

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff

**Case No. 18-18798 FH
COA No. 349870**

-vs-

TRAVIS JOSEPH CALLOWAY

Defendant.

_____/

LENAWEE COUNTY PROSECUTOR
Attorney for Plaintiff

RACHEL N. HELTON (P61885)
Attorney for Defendant

EMERGENCY MOTION FOR APPELLATE BOND

Travis Calloway asks this Court to grant him bond during the pendency of his appeal. On February 25, 2020, this Court issued an Opinion and Order vacating his original sentence of 15 years (three 5 year sentences, to be run consecutively), holding: 1) Both OV 14 and OV 15 had been inappropriately scored at 10 when they should have been scored at zero; 2) The trial court had failed to articulate a valid

basis for exceeding the sentencing guidelines; and 3) The trial court failed to articulate a valid basis for issuing consecutive sentences. It ordered resentencing proceedings commence within 28 days but it retained jurisdiction over this matter.

Resentencing occurred on March 26, 2020. The trial court indicated that it understood that the new sentencing guidelines were 0 to 11 months, and that Mr. Calloway had been a model inmate with a perfect prison record, but it issued a sentence of 36 months, more than triple the guidelines. It cited as its reasoning: 1) Its belief that Mr. Calloway knew the heroin he sold contained fentanyl; 2) Its belief that the sale of a heroin/fentanyl combination was so inherently dangerous that it deserved an upward variance; and 3) The fact that Mr. Calloway was charged with additional crimes that were dismissed as a result of the plea bargain. Mr. Calloway has filed an appeal of the sentence, concurrent with this motion.

At the conclusion of the resentencing hearing, counsel for Mr. Calloway moved for his release pending appeal because of the danger his continued incarceration poses in light of COVID 19. The trial court issued an opinion denying this Motion approximately one hour after the

conclusion of the resentencing hearing.

COVID-19 crisis makes it imperative to reduce jail and prison populations. Eliminating unnecessary detention in cases such as this one is one vital step to protecting the community in our prisons and defendants like this one who was serving an invalid sentence for the past two and one half years. The urgency of the current crisis makes it imperative that Mr. Calloway be a personal recognizance bond. In support of this motion, Mr. Calloway states:

Basic Factual and Procedural Background

1. Mr. Calloway has been incarcerated on these charges since December 7, 2017.
2. On August 7, 2018, Mr. Calloway pled guilty to three counts of Controlled Substance—Delivery/Manufacture (Cocaine, Heroin or Another Narcotic) Less Than 50 Grams.
3. Probation calculated his guidelines at 0 to 17 months. This was based upon the application of 10 points each under OV 14 and OV 15, for being the leader of a multi-offender operation and for committing his crimes where a child was present, respectively.
4. On October 23, 2018, the trial court sentenced him to three

consecutive sentences of five to twenty years.

5. On February 25, 2020, following a lengthy appellate process which included a Motion to Correct Invalid Sentence before the trial court, this Court issued an Opinion and Order in which it vacated Mr. Calloway's sentences, finding that the guidelines had been scored incorrectly because OV 14 and OV 15 should have both been zero, and the trial court failed to articulate a valid basis for consecutive sentencing or a departure from the sentencing guidelines.

6. It ordered that a resentencing hearing be held promptly and it retained jurisdiction over this case.

7. On March 26, 2020, the parties participated in a resentencing hearing before the trial court. The trial court issued a minimum sentence of 36 months, more than triple the top of the newly calculated guidelines of 0 to 11 months, relying upon substantially the same reasons given by the original sentencing judge for the upward departure. Those reasons have been specifically found to be an invalid basis for departure by this Court.

8. At the conclusion of the hearing, Mr. Calloway's attorney moved for him to be released on bond pending appeal, citing the danger

that is posed by continued incarceration in light of the COVID 19 epidemic.

9. The trial court issued an Order denying bond, stating that it would be more dangerous to remove Mr. Calloway from prison and then reintroduce him to prison should his appeal prove unsuccessful.

10. It is significantly more dangerous to Mr. Calloway to remain in prison than to be released to his home, where he can maintain social distancing, during the pendency of his appeal.

11. By denying his Motion for Bond on this basis, the trial court abused its discretion.

Appellate Bond Procedure and Argument

12. This court has jurisdiction to grant this motion under MCR 7.209.

13. MCR 7.209(D) states, in pertinent part: “Except as otherwise provided by rule or law, on motion filed in a case pending before it, the Court of Appeals may amend the amount of bond set by the trial court, order an additional or different bond and set the amount, or require different or additional sureties...”

14. MCR 7.209(F)(2) sets forth six (6) requirements: “A criminal defendant for whom bond pending appeal is allowed after conviction shall promise in writing:

(a) to prosecute the appeal to decision;

(b) if the sentence is one of incarceration, to surrender himself or herself to the sheriff of the county . . . if the sentence is affirmed on appeal or if the appeal is dismissed;

(c) if the judgment or order appealed is other than a sentence of incarceration to perform and comply with the order of the trial court if it is affirmed on appeal or if the appeal is dismissed;

(d) to appear in the trial court if the case is remanded for retrial or further proceedings or if a conviction is reversed and retrial allowed;

(e) to notify the trial court clerk of a change of address.”

15. This Court should grant Mr. Calloway bond pending appeal.

16. Here no evidence shows that Mr. Calloway poses an identified and articulable danger to others. It is undisputed that Mr. Calloway has been a model inmate with no tickets, who is working toward the completion of his GED and whose conduct has been so

exemplary that he has been assigned to an Honors Floor at St. Louis Correctional Facility. He has secure and safe housing with his mother upon his release. He has no violent criminal history.

17. The appeal in this case raises substantial questions of whether the trial court issued a valid Amended Judgment of Sentence. The new sentence is more than triple his sentencing guidelines. The trial judge based its sentence upon conduct with which Mr. Calloway was charged but to which he was never proven guilty. It also based its sentence upon its assertion that the combination of fentanyl/heroin is so dangerous that it must essentially be treated as a different class of crime. It took a lengthy recess between hearing the parties' arguments and rendering sentence, and begged the parties' forgiveness, reminding them that he was not the original sentencing judge, implying a lack of familiarity with the case, despite the fact that it was the same judge who denied Mr. Calloway's Motion to Correct Invalid Sentence on July 1, 2019—more than nine months earlier.

18. Finally, Mr. Calloway will comply with the remainder of MCR 7.209(F)(2). He initiated the resentencing hearing within 28 days of the Court of Appeals' Opinion and Order. He participated in the

resentencing held March 26, 2020. He is filing a concurrent Supplementary Brief in the Court of Appeals objecting to the new triple-guidelines sentence. He will comply with this Court's orders, appear for trial, and notify the clerk of any changes to address.

19. Mr. Calloway recognizes that he is supposed to file a transcript of the hearing denying bond. He has ordered the transcript and will file it with this Court as soon as he receives it. However, this matter is so urgent that he requests that this Court consider this motion immediately.

Additional COVID-19-related Facts and Argument

20. The COVID-19 pandemic that is currently affecting the entire state and nation presents a particularly severe risk to incarcerated persons and to the attorneys and court and jail staff who interact with them. The best available public health advice involves preventing the spread of COVID-19 by regularly washing hands, social distancing, and self-quarantining when necessary.¹ All of these precautions are particularly difficult, if not impossible, in the carceral

¹ See Michigan Department of Health and Human Services, Community Mitigation Strategies, *available at* https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98155-521467--,00.html

setting. Accordingly, Mr. Calloway is at heightened risk of infection while they remain incarcerated.

21. On Tuesday, March 10 Governor Gretchen Whitmer declared a state of emergency in Michigan as a result of the COVID-19 crisis. President Donald J. Trump declared a national emergency on March 13. On March 15, the Michigan Supreme Court issued Administrative Order No. 2020-1, urging all state courts to “take any . . . reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to the COVID-19 crisis.” On March 23, 2020, Governor Whitmer issued a shelter at home order, and as this court is well aware the Michigan courts have also taken additional measures since March for public safety.

THEREFORE, Travis Calloway respectfully requests that this Honorable Court GRANT his Emergency Motion for Appellate Bond pending appeal of his Judgment of Sentence issued March 26, 2020.

Respectfully submitted,

/s/ Rachel N. Helton
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