UNITED STATES SUPREME COURT
Advance Opinion

(OPINIONS OF JUSTICES IN CHAMBERS)

I
ROGER S. BANDY
v
UNITED STATES
5 L ed 2d 218, 81 S Ct —
(No. 171, Misc.)
December 5, 1960

SUMMARY

An application for release on "personal recognizance" pending certiorari was denied by DOUGLAS, J., for the reasons stated in headnote 5, infra.

Bail and Recognizance Sec. 6; Criminal Law Sec. 46 — freedom during trial.

1. An accused's traditional right to freedom during trial and pending judicial review has to be squared with the possibility that he may flee or hide himself; bail is the device to reconcile these conflicting interests. (Per Douglas, J., as individual justice.)

Bail and Recognizance Sec. 6 — purpose.

2. The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court, it being assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release. (Per Douglas, as individual justice.)

Bail and Recognizance Sec. 7.5 — excessive bail.

3. It is unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. (Per Douglas, J., as individual justice.)

Bail and Recognizance Sec. 7 — right to release.

4. An accused's right to release during trial and pending judicial review is heavily favored and the requirement of security for a bond may, in a proper case, be dispensed with. (Per Douglas, J., as individual justice.)

Bail and Recognizance Sec. 7 — hearing — individual justice.

5. A defendant's application for release on "personal recognizance" pending certiorari will be denied by an individual justice of the Supreme Court of the United States without prejudice to an application to the Court of Appeals or the District Court, where the full court decided that the Court of Appeals should hear the accused's appeal. (Per Douglas, J., as individual justice.)

OPINION

Mr. Justice *Douglas*.

On previous application, bail was granted conditioned on the filing of a sufficient bond in the amount of $5,000. Bandy v United States, 5 L ed 2d 34, 81 S Ct 25. Now an application is made to me under Rule 46(a) (2) of the Federal Rules of Criminal Procedure for release on "personal recognizance" pending certiorari. The application recites that the petitioner is unable to give security for the prescribed bond.

The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt. Under Rule 46 a defendant has a right to be released on bail before trial, save in capital cases. Pending review of a judgment of conviction, release on bail may be allowed "unless it appears that the appeal is frivolous or taken for delay." Rule 46(a) (2). See 350 US 1021, 100 L ed 1530.

This traditional right to freedom during trial and pending judicial review has to be squared with the possibility that the defendant may flee or hide himself. Bail is the vice which we have borrowed to reconcile these conflicting interests. "The purpose of bails is to insure the defendant's appearance and submission to the judgment of the court." Reynolds v United States, 4 L ed 2d 46, 80 S Ct 30, 32. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release.

But this theory is based on the assumption that a defendant has property. To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence. Griffin v Illinois, 351 US 12, 100 L ed 891, 76 S Ct 585. Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?

It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Stack v. Boyle, 342 US 1, 96 Led 3, 72 S Ct 1. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. See Foote, Foreword: Comment on the New York Bail Study, 106 U of Pa L Rev 685; Note, 106 U of Pa L Rev 693; Note U of Pa L Rev 1031. The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal.

In the light of these considerations, I approach this application with the conviction that the right to release is heavily favored and that the requirement of security for the bond may, in a proper case, be dispensed with. Rule 46(d) indeed provides that "in proper cases no security need be given." For there may be other deterrents to jumping bail: long residence in a locality, the ties of friends and family, the efficiency of modern police. All these in given case may offer a deterrent at least equal to that of the threat of forfeiture.

Here, the Government has admitted that petitioner's appeal is not frivolous. It had no objection to release on a $5,000 bond. But it does oppose release on an unsecured bond. It contends that there is a substantial risk that petitioner would not comply with the conditions of his release. Its showing in this respect troubles me. But I do not reach a decision on the matter. The Court today holds that the Court of Appeals should hear the appeal. Hence I deny the application without prejudice to an application to the Court of Appeals or the District Court where, at a hearing on the matter, the facts can be better explored than at this distance.

II

THOMAS AKEL, Petitioner

v

STATE OF NEW YORK

5 L ed 2d 32, 81 S Ct —

July 18, 1960

SUMMARY

An application for bail pending a proposed petition for certiorari to review a judgment of conviction affirmed in the Court of Appeals of New York (7 NY2d 998, 199 NYS2d 510, 166 NE2d 514) was denied by FRANKFURTER, J., for the reasons stated in the headnote below.

Bail and Recognizance Sec. 7 — pending certiorari in Supreme Court — federal question.

A justice of the Supreme Court of the United States will deny an application for bail pending a petition for certiorari to be filed seeking review of a judgment of conviction affirmed in the highest court of a state, where it appears from the opposing affidavit that at no time in the course of the prosecution was a claim of a federal nature made, that the state court did not certify that any federal question was presented to it, and that the remititur below has not been amended so as to show that in fact a federal claim was considered and rejected by the state court; and where the petition for admission to bail, while claiming that a federal question is to be raised by the proposed petition for certiorari, does not allege any facts contradicting those stated in the opposing affidavit. (Per Frankfurter, J., as individual justice.)

OPINION

Mr. Justice *Frankfurter*, Associate Justice.

This is a motion to fix bail pending a petition for certiorari to be filed seeking review of a judgment of conviction affirmed in the Court of Appeals of New York on March 24, 1960.

When a judge as solicitous as is Judge Stanley H. Fuld to safeguard the interests of defendant in criminal cases denies an application for bail pending a proposed petition for certiorari to this Court on a claim of a substantial federal right, one naturally attributes some solid ground for such denial. To me this is found in the opposing affidavit in which it is deposed that at no time in the course of this prosecution was a claim of a federal nature made, that the New York Court of Appeals did not certify that any federal question was presented to it, and that, although affirmance of the judgment of conviction was rendered on March 24 last, the remititur below has not been amended so as to show that in fact a federal claim was considered and rejected by the New York Court of Appeals. While the petition for admission to bail claims that a federal question is to be raised by a proposed petition for certiorari, it does not allege that such a federal question had been raised before the New York Court of Appeals and was there denied. Nor is there any claim that the remititur was amended so as to set forth that the Court of Appeals did in fact pass on the federal claim. Nor does the memorandum of the Court of Appeals affirming the conviction, 7 NY2d 998, 999, 199 NYS2d 510, 166 NE2d 514, in setting forth the arguments made by defendant Akel in that court, include the claim of a federal right.

In this state of the record before me I am compelled to deny bail pending the filing of a petition for certiorari.

III

ROGER S. BANDY, Petitioner,

v

UNITED STATES

5 L d 2d 34, 81 S Ct

(No. 171, Misc.)

August 31, 1960

SUMMARY

An application for bail pending disposition of the applicant's petition for certiorari was granted by Douglas, J., for the reasons stated in headnote 1, infra.

Bail and Recognizance Sec. 7 — pending certiorari.

1. Although an application for bail pending disposition of the applicant's petition for certiorari had been denied by another justice of the Supreme Court of the United States, such application will be granted where the Solicitor General does not oppose the granting of bail in the suggested amount and the issues are ones on which there may well be a division of views when the merits are reached. (Per Douglas, J., as individual justice.)

Appeal and Error Sec. 910.6 — certiorari — when granted.

2. One of the tests of whether substantial questions justifying the grant of certiorari by the Supreme Court of the United States are presented is whether the issues are one on which there may well be a division of views when the merits are reached. (Per Douglas, J., as individual justice.)

OPINION

Mr. Justice *Douglas*.

An application for bail pending disposition of the applicant's petition for certiorari was denied by my Brother Whittaker on July 20, 1960. Application was then made to me. In view of my Brother Whittaker's denial I was most reluctant to take contrary action. Accordingly I asked that a response from the Solicitor General be requested. In a letter to the Clerk dated August 25, 1960, the Solicitor General stated:

"It is my opinion that the petition and the record present substantial questions of law. For that reason, and in view of the fact that the petitioner has been incarcerated since June, 1959, the Government does not oppose the granting of bail in the suggested amount of $5,000."

My study of the case leads me to the same conclusion. The issues are one on which there may well be a division of views when the merits are reached. But that is one test of whether substantial questions are presented. See Herzog v United States, 99 L ed 1299, 75 S Ct 349. Accordingly I fix bail in the amount of a $5,000 bond to be approved by the U.S. District Court for the District of North Dakota or a judge thereof. Upon such approval this bond is to be filed with the Clerk of that Court.

The pompus old judge glared over the rims of his spectacles at the prisoner before him on a charge of vagrancy. He looked at the report of the arrest again and asked rather scornfully, "Have you ever earned a dollar in your life?"

"Yes, Your Honor," replied the vagrant. "I voted for you at the last election." *Coronet*, February, 1961

A lawyer who was trying a case asked the witness, "Now, Mr. Jones, did you or did you not, on the date in question or at any other time previously or subsequently, say or even intimate to the defendant or anyone else, whether friend or acquaintance or in fact a stranger, that the statement imputed to you, whether just or unjust and denied by the plaintiff was a matter of no moment or otherwise? Answer — did you or did you not?"

The witness pondered for a while and then said, "Did I or did I not what?" *Coronet*, February 1961.