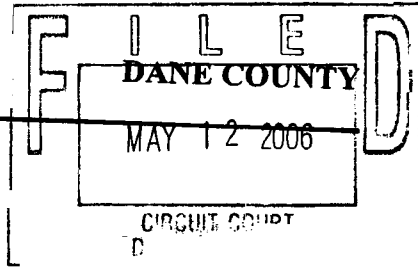


STATE OF WISCONSIN

CIRCUIT COURT
Branch 4



STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 02 CF 2453

SCOTT R. JENSEN,

Defendant

VK

DEFENDANT JENSEN'S MOTION FOR BOND PENDING APPEAL

Defendant Scott Jensen, by his appellate counsel, Skadden, Arps, Slate, Meagher & Flom, LLP, and Friebert, Finerty & St. John, S.C., respectfully moves the Court, pursuant to Sections 809.31 and 969.01, Wis. Stats., for continued release on bond pending his appeal. Defendant has, by separate motion, also moved this Court for a limited stay of execution, in accordance with Section 973.15(8), Wis. Stats., while this Court considers the issue of bond pending appeal and during any immediate appellate review, if necessary, of that bond ruling.

As set forth below, Mr. Jensen readily satisfies each of the criteria enumerated in Section 809.31 to qualify for bond pending appeal. He presents no risk of non-appearance or danger to the community. His appeal is not for purposes of delay, but rather to present significant appellate issues that will be prosecuted promptly and diligently. Indeed, as set forth more fully below, the initial review of the proceedings by appellate counsel (the full trial transcript is not yet available) establishes fundamental

error—particularly in the jury instructions requested by the State concerning the “dishonest advantage” intent requirement—that will necessitate a new trial.

Denial of release pending appeal presents the grave risk that all or a substantial portion of Mr. Jensen’s sentence will be required to be served before his appeal is resolved — resulting in an irreparable and needless injustice to Mr. Jensen and his family in the event his conviction is reversed or remanded. It bears note that Section 809.31 was based upon the standards for release set forth in the ABA Criminal Justice Standards, Criminal Appeal, s. 2.5. *See* § 809.31, Judicial Council Notes – 1978 (“The standards for release are those included in the American Bar Association Criminal Justice Standards, Criminal Appeals, s. 2.5.”). The Commentary to those standards suggests that in such circumstances, “sentences ought to be stayed.” *See* Commentary, attached hereto as Exhibit A (emphasis added).

ARGUMENT

Section 809.31 statutorily defines the standards that govern the continued release of a criminal defendant on bond pending appeal. *See State v. Salmon*, 163 Wis. 2d 369, 373, 471 N.W.2d 286 (Ct. App. 1991) (“The trial court’s exercise of its discretion is guided by Rule 809.31(3) and (4), Stats.”).¹ That statute provides:

809.31 Rule (Release on bond pending seeking postconviction relief).

- (1)** A defendant convicted of a misdemeanor or felony who is seeking relief from a conviction and sentence of imprisonment or to the intensive sanctions program and who seeks release on bond pending a determination of a motion or appeal shall file in the trial court a motion seeking release.

¹ Section 969.01(2)(c) provides that “[i]n felonies, release may be allowed on appeal in the discretion of the trial court.”

The trial court shall promptly hold a hearing on the motion of the defendant, determine the motion by order and state the grounds for the order.

Release may be granted if the court finds that:

- (a) There is no substantial risk the appellant will not appear to answer the judgment following the conclusion of postconviction proceedings;
- (b) The defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice;
- (c) the defendant will promptly prosecute postconviction proceedings; and
- (d) the postconviction proceedings are not taken for purposes of delay.

In making the determination on the motion, the court shall take into consideration the nature of the crime, the length of the sentence and other factors relevant to pretrial release.

As set forth below, each and every factor set forth in Section 809.31 militates strongly in favor of the continued release of Mr. Jensen on bond pending appellate review of his conviction.

I. There is no substantial risk that Mr. Jensen will not appear to answer the judgment following the conclusion of postconviction proceedings.

Mr. Jensen and his family have long-standing ties to the Wisconsin community. Mr. Jensen has fully comported with all obligations regarding his appearance both pre-trial, during trial, and post-conviction. There is no plausible risk, let alone a “substantial” risk, that he will not appear to answer the judgment following the conclusion of postconviction proceedings.

