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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,)	Criminal Case No. 93-11
)	
Plaintiff,)	ORDER GRANTING MOTIONS
)	FOR STAY OF SENTENCE
v.)	AND FOR BAIL PENDING
)	APPEAL
GODWIN BREL,)	
)	
Defendant.)	

This matter came on for hearing on Defendant Godwin Brel's motion to stay his sentence pending appeal and for bail on September 22, 1993. The matter was then continued until October 4, 1993 to allow the parties to submit supplemental memoranda regarding Defendant's likelihood of success on appeal. Deputy Attorney General Cheryl Gill appeared for the Government and Brian Nicholas, Esq., appeared with Defendant.

FACTS

Defendant's case was originally set for trial on October 26, 1992. On the day of trial, the Government moved for a

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1 continuance, citing the unavailability of its primary witness due
2 to weather. The Court denied the motion but granted a dismissal
3 without prejudice for ninety days pursuant to Com. R. Crim. P.
4 48(a). On January 22, 1993, Defendant was re-charged. On
5 February 22, 1993, the Court denied Defendant's motion for
6 dismissal with prejudice pursuant to Com. R. Crim. P. 48(b), and
7 a jury convicted him of aggravated assault and battery on June 6,
8 1993. On July 14, 1993, the Court sentenced him to ten years in
9 prison.

10 Defendant noticed his appeal of this conviction to the
11 Commonwealth Supreme Court on August 16, 1993. As set forth in
12 his *Supplemental Memorandum of Law Regarding Issues on Appeal and*
13 *the Likelihood of Success on Appeal*, Defendant's appeal will be
14 premised on the following claims: 1) the Court abused its
15 discretion in granting the Government leave to dismiss Defendant's
16 case without prejudice on the day the first trial was set to
17 begin; and 2) the Court erred in denying Defendant's motion to
18 dismiss with prejudice after the charge was re-filed. Defendant
19 also states that he has not yet received the transcript of the
20 case and reserves the right to present additional issues on appeal
21 based on the transcript.

22 Defendant moved to stay his sentence pending this appeal on
23 September 14, 1993. At hearing, the Court determined that
24 Defendant is neither a flight risk nor a danger to the community
25 or any other person. Moreover, the Government's initial
26 opposition Memorandum states (at 9) that "the record in this case
27 does not indicate any improper purpose, including delay" for
28 Defendant's appeal. The case was taken under advisement to allow

1 the Court to evaluate whether Defendant's appeal has a sufficient
2 likelihood of success to warrant a stay under applicable
3 Commonwealth law.

4 5 ANALYSIS

6 I. RULES GOVERNING STAYS PENDING APPEAL

7 Commonwealth Rule of Criminal Procedure 46(c) requires the
8 Superior Court to grant a stay of sentence and bail pending appeal
9 under the same conditions that pre-trial release and bail are
10 granted, unless:

11 the Court has reason to believe that no one or more
12 conditions of release will reasonably assure that the
13 person will not flee or pose a danger to any other
14 person or to the community. If such a risk of flight or
15 danger is believed to exist, or if it appears that an
16 appeal is frivolous or taken for delay, the person may
17 be ordered detained.

18 Com. R. Crim. P. 46(c) (emphasis added). However, there is a
19 sharp and troubling disparity between the language underscored
20 above and the corresponding Rule of Appellate Procedure 9(c),
21 which requires that, in order to obtain a stay pending appeal,

22 [d]efendant has the burden of proof of establishing that
23 he will not flee or pose a danger to any other person or
24 to the community and that the appeal is not for purpose
25 of delay and raises a substantial question of law or
26 fact likely to result in reversal or in an order for a
27 new trial.

28 Emphasis added. As the Government's *Response to Motions for Stay
of Sentence* (at 7) points out, Criminal Rule 46(c) mirrors the
language of the old Fed. R. Crim. P. 46(c) and the Bail Reform Act
of 1966, while Appellate Rule 9(c) incorporates this federal Rule
as it was amended in 1984. The 1984 federal amendment had the
explicit purpose of reversing the prior Rule's presumption in
favor of bail pending appeal. See *United States v. Miller*, 753

1 F.2d 19, 22 (3d Cir. 1985) (citing legislative history of
2 amendment). Whereas under the old Rule a defendant was
3 presumptively entitled to bail, the new Rule places the burden
4 upon him to show that the merits of his appeal are at least
5 "fairly debatable." *United States v. Handy*, 761 F.2d 1279, 1281
6 (9th Cir. 1985).

7 The CNMI Supreme Court has stated that courts should "turn to
8 counterpart federal rules for guidance" when interpreting the
9 Commonwealth Rules governing stays pending appeal. *CNMI v.*
10 *Martinez*, No. 93-034, slip op. at 3 (N.M.I. July 26, 1993). The
11 Commonwealth thus has two opposing standards of "merit" for stays
12 pending appeal: the Superior Court must grant a stay unless it
13 finds the appeal "frivolous", whereas the Supreme Court must deny
14 the stay unless defendant proves that the appeal "raises a
15 substantial question of law or fact."

16 The Government here urges this Court to overlook the
17 "frivolity" language of Rule 46(c) in favor of the "substantial
18 question" language of Rule 9(c), because the latter parallels "the
19 existing federal standard for release pending appeal." While this
20 approach may be attractive from a policy point of view, this Court
21 lacks the authority to ignore its own Rules in favor of those
22 governing the Supreme Court. We therefore hold that the relevant
23 question is whether defendant's appeal is "frivolous" as defined
24 by cases interpreting the pre-1984 Fed. R. Crim. P. 46(c).

25
26 **II. LIKELY MERIT OF DEFENDANT'S APPEAL**

27 Defendant's asserted grounds for appeal are that the Court
28 abused its discretion in dismissing without prejudice the first

1 information against defendant on the day of trial. This argument
2 is unlikely to prevail. Binding precedent makes clear that
3 motions for dismissal under Criminal Rule 48(a) should be granted
4 where the court finds that the prosecution is acting in good
5 faith. *United States v. Hayden*, 860 F.2d 1483, 1487 (9th Cir.
6 1988); see also *United States v. Welborn*, 849 F.2d 980, 983-4 (5th
7 Cir. 1988).

8 Here, Defendant's Supplemental Memorandum alleges inadequate
9 preparation by the Government in securing the attendance of its
10 witnesses, but does not allege bad faith per se. For its part,
11 the Government cites *United States v. Hattrup*, 763 F.2d 376 (9th
12 Cir. 1985), the facts of which are closely analogous to the
13 situation here. In *Hattrup*, the State's main witness was
14 unavailable and the prosecution moved for a continuance on the day
15 of trial. The trial court denied the motion and dismissed the
16 case with prejudice pursuant to Rule 48(b). The Ninth Circuit
17 reversed, on the grounds that the prosecution had not been
18 forewarned of the consequences of its action before the dismissal
19 was ordered. 763 F.2d at 377. Thus, under this precedent, this
20 Court would have erred if it had not granted a dismissal without
21 prejudice.^{1/}

22 However, this Court cannot say that Defendant's argument is
23 "frivolous" within the meaning of the former Fed. R. Crim. P.
24 46(c). In *Leary v. United States*, 431 F.2d 85, 88-89 (5th Cir.
25 1970), appellant contended that the statute under which he was
26

27 ^{1/} Conversely, Defendant cites *United States v. Olson*, 846
28 F.2d 1103, 1114 (7th Cir. 1988), which applies a presumption of
prosecutorial good faith and does not support the proposition that
Rule 46(a) was misapplied here.

1 convicted violated his privilege against self-incrimination as
2 applied. The Fifth Circuit had previously rejected similar
3 constitutional challenges to the statute. Noting that the
4 standard for bail tending appeal was "liberalized," the Fifth
5 Circuit held that defendant's "constitutional argument is not so
6 insubstantial that the appeal should be held frivolous." 431 F.2d
7 at 89.

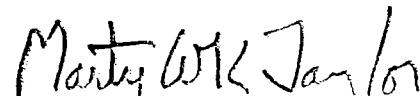
8 Further, the fact that Defendant here has not yet had the
9 opportunity to review his trial transcript weighs against a
10 finding of frivolity. In *United States v. Seegers*, 433 F.2d 493,
11 494 (D.C. Cir. 1970), the Court reversed a denial of a stay of
12 sentence pending appeal, in part on the grounds that defendant had
13 been "unable to define the issues to be presented on appeal
14 because he had not received a copy of the trial transcript." *Id.*
15

16 **CONCLUSION**

17 Applying relevant federal precedent to the facts presented
18 here, this Court holds that Defendant's appeal is not frivolous
19 under the meaning of Com. R. Crim. P. 46(c). Thus, finding good
20 cause therefor, the Court ORDERS:

21 1. Defendant Godwin Brel is hereby released pending his
22 appeal to the Commonwealth Supreme Court, subject to the same
23 conditions governing his pre-trial release.

24
25 So ORDERED this 8TH day of October, 1993.

26
27 
28 MARTY W.K. TAYLOR, Associate Judge