

<p>LOWER COURT</p> <p>Macomb County Circuit Court</p>	<p>Electronically Filed</p> <p>BRIEF COVER PAGE</p>	<p>CASE NO.</p> <p>Lower Court 12-1590FC</p> <p>Court of Appeals 315827</p>
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(Short title of case)

Case Name: **People v. Caroline Hocking-Sullivan**

1. Brief Type (select one):
- APPELLANT(S) APPELLEE(S) REPLY
- CROSS-APPELLANT(S) CROSS-APPELLEE(S) AMICUS
- OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Caroline Hocking-Sullivan**

3. This brief is in response to a brief filed on July 29, 2013 by Mary Joe Diegel, Macomb County Prosecutor's Office.

4. ORAL ARGUMENT: REQUESTED NOT REQUESTED

5. THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

- Table of Contents [MCR 7.212(C)(2)]
- Index of Authorities [MCR 7.212(C)(3)]
- Jurisdictional Statement [MCR 7.212(C)(4)]
- Statement of Questions [MCR 7.212(C)(5)]
- Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
- Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- Relief Requested [MCR 7.212(C)(9)]
- Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Meredith Krause**
Signing Attorney's Bar No. [if any]: **(P72667)**

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STATEMENT OF JURISDICTION

Defendant-Appellee adopts the Statement of Jurisdiction presented in the Plaintiff-Appellant's Brief on Appeal filed in with this Court on July 29, 2013.

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STATEMENT OF QUESTIONS PRESENTED

- I. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT GRANTED MS. HOCKING-SULLIVAN’S MOTION FOR BOND PENDING APPEAL AND DENIED THE PROSECUTION’S MOTION FOR RECONSIDERATION?

Trial Court answers, "No".

Plaintiff-Appellant answers, “Yes”.

Defendant-Appellee answers, "No".

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COUNTER-STATEMENT OF FACTS

At approximately 11:00 p.m. on May 25, 2011, four police officers entered the home of Caroline Hocking-Sullivan with their guns drawn in response to a 911 call from Ms. Hocking-Sullivan's sister indicating that Ms. Hocking-Sullivan may be suicidal. 11/8/12 pp. 191, 198, 202; 11/9/12 p. 22, 60.¹ Ms. Hocking-Sullivan was unresponsive, lying in a fetal position on her living room sofa after drinking a few alcoholic beverages and taking some prescription medication. 11/8/12 p. 217; 11/9/12 p. 58; 11/20/12 p. 26. Ms. Hocking-Sullivan, the victim of a brutal rape years before, slept with a knife for protection. 11/20/12 pp. 13, 16, 17. When officers entered, Ms. Hocking-Sullivan remembered hearing someone make a statement about putting the dog outside – a similar statement to one made by Ms. Hocking-Sullivan's rapist. 11/20/12 pp. 12, 30. Ms. Hocking-Sullivan testified that she didn't know who was entering her home and never heard anyone announce that they were police or order her to drop a knife. 11/20/13 p. 35. Officers claim that Ms. Hocking-Sullivan leapt from the sofa and attacked them with the knife. 11/8/12 p. 229. One of the officers shot Ms. Hocking-Sullivan in the chest. 11/9/12 pp. 122, 137.

While in police custody and receiving treatment for her gunshot wound to the chest, Ms. Hocking-Sullivan gave a statement to police which was recorded and later used by the prosecution during cross-examination over the objection of defense counsel. 11/20/13 pp. 37, 38, 81. The court found that the recording was improper impeachment without a finding of voluntariness of the statement, and defense counsel requested a curative instruction, which was given to the jury. 11/20/13 pp. 95, 98, 101.

¹ Ms. Hocking-Sullivan was convicted following an eight-day trial in the Macomb County Circuit Court. Transcripts of the trial are herein cited by their date followed by the appropriate page number.

On November 26, 2012, Ms. Hocking-Sullivan was convicted of one count of Assault with Intent to Murder under MCL 750.83 and three counts of assault with a dangerous weapon under MCL 750.82. Defense counsel filed a motion for mistrial on January 3, 2013, arguing that Ms. Hocking-Sullivan's statement while hospitalized was involuntary and that the prosecution had failed to lay a proper foundation for the admission of the recording. Motion for Mistrial, Appendix A. On February 14, 2013, the court denied the motion finding that trial counsel had waived the right to assert error after objecting to a mistrial and requesting a curative instruction. Order and Opinion, 2/14/2013; Appendix B.

On March 11, 2013, defense counsel filed a Motion for New Trial claiming that 1) the court allowed the prosecution to impeach Ms. Hocking-Sullivan with involuntary statements; 2) Ms. Hocking-Sullivan did not make an intelligent, knowing, and voluntary decision to testify; 3) the prosecution failed to show that the use of the involuntary statement was harmless beyond a reasonable doubt; 4) the court admitted the statements without a proper hearing on voluntariness and without a properly laid foundation; and 5) the court erred in not instructing the jury on missing evidence. Motion for New Trial and Brief in Support Appendix C. Defense counsel simultaneously filed a Motion for Bond Pending Appeal alleging that several substantive errors were made at trial and asserting that Ms. Hocking-Sullivan was not a danger to the community. Motion for Bond Pending Appeal, Appendix D.

The trial court denied the Motion for New Trial by incorporating its decision to deny the prior motion for mistrial and additionally found that Ms. Hocking-Sullivan made an intelligent, knowing, and voluntary decision to testify and there was no error in not providing an instruction

on missing evidence. 3/13/13 pp. 29-32.² The trial court then found compelling and substantial reasons to depart from the guidelines and sentenced Ms. Hocking-Sullivan to concurrent terms of 4-20 years of imprisonment for the assault with intent to murder and 2-4 years for assault with a dangerous weapon charges. 3/13/13 pp. 61-62.

After hearing argument from both sides as to the Motion for Bond, the court stated, “I don’t think that it’s a secret that there is no law of which the Court has asked you to provide that addresses specifically whether this curative instruction was sufficient to take away any possible taint that the jury may have sustained as a result of hearing the tape without a hearing on voluntariness. That is a major issue of which I decided and I’ve ruled on that has been perplexing to me.” 3/13/13 p. 66. After also finding that Ms. Hocking-Sullivan does not pose a danger to others, the court granted the bond pending appeal. Id. at 66-67. The prosecution filed a motion for reconsideration of this order, and the motion was denied April 8, 2003.

Ms. Hocking-Sullivan has filed a claim of appeal of her convictions. The prosecution has filed an appeal of the downward departure from the sentence guidelines. The prosecution filed an application for leave to appeal the trial court’s order granting bond, and this Court granted leave on May 23, 2013. The trial court’s bond decision should be affirmed because the trial court found by clear and convincing evidence that Ms. Hocking-Sullivan does not pose a threat to others and a substantial question of law or fact exists for appeal.

² The transcript of the hearing and ruling of the defendant’s Motion for New Trial and sentencing which took place on March 13, 2013, is hereinafter cited as 3/13/13 followed by the appropriate page number. The prosecution filed a copy of this transcript with the Court on April 26, 2013.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED MS. HOCKING-SULLIVAN'S MOTION FOR BOND PENDING APPEAL AND DENIED THE PROSECUTION'S MOTION FOR RECONSIDERATION.

Standard of Review

This Court reviews a trial court's decision to grant bond pending appeal for an abuse of discretion. MCR 7.209(B)(2) provides: "In a criminal case the granting of bond pending appeal and the amount of it are within the discretion of the trial court, subject to applicable law and rules." An abuse of discretion occurs "when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

Argument

The defense argued below that Ms. Hocking-Sullivan met the requirements for bond pending appeal. The trial court found by clear and convincing evidence that Ms. Hocking-Sullivan satisfied the requirements of MCL 770.9a(2). The trial court further denied the prosecution's motion to reconsider bond. The prosecution has failed to show that the trial court abused its discretion by choosing an outcome falling outside the permissible principled range of outcomes. Therefore, the prosecution's leave application should be denied.

MCL 770.9a states in relevant part:

A defendant convicted of an assaultive crime... shall be detained and shall not be admitted to bail unless the trial court... finds by clear and convincing evidence that section 9b³ of this chapter does not apply and that both of the following exist:

- (a) The defendant is not likely to pose a danger to other persons.
- (b) The appeal or application raises a substantial question of law or fact.

³ Section 9b does not apply as this case does not involve criminal sexual conduct.

The defense presented clear and convincing evidence to satisfy both of these requirements.

First, Ms. Hocking-Sullivan is not likely to pose a danger to other persons. Defense counsel argued below that Ms. Hocking-Sullivan had been released on bond during the pendency of the trial without any violations; has lived in the community all of her life; currently resides with her sister, brother-in-law and other close family members; maintains a close relationship with her daughters; has no assaultive criminal history; is currently free from substance abuse; and regularly attends substance abuse meetings with her family. 3/13/13 p. 48, 63-64. Ms. Hocking-Sullivan also remains on a tether, allowing her to leave home only for therapy, church, and attorney visits.

The prosecutor points out that defense counsel erroneously relied upon MCL 770.8 and *People v Giacalone*, 16 Mich App 352, 167 NW2d 871 (1969) to justify granting bond, when this case involves an assaultive crime and should therefore be evaluated under the stricter standards of MCL 770.9a(2). However, the trial court applied the stricter standard to determine that bond was appropriate. The trial court found “by clear and convincing evidence that the defendant, through her stay on bond, had not posed a threat or danger to herself or anyone else in society”; “proven herself by engaging in a variety of rehabilitative programs”; “lived in a residence which [] satisfied [] her needs”; and had spent the time following trial “in a productive fashion by getting [] her mental health treatment, her rehabilitation, regarding her substance abuse problems” addressed. 3/13/13 p. 67. “[T]he defendant has proven by clear and convincing evidence that she is not a threat to anyone else in society, nor is she a threat to herself.” Id.

The prosecutor also argues that since Ms. Hocking-Sullivan was a threat to herself, she became a threat to others. To support this, the prosecutor points out that Ms. Hocking-Sullivan

was in her own home when this incident occurred, that she was consuming alcohol and medication, possessed a knife and she wasn't being threatened at the time of the incident. The prosecution's argument fails to acknowledge the highly unlikely possibility of reoccurrence of this situation, and the large role that others – particularly the police – played in creating this unfortunate scenario. When justifying her downward departure from the sentencing guidelines, the trial court stated:

“[T]he defendant was in the privacy of her own home when this incident occurred, and although the officers were lawfully present in her home, she did not invite them to enter.... It was her sister's perception of a --- which ended up being erroneous or could have been erroneous, perception of a potential suicide attempt that caused the police to enter her home. The defendant, through her own testimony, indicated that it was not her desire to commit suicide that night. She was merely making a cry for help.

[T]he defendant was startled by the officers, awoke to the same words the rapist had said about putting the dog out as they entered her home with guns drawn, as she slept and was under the influence of alcohol, which was lawfully consumed, and prescription drugs.

3/13/13 pp. 60-61. Ms. Hocking-Sullivan did not go out looking for trouble and testified that she wasn't really trying to harm herself. 11/20/13 p. 28. She was in the privacy of her own home, acting lawfully, when strangers (albeit police) entered her home in the nighttime. This scenario is unlikely to be repeated.

The prosecution claims that there was insufficient evidence presented at sentencing for the court to conclude that Ms. Hocking-Sullivan's emotional trauma and addictions have been sufficiently addressed so that she will not pose a threat to herself, and in turn pose a threat to others. However, Ms. Hocking-Sullivan – prior to sentencing – provided the court with documentation from Ms. Hocking-Sullivan's therapist outlining her treatment for mental illness

and substance abuse, which states that Ms. Hocking-Sullivan has actively participated in therapy and has a grasp on effective coping mechanisms. Letter from Eastwood Clinics, Appendix E. Ms. Hocking-Sullivan continues to receive these services to help her cope with any additional stress caused by the incident, conviction, and threat of incarceration. Further, by citing *People v Dunbar*, 463 Mich 606, 617 & n 13, 625 NW2d 1 (2001), in its order denying the prosecution's motion for reconsideration the court suggest that it properly relied upon defense counsel's statements concerning Ms. Hocking-Sullivan's recovery from substance abuse and mental illness. Therefore the court's finding that Ms. Hocking-Sullivan no longer posed a danger to others was supported by clear and convincing evidence, and not simply based upon the self-serving statements of the defendant, as claimed by the prosecution.

Second, the trial court did not abuse its discretion by finding that there is a substantive question of law and fact to be raised by Ms. Hocking-Sullivan on appeal. The prosecution argues that because the trial court denied defense counsel's post-trial motions and didn't find ineffective assistance of counsel where defense counsel requested a curative instruction over requesting a mistrial, that there cannot be a substantial issue of law or fact to be reviewed by this Court. The trial court, being familiar with the law and facts of this case, disagrees. 3/13/13 p. 66. The court expressed doubt regarding the sufficiency of the curative instruction given to the jury. *Id.* The court stated in its order denying reconsideration of the bond that "a significant issue during trial was People's impeachment of defendant with her recorded statement at the hospital. While a curative instruction was given to the jury, neither party – and particularly People, the proponent of the use of the conversation – has been able to cite any persuasive authority as to whether the specific language of the curative instruction was sufficient to remove any taint from the conversation's use. Given the seriousness of this issue, an appellate court

might not insulate defense counsel's decision to seek a curative instruction as trial strategy." Opinion and Order, 4/8/2013; Appendix F p. 3. Despite the court's earlier rulings on the pre-trial motions and its finding that defense counsel was not ineffective for requesting a curative instruction over a mistrial, the court still doubted its decision and the sufficiency of instruction and believed it posed a substantial question on appeal.

MCL 770.9a(2) does not require a guarantee for success on appeal, but rather a showing of clear and convincing evidence that a substantial question of law or fact exists for appeal. The trial court was clearly convinced that the sufficiency of the curative instruction given at trial is a substantial issue of law to be explored on appeal. Additionally, this case involves several other substantial questions of law and fact for appeal including a trial attorney who has alleged his own ineffective assistance and the denial of a mental health expert to support a self-defense claim. Opinion and Order, 7/30/12, Appendix G. Therefore the trial court's decision to continue bond during the pendency of the appeal was not outside the permissible principled range of outcomes.

Because Ms. Hocking-Sullivan satisfies the requirements of MCL 770.9a(2), bond was properly granted and the prosecution's motion to reconsider was properly denied, this Court should affirm the trial court's order granting bond pending appeal.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court affirm the trial court decision to grant bond pending appeal.

STATE APPELLATE DEFENDER OFFICE

/s/ Meredith Krause

BY: _____

MEREDITH KRAUSE (P72667)
Special Assistant Defender
101 North Washington
14th Floor
Lansing, MI 48913
(517) 334-6069

Date: August 19, 2013

REQUEST FOR ORAL ARGUMENT

Defendant-Appellant submits that oral argument should be granted because this Brief on Appeal was timely filed thus preserving his qualified right to oral argument under MCR 7.214(A). Furthermore, the exceptions under MCR 7.214(E) are not applicable because, (a) this appeal has merit, (b) the Court's deliberations would be significantly aided by oral argument because the briefs may not adequately represent all of the legal arguments by the time that this case is reviewed by the Court, due to the substantial passage of time between the filing of a brief on appeal and review by this Court, and (c) there is no way for counsel to predict whether a decision will be released between the time of filing and the time of review which would aid the Court in reviewing this case. See MCR 7.214(E).