

SSC- 12648

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2018-0499

Worcester Superior Court
No. 1885CR00287

MATEUSZ DYMON vs. COMMONWEALTH

&

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2018-0512

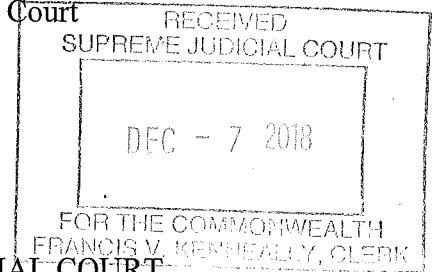
Worcester Superior Court
No. 1885CR00286

COMMONWEALTH vs. JOSEPH WALSH

RESERVATION, REPORT, AND ORDER OF PARTIAL REMAND

Background

I have before me two essentially identical petitions for relief pursuant to G. L. c. 211, § 3, one from each of the codefendants in the underlying criminal cases in the Worcester Superior Court, Mateusz Dymon and Joseph Walsh. Each defendant has been charged with breaking and entering in the daytime (G. L. c. 266, § 17), larceny from a building (G. L. c. 266, § 20), possession of burglarious tools (G. L. c. 266, § 49), and defacement of property (G. L. c. 266, § 126A). They were arraigned on September 20, 2018, at which time the Commonwealth requested a dangerousness hearing for each of



them. Each defendant was held without bail pending his dangerousness hearing. Those hearings were scheduled for October 5, 2018, but, on that date, were continued until October 16, 2018.

It is unnecessary for present purposes to recite all the procedural details. It suffices to say that by October 5, the day initially scheduled for the dangerousness hearings, no attorney had been appointed to represent Dymon at his hearing and, although an entry on the trial court docket indicates that an attorney had been appointed on October 1, 2018, to represent Walsh, that attorney was not present on October 5. The judge presiding on October 5, Judge Kenton-Walker, therefore continued the hearings until October 16; ordered that the attorney in charge of the Worcester office of the Committee for Public Counsel Services be appointed to represent Dymon; and ordered the appointment of a new counsel for Walsh. The CPCS attorney in charge informed the judge that, because of a shortage of available counsel in the county, no attorney was available through either the public defender division or the private counsel division to take on new matters. The judge acknowledged what she described in her own words as a “crisis” with the shortage of counsel and defendants needing representation for bail and dangerousness matters. The judge nevertheless denied the attorney’s motion to decline her appointment as well as the motion to have Dymon immediately released from custody.

By the time of the hearings on October 16, different counsel (the defendants’ present counsel) had been appointed by CPCS to represent the defendants, and the dangerousness hearing for each defendant went forward. Each defendant objected to his hearing going forward because of the time that had elapsed since his arraignment, and

each asked for his immediate release, relying on the terms of G. L. c. 276, § 58A, and Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004). The presiding judge, Judge Campo, heard the evidence; concluded that there had been good cause to continue the hearings until October 16; ruled that the defendants' rights under the statute and under the Lavallee case therefore were not violated; denied each defendant's request for immediate release; and set bail with conditions for each defendant. The judge ordered a cash bail for Dymon of \$5,000 and set various conditions for his release; he ordered a cash bail for Walsh of \$7,500 and set conditions for his release as well. The judge acknowledged that neither defendant may have the ability to pay his bail amount, and, in fact, neither defendant has posted bail since that time. The defendants continue to be held awaiting trial.

Claims raised by these petitions

Each defendant's petition contains two distinct claims for relief. First, they claim that they were improperly detained for more than seven days without counsel while awaiting a dangerousness hearing, which they contend violates this court's holding in the Lavallee case, and that they therefore should have been released on personal recognizance. They argue that Judge Campo's post hoc conclusion that the dangerousness matters had been continued for "good cause" for purposes of G. L. c. 276, § 58A, does not overcome the violation of their constitutional rights as described in Lavallee, and, in any event, that Judge Campo misapplied the good cause provision of the statute. For ease of reference, I will refer to these claims as "the Lavallee claims."

Second, each defendant claims that the judge erred by ordering a cash bail in an amount that the defendant could not afford, without adequately considering the

defendant's limited financial resources, and without adequately explaining his reasons for doing so. They contend that doing so violated the letter and the spirit of c. 276, § 58A, and this court's holding in Brangan v. Commonwealth, 477 Mass. 691 (2017), and effectively guaranteed the defendants' long-term pretrial detention. They further contend that a cash bail was unnecessary in light of the other conditions the judge had imposed for the defendants' release, including around-the-clock home confinement (with limited exceptions) and regular check-ins with the probation department. I will refer to these claims as the defendants' "conditions of release claims."

Disposition

1. The Lavallee claims. This claim is of great significance not only to these two defendants but also to all defendants in Worcester county who face bail or dangerousness hearings. Given the current shortage of counsel available in Worcester to represent indigent defendants in these matters, something that Judge Kenton-Walker acknowledged as having reached "crisis" proportions, the questions raised here are ones that will surely recur, and whatever answers and guidance the court provides in this case will surely have consequences beyond these parties. The questions and answers will apply to all similarly situated defendants who are held when their bail or dangerousness hearings are continued beyond seven days while unrepresented by counsel.

For these reasons, I reserve decision on this aspect of the case – i.e., the Lavallee claims – and report it to the full court. The full court will be in the best position to decide whether these defendants and others like them are held unconstitutionally or in violation of the statute in circumstances like this, and, if so, what remedy or remedies are appropriate. The record before the full court shall consist of the defendants' petition in

each case; his memorandum in support of the petition, with attached exhibits; the Commonwealth's opposition to each petition, with exhibits; the docket sheets for SJ-2018-0499 and SJ-2018-0512; and this Reservation, Report, and Order of Partial Remand.

In addition, in order to ensure that the factual record before the full court is adequate (i) to enable the court to resolve the issues raised by these defendants, (ii) to assist the court in understanding the implications of this case for the administration of justice in other current and future cases like this in Worcester county, and (iii) to allow the court to provide an effective remedy or remedies, the parties shall prepare and file in the full court a comprehensive statement of agreed facts necessary for this claim. The statement of agreed facts shall be prepared in time for inclusion in the parties' record appendix and, together with the specific papers listed in the preceding paragraph, will be part of the record of this case before the full court. The failure to agree on all of the necessary facts could impair the court's ability to resolve the matter. Among other things the parties deem pertinent, I ask the parties to consider providing the court, if possible, with factual information as to:

- the number of defendants who have had their G. L. c. 276, § 58A, dangerousness hearings continued because of the unavailability of counsel, and the amount of days the defendants have remained unrepresented;
- the number of attorneys available through the CPCS public defender and private counsel divisions, respectively, to represent indigent defendants at bail and dangerousness hearings in Worcester county, and the number of such matters that require representation over time;
- the average number of cases assigned to the available counsel, and the time it takes from arraignment for CPCS to assign or appoint counsel for such matters under current circumstances;

- the process by which counsel are assigned or appointed by CPCS for such matters, including the frequency at which CPCS must resort to the appointment of private counsel due to a CPCS conflict of interest;
- the rate at which these attorneys are compensated for bail and dangerousness matters;
- the policy of the district attorney in Worcester with respect to prosecuting minor offenses as civil infractions where possible, and the number, types, and frequency of cases in which that occurs;
- any policy of the district attorney in Worcester of informing the judge at arraignment that the Commonwealth will not be seeking committed time for certain minor criminal offenses.

2. The conditions of release claims. With respect to the individual conditions of release claims made by each defendant, I have both factual and legal concerns. As I read the Superior Court judge's memoranda, I question whether he has adequately articulated reasons for setting the cash bails in amounts that he explicitly recognized the defendants may not be able to afford, and whether the terms set for the defendants' release, including the cash bails, were appropriate. In order to resolve these claims, I will ask for assistance from both the judge (as to factual matters) and from the full court (as to a legal matter). Specifically, I hereby remand this aspect of the case to the judge in order to give him an opportunity to provide a further, more detailed explanation as to how and why he arrived at the specific bail amounts and other terms of release for each defendant, what factors he considered, how he weighed the relevant factors, etc. I will retain jurisdiction over these claims in the meantime. I will be in a better position to rule on them after I receive the judge's further findings and explanations. I request that the judge provide me with his further findings and explanations as soon as reasonably practicable, recognizing that the defendants' liberty is at stake and the matter is therefore time sensitive.

At the same time, I hereby exercise my prerogative as a single justice to report to the full court two general legal questions that will assist me in ruling on the conditions of release claims, and which, I believe, will also assist trial court judges, parties, and single justices reviewing similar petitions, in future cases. The questions are as follows:

“In Brangan v. Commonwealth, 477 Mass. 691 (2017), the court held that a judge must consider a defendant’s financial resources as a factor when setting a bail amount (*id.* at 697-700); that a bail set in an amount a defendant cannot afford to pay is not necessarily unconstitutional (*id.* at 700-702), but that the imposition of an unaffordable bail is subject to certain due process requirements (*id.* at 702-710); and that when bail is set in an amount a defendant is likely unable to pay, the judge must, among other things, provide a statement of reasons for his or her decision that confirms the judge’s consideration of the defendant’s financial resources, explains how the particular amount was chosen and why the defendant’s flight risk is so great that no alternative, less restrictive financial or nonfinancial conditions would suffice (*id.* at 707-709). See also A Juvenile v. Commonwealth, 480 Mass. 1012 (2018).

“a. Can, and should, the full court provide any further guidance, beyond what it has already said in Brangan, for trial court judges, the bar, and single justices of this court as to the level of analysis and detail that must be reflected in the judge’s statement when a judge sets an unaffordable cash bail? Must the judge itemize the defendant’s resources, articulate a detailed factor-by-factor analysis as to why the amount of the bail is nevertheless appropriate, and specify each less restrictive alternative that has been considered and why each has been rejected – or is it sufficient that the judge’s statement indicates in a more general way the judge’s consideration of the relevant factors and the animating rationale for his or her determination? In short, what level of detail is required for the statement?

“b. What differences, if any, might there be in the requirements for a judge’s bail determination (and the statement of reasons he or she must provide) under G. L. c. 276, §§ 57 and 58, as was the case in Brangan, and a bail determination made in the context of a dangerousness hearing pursuant to G. L. c. 276, § 58A, as we have here? For example, may a judge set a cash bail that a defendant cannot post under G. L. c. 276, § 58A (3)?”

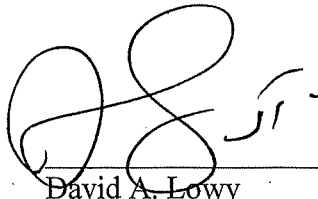
As to the conditions of release claims, I am reporting only these questions to the full court. I will retain jurisdiction over the claims themselves, and will decide them as a single justice after I receive the motion judge’s further findings and explanations (unless

upon receiving the further findings and explanations I decide that the better course is to wait for the full court's answers to these questions).

Logistics before the full court. These cases will be consolidated in the full court for purposes of briefing and argument. There will be one full court docket number. The defendants, as the petitioners before me, are designated as the appellants. They may file individual briefs or a joint brief; but if they file individual briefs they should coordinate their efforts in an attempt to minimize any repetitive arguments. Their brief or briefs shall address both the Lavallee claim and the questions I am reporting as to the conditions of release claims.

Given the time sensitivity of these matters, I am ordering the case on for oral argument before the full court at the February, 2019 sitting. The parties should confer with each other and with the full court clerk to arrange a briefing schedule that permits that to happen.

Conclusion. As stated on pp. 4-6 above, I hereby reserve decision and report to the full court so much of the defendants' petitions as raise their Lavallee claims. As stated on pp. 6-8, I also report to the full court two general legal questions concerning the conditions of release claims and remand to the motion judge the factual aspect of those claims in order for him to provide further findings and explanations regarding his conditions of release, including the amounts of the cash bails that were set; and I retain jurisdiction over the conditions of release claims in the meantime.

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by 'A. Lowy'.

David A. Lowy
Associate Justice

Date: December 7, 2018