

IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN )  
MARIANA ISLANDS, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
YI XIOU ZHEN, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Criminal Case No. 99-0338

**ORDER**

**I. PROCEDURAL BACKGROUND**

This matter came before the court on July 25, 2000, in Courtroom 223A at 9:00 a.m. on Defendant's motion for release pending appeal. Assistant Attorney General Marvin J. Williams, Esq., appeared on behalf of the Commonwealth. Anthony G. Long, Esq., appeared on behalf of the Defendant, Yi Xiou Zhen. The court, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its decision.

**II. FACTS**

On July 16, 1999, the Commonwealth filed an Information charging Defendant with one count of Promoting Prostitution in the Second Degree, in violation of 6 CMC § 1344(a) and 6 CMC § 1344(d)(2) and made punishable by 6 CMC § 1346(c).

On February 11, and February 12, 2000, a bench trial was conducted before the Superior Court. [p. 2]

On February 14, 2000, the court entered a judgment of conviction whereby Defendant was adjudged guilty beyond a reasonable doubt of one count of Promoting Prostitution in the Second Degree, in violation of 6 CMC § 1344(a) and 6 CMC § 1344(d)(2) and made punishable by 6 CMC § 1346(c).

**FOR PUBLICATION**

Also on February 14, 2000, the court entered a sentencing and commitment order whereby Defendant was sentenced to: two years imprisonment, to commence on February 14, 2000; a fine in the amount of one thousand dollars (\$1,000.00), to be paid within thirty (30) days; a further payment of two thousand dollars (\$2,000.00) pursuant to 6 CMC § 1346(e)(2); and a fee assessment of one hundred dollars (\$100.00) pursuant to Public Law 11-105.

On March 13, 2000, Defendant filed a notice of appeal to the Commonwealth Supreme Court.

On June 30, 2000, Defendant filed the present motion for release pending appeal asserting that Defendant should be released because there is no evidence that Defendant is a danger to any person or to the community, because Defendant is not a flight risk, and because Defendant's appeal is meritorious.

### **III. ISSUE**

Whether the court shall grant Defendant's motion for release pending appeal pursuant to Com. R. Crim. P. 46(c) on the ground Defendant is not a danger to any person or to the community, is not a flight risk, and because Defendant's appeal is not frivolous or taken for the purpose of delay.

### **IV. ANALYSIS**

#### **A. Standard for Release Pending Appeal.**

A convicted defendant has no absolute right to bail and the question of his release on bail pending appeal rests in the sound discretion of the trial court. *United States v. Quicksey*, 371 F. Supp. 561, 564 (D. W.Va. 1974). Com. R. Crim. P. 46(c), however, requires the Superior Court to determine the release of a defendant awaiting appeal from a conviction under the same criteria as a defendant seeking pretrial release, unless "the court has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community . . . or if it appears that an appeal is frivolous or taken for delay . . ." *See* Com. R. Crim. P. 46(c). **[p. 3]**

If the Superior Court denies Defendant's motion for release pending appeal, Defendant's recourse is set forth at Com. R. App. P. 9(b), which states, in pertinent part:

If the Superior Court refuses release pending appeal, or imposes conditions of release, the Court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release pending review may be made to [the Supreme Court] or to a justice thereof.

*See* Com. R. App. P. 9(b). The criteria for an order of the Supreme Court releasing a defendant pending appeal are presented at Com. R. App. 9(c) which places the burden on the defendant to show that "[s]he will not flee or pose a danger to any other person or the community and 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 in an order for a new trial." *See* Com. R. App. P. 9(c).

The Superior Court, however, is governed by Com. R. Crim. P. 46(c) under which the standard for release pending appeal is more lenient. *See* Com. R. Crim. P. 46(c), *see also* *Commonwealth v. Ramangmau*, Traffic Case No. 93-1284 (N.M.I. Super. Ct. Dec. 9, 1993) (Order Denying Release Pending Appeal) (Language of Com. R. Crim. P. 46(c) manifests a presumption of release pending appeal that can be overcome only if the court "has reason to believe" one of the four grounds for detainment exists).

## B. Application of Standard for Release Pending Appeal.

Courts should "turn to counterpart federal rules for guidance" when interpreting the Commonwealth Rules governing stays pending appeal. *Commonwealth v. Martinez*, 4 N.M.I. 18, 20 (1993). Also, the question of whether a convicted defendant is to be released on bail pending appeal rests in the sound discretion of the trial court. *United States v. Baca*, 444 F.2d 1292 (10<sup>th</sup> Cir. 1971), *cert. den.* 404 U.S. 979, 92 S.Ct. 347, 30 L.Ed.2d 294 (1971).

### 1. Flight Risk.

Defendant was sentenced to two years of incarceration. Having been incarcerated since February 14, 2000, a period of approximately five months and two weeks, Defendant faces an additional eighteen months of incarceration. The Commonwealth asserts that the period remaining

on Defendant's sentence gives Defendant an increased incentive to flee the jurisdiction. The Commonwealth also notes that Defendant is not a Commonwealth resident, has no family, and is not currently employed. Defendant, however, notes that she remained free on bail between the date of conviction, February 12, 2000, until the date of sentencing, February 14, 2000, and did not attempt to leave the jurisdiction. In addition, Defendant notes that the court has the discretion to impose terms and conditions that ensure that Defendant remains in the jurisdiction, including requiring that Defendant be supervised by a third-party custodian.

The court finds that terms and conditions can be imposed upon Defendant to ensure that she does not present a flight risk. Possible terms and conditions include retention of Defendant's passport and a geographic restriction prohibiting Defendant from being at or near any airport or seaport. In addition, Defendant's release, if any, shall be contingent upon presentation to the court of a suitable third-party custodian.

## 2. Danger to Community.

The Commonwealth contends that the release of Defendant during the pendency of her appeal will allow her to go back into the community in which she was arrested, to participate in the same criminal activity for which she was convicted, promoting prostitution. Defendant, however, notes that although she has been convicted of a felony, she has not been convicted of a crime of violence. Defendant further notes that she presented no danger to any other person or the community while she remained free on bail from the date of conviction, February 12, 2000, until the date of sentencing, February 14, 2000.

"The danger to the community posed by the defendant must be of such dimension that only his incarceration can protect against it." *United States v. Provenzano*, 604 F.2d 85, 94 (3<sup>rd</sup> Cir. 1979). Here, the court finds that terms and conditions, other than continued incarceration, can be imposed upon Defendant to ensure that she does not present a danger to any other person or the community. Possible terms and conditions include a curfew to ensure that Defendant does not participate in the same criminal activity for which she was convicted. [p. 4]

### 3. Frivolous Appeal.

A frivolous appeal “is one in which no justiciable question has been presented and the appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed.” *Commonwealth v. Kawai*, 1 N.M.I. 66, 72 (1992). A legal argument is non-frivolous if it is likely to succeed on the merits or if reasonable persons could differ as to the likelihood of its success on the merits. *Tenorio v. Superior Court*, 1 N.M.I. 114, 123 (1990).

Here, Defendant appeals the decision of the trial court on the following grounds: the trial court refused to grant Defendant a jury trial, the trial court limited Defendant’s examination of one of the Commonwealth’s chief witnesses, and the trial court failed to order a pre-sentence investigation.

The Superior Court has held that a defendant charged with promoting prostitution in the second degree is entitled to a jury trial. *See Commonwealth v. Chen*, Criminal Case No. 99-0339 (N.M.I. Super. Ct. Apr. 26, 2000) (Order). However, the Superior Court has also held that a defendant charged with promoting prostitution is not entitled to a jury trial. *See Commonwealth v. Zhang*, Criminal Case No. 99-0341 (N.M.I. Super. Ct. Nov. 9, 1999) (Order). Furthermore, two oral decisions denying jury trials to similarly situated defendants have also been entered. Defendant claims that this is a “split of authority” which necessitates review by the Supreme Court and which shows that there is a possibility that the Supreme Court will remand the present matter for further proceedings.

The court finds, given the aforementioned “split of authority,” that Defendant’s appeal on the issue of the trial court’s failure to grant a jury trial is not frivolous, but rather, is one which presents a justiciable question.

Regarding the alleged limited examination of an adverse witness, Defendant asserts that the trial court erred in limiting the recross examination of one of the Commonwealth’s chief witnesses, Yoichi Matsumura. A trial court’s limitation on the scope of cross-examination is reviewed for an abuse of discretion. *United States v. Kennedy*, 714 F.2d 968 (9th Cir. 1983). *cert. den.* 104 S.Ct. 1305 (1984). Here, the trial court had the discretion to limit Defendant’s examination of Yoichi

Matsumura because the questions asked went beyond the scope of redirect examination. *See* Trial Transcript at 76-78. [p. 5]

Regarding the failure to order a pre-sentence investigation, the court turns to 6 CMC § 4106, which states:

Before imposing or suspending the execution of sentence upon a person found guilty of a criminal offense, or in suspending the imposition of sentence and granting probation, evidence of good or bad character, including any prior criminal record of the defendant, **may** be received and considered by the court.

6 CMC § 4106 (emphasis added). The language of 6 CMC § 4106 is permissive, not mandatory. As such, the trial court has the discretion to render a sentence without ordering a pretrial conference as long as the court, orally or otherwise, follows the mandate of 6 CMC § 4115, which states:

The court, in imposing any felony sentence, shall enter specific findings why a sentence, fine, alternative sentence, suspension of a sentence, community service or probation, will or will not serve the interests of justice.

6 CMC § 4115. Here, the court, at the sentencing hearing on February 14, 2000, orally provided specific findings as to why the sentence was imposed *See* Trial Transcript at 182-183. The court finds, therefore, that Defendant's appeal on the issue of the trial court's failure to order a pre-sentence investigation fails to present a justiciable question.

Despite the weakness of some of the grounds upon which Defendant rests her appeal, the court finds that Defendant's appeal on the issue of the trial court's failure to grant a jury trial is not frivolous, but rather, is one which presents a justiciable question with at least a prospect that it can succeed.

#### 4. Appeal for Purpose of Delay.

Given that the court has found that Defendant's appeal is not frivolous, but rather, is one which presents a justiciable question, the court also finds that Defendant's appeal is not for the purpose of delay.

## V. CONCLUSION

For the foregoing reasons, the court finds that, subject to the imposition of significant terms and conditions of release, Defendant is not a danger to any person or to the community and is not a flight risk. The court further finds that Defendant's appeal is not frivolous or taken for the purpose of delay. As such, [p. 6] Defendant's motion for release pending appeal is **GRANTED**. Defendant's release, however, is contingent upon the following:

1. Defendant Yi Xiou Zhen shall remain in custody pending presentation to the court of a suitable third-party custodian;
2. Counsel for Defendant shall provide counsel for the Commonwealth with the name and occupation of the proposed third-party custodian within three (3) days of this order;
3. Counsel for the Commonwealth shall then have three (3) days, from the time the information regarding the third-party custodian is received, to conduct any pertinent investigation;  
and
4. A hearing will be held on August 11, 2000, in Courtroom 223A at 9:00 a.m., at which time counsel for Defendant shall present the proposed third-party custodian. The specific terms and conditions of Defendant's release will be imposed after the court's approval, if such is warranted, of the proposed third-party custodian.

So ORDERED this 3<sup>rd</sup> day of August, 2000.

/s/ Juan T. Lizama  
JUAN T. LIZAMA, Associate Judge