COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS

APPEALS COURT
NO. 2020-P-0570

AFAR NO. _____

COMMONWEALTH,
APPELLEE,

V.

HECTOR GARCIA,
APPELLANT.

Application for Further Appellate Review

1. Request for Further Appellate Review.

Pursuant to Mass. R. App. P. 27.1, Mr. Garcia seeks further appellate review of the Appeals Court's opinion that *Foster v. Commissioner of Correction (No. 1)*, 484 Mass. 698 (2020), forecloses allegations of non-compliance with COVID-19 protocols in a Massachusetts prison.

2. Statement of Prior Proceedings

On August 7, 2015, the Defendant was charged with armed robbery. On October 23, 2017, he was convicted and sentenced to serve a term of 6-7 years. On April 22, 2020, the Defendant filed a to vacate his sentence and for resentencing pursuant to Mass. R. Crim. P. 30(a). The motion was denied on May 4, 2020. The Defendant noted his appeal on May 8, 2020. The Appeals Court denied the appeal on June 29, 2020.

3. Facts Relevant to the Appeal

Mr. Garcia is a prisoner at MCI Shirley. He will be parole eligible in approximately one year.

Mr. Garcia refused to share a cell with a man who had just been exposed to COVID-19. The man's previous cell-mate had fallen ill and then tested positive for COVID-19. Staff at MCI-Shirley moved the sick man out of the unit. But instead of isolating the man who had been exposed, they tried to move him into Mr. Garcia's cell. When Mr. Garcia objected, Mr. Garcia was moved to segregation and threatened with loss of "privileges" such as access to the commissary (where prisoners buy food and sanitary supplies), and access to the telephone (because visits are suspended, phone calls are the only means by which prisoners can have real-time with loved ones.) (Aff. ¶¶ 31-36.)[1] It was the first time Mr. Garcia has been the subject of a disciplinary action since he was imprisoned in 2017. (C.A. 64.)

Mr. Garcia has risk factors for severe illness from COVID-19. He is also geriatric as public health professionals define the term for his racial and socio-economic background. (R.A. 17.) (Notably, although only 51 years old, Mr. Garcia was already using a cane in 2018. (C.A. 57.)) According to data reported by the DOC and the Office of the District Attorney, the rate of infection at MCI Shirley is 30 times that in the general population. The case fatality rate at MCI Shirley is about 20 times that of the seasonal flu.

[1] The materials before the panel include (1) Affidavit of Counsel, (2) Record Appendix, and (3) Commonwealth's Appendix, cited respectively as Aff. ¶ ___, R.A. [page], and C.A. [page].

When Mr. Garcia filed his appeal, MCI Shirley was housing prisoners at 121% of design capacity.[2] At MCI Shirley, the DOC had failed to enforce mask wearing among staff who interact with prisoners; failed to enforce 6-ft, social distancing protocols even where it is physically feasible to do so; failed to arrange for individual (as opposed to group) showers, and continued to "double-bunk" prisoners in 8x12 cells. (R.A. at 32-33; *Foster* at 10, n.11.)

The fatality rate of COVID-19 cases at MCI Shirley was unusually high, about 20 times the fatality rate for seasonal flu. The case fatality rate of COVID-19 at MCI Shirley is 1.9%. (There were 160 confirmed positive cases, and three people have died. Gov't Opp. at *4 n.3.)) This makes COVID-19 significantly more deadly than polio and a little bit more deadly than cholera. For comparison, the seasonal flu has a case fatality rate of about 0.1%. Based on the DOC's own reports, COVID-19 at MCI Shirley is about 19 times more deadly than the seasonal flu.

The infection rate at MCI Shirley was unusually high, and it was still increasing when Mr. Garcia briefed his appeal. It was about 30 times higher than the infection rate among the general population in the United States. There are only about 990 people at MCI Shirley, and at last count 160 of them had tested positive. (Gov't Opp. at *4 n.3.) That means MCI Shirley had a confirmed per capita infection rate of 160 per 1000. The overall rate in the United States was about 5 per 1000. MCI Shirley had a per capita infect rate about 32 times the per capita infection rate of the population at large.

[2] *Foster* at 10, n.11.

While Mr. Garcia's appeal was pending, MCI Shirley was the site of the biggest outbreak at any DOC-run facility DOC. However, staff there conducted only 14 tests between May 26 and June 1.[3] Compare the testing rate at the Donald W. Wyatt Detention Facility in Providence, Rhode Island, which houses a comparable number of inmates and also experienced a COVID-19 outbreak at the same time. During and after the outbreak, the Federal Bureau of Prisons was conducting over 100 tests per week at Wyatt. The same day week, May 26-June 1, that the DOC reported conducting 14 tests at Shirley, the BOP reported conducting 130 tests at Wyatt.[4]

The government did not dispute any of the Defendant's factual assertions about the conditions of confinement at MCI Shirley. It offered no submissions by anyone with personal knowledge of the actual conditions at MCI Shirley. The government did not explain why the DOC could not test more than 14 people at MCI Shirley in one week during an outbreak. The government did not explain why it could not arrange for safe individual showers, clean high-touch surfaces, or enable inmates to disinfect their living spaces. The government did not explain why the DOC (1) failed to isolate individuals who were infected and exposed and (2) disciplined a prisoner who complained about the failure. Instead, the government submitted a list of rules to which the DOC is subject in the ordinary

[3] See *CPCS v. Chief Justice*, SJC-12926, Special Master's Weekly Report at *30 (June 1, 2020).
[4] Cf. *In re. Donald W. Wyatt Detention Facility*, Dkt. 20-MC-00004, Doc. 14 at *1 (D.R.I. May 26, 2020), with *id.*, Dkt. 16 at *1 (D.R.I. May 26, 2020).

course (C.A. 67-69) and a list of topics on which the DOC had issued memoranda and directives to itself and its employees (C.A. 69-71).

4. Point with respect to which the Plaintiff seeks further appellate review:

Do the findings of fact in *Foster* collaterally estop the lower courts from considering whether the DOC is following CDC protocols for pandemic containment?

5. Why further appellate review is appropriate.

Mr. Garcia alleged that, at MCI Shirley, the DOC was *not* actually complying with the measures the Court had cited with approval in *Foster*. The Panel foreclosed his claim by interpreting *Foster* to bar case-by-case fact-finding regarding such compliance. Its interpretation Mr. Garcia from proving those practices and seeking relief. It is in the public interest and the interest of justice to correct this misapprehension immediately. No class was ever certified in *Foster*. Foster does not bar case by case consideration of individual prisoners' conditions of confinement. Fact-finding in individual claims is not properly constrained by the findings of fact made in *Foster*. Mr. Garcia's claim is entitled to consideration.

In *Foster*, this Court held that plaintiffs in a civil lawsuit seeking relief based on dangerous conditions of confinement arising from COVID-19 must prove "deliberate indifference" on the part of the incarcerating authority. *Foster* at 717. This Court noted that it was "unlikely" such a claim would succeed because of "significant steps" that the DOC was allegedly taking as a result of the pandemic to "protect inmates." *Foster* at 729. This Court noted that the DOC appeared to be following interim guidance from the CDC in matters of hygiene

and housing and found, as a matter of fact, the DOC was undertaking a number of specific steps to keep inmates safe. *See Foster* at 730.

The Defendant made uncontested sworn statements that, at MCI Shirley, the DOC was *not* providing basic hygiene materials, was *not* cleaning the facilities on a regular basis (especially high-touch surfaces), was *not* enforcing physical distancing among inmates of staff, was *not* enforcing its mask mandate on either staff or inmates, and perhaps most significantly was *not segregating infected inmates* but was forcing him to share a cell with one on pain of disciplinary sanction. Thus, the Defendant's specific claims about MCI Shirely directly contradicted the general findings in *Foster*.

The panel of the Appeals Court stated that it was not considering the Defendant's claims because the DOC's compliance with hygiene and quarantine recommendations had already been "considered" in *Foster*:

> The defendant cites to nothing that the DOC could be doing at MCI-Shirley but is not doing, beyond those steps that the court considered in Foster (No. 1). The defendant asserts that the DOC is not following protocols from the Centers for Disease Control for congregant-living facilities by canceling all time out of doors; failing to arrange for individual as opposed to group showers; failing to disinfect or even to wipe down frequently touched surfaces; failing to refill pump bottles of hand sanitizer, apparently as a sanction for inmates using it up too quickly (which the staff characterize as "stealing" hand sanitizer); failing to supply cleaning and disinfectant products to inmates who want to clean their cells; failing to enforce mask wear among staff members who interact with prisoners; continuing to "double-bunk" prisoners in eight by twelve cells; continuing to maintain occupancy at 121 percent of design capacity; failing to isolate infected and exposed individuals; and failing to implement "comprehensive test-and-trace.

M&O at *6-7. That is, the interpreted *Foster* as collaterally estopping all related factual claims by all criminal defendants. Per the panel's interpretation, the DOC's

compliance with the CDC's COVID-19 protocols is henceforth established indefinitely and not subject to challenge in court.

6. Conclusion

The panel's interpretation of *Foster's* is wrong. In the absence of a certified class, Mr. Garcia's individual claims are cognizable and entitled to full consideration by the court.

Respectfully submitted,
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Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 20-P-570

COMMONWEALTH

vs.

HECTOR GARCIA.

Pending in the Superior

Court for the County of Hampden

Ordered, that the following entry be made on the docket:

Order denying motion for release from unlawful restraint affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date June 29, 2020.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-570

COMMONWEALTH

vs.

HECTOR GARCIA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Hector Garcia, appeals from the order denying his emergency motion for release from an unlawful sentence pursuant to Mass. R. Crim. P. 30 (a), as appearing in 435 Mass. 1501 (2001). Specifically, he argues that the risk of exposure to COVID-19 resulting from his incarceration amounts to cruel and unusual punishment thereby rendering his jail sentence illegal under the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights. We affirm.

Background. On October 23, 2017, a jury found the defendant guilty of armed robbery in violation of G. L. c. 265, § 17; assault and battery upon a public employee in violation of G. L. c. 265, § 13D; and threatening to commit a crime in violation of G. L. c. 275, § 2. The judge sentenced the

defendant to a six-to-seven-year prison sentence for the armed robbery conviction, and to three years' probation on the remaining convictions, the probation portion of the sentence to run from and after the committed sentence for armed robbery. The defendant, who is fifty-one years of age, is currently serving the final year of the armed robbery sentence at the Massachusetts Correctional Institute at Shirley (MCI-Shirley).

On April 22, 2020, the defendant filed a motion for relief from unlawful restraint or, in the alternative, to stay the execution of his sentence pending his appeal from the order denying his motion for a new trial in the Superior Court. On May 4, 2020, the motion judge, who was also the trial judge, denied the defendant's motion.[1] We note that the defendant appealed the order denying his motion for a stay of execution of sentence to a single justice of this court; the single justice denied the request for a stay and ordered that his appeal from the order denying his rule 30 (a) motion be expedited. The defendant does not challenge the order denying his motion for a stay; we therefore review only the order denying the defendant's motion for relief from unlawful restraint.

[1] The motion judge's rulings focused primarily on the stay; regarding the legality of the sentence, he explained that "[t]here is no basis to disturb the sentence. It is lawful."

Discussion. As an initial matter, it may be that rule 30 (a) is not the appropriate vehicle to raise to raise a claim under the Eighth Amendment or art. 26. The defendant's quarrel is not with the sentence when imposed but with the conditions of his current confinement. See rule 30 (a) ("Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts" [emphasis added]). However, in an abundance of caution, we address the merits of the defendant's argument.

Rule 30 (a) permits a defendant to seek relief from an illegal sentence. See Commonwealth v. Walters, 479 Mass. 277, 280 (2018) ("Our review of criminal sentences is limited. Commonwealth v. Coleman, 390 Mass. 797, 804 [1984]. This court will review a sentence only to determine if it is illegal or unconstitutional. Commonwealth v. Molino, 411 Mass. 149, 155 [1991]"). Here, the defendant argues that the exposure to COVID-19 resulting from his incarceration amounts to cruel and unusual punishment, rendering his jail sentence illegal and unconstitutional under art. 26 and the Eighth Amendment. "To succeed on an Eighth Amendment claim, a [defendant]-inmate must

demonstrate that (1) a prison's conditions of confinement present 'a substantial risk of serious harm'; and (2) prison officials acted with 'deliberate indifference' to inmate health or safety'" (citation omitted). Torres v. Commissioner of Correction, 427 Mass. 611, 613-614 (1998).

As an initial matter, because there can be no real dispute that limits on physical distancing in prisons during the COVID-19 pandemic have increased the risk of contracting the virus in prisons, incarceration presents a "substantial risk of serious harm" (citation omitted). Foster v. Commissioner of Correction (No. 1), 484 Mass. 698, 718 (2020). Accordingly, we turn to whether prison officials acted with deliberate indifference to inmate health or safety.

Recently, in Foster (No. 1), 484 Mass. 698, the Supreme Judicial Court addressed the merits of a similar claim, brought by a class of inmates, alleging that the conditions of their confinement exposed them to unreasonable risks from the COVID-19 pandemic. The case turned on whether the plaintiffs demonstrated that prison officials acted or failed to act with deliberate indifference. Id. at 718-719. In other words, the question was whether the Department of Correction (DOC) knew of and disregarded an "an excessive risk to inmate health or safety." Id. at 717, quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994). The court held that "[w]here the risk of serious

harm is substantial, but prison officials have undertaken significant steps to try to reduce the harm and protect inmates . . . [it is unlikely that] deliberate indifference on the part of the DOC [will be able to be established] regarding their conditions of confinement as a result of the pandemic." Foster (No. 1), supra at 720, 724. In reaching its conclusion, the court detailed the significant measures taken by the DOC in addressing the pandemic.[2] See id. at 704-710. In particular, the court considered the number of confirmed cases at MCI-Shirley, and the fact that MCI-Shirley (a "medium security" institution) is at eighty-one percent of its operational capacity and 121 percent of its design capacity. Id. at 704 n.11.

The defendant cites to nothing that the DOC could be doing at MCI-Shirley but is not doing, beyond those steps that the court considered in Foster (No. 1).[3] See 484 Mass. at 704-710

[2] The court relied, in part, on the findings submitted by a Superior Court judge who, by special assignment, conducted a series of evidentiary hearings, took limited testimony from all parties over three days, and collected affidavits. Foster (No. 1), 484 Mass. at 700-701.

[3] The defendant asserts that the DOC is not following protocols from the Centers for Disease Control for congregant-living facilities by canceling all time out of doors; failing to arrange for individual as opposed to group showers; failing to disinfect or even to wipe down frequently touched surfaces; failing to refill pump bottles of hand sanitizer, apparently as a sanction for inmates using it up too quickly (which the staff characterize as "stealing" hand sanitizer); failing to supply cleaning and disinfectant products to inmates who want to clean

(particularly, sections entitled "Physical distancing"; "Facility sanitation and personal protective equipment"; "Entrance screenings and quarantines"; "Testing"; and "Decreasing population"). See also id. at 739 (Gants, C.J., concurring); id. at 721-722 (canceling outdoor time reduces inmates congregating in close contact with each other). Accordingly, because the defendant has failed to establish deliberate indifference, his Eighth Amendment claim fails.

For identical reasons, we reject the defendant's contention that the motion was improperly denied under art. 26. In Foster (No. 1), 484 Mass. at 716, the court noted specifically that it has "not held that art. 26 provides greater protections with respect to conditions of confinement than does the Eighth Amendment," stating, however, that "the rights guaranteed under art. 26 'are at least equally as broad as those guaranteed under the Eighth Amendment,'" Torres, 427 Mass. at 615-616, quoting Michaud v. Sheriff of Essex County, 390 Mass. 523, 534 (1983). A prisoner seeking relief under art. 26 "must point to both (1) a condition or situation which poses a substantial risk of serious harm; and (2) facts establishing that a prison official

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their cells; failing to enforce mask wear among staff members who interact with prisoners; continuing to "double-bunk" prisoners in eight by twelve cells; continuing to maintain occupancy at 121 percent of design capacity; failing to isolate infected and exposed individuals; and failing to implement "comprehensive test-and-trace."

has knowledge of the situation and ignores it" (citation and quotations omitted). Torres, supra. As previously discussed, the defendant has failed to provide evidence of the second requirement. Consequently, the judge properly denied the defendant's motion.

Order denying motion for release from unlawful restraint affirmed.

By the Court (Hanlon, Sacks & Singh, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: June 29, 2020.

[4] The panelists are listed in order of seniority.

Certificate of Compliance

I, Dana Goldblatt, here certify that I have complied with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and specifically that I used the Microsoft Word Count feature to determine that this entire AFAR contains 1671 words.

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Docket Number 2020-P-570

Hector Garcia

Appellant(s)

v.

Commonewalth

Appellee(s)

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on this date of July 20, 2020 I have made service of a copy of the following document(s):

Application for Further Appellate Review

upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by

○ hand delivery ○ first class mail

to the following person(s) and address(es). *Attach a separate page if more space is necessary.*

By email at the following verified email address:

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