

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,  
PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

VS. :

CP-14-CR-2421-2011  
CP-14-CR-2422-2011

GERALD A. SANDUSKY :

**MEMORANDUM AND ORDER**

**Cross Motions to Modify Conditions of Bail**

John M. Cleland, Senior Judge

February 13, 2012

FILED FOR RECORD  
2012 FEB 13 A 9:30  
DEBRA C. IMEL  
PROTHONOTARY  
CENTRE COUNTY, PA

The Defendant has been released on \$250,000 bail and placed on the Centre County Electronic Monitoring/In-Home Detention Program. He has made a motion to modify the conditions of his bail to permit him to communicate with his grandchildren, to permit him to have adult visitors, and to permit him to leave him home to assist in the preparation of his defense. The Commonwealth, in response, has objected to all three of the requested modifications and has, instead, requested that the conditions of bail be modified to prevent the Defendant from being on his outside deck.

The Defendant's motion will be granted, with certain conditions. The Commonwealth's motion will be denied.

After the Defendant was arrested on the first set of charges on November 5, 2011, he was released following his preliminary arraignment on \$100,000 unsecured bond.

One month later, on December 7, 2011, he was arrested on additional charges. At the preliminary arraignment on those charges specially assigned Magisterial District Justice Robert E. Scott set bail set at \$250,000. Judge Scott added additional conditions that the Defendant "shall not be in the lone company of, or in a supervisory capacity of any minor child" and that if the Defendant posted bail he would be released under the conditions of the Centre County Electronic Monitoring/In-Home Detention Program. On December 8, 2011 the Defendant posted bail and was released to the Centre County program.

The County program contains four single spaced pages of conditions, three of which are at issue in the competing motions:

- a. Paragraph 33 states "You are not permitted contact with any individual under the age of 18." It is that condition which prohibits the Defendant from having contact with his grandchildren.
- b. Paragraph 26 states "You shall not be permitted any unauthorized visitors at your residence during your period of Home Detention." It is that condition which limits the Defendants contact with other adults.
- c. Paragraph 25 contains a restriction that requires the Defendant to remain at his residence, and not to leave except with the approval of the Program Coordinator. It is that conditions which it is argued impedes the Defendant's ability to assist in the preparation of his defense.

An analysis of the respective positions of the Defendant and the Commonwealth must begin with a clear understanding of the purpose of bail. The Defendant, of course, is presumed to be innocent. The fact the Commonwealth has charged him with a crime is not evidence of guilt. He remains entitled to the constitutionally protected presumption of innocence until the Commonwealth has proved his guilt beyond a reasonable doubt to the unanimous satisfaction of the jury.

In cases such as the one presented here, a defendant has an absolute right to be released on bail while awaiting trial. Pa.R.Crim.P. 520. A defendant's release, however, may be conditioned on reasonable terms that are intended to assure his presence in court at any time required until the disposition of his case. In addition, a defendant's release may be subject to reasonable conditions intended to protect community safety.

It could not be more clear, however, that "No condition of release, whether nonmonetary or monetary, should ever be imposed for the sole purpose of ensuring that a defendant remains incarcerated until trial." *Comment*, Pennsylvania Rule of Criminal Procedure 524. It is, therefore, not a helpful analogy to compare the Defendant's situation at home with what it would be if he were incarcerated. The conditions of bail must always be analyzed bearing in mind the presumption of innocence and the purposes of bail.

Request to Permit Contact With Grandchildren:

At the hearing on the Defendant's motion, counsel for the Commonwealth and the Defendant stipulated to the introduction of evidence which established:

- that the Defendant has 11 grandchildren, ranging in age from 14 years old to 2 years old;
- that the residences of the six parents of the grandchildren, five sons and one daughter, are scattered throughout the country, except for two sons who live in Centre County;
- that one of the Defendant's sons is divorced from the mother of three of the Defendant's grandchildren, has remarried, and is involved in custody litigation involving the three children;
- that the mother of those three grandchildren strongly objects to any contact between her children and the Defendant;
- that the court-appointed guardian ad litem for the three grandchildren who are the subject of the custody litigation submitted a letter to me stating that in his opinion contact with the Defendant would be in the children's best interest if it was subject to the clearly defined restrictions which he suggested in his letter;
- that all of the other parents of the grandchildren have asked that electronic and in-person contact with the Defendant be permitted and have agreed to supervise any permitted contact;

Except as noted, all the parents of the Defendant's grandchildren have asked that their children be permitted to visit at the Defendant's residence and

that they be permitted to communicate by telephone, mail, text, email and Skype. All of those parents have also agreed that at least one parent would be present during all such personal or electronic contacts with the Defendant.

It might be argued that, given the nature of the charges filed against the Defendant, contact with children in general should be prohibited out of an abundance of caution to protect the public safety. However, the request here comes from the parents of the Defendant's grandchildren, and is accompanied by the assurance that the parents will supervise any personal or electronic contact that is permitted. The Commonwealth objects to the parents' request, but has presented no evidence that the parents of the Defendant's grandchildren are not capable of assuring the safety of their children.

I will enter an order granting the requested modification and permitting the requested contact between the Defendant and his grandchildren, except regarding the three grandchildren who are involved in the custody litigation.

There is evidence, of course, of a disagreement between the parents of those three grandchildren over whether their children should have any contact with the Defendant. The guardian ad litem for the children has expressed his opinion that contact, under strictly controlled conditions, would be in the children's best interest. Because this is an issue of concern in ongoing child custody litigation, I will defer to the judge in the custody case to decide whether contact between the children and the Defendant would be in the children's best interest, and, if so, what conditions, if any, limiting their contact would be appropriate.

Visits By Adult Friends:

Specifically the Defendant requests that he be permitted to have visits from adult friends in his home at such times, and under such conditions, and as the Adult Probation Department deems reasonable.

At the hearing on the Defendant's motion Thomas Young, the Adult Probation Department's Program Coordinator, testified that the Defendant has complied fully with all of the conditions of the program. He acknowledged that Paragraph 26 of the program conditions impliedly authorizes him to permit visitors at the Defendant's residence. Aside from the request in the Defendant's motion, however, he testified no request has been made to authorize any adult visitors. Mr. Young testified that his concern about allowing visitors is to assure visitors did not bring into the Defendant's home items prohibited from being there under the program conditions.

It appears the purposes of the program may be applied in a manner consistent with the purposes of bail so as to permit the Defendant to meet on a periodic basis with adult visitors as approved in advance by the Program Coordinator.

I will authorize the Program Coordinator to establish reasonable procedures to assure the integrity of the program. The Defendant may provide to the Program Coordinator a list of up to twelve people, in addition to members of the Defendant's immediate family, whom he requests be authorized to visit. The Program Coordinator, in his discretion, may approve all, some or none of the names on the list. The Program Supervisor may limit the number of people who

may visit at any one time, and he shall meet in person with each person authorized to visit to provide an orientation regarding what will be required of them to assure the program conditions are not violated. The total length of visits from all visitors shall be limited to two hours, three times a week. In addition to those on the approved list the Program Supervisor may authorize visits from religious, medical or other similar professionals.

Leaving the Residence to Assist Members of the Defendant's Defense Team:

Finally, the Defendant asks for authorization to leave his residence in the company of his defense team, with the prior approval of the Program Coordinator, to assist in the preparation of his defense.

Defense counsel explained at the hearing on the motion that the Defendant can be of assistance in locating witnesses or other people of aid to the defense who he does not recall by name by identifying a residence where a witness lives, or might have lived in the past. Counsel agreed to submit a written request for the Defendant to leave the residence, including an explanation for the request, in advance. He said he anticipated such requests would "occur rarely."

Such a request would not be inconsistent with either the conditions of bail or the conditions of the Electronic Monitoring/In-Home Detention Program. The Defendant has been authorized to leave his residence in the past to attend legal proceedings and medical appointments. The Program Coordinator has not indicated that such departures have presented any problems in the administration of the program or enforcement of the Defendant's bail conditions.

Therefore, I will enter an order granting the requested relief on the condition that counsel submit such a request to the Program Coordinator at least 36 hours before the time he requests permission for the Defendant to leave his residence and explain in the request the purpose for leaving the residence, when he requests permission to leave, how long he requests to be gone, and who will accompany him. The Program Coordinator is authorized to grant the request on his own discretion, or may consult with me for specific guidance. The reason for leaving the residence shall remain confidential since it will only be granted if it involves matters associated with the preparation of his defense, and will not be shared with counsel for the Commonwealth.

Commonwealth's Motion Requesting that the Defendant Be Confined to "the Walls of His House."

The Commonwealth asserts in its New Matter to the Defendant's motion for bail modification that the Defendant has been observed "outside" of his house, and requests that the bail conditions specify that he be confined within the wall of his residence.

The Commonwealth presented evidence that the lot on which the Defendant's residence is located adjoins an elementary school. It is approximately 30 feet from the back deck on the Defendant's residence to the elementary school property fence. It is approximately an additional 100 feet from the fence to a school playground, and another 100 feet beyond the playground to the school building.

With the agreement of defense counsel not to raise a hearsay objection, the Commonwealth presented the testimony of one of its investigators who testified he had spoken to a neighbor living on an adjacent lot who said he had seen the Defendant outside the Defendant's house, expressed concerns for the safety of his children because the Defendant's backyard adjoins an elementary school, and believed the Defendant was receiving special treatment from the Adult Probation Department. By stipulation, a video the neighbor had taken purporting to document the Defendant's violations was admitted into evidence and I have watched the video.

The investigator also testified he had spoken to two women. One, the mother of a 7-year-old child, expressed "outrage" that the Defendant was standing on the back deck of his residence and said it caused her concern for the safety of her child. The other woman, a person involved in the after school program at the adjacent elementary school, said that when the Defendant is on his deck it causes "disruption" for the children in the school when they look out the window and see him.

The investigator testified there have been no reports the Defendant has approached any child on school property. The Program Supervisor testified he granted the Defendant's only request to leave the residence which was to assist his wife in shoveling snow from their driveway. The Program Supervisor also testified that "residence" for in-home detention purposes is defined to include the main residence, any attached buildings, and any attached deck. The definition, he testified, is applied uniformly to all defendants under the program's

supervision and the Defendant had received no preferential treatment in that regard.

I acknowledge the undoubtedly good faith concern of those adults whose views were presented by the Commonwealth's investigator. Nevertheless, the Commonwealth failed to present any evidence whatsoever that the Defendant presents a clearly defined threat to any student at the adjoining elementary school simply by being on his deck. No evidence was presented that at any time the Defendant made any effort to contact any of the children by signaling or calling to them, or that he made any gestures directed toward them, or that he acted in any inappropriate way whatsoever.

The generalized concerns of parents, while understandable, cannot justify additional bail restrictions in the absence of some evidence from the Commonwealth that the Defendant's presence or behavior on his deck presents a danger to the community.

Accordingly, I enter the following:

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**ORDER**

AND NOW, February 13, 2012, in consideration of the Defendant's Motion for Modification of Bail Conditions and the Commonwealth's Answer and New Matter, and of the foregoing Memorandum, it is ordered as follows:

1. That the Defendant's Motion for Modification of Bail Conditions to modify program condition 33 and permit him to have contact with his grandchildren is granted, subject to the following conditions:
  - a. Whether to allow contact with the three grandchildren who are the subject of an ongoing child custody litigation, and the conditions under which any contact will be allowed, shall be determined by the judge assigned to the custody litigation.
  - b. Contact with the remaining grandchildren will be permitted in person at the Defendant's residence and electronically by telephone, mail, text, email and Skype as may be consistent with all other conditions of the Electronic Monitoring/In-Home Detention Program, provided that at least one parent is present during all

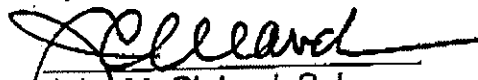
such personal and electronic contacts between the Defendant and the parent's child.

2. That the Defendant's Motion for Modification of Bail Conditions to modify program condition 26 and clarify the conditions under which the Program Coordinator is authorized to permit adult visitors at the Defendant's residence is granted, subject to the following conditions:
  - a. The Defendant may provide the Program Coordinator with a list of up to 12 people, exclusive of members of his immediate family, who he requests be authorized to visit.
  - b. Upon review of the names on the Defendant's list the Program Coordinator may approve all, some, or none of the people listed.
  - c. Before authorizing visits by any person approved to visit, the Program Coordinator shall personally provide an orientation regarding what will be required of them to assure the program conditions are not violated.
  - d. The number of visitors at any one time may be limited.
  - e. The total time for all visits by those on the list approved by the Program Coordinator shall be limited to two hours, three times a week.
  - f. In addition to those on the approved list, visits by religious, medical or similar professionals may also be authorized.
3. That the Defendant's Motion for Modification of Bail Conditions to modify program condition 25 and permit the Defendant to leave his residence to

assist in the preparation of his defense is granted, subject to the following conditions:

- a. The Defendant, through counsel, must request permission to leave his residence at least 36 hours in advance.
  - b. The request must be submitted to the Program Coordinator in writing and must specify the purpose for which permission is being requested. The request must also specify the time the Defendant will be leaving his residence and returning to it, where he will be going, and who will be accompanying him. Because the only reason which would justify granting the request would involve preparation of materials associated with his defense, the reason will be kept confidential and not shared with the Commonwealth.
  - c. The Program Coordinator is authorized to grant or deny the request in the exercise of his own discretion, but may consult with the Court for specific guidance.
4. That the Commonwealth's Motion for Modification of Bail Conditions seeking to "prevent him from leaving the walls of his house" (Commonwealth's Response to Motion For Bail Modification and New Matter, p. 7.), for reasons explained in the foregoing memorandum, is denied.

By the Court:

  
John M. Cleland, S.J.  
Specially Presiding