

## **GINSBERG V. RYAN, COURT OF APPEALS OF FLORIDA, NO. 3D11-924, 4/14/11**

Florida statute § 907.041(4) allows the court to hold a defendant in detention without bail under certain circumstances. One of those circumstances is if the defendant violates one or more of the conditions of pretrial release and the court finds that no conditions of release can reasonably protect the public or assure the appearance of the accused. The statute and an accompanying court rule (Fla. R. Crim. P. 3.132(c)) requires specific procedures that must be followed in making the decision to detain a defendant without bail. Among those requirements are that the State must file a motion seeking pretrial detention, that an evidentiary hearing must be held on the motion, and, at the hearing, that the State has the burden of establishing the need for pretrial detention.

In this case, Barry Ginsburg had been arrested on a charge of felony DUI (third or subsequent conviction) causing serious bodily injury. He was initially held in jail on a \$25,000 bond. Several weeks later, Ginsburg moved for a bond reduction, and the court released him to 24-hour-a-day home confinement, tracked by GPS. Shortly after his release, an affidavit was filed with the court alleging that Ginsburg had violated the terms of his pretrial release by leaving his home without authorization. His bond was revoked and he was ordered held without bail. At three subsequent hearings, the court denied Ginsburg's request to reinstate his bond.

Nine months after he was ordered held without bail Ginsburg petitioned for a writ of habeas corpus challenging his continued detention. The State conceded that the requirements of Fla. Stat § 907.041(4) and Fla. R. Crim. P. 3.132(c) were not followed, but argued that the trial court's decision to detain Ginsburg should be affirmed because the defendant had opportunities to be heard on his requests for pretrial release subsequent to his detention for violating his release conditions. The appeals court found that this argument was without merit. "A defendant who violates a condition of his pretrial release forfeits his right to continued release under the original bond, but does not forfeit altogether his constitutional right to pretrial release," noted the court. "A trial court's authority to hold the defendant without any bond is circumscribed by the provisions of Section 907.041 and the trial court must consider and follow the pertinent provisions of the pretrial detention statute as well as Rule 3.132."

The court granted the petition for writ of habeas corpus, and remanded the case to the trial court. In the remand order, the court directed that the State's Attorneys Office had three business days to file a legally sufficient motion for pretrial detention. Failing that, the trial court was directed to hold a hearing to determine the appropriate conditions of pretrial release.

## **HAAG V. STEINLE, COURT OF APPEALS OF ARIZONA, DIVISION ONE, NO. 1 CA-SA 11-0084, 5/5/11**

Arizona Statute § 13-3967 (E)(1) mandates that individuals charged with certain bailable sex offenses be subject electronic monitoring "where available," as a condition of pretrial release. This case involved a defendant, Albert Haag, who had been charged in Maricopa County, Arizona with sexual exploitation of a minor. Haag had been a resident of Maricopa County when the alleged offense occurred but had moved to Buffalo, New York by the time that the charges had been filed. Haag sought pretrial release to his home in Buffalo. The State objected

on the grounds that § 13-3967 (E)(1) required the electronic monitoring of the defendant as a condition of pretrial release. The capacity to provide this monitoring was available in Maricopa County, but not in Buffalo. As a result, the trial court concluded that it had no choice but to order Haag to remain in Maricopa County under electronic monitoring. Haag appealed.

The appeals court granted Haag's special action petition for extraordinary relief given that the issue would become moot if Haag's criminal case was adjudicated before an appeal could be heard. The appeals court focused on the statutory language of "where available." To do so, it looked at the legislative history of the statute, and found that the "where available" language was inserted into the bill after a fiscal impact study found that imposing electronic monitoring as a requirement in every Arizona jurisdiction would place a fiscal burden on those counties that did not have the capacity to provide it.

"The question then becomes whether the legislature intended that a non-resident defendant be required to remain in a county that has electronic monitoring simply because he is charged in such a county," said the court. In addressing this question, the court noted that it cannot read anything into a statute that is not expressed. It concluded that since the legislature had recognized that not all individuals charged with bailable sex offenses would be monitored electronically, it stands that the mandatory electronic monitoring requirement does not apply to Haag.

In conclusion, the court noted that the purposes of the pretrial release decision are to protect the safety of the community and assure appearance in court. "Whether these goals can be achieved by allowing a defendant to be released to a home county that lacks electronic monitoring is a fact-intensive inquiry that must be resolved on a case-by-case basis, relying on the trial court's sound discretion." The court remanded the case to the trial court with the instruction that the court "exercise its sound discretion and decide whether to release Haag to his home in Buffalo without electronic monitoring. We express no opinion on this issue. In reaching its decision, the court may consider the unavailability of electronic monitoring in Buffalo as a factor relevant to the release determination."

#### **U.S. V. URENA, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, NO. 10-645-CR, 4/13/11**

In 1994, Miguel Urena failed to appear in federal court on a charge of trafficking crack cocaine, which was punishable by 15 years in prison. He remained a fugitive for over ten years. By the time that he was arrested on the failure to appear bench warrant, the evidence against him on the drug charge had deteriorated, so that charge was dropped. He was, however, charged with failure to appear. He pled guilty on that charge and the court imposed a 60-month sentence, far in excess of the 18-to-24-month range provided in the Sentencing Guidelines for failure to appear.

Urena appealed this sentence, claiming first that the trial court committed procedural error when it considered the 1994 drug charge, and second that the non-Guidelines sentence was substantively unreasonable. In rejecting the procedural error claim that the trial court considered the drug charge in sentencing, the U.S. Court of Appeals for the Second Circuit pointed to the record at sentencing, which showed the trial judge explicitly rejecting the defense attorneys

suggestion that the drug charge may have influenced the sentence. “Someone who has never been convicted of a charge is presumed innocent as to those charges, so the underlying charges are neither here nor there,” the appeals court quoted the trial court as saying. As to the substantive unreasonableness of the significant departure from the Sentencing Guidelines range, the appeals court again quoted the trial court’s statements at sentencing: “Facing very heavy time, clothed with the presumption of innocence, clothed with all of the innumerable procedural protections that this country affords criminal defendants, he chose instead to flee and to, in effect, by the flight and the length of his absence, alter the risk of conviction on an offense and a very heavy sentence on the underlying offense and transmute it to the risk of conviction on an offense that carried a considerably lesser maximum penalty.” The appeals court noted that this line of reasoning was “more than sufficient to allow us to conclude that the challenged sentence fell within the broad range that must be considered substantively reasonable.”