VERMONT SUPERIOR COURT
Bennington Unit
200 Veterans Memorial Drive
Bennington, VT 05201
802-447-2727
www.vermontjudiciary.org

CRIMINAL DIVISION
Case No. 1031-7-87 Bncr

. State of Vermont vs. Forte, Leonard

DECISION AND ORDER ON MOTION ASSERTING PHYSICAL INCOMPETENCY TO STAND TRIAL

The defendant filed a Notice/Motion Asserting Defendant's Physical Incompetency to Stand Trial on May 5, 2020.[1] The State filed an Opposition on June 17, 2020. The court held hearings on the motion over the course of five days, March 30, 2021, March 31, 2021, May 4, 2021, May 7, 2021, and June 3, 2021. Both parties filed Post-Hearing Memoranda on June 17, 2021. The court issues the following decision:

Background

Defendant was convicted of three counts of Sexual Assault on a Minor in a December 1988 jury trial. On October 14, 1989, a new trial was ordered which the State appealed before ultimately dismissing its challenge on January 31, 1995. Defendant motioned to dismiss the charges on medical grounds on June 28, 1995. The parties stipulated to continue the proceedings until defendant was "medically able to withstand a trial." The stipulation was approved and ordered on February 19, 1997. *State v. Forte*, No. 1031-7-87 Bncr, Decision on Motion (Vt. Super. April 29, 2020) (Valente, J.). The stipulation provided that defendant would, through counsel, "provide all relevant medical records every six (6) months, so that defendant's recovery can be monitored regarding his fitness to stand trial." *Id.*

Two years later, on January 15, 1999, the court "order[ed] that for the time being defendant is considered pro se . . . [and that] [m]edical records to be provided to [the State] to be mailed out no later than Tuesday 1/19/99 by defendant, and updated as new records exist." *State v. Forte*, No. 1031-7-87 Bncr, Entry Order (Vt. Super. Jan. 15, 1999) (Wesley, J.). Defendant submitted medical records inconsistently and often only upon court order over the following 14 years.

On January 7, 2013, the parties stipulated to an agreement requiring defendant to "sign all necessary documents to all his physicians and medical providers to speak with a representative of the Vermont Attorney General's Office about his current medical condition, his prognosis, and his current and future ability to participate in court proceedings." *State v. Forte*, No. 1031-7-87 Bncr, Entry Order (Vt. Super. January 7, 2013) (Corsones, J.). Defendant inconsistently submitted medical records over the following seven years and often only upon court order.

[1] For purposes of this Decision, the court will be referring to this filing as a motion. Alternatively, the court could consider this "motion" as an intent to pursue the motion to dismiss the charges on medical grounds filed by defendant on June 28, 1995. However, in either event, the decision and order would be the same.

An attorney was appointed to represent the defendant on January 4, 2020. A January 29, 2020 Scheduling Order required the defendant to "file motion re unavailability to appear for trial" by March 13, 2020. After further motion practice, the court extended this deadline. Defendant complied with this deadline by filing his motion on May 5, 2020. This motion is currently before the court for determination.

I. Findings of Fact

Defendant resides with his wife in LaBelle, FL. He is 79 years old. Defendant suffers from a myriad of health issues, the most significant being coronary artery/heart disease, diabetes, kidney disease, and anxiety. Of these, his most serious issues relate to his heart disease.

A. Heart Issues

The defendant suffered a heart attack in 1993, five years after the initial trial in this case. In 1995, defendant was either placed on the heart transplant list or was referred to a specialist for consideration of a heart transplant – the records on this are not clear. In any event, defendant saw a cardiac specialist, Dr. Evelyn Horn, in 1995. Dr. Horn recommended heart bypass surgery, and not a heart transplant. Defendant had the bypass surgery. After the surgery, defendant's heart condition stabilized, although the heart attack had caused permanent damage to his heart.

In 2000, defendant had an operation to implant a defibrillator/pacemaker (an "ICD" device) in his body. The purpose of the ICD is to prevent a dangerous arrhythmia and to ensure a safe pacing of his heart. If the defendant's heart rhythm reaches a dangerous level, the ICD will produce an electric shock which will restore the heart's natural rhythm. Persons react differently to this shock. Some people are not bothered by it, others can be severely affected by it and can suffer from PTSD as a result. The defendant's shocks have caused him severe anxiety, but he has not been diagnosed as suffering from PTSD and he does not receive mental health counseling.

The battery in defendant's ICD was replaced in 2011. When the battery is replaced in this device, it is akin to replacing the entire device. Defendant's ICD has functioned as intended. Defendant received no electrical shocks from his ICD until July 2019. Since then, he has received two more shocks. Two of the three shocks resulted in the defendant spending one day (or night) in the hospital, and the other shock did not result in hospitalization. The defendant's shocks are unpredictable. He received one shock while at home. He received another when he was camping. Most recently, in November 2020, the defendant was visiting his daughter when he received a shock. At that time, apparently, the defendant was lifting some light lawn furniture into his recreational vehicle. After the November 2020 shock, the defendant was admitted to the hospital and was kept overnight for observation.

Defendant's Florida cardiologist is planning to upgrade his defibrillator in the near future.

The defendant suffers from mitral regurgitation of the heart. This means that some of defendant's blood is leaking backwards from one of his heart's chambers to another through a valve designed to prevent this from occurring. This lessens the heart's efficiency, known as its ejection

fraction or "EF." However, defendant's mitral regurgitation has been relatively stable since July 2019 and when measured is generally in the mild to moderate range.

The defendant is prescribed medication for his heart condition, including, a beta blocker, amiodarone, and lisinopril (for his heart, kidney, and blood pressure).

Cardiologists classify heart failure on the New York Heart Association scale ("NYH"). The classifications go from 1 to 4. One means that a patient has minimal symptoms and minimal limitations in daily activity. Four means that the patient is unable to really do anything due to heart failure. The scoring system is subjective. Several doctors have scored the defendant on this system, with varying results. Dr. Robert Lobel is a highly trained cardiologist. He was hired by the defendant to render an opinion in this case. He reviewed defendant's records and spoke with defendant. When Dr. Lobel initially rendered an opinion in this case, he opined that defendant should be classified as a 4 on NYH classification. However, Dr. Lobel conceded at hearing that defendant exaggerates some of his symptoms. The defendant had informed Dr. Lobel that he was, basically, unable to do anything due to his heart condition. However, Dr. Lobel subsequently reviewed surveillance evidence offered by the State from January 2021. Defendant's activities in that video demonstrated that he was not at a class 4 designation on the NYH scale. When he testified on May 4, 2021, Dr. Lobel modified his opinion and testified that defendant should be rated as a 3 on the NYH scale, meaning defendant suffers from a marked impairment of function.

Dr. Gregory McDonald is a highly trained cardiologist. He was hired by the State to render an opinion in this case. He reviewed the defendant's medical records and the State's surveillance records. Dr. McDonald rendered an opinion that defendant should be classified as a 2 on the NYH classification. A classification of 2 means the defendant's heart condition has a mild effect on his activities. Dr. McDonald opined that defendant has a stable cardiac function.

In January 2020, during a hospital stay, Dr. Fisher, a cardiologist, classified the defendant as a 2 on the NYH scale. On March 29, 2021, the defendant's treating cardiologist, Dr. Vitayim, classified him as a 4 on the NYH scale. However, it is unknown how much weight either doctor gave to defendant's subjective symptoms and stated limitations.

The defendant has had no recent hospital admissions due to heart failure. He has no evidence of fluid retention in his heart, which is typical of one suffering from end stage cardiac failure.

Defendant has been admitted to hospice twice due to his heart condition. The first time he was admitted was in March 2016. However, he was discharged as he travelled outside the area. The defendant was again admitted to hospice in March 2019. He was, subsequently, discharged based on a "failure to decline." Defendant started receiving home health care services in July 2019. He was discharged from their services in November 2019 as he was traveling outside their area.

Defendant's coronary artery/heart disease has been relatively stable since his ICD was implanted in 2000.

B. Kidney Disease

The defendant suffers from moderate kidney disease. Kidney disease is common in patients with diabetes. Kidney disease is rated on a 1 to 5 scale. A rating of 1 or 2 means a patient has no serious issues. A rating of 5 means that the patient is on dialysis. Defendant is rated at a 3. This means that his kidneys are not functioning normally and this places him at risk of kidney failure. However, defendant's kidney disease has been stable since at least 2014, and he is asymptomatic. His treating physicians have never recommended that he be seen by a kidney specialist. The defendant has never been hospitalized for kidney issues.

On March 21, 2021, defendant's treating physician, Dr. Martinez, described defendant's kidney disease as stable and unchanged. Defendant's kidney disease does not affect his activity level.

C. Diabete

The defendant has suffered from Type II Diabetes for 10 years. His diabetes is treated with insulin and diet. Defendant does not follow his prescribed regimen, and as a result, his diabetes is poorly controlled. When defendant has been hospitalized, and he is forced to follow his diabetes regimen, his diabetes is well-controlled. Defendant's poor management of his diabetes can have a negative affect on his heart disease.

The defendant has never been hospitalized for his diabetes. He has never been treated by a specialist for his diabetes. When defendant last saw Dr. Martinez, she scheduled a follow-up diabetes visit in three months.

The defendant's diabetes does not significantly affect his activity level. Controlling his diabetes is within the defendant's control.

D. Anxiety

Defendant suffers from significant anxiety. His heart disease causes him anxiety. He is very anxious about his defibrillator going off and giving him a shock. The sexual assault charges against him cause anxiety. The defendant is on medication, temazepam, for his anxiety.

The defendant has not been diagnosed as suffering from depression or major mental illness. The defendant does not receive, and has not sought out, counseling.

Defendant has passed all stress tests which he has been administered. It is likely that a sexual assault trial would increase defendant's stress level, which contains the possibility of negatively impacting heart condition.

E. Defendant's Activity Level

The defendant's activity level has been in dispute. As indicated above, the defendant reported to Dr. Lobel that he could not meaningfully participate in any activities due to his heart failure. Dr. Lobel found the defendant's activities on the January 13, 2021 surveillance video to be inconsistent with defendant's description of his activity level.

The State hired a Florida law enforcement officer to surveil the defendant. The officer, John King, surveilled the defendant's property on many occasions without observing any activity at the

residence. However, on January 13, 2021, Mr. King surveilled the defendant and observed him leaving the property with his wife and running typical household errands.

On January 13, at 12:41 pm, the defendant left his property in LaBelle in the family's Kia automobile. Defendant was a passenger in the vehicle and his wife was driving. The vehicle drove to a credit union where defendant got out of the car and walked up to an ATM and made a transaction. Defendant then left the ATM and walked into the bank. He was inside the bank for approximately 3 minutes. He then walked back to the Kia and he and his wife drove towards Ft. Myers. They next drove to a Walmart Supercenter and pulled into a gas station/convenience store associated with the Walmart. The defendant then walked from the Kia towards the convenience store. Mr. King lost sight of the defendant, but then saw him again approximately 3 minutes later walking back towards the Kia. Defendant's wife then walked into the convenience store and the defendant drove the Kia from the gas pumps to a designated parking spot near the store. When defendant's wife returned to the car, the defendant then went into the store. Defendant returned 2 minutes later and the Kia drove away, with defendant's wife again driving. The Kia continued west to the Ft. Myers area and pulled into a Kohl's Department Store. At this point, the defendant was 31.2 miles from his home in LaBelle. The defendant walked into the Kohl's and sat in a chair near the front of the store. At 2:39 pm, Mr. King observed the defendant and his wife exit the Kohl's. The defendant was walking unaided. The defendant's wife was walking with a walker and holding defendant's hand for support. When they got back to the vehicle, the defendant loaded the walker and the packages into the Kia. The defendant's wife again drove and Mr. King lost them in traffic at 3:19 pm, which was 2 hours and 9 minutes from when they left the residence.

During the entire incident on January 13, 2021, the defendant walked without assistance, and without any apparent difficulty. He did not use oxygen. The defendant never appeared to be in respiratory distress. As testified by Dr. Lobel, the defendant's activities on this date were inconsistent with someone classified 4 on the NYH scale.

Sgt. Christopher Norwood also testified for the State. He is a Henry County Deputy Sheriff. LaBelle is in Henry County. On June 17, 2020, Sgt. Norwood was working traffic for a memorial service for a law enforcement officer killed on duty. The defendant drove by him in a tan SUV (the defendant was the driver) and stopped in a crosswalk thirty feet from Sgt. Norwood. The defendant got out of his SUV and walked up to Sgt. Norwood. Defendant shook Sgt. Norwood's hand and said that he was a former law enforcement officer, and showed him his law enforcement identification. Sgt. Norwood observed that the defendant had no difficulty walking; that he had no difficulty breathing; and that he was steady on his feet. After a short conversation, Sgt. Norwood told the defendant that he had to move his vehicle as he was parked in a crosswalk. The defendant complied with the request and drove on.

Sgt. Norwood knew defendant as he had taken a criminal mischief complaint from him at the station on October 13, 2016. At that time, defendant explained to Sgt. Norwood that he left Florida on June 28, 2016 and had travelled to New York City, returning October 13, 2016. Sgt. Norwood observed that defendant had no issues walking, speaking, or breathing. This interaction lasted 30-45 minutes.

For his trip to New York City, the defendant travelled in his motor home. The three-month trip to New York City is inconsistent with a NYH classification 4 but not a classification 3.

Sgt. Laura Hernandez of the Henry County Sheriff's Department also testified. She had a citizen contact with defendant at the sheriff's department on February 15, 2019. She interacted with the defendant for 20-30 minutes. During the interaction, the defendant was standing and did not appear out of breath. He was gesturing and speaking in an animated manner. At one point, defendant seemed to lean against the counter for support.

In 2016, the defendant traveled to Jacksonville, FL and Orlando, FL.

On May 10, 2019, the defendant signed a Request for a Security Check with local law enforcement, stating that he would be traveling to NJ from May 13, 2019 until May 31, 2019. Ex. 13. He indicated that his probable travel route would be on Interstate 95, indicating that he intended to travel by motor vehicle.

In November 2020, the defendant travelled 2-2½ hours by motor vehicle to be at his daughter's house for Thanksgiving. It was during this trip when he received his most recent shock from his defibrillator.

F. Recent Incident

The defendant had an incident on April 29, 2021 where he fell in his bathroom at home. He did not injure his head in the fall, but suffered some type of injury to his lower back. As a result of the fall, defendant was hospitalized for one week. In the hospital he was seen by a neurologist and a cardiologist. The defendant had subjective symptoms of overall weakness, dizziness, and chest pain. The defendant had objective symptoms of weakness in his legs and difficulty swallowing. Upon admission to the hospital, the defendant's physical examination revealed that he was oriented to person, place, and time; his heart rate was normal with regular rhythm; his breathing was normal; he exhibited normal muscle tone; and his coordination was normal. Ex. 43 at 4. He also appeared to be malnourished.

After one week, on May 5, 2021, the defendant was discharged to a nursing home for rehabilitation. In the nursing home, the defendant received occupational therapy and physical therapy. While in the nursing home, the records vary as to how well he was doing, but overall they describe him as doing well, physically and mentally, while in the nursing home. For example, on May 6, 2021 (the day after he was admitted to the nursing home), the records describe him as alert and oriented. Ex. 41 at 43. The records further note that he was able to get in and out of bed safely; that he did not have problems with balance and trunk control; that he was ambulatory and continent; and that he did not exhibit behavioral symptoms that may place him at risk for accident hazards. *Id*. at 43-44. The nursing home records also state that the defendant was able to move all extremities and had no impairment in range of motion in his upper or lower extremities. *Id*. at 80.

The defendant was discharged home after three weeks in the nursing home. His discharge recommendations included that he be placed on a puree diet; that he obtain a wheelchair; and that he receive occupational therapy and physical therapy. It is unknown whether he has obtained a wheelchair.

While the defendant was hospitalized and in the nursing home, he did not suffer heart failure, nor did he suffer from issues with his kidneys or his diabetes. Neither the stress of the fall and its

aftermath, nor defendant's time and treatment in the hospital and nursing home caused defendant's defibrillator to go off.

G. Defendant as a Reporter

As indicated by the medical professionals in this case, the defendant is not a reliable reporter of his symptoms and limitations. Some of this is explained by defendant's anxiety over his condition. However, other reports from defendant are not able to be explained in this manner. For example, at a hearing on February 9, 2017, the defendant advised the court that that he was on a respirator. Ex. 34 at 4. However, the medical professionals testified that there is no evidence in the records that he was ever on a respirator. At that same hearing, the defendant advised the court that he was in hospice care, receiving end of life treatment. Ex. 34 at 4. However, the medical records do not show that he was in hospice care at that time.

In addition, the evidence shows that defendant took an extended trip from Florida to New York in his motor home in the summer and fall of 2016. During this time frame, the defendant was asserting to the court that he was too ill to travel to VT for trial. Similarly, he took a three-week trip to NJ in 2019, again while asserting he could not travel to VT for trial.

H. Accommodations

The court can make accommodations to assist defendant with being able to participate in the jury trial. The court can shorten the days of the trial and can increase the number of breaks. This will provide defendant with more time to address any needs such as taking his medication, eating the proper foods, and lessening the overall stress of the proceedings. The defendant can use a wheelchair to help with mobility, and to reduce the risk of falling.

In addition, there remains a possibility that some form of Administrative Order 49 will remain in effect, allowing for the defendant to appear remotely for jury trial. The current iteration of A.O. 49 would allow the defendant to appear remotely "upon agreement of the parties" and with the court's permission. A.O. 49(5)(b)(ii).[2]

I.*Expert Opinions*

The court received expert opinion testimony from several highly qualified doctors, including specialists. The court received opinions from Dr. Thomas Powell, Dr. John Kurtz, Dr. Robert Lobel, Dr. Jason Bartsch, and Dr. Gregory McDonald. The opinions of Dr. Lobel, Dr. Bartsch, and Dr. McDonald were particularly germane to the issue before the court.

Dr. Lobel was asked by defense counsel whether the defendant was healthy enough to travel from Florida to Vermont for trial. Dr. Lobel responded that it was a "hard question" but that it would be "an incredibly bad idea." Dr. Lobel opined that the travel would be risky. He testified that the driving would not be an issue, but the stops for meals and overnight stays would be problematic. Dr. Lobel opined that air travel would be risky for someone with his heart condition. Dr. Lobel opined that a 2-week jury trial would be incredibly difficult on defendant. Dr. Lobel was concerned that the stress of trial would increase the risk of his defibrillator giving a shock, resulting in a hospitalization. While heart

[2] The defendant was able to participate remotely in this evidentiary proceeding.

attacks are very difficult to predict, Dr. Lobel did testify that based upon the results of his stress tests, defendant's risk of another heart attack is "reasonably low."

Dr. Bartsch opined that requiring the defendant to undergo a jury trial in VT would be a serious detriment and risk to his health. Dr. Bartsch, like Dr. Lobel, was primarily concerned about the defendant's heart condition. However, Dr. Bartsch was also concerned about the problems stress and anxiety could cause regarding the defendant's kidney disease, diabetes, and the effects of these on his heart disease. Dr. Bartsch also opined that the defendant is a "frail" individual, placing him at a higher risk of falling and suffering serious injury.

Dr. McDonald opined that travel to VT and standing trial presents a low risk to defendant's health. Dr. McDonald observed that defendant's subjective symptoms are typically dramatically worse than the objective findings. Dr. McDonald opined that defendant's cardiac function is stable, meaning that it is safe for him to travel, including by air. Dr. McDonald opined that the stress of trial would not cause the defendant to suffer serious health issues.

All the experts who testified are highly qualified. However, the court finds Dr. McDonald's testimony to be most convincing. Dr. McDonald relied more on the objective findings, and less on defendant's subjective symptoms than did Dr. Lobel or Dr. Bartsch. Defendant's subjective symptoms are unreliable. Dr. Lobel testified that defendant's health has been in a downward spiral since July 2019. The court finds from the evidence presented, that while defendant has had ups and downs since then, his overall health, including his cardiac health has been relatively stable over that time.

II. Conclusions of Law

Wholly distinct from the issue of mental competency, physical incompetence to stand trial invokes the premise that a "defendant cannot fairly be subjected to legal proceedings that would involve a substantial 'risk to his health or life." *United States v. Passman*, 455 F. Supp. 794, 797 (D.D.C. 1978) (citing *United States v. Bernstein*, 417 F.2d 641, 643—44 (2d Cir. 1969)). In contrast to mental competency, "no statutory standard exists for [determining] whether a defendant is physically incompetent to stand trial." *United States v. Jones*, No. 1:08-CR-00033-JGM-l, 2010 WL 2618424, at *1 (D. Vt. June 24, 2010). It follows that granting or denying a continuance for physical competency falls to the sound discretion of the trial court. *Id*. (citing *United States v. Jones*, 876 F. Supp 395, 397 (N.D.N.Y. 1995)).

A physical competency determination encompasses consideration of five factors: "(1) medical evidence on the defendant's physical condition, (2) the defendant's activities outside the courthouse, (3) measures to minimize the risk to the defendant's health, (4) the usefulness of delay, and (5) the seriousness of the case." *Id*. (citing *United States v. Doran*, 628 F.Supp. 1261, 1263 (S.D.N.Y. 1971)).

The court concludes that the defendant is physically competent to stand trial in VT. Clearly, the defendant suffers from serious heart disease, serious kidney disease, diabetes, and anxiety. However, the defendant's heart disease, while serious, has been stable for many years. His heart disease does not prevent him from traveling significant distances. The defendant treats his heart disease with medication and benefits by the implanted ICD device. This device will be upgraded in the near future. The defendant's kidney disease, while serious, has been stable since at least 2014 and has never resulted in

hospitalization, and has never required him to see a specialist. His kidney disease is asymptomatic. The defendant's diabetes is easily controlled by insulin and diet. Unfortunately, the defendant has not regularly followed the recommended regimen. Despite that, the defendant has never been hospitalized as a result of his diabetes, and he has never been referred to a specialist for this disease. The defendant does suffer from anxiety, primarily as a result of his medical conditions. The defendant takes medication to help control his anxiety. However, the defendant has not been diagnosed with depression and has not sought the treatment of a mental health professional. Although the defendant suffers from serious medical conditions, and heart attacks cannot be predicted, the medical evidence demonstrates that the defendant is not at substantial risk to his health or life, if he is required to travel to VT and to attend jury trial.

The defendant's "activities outside the courthouse" also support a finding that the defendant is physically competent to stand trial. Certainly, the defendant's medical diseases affect his functioning to a degree. However, the evidence demonstrates that the defendant exaggerates the limitations on his activities. The defendant informed Dr. Lobel that he could not engage in any meaningful activities. That was disproven by the State in its video surveillance from January 2021. In that surveillance, the defendant travelled over 60 miles, roundtrip, by car. He walked in and out of stores without difficulty. He was not short of breath. He walked unaided. He assisted his wife in her walking. He was able to load his wife's walker and packages into his vehicle. The defendant was able to perform the tasks of his daily living, with the assistance of his wife's driving.

The defendant has been advising the court for years that he cannot travel to VT to attend trial, yet in 2016 he made a three-month trip to NY, and in 2019 he made a 3-week trip to NJ. The defendant is able to safely travel, when it is something he wants to do.

The court can take measures to minimize the risk to the defendant's health. The court can shorten the days of the trial and can increase the number of breaks. This will provide defendant with more time to address any needs such as taking his medication, eating the proper foods, and lessening the overall stress of the proceedings. The defendant can use a wheelchair to help with mobility, and to reduce the risk of falling. In addition, there remains a possibility that some form of Administrative Order 49 will remain in effect, allowing for the defendant to appear remotely for jury trial. The current iteration of A.O. 49 would allow the defendant to appear remotely "upon agreement of the parties" and with the court's permission. A.O. 49(5)(b)(ii).

There would be no "usefulness" in delaying this case further. Defendant's most serious conditions are permanent and will not improve over time.

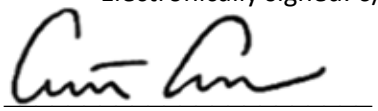
The case is extremely serious. The defendant is charged with sexually assaulting a then-12-year-old female on three occasions. Each charge carries a maximum potential penalty of 20 years' incarceration. The complainant is still available to testify and remains committed to receiving her day in court. The defendant was initially convicted on all charges by a jury in 1988. Subsequently, that verdict was set aside by the presiding judge and a new trial was ordered.

III. Order

The defendant's Motion Asserting Defendant's Physical Incompetency to Stand Trial is *denied*.

The court shall schedule a status conference for setting dates for a jury draw and trial.

Electronically signed: 6/24/2021 1:05 PM pursuant to V.R.E.F. 9(d).



Superior Court Judge