Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203	DATE FILED May 03, 2024 3:35 PM
Original Proceeding Denver County Court The Honorable Kerri Lombardi Case No. 19 M 00428	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. **RICHARD LEWIS,** Defendant-Appellant.	▲ COURT USE ONLY ▲ Case Number: 24SA75
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People's Response to Rule to Show Cause Under C.A.R. 21	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all applicable requirements of C.A.R. 21, 28, and 32, including the formatting requirements set forth in those rules. It contains 2,548 words.

/s/ Alison Suthers
Alison Suthers
Deputy District Attorney

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ISSUE PRESENTED

Does section 16-2-114(6), C.R.S. (2023), implicitly create a statutory right to bail pending appeal?

STATEMENT OF THE CASE

Richard Lewis was convicted at trial of four misdemeanors in Denver County Court: two counts of sexual assault on a client by a psychotherapist, and two counts of unlawful sexual contact. Because the convictions arose from two incidents of sexual assault, the court merged the counts per incident. TR 1/5/24, p 32:16-19. The court sentenced Lewis to 12 months in jail for one incident, and five years of sex offender probation for the other incident. TR 1/5/24, pp 33:12-34:1.

Lewis requested a stay of the sentence and asked that his $5,000 cash bond remain in effect pending appeal. TR 1/5/24, p 35:10-16. The court expressed "significant concerns about the safety of the community and specifically [the victim]" in light of statements Lewis made blaming the victim for his conviction. TR 1/5/24, pp 37:22-38:2. The court described Lewis's "manipulation" of the

victim as "shocking" and "predator[y]." TR 1/5/24, p 30:1-3.[1] The court noted Lewis "made every statement possible that blamed" the victim. TR 1/5/24, p 30:14-15. The court also expressed concerns about a pattern of conduct because Lewis's first wife had been his therapy patient. TR 1/5/24, pp 30:21-31:1.

Based on the conduct for which Lewis was convicted, as well as his accusatory stance toward the victim, the court concluded it could not find Lewis does not pose "a danger to the safety of any person or the community." TR 1/5/24, pp 37:13-38:5. Accordingly, the court denied bond pending appeal. *Id.*; *see* Colo. Const. art. II, § 19(2.5)(b)(I); § 16-4-201.5(2)(a). The court also found that bond was not appropriate because "at least with respect to the 12 month sentence any appeal with respect to that is frivolous." TR 1/5/24, pp 38:2-3; *see* Colo. Const. art. II, § 19(2.5)(b)(II); § 16-4-201.5(2)(b).

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[1] In her sentencing statement, the victim described being "terrified" of Lewis's advances and "hid[ing] from him in the furthest corner of my bathroom, in my complete dark apartment trying not to make a sound." TR 1/5/24, p 23:16-22. She described being "stalked, harassed, assaulted and traumatized" by Lewis. TR 1/5/24, p 24:5. Yet Lewis still accuses the victim of seducing him so that she could file a lawsuit and ruin his career. TR 1/5/24, pp 17:21-18:2; 18:15-18; 19:10-15.

REASONS TO DISCHARGE THE RULE AND DENY THE RELIEF REQUESTED

Article II, Section 19 of Colorado's Constitution requires that certain offenders, including those who pose safety risks, be denied bail after conviction. Colo. Const. art. II, § 19(2.5)(b). Neither section 16-2-114(6) nor *People v. Steen*, 2014 CO 9, can create a right to bail pending appeal when the constitution prohibits it.

I. Standard of Review

This case presents a legal question of statutory interpretation, subject to *de novo* review. *See Steen*, 2014 CO 9, ¶ 9.

II. The constitution does not allow for postconviction bail if the court finds that the defendant poses a safety risk.

Article II, Section 19 of the Colorado Constitution provides that "[t]he court shall not set [postconviction] bail … unless the court finds that: (I) The person is unlikely to flee and does not pose a danger to the safety of any person or the community; and (II) The appeal is not frivolous or is not pursued for the purpose of delay." Colo. Const. art. II, § 19(2.5)(b). This standard is restated in section 16-4-201.5(2). The trial court found that Lewis poses a danger to the safety of the victim and the community and therefore denied bail, a result explicitly required by the constitution. *See* TR 1/5/24, pp 37:13-38:5.

People v. Steen, 2014 CO 9, on which Lewis relies, did not interpret Article II, Section 19; in fact, the case didn't address bail pending appeal at all. Rather, *Steen* dealt with stays of execution and interpreted an interplay between *statutes*: specifically, *Steen* squared the mandatory stay of execution for county court sentences in section 16-2-114(6) with other statutory provisions describing stays of probation pending appeal as discretionary. *Steen*, 2014 CO 9, ¶ 23; *see* §§ 18-1.3-202(1)(a); 16-4-201(2). *Steen*'s holding is thus inapplicable to the body of law governing postconviction bail, which is controlled by Article II, Section 19. As a matter of constitutional supremacy, the mandatory stay of execution for county court sentences in section 16-2-114(6), cannot create a right to postconviction bail where Article II, Section 19 prohibits it.[2] *See Colo. State Civ. Serv. Emp. Ass'n v. Love*, 448 P.2d 624, 628 (Colo. 1968) ("Because state legislatures have plenary power for all purposes of civil government, state constitutions are [l]imitations upon that power." (citation omitted)). And nothing in Article II, Section 19 indicates it does not apply to county court defendants.

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[2] Moreover, section 16-2-114 doesn't expressly create a right to bail pending appeal at all. Instead, the statute suggests that bail is discretionary: "If a sentence of imprisonment has been imposed, the defendant may be required to post bail." § 16-2-114(6).

Lewis's argument ignores Article II, Section 19 entirely, even though that constitutional provision controls the issue raised here. But even setting that aside, Lewis also wrongly assumes that the right to an appeal bond flows automatically from the right to a stay. To the contrary, Colorado treats stays and appeal bonds as *separate* matters. All criminal defendants, not just those in county court, are entitled to stays of execution pending appeal. *See* § 16-12-103 ("When a person has been convicted of an offense and a notice of appeal is filed, he shall be entitled to a stay of execution by compliance with the provisions and requirements of the applicable rules of the supreme court of Colorado."). But Colorado law has traditionally decoupled stays from bail. *See Ritchey v. People*, 43 P. 1026, 1027 (Colo. 1896) (interpreting Colorado statutes in effect at statehood to provide that a stay of execution pending appeal "is in no way dependent upon the question of bail; in other words, bail is made, by the statute, an independent matter").

That traditional approach survives. Several provisions show that stays do not automatically create the right to bail pending appeal:

- Article II, Section 19 and sections 16-4-201 and 201.5 describe circumstances in which a convicted defendant, though entitled to a stay under section 16-12-103, is ineligible for an appeal bond. (That happens, for example, when a defendant is convicted of certain crimes.)

- Colorado Appellate Rule 8.1 acknowledges that a sentence may be stayed while an offender remains incarcerated pursuing an appeal and limits the stay to sixty days if the defendant is not admitted to bail.
- Section 16-11-307(1)(b) provides confinement credit for any defendant who is incarcerated pending appeal when a stay has been granted. In so doing, the statute obviously contemplates that criminal defendants may be in custody while their appeals are pending, even if a stay is in place.

This court has often noted that a statute should be read so that it harmonizes with other related statutes. *E.g.*, *Steen*, 2014 CO 9, ¶ 9 ("We will read and consider the statutory scheme as a whole to give consistent, harmonious, and sensible effect to all its parts." (citation omitted)). Lewis's argument invites this court to violate that principle of statutory interpretation.

III. *Steen* does not support a rule that all defendants sentenced in county court should be admitted to bail after conviction.

Lewis asks this Court to draw a rule from *Steen* that defendants must be released from custody pending appeal when their sentences are short enough. But

Steen did not create such a rule,[3] and neither Colorado nor federal courts have recognized any right to bail pending appeal. *See*, *e.g.*, *People v. Hoover*, 119 P.3d 564, 566 (Colo. App. 2005) ("The constitution does not establish a right to bail after trial…."); *Hamilton v. New Mexico*, 479 F.2d 343, 344 (10th Cir. 1973) ("A state prisoner has no absolute federal constitutional right to bail pending appeal." (citations omitted)).

Lewis's proposed rule that defendants with short sentences should be entitled to release pending appeal would pose practical and doctrinal problems:

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[3] As Lewis repeatedly notes (Pet. pp 1, 3, 4, 9, 10, 13, 14), *Steen* said this about stays of execution in county court:

> The right to a direct appeal of a criminal conviction is fundamental in our state. We note that without a mandatory stay upon request, a defendant may choose not to appeal a county court conviction because he may realize little or no benefit to succeeding on appeal in the district court if all or most of his sentence has already been served. Given the length of time required to obtain a judgment on appeal, county court defendants are at a greater risk of completing all, or most, of their sentences before an appellate judgment has been reached by the district court. Our decision today ensures that, upon request, a county court will grant a stay of execution to a defendant, thus removing the specter of a useless appeal.

2014 CO 9, ¶ 24 (citation omitted). This observation was not necessary to decide the question of statutory interpretation before the Court and therefore does not create controlling precedent. *See Main Elec., Ltd. v. Printz Servs. Corp.*, 980 P.2d 522, 526 n.2 (Colo. 1999) ("Dictum is not the law of the case and is not controlling precedent." (citation omitted)). *Steen* did not mention appeal bonds.

- First, it is not clear what the legal source of Lewis's proposed rule would be. Lewis correctly points out that defendants in Colorado have a right to appeal secured by statute. *See* § 16-12-101. But Article II, Section 19 confirms that liberty is not necessary to that right.[4] Moreover, an incarcerated defendant can of course pursue an appeal and realize benefits from success even after serving a short jail sentence (clearing the conviction from a criminal history, reinstating professional or driving licenses, sealing records, etc.).
- Second, Lewis's proposed rule would create practical difficulties. How short must a sentence be to warrant mandatory release pending appeal, given that appeals take an uncertain amount of time to resolve? What if a defendant received an 8-year total sentence on several misdemeanor counts? Should the calculation account for good time, earned time, or

[4] There is no federal due process right to an appeal. *Jones v. Hendrix*, 599 U.S. 465, 487 (2023) ("due process does not guarantee a direct appeal" (citing *McKane v. Durston*, 153 U.S. 684, 686–87 (1894))). Due process does protect the right to appeal when that right is guaranteed by the state, as it is in Colorado. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Because the right to an appeal is guaranteed by statute in Colorado, the constitutional provisions in Article II, Section 19 limiting postconviction bail would also limit any process that is due to a defendant pursuing the statutory right to appeal.

presentence confinement? Would the threshold vary based on the case load of a particular appellate court?

- Third, Lewis's proposed rule conflicts with the constitutional and statutory provisions that prohibit postconviction bail for offenses that may carry short sentences. For example, several class 5 felonies can carry sentences of as little as one year in prison but are ineligible for postconviction bail. *See* § 16-4-201.5(c), (e), (f), (h). Other defendants convicted of low-level felonies, including a first offense of possession of a weapon by a previous offender, may also receive short prison sentences but may present a danger to community safety and be ineligible for bond under Article II, Section 19 (2.5)(b). Similarly, being convicted of a misdemeanor with a short jail sentence is no guarantee that a defendant does not present a community safety or flight risk. Indeed, these dangerous offenders are the very ones most likely to be sentenced to jail rather than probation for misdemeanor offenses.
- Fourth, Lewis suggests that his proposed rule should apply only to misdemeanors charged *in county court*. (His argument relies on the simplified procedures for county court in section 16-2-114(6) and *Steen*'s commentary about that section's stay provision.) But if this Court adopts

that distinction, then defendants sentenced to short sentences for misdemeanors *in district court* would not be eligible for the same relief pending appeal as defendants serving the exact same sentence for the exact same crime in county court, creating equal protection concerns. This Court should avoid such an interpretation. *See Colo. Dep't of Labor & Emp't v. Esser*, 30 P.3d 189, 194 (Colo. 2001) ("If alternative constructions of a statute … may apply to the case under review, we choose the one that … avoids the constitutional issue.").

Finally, Lewis has access to the relief he seeks without the broad and ill-defined rule he proposes. Defendants like Lewis who want to challenge the trial court's findings making them ineligible for bond under Article II, Section 19 (2.5) and section 16-4-201.5(2) can request immediate relief from the appellate court. *See* §§ 16-4-204 (providing for appellate review of the terms and conditions of an appeal bond); 16-2-114(6) (acknowledging authority of district court to modify appeal bond in county court appeals).

CONCLUSION

The Court should discharge the rule.

Date: May 3, 2024.

Respectfully submitted,
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