns regarding risk of fleeing the jurisdiction. Finally, it also bears mentioning again that the Court is hampered somewhat by the Defendant's failure to provide any competent, substantial evidence sufficient to allay the Court's concerns raised by the evidence and undisputed facts that are available to the Court.

28. Based on the Court's consideration of the above factors and in evaluating the facts which are essentially undisputed, the Court concludes that Defendant has failed to provide competent, substantial evidence demonstrating his entitlement to post-conviction release pending sentencing. In *Coolley*, the second district recognized that flight risk is a "factor that in and of itself would support the denial if supported by sufficient facts." *Coolley v. State*, 720 So. 2d at 598. As explained above, unlike in *Coolley* where the Second District concluded that there was no evidence in the record before it that the defendant was likely to flee, here the Court has determined the existence of a number of facts that considered holistically underlie the Court's concerns regarding the Defendant's likelihood of and incentive to flee and the risks attendant thereto.

29. Given that post-trial release is a discretionary matter, an appellate court's review is limited to discerning whether the trial court's exercise of discretion is arbitrary or capricious. See *McGlade v. State*, 941 So.2d 1185, 1188 (Fla. 2d DCA 2006). Therefore, as noted under the

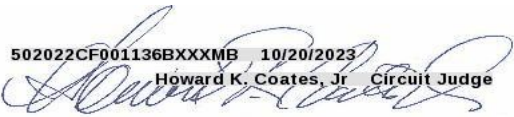
caselaw, “[i]t would seem [that] the obvious purpose [of requiring written findings] is to pinpoint the reason for the trial court’s action which facilitates appellate review thereof.” *McCormack v. State*, 338 So.2d 208, 209 (Fla. 4th DCA 1975); *see also McGlade*, 941 So.2d at 1189 (“An important safeguard against arbitrariness is the requirement that when denying posttrial release a judge must state the factual bases and reasoning for the denial.”). In addressing each of the factors set forth above, the Court has given detailed and thoughtful consideration to the available facts, limited as they may be. However, as the burden lies with Defendant in establishing an evidentiary basis for the granting of the relief sought in his Motion, at the end of the day any deficiency in or lack of sufficiency of evidence must be borne by him.

Based on the above, it is thereby

ORDERED AND ADJUDGED as follows:

A. Defendant’s Motion to Set Bond seeking post-conviction release pending sentencing is DENIED.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida on October 20, 2023.

502022CF001136BXXXMB 10/20/2023

Howard K. Coates, Jr. Circuit Judge
502022CF001136BXXXMB 10/20/2023
Howard K. Coates, Jr.
Circuit Judge

HOWARD K. COATES, JR.
CIRCUIT JUDGE

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