

FILED
SECTION 11 OF
SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JIMMY CHIN SONG,
Defendant-Appellant.

Supreme Court Case No. CRA11-004
Superior Court Case No. CF0329-11

OPINION

Cite as: 2011 Guam 19

Appeal from the Superior Court of Guam
Argued and submitted July 26, 2011
Hagåtña, Guam

Appearing for Defendant-Appellant:

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Appearing for Plaintiff-Appellee:

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice, KATHERINE A. MARAMAN, Associate Justice

PER CURIAM:

[1] On June 24, 2011, Defendant-Appellant Jimmy Chin Song was admitted to bail by Magistrate Judge Alberto Tolentino on charges of Aggravated Assault as a Second Degree Felony upon the condition that Song post \$50,000.00 cash and have no contact with the alleged victim and witnesses in the case. Later that day, Song posted the cash bail amount and appeared before Judge Vernon Perez, who added additional release conditions to those set by Magistrate Judge Tolentino, but left the cash amount at \$50,000.00. Song was released on Judge Perez's conditions. Thereafter, the alleged victim in the case died, and an indictment was handed down against Song charging him with Manslaughter as a First Degree Felony and Aggravated Assault as a Third Degree Felony. Plaintiff-Appellee People of Guam went *ex parte* before Judge Anita Sukola and obtained an arrest warrant for Song in the amount of \$250,000.00 cash.

[2] Upon Song's re-incarceration pursuant to the arrest warrant, he was again brought before Judge Perez on July 5, 2011, who re-set Song's bail amount at \$250,000.00 cash and imposed other release conditions, over the objection of Song's counsel. These new bail conditions were left undisturbed at Song's arraignment. Song requested that Judge Perez modify his bail conditions and reinstate the previous bail conditions, to include the \$50,000.00 cash bail amount. Judge Perez denied Song's request. Song thereafter filed a notice of appeal of his bail conditions. For the reasons set forth below, we vacate the July 5, 2011 bail conditions set by Judge Perez, and reinstate the bail conditions set by Judge Perez on June 24, 2011.¹

¹ This opinion supersedes the Order issued by this court *nunc pro tunc* to July 27, 2011.

I. FACTUAL AND PROCEDURAL HISTORY

[3] Defendant-Appellant Jimmy Chin Song was arrested on June 23, 2011, on charges of attempted murder and aggravated assault. The following day, on June 24, 2011, Song was magisterated on charges of Aggravated Assault as a Second Degree Felony, alleging that he recklessly caused serious bodily injury to the victim, Yun Mo Ku, aka Jimmy Ku, under circumstances manifesting extreme indifference to the value of human life. At Song's first appearance before Magistrate Judge Alberto Tolentino, Plaintiff-Appellee People of Guam (the "People") requested that bail be set at \$50,000.00 cash and that Song have no contact with Ku, his family, or any witnesses. The People argued to Magistrate Judge Tolentino that the circumstances and posture of the case required the imposition of \$50,000.00 cash bail. The People argued their position as follows:

Your Honor, at this time the People are going to ask for \$50,000.00 cash bail. The Defendant in this case is facing a very serious charge in second degree felony. I'd submit to Your Honor that we expect the complexion of this case to change, as the victim currently is brain dead, he's currently on life support. There's going to be a potential for a possible homicide charge right now, he's facing a serious charge, or charges, in the future.

We would also submit that, because of the Defendant's alleged actions against his victim, again, seriousness of his injuries, likelihood of death in this case, it's demonstrated a clear ability that he posed a danger to this victim, that he poses a danger to the People of Guam.

Transcript ("Tr."), Vol.1 at 3, (Mag.'s Hr'g, June 24, 2011). Later during the hearing, the People reiterated that Ku's death was imminent, and that homicide charges would be forthcoming upon Ku's death. Further, the People argued that Song was a flight risk because he is a "Korean national."² *Id.* at 4-5. The People indicated that, given all these factors, they believed that the requested bail amount was warranted.

² Song's counsel informed the court that Song is a United States citizen.

[4] Magistrate Judge Tolentino granted the People's request and set bail at \$50,000.00 cash, and in addition, ordered Song to refrain from contacting Ku, Ku's family, or any witnesses. In making his oral findings, Magistrate Judge Tolentino stated:

As indicated by the prosecution, there is a likelihood or a potential of more serious charges being brought. The Court then agrees with the prosecution that the cash bail is appropriate at this time. The amount of that bail is supposed to be based on a reasonable calculation by the Court, that it will be high enough to assure the safety of the community and to the victim, as well as to guarantee your appearance, further hearings.

Id. at 7. Magistrate Judge Tolentino later made the statement that "[i]f the charges should change, that bail might be increased, just so you're aware." *Id.* at 8. The commitment order signed by Magistrate Judge Tolentino reflected these conditions, followed by a statement that "[i]f bail is met, the defendant shall be brought back before the court for conditions." *See People v. Song*, Super. Ct. Case No. CF0329-11 (Commitment Order, June 24, 2011).

[5] Later that same day, Song posted the \$50,000.00 cash bail and was brought before Judge Vernon P. Perez for a bail hearing. At the hearing, Judge Perez conditioned Song's release on additional requirements that were not a part of Magistrate Judge Tolentino's conditions. *See Appellant's Excerpts of Record ("ER")* at 5 (Order of Conditional Release and Appearance Bond, June 24, 2011). Song's counsel objected to the additional conditions. Song was released according to the conditions ordered by Judge Perez. Judge Perez issued his findings as to bail in a written decision and order. *ER* at 7-8 (Dec. & Order, June 29, 2011). Shortly after Song's release, Ku's family made the decision to terminate life support and, as anticipated, Ku died.

[6] On July 1, 2011, the grand jury returned an indictment against Song for Manslaughter as a First Degree Felony, alleging that Song recklessly caused Ku's death, and Aggravated Assault as a Third Degree Felony, alleging that Song recklessly caused serious bodily injury to Ku. The People went before the *Ex Parte* Judge, Judge Anita A. Sukola, and requested that a warrant of

arrest be issued for Song with bail set at \$250,000.00, which Judge Sukola granted. Song was then arrested and re-incarcerated pursuant to the warrant. On July 5, 2011, Song was brought before Judge Perez on a return of warrant, whereupon counsel for Song expressed his surprise that an arrest warrant rather than a summons was issued in this case since Song was already released on bail and was compliant with his release conditions. Tr., Vol. 4 at 3 (Return of Warrant, July 5, 2011). Song's counsel requested that the original bail amount of \$50,000.00 be reinstated. *Id.* at 3-4. Judge Perez denied this request, stating that the "circumstances have changed to some degree" and that the court would therefore accept the People's recommendation as to the increased bail amount. *Id.* at 5.

[7] Song was arraigned on July 6, 2011, before Magistrate Judge Tolentino, and his counsel again requested that the original bail amount be reinstated. Magistrate Judge Tolentino declined to do so, stating that the matter was properly before Judge Perez, and he would not modify Judge Perez's bail determination. Tr., Vol. 5 at 5, 7-11 (Arraignment, July 6, 2011). Song filed a written motion for modification of his release conditions to reduce his bail amount back to \$50,000.00 cash. *See People v. Song*, Super. Ct. Case No. CF0329-11 (Mot. for Modification of Def.'s Bail Conditions, July 11, 2011). Judge Perez orally denied the motion. In his oral order, Judge Perez stated:

The Court believes that the \$250,000.00 bail at this time is not inappropriate. It is based on primarily two factors. One is, likelihood to appear back in Court for proceedings. Second, the extent perhaps that the Defendant might pose a danger to the community, or members of the community, or certain individuals as might be specified. The Court believes that both of those factors have some questions about them and the Court is not certain that something less than \$250,000.00 in bail at this time might necessarily, again, guaranty [*sic.*] his appearance back to Court, number one. Also, number two, of course, the safety to the community.

Tr., Vol. 6 at 15-16 (Bail Hearing, July 11, 2011). Song filed a notice of appeal on July 13, 2011 challenging: (1) the bail conditions set by Judge Perez on June 24, 2011; (2) the bail conditions

set by the Judge Sukola on July 1, 2011; (3) the bail conditions set by Judge Perez on July 5, 2011; and (4) the denial of bail modification by Judge Perez on July 11, 2011.

II. JURISDICTION

[8] This court has jurisdiction over appeals from determinations of bail pursuant to 8 GCA §§ 40.80(a) and 130.15(d) (2005).

III. STANDARD OF REVIEW

[9] The trial court's determination of bail conditions is reviewed for an abuse of discretion. *People v. Bruneman*, 1996 Guam 3 ¶ 7. Statutory interpretation of Guam's Code of Criminal Procedure is subject to *de novo* review. *See People v. Anastacio*, 2010 Guam 18 ¶ 10.

IV. ANALYSIS

A. Guam's Bail Statute.

[10] Guam law requires that, at the first appearance of an accused, the judge "shall" release the accused pending trial subject to the provisions and conditions found in 8 GCA §§ 40.15 and 40.20. 8 GCA § 40.10 (2005). The judge is required by law to order a person charged to be released on his own recognizance, "*unless* the judge determines, in his discretion, on the basis of available information, that such a release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 8 GCA § 40.15(b) (2005) (emphasis added). The statute enumerates the considerations that may factor into a judge's determination as to whether the accused poses a risk of non-appearance or a danger to any individual or to the community. 8 GCA § 40.15(c) (2005). The judge is mandated by law to release the accused under the least onerous condition or combination of conditions reasonably likely to assure the appearance of the accused as required and to ensure the safety of

any other person and the community. 8 GCA § 40.20 (2005). Pursuant to the requirements and limitations set forth in 8 GCA §§ 40.50, 40.60, and 40.75, the court may modify bail conditions.

[11] Determinations as to bail conditions and amounts are not to be driven by the goal of keeping the accused incarcerated, but should rather be reached in consideration of the only authorized interests, *to wit*, ensuring the appearance of the accused and the safety of others. *See* 8 GCA §§ 40.10, 40.15, 40.20; *see also Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”).

B. The People’s Argument that the Matter Appealed is Not Ripe for Review is Without Merit.

[12] The People assert that the matter appealed is not ripe for review because no written findings have been issued by the judge setting forth reasons for the challenged bail determinations. The People cite 8 GCA § 40.50(a), which states in part that if a judge from whom bail redetermination is sought does not modify the release conditions as requested, then the judge shall set forth in writing the reasons for requiring the conditions imposed. 8 GCA § 40.50(a) (2005). The People contend that without obtaining such a writing, the matter is not reviewable, citing the Guam Rules of Appellate Procedure, which provide that in an appeal from an order regarding bail conditions, the Superior Court shall state in writing the reasons for the action taken. Guam R. App. P. 5(a). The People take the position that the absence of a writing should be a failure attributed to Song – i.e., that Song was “mandated to acquire a ‘writing’ from the Superior Court[.]” Appellee’s Br. at 5 (July 26, 2011). However, the statute assigns that duty to the issuing judge, and not the defendant seeking the redetermination. *See* 8 GCA § 40.50(a) (“the *judge shall* set forth in writing the reasons for requiring the conditions imposed”) (emphasis added).

[13] This court will not impose that duty, which by statute belongs to the judge, upon the person seeking to appeal the judge's bail determination.³ To hold otherwise would allow a judge, even unintentionally, to delay appeal of his or her bail order by simply delaying the issuance of written findings. While the person seeking to appeal may have the remedy in such a situation to seek a writ from this court mandating the Superior Court judge to issue the written findings, which is a remedy the People suggested at oral argument, this would not serve the interest of justice and would create unnecessary hurdles in bringing an appeal which our laws specifically authorize. *See* 8 GCA §§ 40.80(a), 130.15(d). We therefore reject the People's argument that the matter is not ripe for review.

C. Judge Perez was Authorized to Modify the Conditions Set in Magistrate Judge Tolentino's June 24, 2011 Commitment Order.

[14] Song argues that once Magistrate Judge Tolentino entered his order regarding release conditions and set the bail amount at \$50,000.00, any modification of that order should have been brought before Magistrate Judge Tolentino rather than another judge, unless he was for some reason unavailable. Song cites the provision of 8 GCA § 40.50(b) that a review of release conditions should be made by the judge who imposed the condition, and 8 GCA § 40.50(c) that another judge may review the condition "if the judge who imposed [the] conditions of release is not available." That section of the Code of Criminal Procedure relates to which judge may hear a bail redetermination. We find that the June 24, 2011 hearing before Judge Perez was not a bail redetermination hearing but was rather the hearing contemplated in the commitment order. Magistrate Judge Tolentino's commitment order, wherein he set bail at \$50,000.00 and ordered

³ This holding is not meant in any way to relieve the trial court of its statutory duty pursuant to 8 GCA § 40.50(a) to set forth its order in writing; rather, this court simply holds that we will not place the onus of obtaining a written order upon the defendant.

Song to have no contact with the alleged victim and witnesses, also ordered that upon the posting of bail, Song shall be brought back before the court for the setting of conditions. When Song was able to meet the monetary condition, he was brought before Judge Perez, who was the assigned judge for this matter. This was in accord with the provisions of Magistrate Judge Tolentino's earlier order.⁴

[15] Thus, the addition of conditions such as those indicated in the Order of Conditional Release and Appearance Bond, was within Judge Perez's authority to impose and was proper so long as his determination was made pursuant to 8 GCA §§ 40.15 and 40.20 and not in an abuse of his discretion. At the June 24, 2011 bail hearing before Judge Perez, Judge Perez made findings on the record and in a subsequent decision and order setting forth the reasons for his order of release conditions. Having done so, this court does not find that Judge Perez was without authority to modify Magistrate Judge Tolentino's conditions or that he abused his discretion in making his determination.

D. *Ex Parte* Judge Sukola had the Authority to Set in the Arrest Warrant a Bail Amount of \$250,000.00.

[16] Upon the return of the indictment, the People went *ex parte* before Judge Sukola on July 1, 2011 and sought a warrant of arrest for Song and asked that bail be set at \$250,000.00. Although the actual issuance of the warrant of arrest is not on appeal, the bail amount set in the warrant is. Guam law governing the issuance of warrants and summonses after an indictment is returned states:

⁴ While the court recognizes that there is authority holding that oral pronouncements control over conflicting written orders, as in the contexts of such matters as sentencing and boilerplate waivers in plea agreements, we decline to pass on the issue of whether the standard language in the commitment order signed on June 24, 2011 by Magistrate Judge Tolentino conflicted with his orally rendered release conditions, and whether one controls over the other.

(a) After the return of an indictment and upon the application of the prosecuting attorney, the clerk shall issue a summons for the appearance of any defendant named in the indictment.

(b) Notwithstanding Subsection (a), a warrant shall issue where:

(1) A valid reason is shown for the issuance of an arrest warrant in lieu of summons; or

(2) A summons having previously issued, the defendant failed to appear in response thereto, or some other valid reason is shown for the issuance of an arrest warrant.

8 GCA § 15.40(a),(b) (2005). In this case, during the hearing at which the People sought *ex parte* to obtain a warrant of arrest and the additional bail amount, the People stated that the arrest warrant was requested because the change in the charge is substantial in nature, and further requested that the bail amount in the arrest warrant be set at \$250,000.00. Tr., Vol. 3 at 3 (Return of Grand Jury). Judge Sukola granted the People's request. *Id.* at 4.

[17] Although the court has some question about the People's decision to seek the warrant and the bail increase *ex parte* when they were well aware that Song was represented by counsel, we need not pass on that issue at this time. Without determining the propriety of the People's *ex parte* application or the propriety of issuing an arrest warrant rather than a summons pursuant to 8 GCA § 15.40, *Ex Parte* Judge Sukola had the authority pursuant to 8 GCA § 15.50 to "set conditions upon which the defendant may be released pending his first appearance and endorse such on the warrant." 8 GCA § 15.50 (2005). This is precisely what Judge Sukola did, affixing on the warrant that Song shall be held on \$250,000.00 bail.

[18] Based on a *de novo* review of the statute governing issuance of warrants, we hold that the bail condition set in the warrant – namely that Song be held on \$250,000.00 bail – was extinguished upon Song's first appearance on the indictment by operation of the statutory language itself: The court may "set conditions upon which the defendant may be released

pending his first appearance” 8 GCA § 15.50 (emphasis added). As such, we find that Judge Sukola acted within her statutory authority in setting the \$250,000.00 bail amount in the arrest warrant. However, that condition terminated by operation of the statute once Song was brought in for his first appearance after the indictment issued. *See* 8 GCA § 45.30 (2005).

E. Judge Perez Did Not Have the Statutory Authority to Set a New Bail Amount and Conditions of Release Where No Party Applied for Such Modification.

[19] Having been arrested and re-incarcerated pursuant to the warrant of arrest, Song was brought before Judge Perez on a return of warrant on July 5, 2011. At the return of warrant, the People requested that Song continue to be held on \$250,000.00 bail. Judge Perez accepted the People’s request against objections from Song’s counsel. Judge Perez stated that his reason for doing so is that the “circumstances have changed to some degree.” Tr., Vol. 4 at 5 (Return of Warrant). At Song’s arraignment on July 7, 2011 before Magistrate Judge Tolentino, Song’s counsel again asked that the original bail amount be reinstated. Magistrate Judge Tolentino declined jurisdiction, stating that he believed the matter was properly before Judge Perez and that he would not disturb Judge Perez’s bail conditions. Tr., Vol. 5 at 5 (Arraignment). Magistrate Judge Tolentino apparently regarded Judge Perez’s grant of the People’s request for a five-fold increase in Song’s bail amount at the return of warrant as a new, or modified, release order. However, Guam law sets forth when and under what circumstances a judge may modify release conditions, none of which occurred at the time Judge Perez orally ordered Song to be held on \$250,000.00 bail.

[20] Guam’s Code of Criminal Procedure, at chapter 40, provides our governing rules regarding matters of release in criminal cases. As discussed above, Guam law requires an accused to be released at his first appearance pending trial, subject to certain conditions. 8 GCA § 40.10. Sections 40.15 and 40.20 give guidance to the judge in making a determination

regarding personal recognizance and release conditions. The Code further allows bail conditions to be brought before the court for redetermination. Section 40.50 describes the conditions under which the person upon whom conditions are imposed may seek bail redetermination, and sections 40.60 and 40.75 provide the mechanism by which the People may seek additional bail restrictions. In each instance, an application must be made to the court, and applications brought pursuant to section 40.75 must be by noticed motion.⁵ Nothing in Guam's bail statutes authorizes any judge, absent application by either the person for whom release conditions are imposed or by the People, to modify release conditions.

[21] Without the matter of modification or redetermination being properly brought before the court, the court may not alter the release conditions of a person already admitted to bail. And certainly, any modification made pursuant to sections 40.50, 40.60, or 40.75 must be made in accordance with the mandates of sections 40.15 and 40.20, with the only permissible goals being to reasonably assure the person's presence as required and to ensure the safety of any person or the community. In this case, we find that the bail conditions set by Judge Perez at the return of warrant on July 5, 2011, including the increased bail amount of \$250,000.00, which Magistrate Judge Tolentino left undisturbed at Song's arraignment on July 7, 2011, were modified without a proper application to the court and in violation of statutory authority.

V. CONCLUSION

[22] Based on the foregoing, the July 5, 2011 bail conditions, including the increased amount of \$250,000.00, are hereby **VACATED** and the bail conditions set by Judge Perez on June 24, 2011, including the bail amount of \$50,000.00 cash, are hereby **REINSTATED**. Because we

⁵ Not at issue in this matter are warrants issued when a defendant has violated conditions of release and the holdings in this order do not apply to those circumstances.

vacate Judge Perez's July 5, 2011 bail conditions, the court need not address Judge Perez's denial of bail modification at the July 11, 2011 hearing.

Original Signed: Robert J. Torres

By
ROBERT J. TORRES
Associate Justice

Original Signed: Katherine A. Maraman

By
KATHERINE A. MARAMAN
Associate Justice

Original Signed: F. Philip Carbullido

By
F. PHILIP CARBULLIDO
Chief Justice