# The State of New Hampshire
# Superior Court

## Hillsborough-North

STATE OF NEW HAMPSHIRE

v.

CARLOS MARSACH

No. 216-2020-CR-00046

**ORDER REGARDING SANCTIONS**

The defendant has been indicted for Reckless Conduct with a Deadly Weapon. The Court has found that the Hillsborough County Attorney's Office ("HCAO") did not comply with a number of court orders and rules in this case, including failing to extend a plea offer or produce discovery pursuant to the deadlines. See Dispositional Conference Order (Doc. 11); Status Order (Doc. 15); Order (Doc. 19); Order on State's Motion to Reconsider September 7, 2021 Orders (Doc. 25).[1] Because no single prosecutor was responsible for the lapses, the Court cited HCAO as an organization for the violations. On October 12, 2021, the Court held a hearing on the issue of what sanctions the Court should impose for these infractions. County Attorney John Coughlin, First Assistant County Attorney Shawn Sweeney, and Assistant County Attorney Elena Brander all addressed the Court on the issue of sanctions. They urged this Court not to impose a penalty, citing a number of administrative initiatives designed to prevent the problems from recurring. The defendant urged this Court to find that

[1] After the initial citation, the Court will reference all pleadings and orders by the index number (Doc. __) of the document in the court file.

HCAO had a conflict of interest with the continued prosecution of this case and order that the case be reassigned to another prosecuting agency.

The superior court rules of criminal procedure specifically recognize the Court is empowered to punish non-compliance with court rules: "Upon the violation of any rule of court, the court may take such action as justice may require. Such action may include, without limitation, the imposition of monetary sanctions against either counsel or a party, which may include fines to be paid to the court, and reasonable attorney's fees and costs to be paid to the opposing party." N.H. R. Crim. P. Preface; see also N.H. R. Crim. P. 12(b)(9) and 37(b). In addition to this authority, trial courts also have inherent power to enforce their orders, which "includes the right to manage their trial docket," B.F. Specialty Co. v. Charles M. Sledd Co., 475 S.E.2d 555, 558 (W. Va. 1996), and to "to impose sanctions for violations of court orders." Thompson v. State, 909 A.2d 1035, 1046 (Md. 2006); see United States v. Seltzer, 227 F.3d 36, 42 (2d Cir. 2000) (""[T]he inherent power of the [trial] court also includes the power to police the conduct of attorneys as officers of the court, and to sanction attorneys for conduct not inherent to client representation, such as, violations of court orders or other conduct which interferes with the court's power to manage its calendar and the courtroom without a finding of bad faith."). "The power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice." Emerson v. Town of Stratford, 139 N.H. 629, 631 (1995) (quotation omitted). "The summary jurisdiction which the court has over its attorneys as officers of the court is inherent, continuing, and plenary and

ought to be assumed and exercised ... not only to maintain and protect the integrity and dignity of the court, to secure obedience to its rules and process, and to rebuke interference with the conduct of its business, but also to control and protect its officers, including attorneys." Barnard v. Wassermann, 855 P.2d 243, 249 (Utah 1993) (ellipses omitted).

Rule 37 of the New Hampshire Rules of Criminal Procedure specifically provides: "Upon the violation of any rule of court, the court may take such action as justice may require. Such action may include, without limitation, the imposition of monetary sanctions against either counsel or a party, which may include fines to be paid to the court, and reasonable attorney's fees and costs to be paid to the opposing party." N.H. R. Crim. P. 37(b). Likewise, Rule 12(b)(9) provides, "If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances . . . ." That rule goes on to identify a non-exclusive list of possible sanctions. Without the ability to impose meaningful sanctions, the court rules and orders would be empty words readily ignored by the litigants when those procedures are burdensome, or even merely inconvenient. See Barnard, 855 P.2d at 249. In other words, the Court's "recourse is not limited to public hand-wringing." United States v. Auch, 187 F.3d 125, 133 (1st Cir. 1999).

The New Hampshire Supreme Court has held that a trial court may not dismiss a charge except as a sanction of last resort and only when the defendant was actually prejudiced by the prosecutor's conduct. See State v. Cotell, 143 N.H. 275, 279-82 (1998). The Court went on to note that the trial judge "should not hesitate to impose

proportionate and meaningful sanctions to remedy a prosecutor's failure to comply with a discovery order." Id. at 282. "The superior court has at its disposal several 'disciplinary weapons' to deal adequately with the problem if it finds that the late compliance was willful or otherwise inexcusable. They include citation for contempt, suspension for a limited time of the right to practice before the court, censure, informing the appropriate disciplinary bodies of the misconduct, and (infraction) of costs". State v. Arthur, 118 N.H. 561, 564 (1978) (quotation and citations omitted).

The Court does not exercise this power to sanction lightly. The Court is mindful that we are all human and prone to make mistakes, especially when the lawyers work under tremendous pressure from crushing caseloads. Isolated lapses, inadvertent oversights, or other sporadic non-compliance that does not cause significant disruption or waste of judicial resources would not warrant a judicial remedy. But that is not the situation presented in this case. Nor is it the recent experience of this Court with respect to the HCAO's noncompliance with rules and orders in other cases.

The Court took no remedial action when the parties in the case at bar did not file a case status report by the March 9, 2021 deadline as required by court order. Doc. 8. The Court did not issue a sanction when the prosecutor appeared at a dispositional conference on April 13, 2021, and had neither provided complete discovery as required by Rule 12(b)(1), nor made a plea offer as required by Rule 12(b)(3)(A). See Doc. 11. Instead, the Court scheduled a further status conference, setting specific deadlines in order to ensure meaningful progress occurred on the case. Id.; see N.H. R. Crim. P. 12(b)(9) (recognizing that ordering a party to produce discovery and continuing a hearing are appropriate remedies for non-compliance with the rule). On May 11, 2021,

the Court held a further status conference. Again, the State had not complied with the specific deadlines established by the Court in the April 13 order. Doc. 15. The State did not produce all of the required discovery, only produced one video the day before the hearing, and did not make a plea offer in the case. Id. As a result, no meaningful progress toward resolution of the case occurred in the four months that the case was pending.

Still the Court stayed its hand and did not sanction the prosecutor for non-compliance. Rather, the Court set one more status conference with the following directives:

> At least 3 weeks before the next status conference the State must provide defense counsel with all requested discovery or file a motion seeking an extension or other relief. The State must provide a plea offer within 15 days of the next status conference and the parties shall engage in meaningful plea discussions.

Id. In order to give both parties incentive to engage in meaningful plea negotiations before the next status conference on the case, the Court ordered: "Failure to comply with this order will result in the case being placed on the trial docket and the Court will only accept a naked plea after a trial date is set in this case." Id.

The Court held the next status conference nearly 90 days later, on August 2, 2021. At that time the Court learned that the State still had not made a plea offer in the case. Doc. 19. As a result, the defendant had no opportunity to engage in any meaningful plea discussion to resolve the case short of trial. While a defendant certainly is free to initiate plea negotiations, both Rule 12(b)(3)(A) and the court orders in this case put the burden on the State to make the first move. Here, the public defender attempted to communicate with the prosecutor assigned to the case before the

August 2 hearing without success. See Doc. 19 at 2. The Court ruled that it would "not impose the sanction set forth in the May 18 order, in which it indicated it would only accept a naked plea after the matter was scheduled for trial. To do so would only punish the defendant. It is apparent from the events outlined in this order that defense counsel has acted diligently and in good faith." Id. Thus, the Court was left with two options to address the non-compliance with the rules and court orders: (1) ignore the problem or (2) attempt to craft a remedy or sanction with the intent to deter this type of omission in the future.

Ignoring the lapses here is not palatable because it would be a tacit acknowledgment that the Court's orders have no teeth. See State v. Knight, 161 N.H. 388, 341 (2011) ("Courts have a legitimate interest in the enforcement of scheduling deadlines, both to manage a pending case and to retain the credibility of these deadlines in future cases." (quotation omitted)). It also was not an acceptable outcome because the Marsach case was not an aberration. The following is just a sampling of recent cases where similar issues have occurred:

- State v. Claudio, No. 216-2020-CR-01998 (May 18, 2021) (Doc. 20) (detailing violations of court orders and missed deadlines);
- State v. Gurney, No. 216-2020-CR-01216 (Aug. 2, 2021) (Doc. 19) (State made plea offer on the morning of the dispositional conference and defense had not even received all discovery despite efforts to obtain it from the State);
- State v. Lavasser, No. 216-2020-CR-00510 (Aug. 17, 2021) (Doc. 21) ("Despite the Court's July 14 order requiring the State to make a plea offer on both cases and engage in meaningful plea negotiations, the State did not make an offer until yesterday.");
- State v. Salvador, No. 216-2020-CR-01923 (Sept. 10, 2021) (Doc. 24) ("It is not unusual for offers to be made in an untimely manner, late discovery to be provided, and cases to be continued or nol prossed at the last minutes. The Court does not have the luxury of scheduling two and three dispositional

conferences as has become the norm. The answer is not to relax the rules on a regular basis with the results that cases are not prosecuted in accordance with the speedy trial policy. Defendants and victims are entitled to speedy justice.");

- State v. Lecerte, No. 216-2020-CR-00455 (Oct. 1, 2021) (Doc. 44) (ruling on motion to dismiss based on late discovery in violation of Rule 12);

- State v. Campbell, No. 216-2021-CR-00857 (Oct. 7, 2021) (Doc. 19) (noting that the prosecution "arrived almost 45 minutes late" for a dispositional conference because he "did not have the case on his calendar and suspects the issue may have to do with improper service contacts." The parties also did not file a case status report. The prosecutor cited a complex calendaring system that may have contributed to the problems).

In fact, the failure of HCAO prosecutors to comply with Rule 12 continued even after the sanctions hearing in this case. See State v. Lawton, No. 216-2020-CR-01789 (Oct. 19, 2021) (Doc. 44) (State had not filed witness list by the final pretrial conference in violation of N.H. R. Crim. P. 12(b)(4)(A) because the deadline had not made it on the prosecutor's calendar); State v. Brown, No. 216-2020-CR-00483 (Oct. 27, 2021) (Doc. 79) (citing violations of N.H. R. Crim. P. 12(b)(1)(B) and 12(b)(1)(D) in excluding expert witness testimony based on lack of expert disclosure and continuing trial because State had not disclosed medical records until the eve of jury selection); State v. Mastro, No. 216-2021-CR-01055, *et al.*, Status Order (Nov. 3, 2021) (Doc. 14) (prosecutor cited work load for failure to file joint case status report and for not extending a plea offer as required by Rule 12(b)(3)(A)). What is note-worthy about this list, including the case at bar, is that the cases involve nine different lawyers—or nearly half of the 19 lawyers—within the HCAO. This leads the Court to conclude that the issue is largely one of systematic breakdown.

Hillsborough County Attorney John Coughlin personally appeared at the sanctions hearing to defend his office. He explained the problems facing the HCAO

when he took office on January 6, 2021, and the steps he has undertaken to try to correct those shortcomings. As he wrote in his Report to the Hillsborough County Board of Commissioners, the HCAO had been under the supervision of the Attorney General's Office in 2020 because the office "lacked effective leadership and management support due to lack of involvement of the County Attorney and a management team that had a full workload, specifically managing prosecutors who had full caseloads." Ex. 1A (Tab 1 at 1). County Attorney Coughlin had five prosecutor vacancies to fill when he assumed his office. Id. Five additional prosecutors left after he started as County Attorney. Ex. 1A (Tab 4 at 1). In addition, he obtained approval of the County Commissioners to hire additional positions to address staffing levels. Ex. 1A (Tab 1 at 1). He worked with the Court and public defenders to re-initiate an Early Case Resolution ("ECR") program. Id.

One of the excuses for failing to comply with deadlines frequently cited by prosecutors is the lack of an effective calendaring system. County Attorney Coughlin explained during the sanctions hearing that he had obtained approval from the County Commissioners to purchase Microsoft365 to address this deficit. See also id. He informed the Court that even though the funds had been approved by the County Commissioners in July 2021, he was dependent on the county IT department to purchase and install the software. For reasons he could not explain, the IT department had not taken any steps to address this issue.

A number of problems have also arisen in the context of case transfers, particularly when prosecutors left the office and a new prosecutor was assigned to the case. This appears to be the root of several (but not all) of the lapses in the Marsach

case. County Attorney Coughlin explained that when he started in January there was no standardized procedure for departing attorneys. He informed the Court that he recently implemented a formal policy for case transfers in an attempt to address the communications gaps that occur in these situations. See Ex. 1A Tab 3.

The materials submitted by County Attorney Coughlin also identify a number of staff trainings the office has implemented to address the problems in the cases described above. See Ex. 1A at Tab 9. County Attorney Coughlin and First Assistant Shawn Sweeney also meet regularly with the Clerk of Court and the Deputy Clerk to discuss recurrent issues. Id.

It appears that the HCAO recognizes the problems presented in this order and has taken the Court's concerns about the lapses seriously. The Court is also mindful that organizational change takes time to fully implement. Nonetheless, some of the problems, like the failure to make a timely plea offer as required by Rule 12(b)(3)(A), could have been implemented on the first day the new County Attorney took office. Yet that problem continues even after the sanctions hearing in this case. See State v. Mastro, supra, Status Order (Nov. 3, 2021). It is also the most frequently cited reason by this judge and my colleagues for scheduling multiple dispositional or status conferences. This results in a tremendous waste of judicial resources. These repeated status conferences due to the lack of plea offers (or failure to provide a timely response to the defendant's counter-offer) only exacerbate the backlog facing the prosecutors. Prosecutors, defense lawyers, defendants, judges, and the court staff all spend a considerable amount of time attending repeated court hearings when the parties have not had meaningful plea negotiations prior to the first depositional conference.

Likewise, victims are left with uncertainty while the proceedings are in scheduling limbo. Cf. RSA 21-M:9-k, II(g) (recognizing that victims have "[t]he right to have inconveniences associated with participation in the criminal justice process minimized"). Moreover, cases remain on the docket longer than necessary resulting in an even greater case load for each individual prosecutor. None of this is in the public interest. The Court must fashion a remedy to provide incentive for the HCAO to more faithfully comply with Rule 12(b)(3)(A) (as well as other rules and orders).

In State v. Roberts, No. 216-2014-CR-00952 (Hills. Cnty. Super. Ct.-North), the Court issued a suspended fine against the Hillsborough County Attorney's Office under the prior administration for systemic failure to properly enter service contacts in the electronic file-and-service system, despite repeated warnings and efforts by the clerk's office to correct the deficiency. See id., Order (July 23, 2020) (Doc. 100). There were no further systemic failings related to this problem after this finding. Given the measures the HCAO has already undertaken to address the deficits in the case at bar and this past experience, the Court believes that a suspended fine reflects the appropriate balance of interests. On the one hand, it is a recognition that the Court has the authority to enforce its orders and the procedural rules. On the other hand, it creates an incentive to continue with the positive progress begun by County Attorney Coughlin without imposing an immediate burden on the office in need of resources to fulfill meaningful change.

The defense counsel in the case at bar urged this Court to find that the HCAO had a conflict of interest in the continued prosecution of this case. The defendant argued that this Court should order that the case be reassigned to another prosecuting

agency. The defendant alleges that that State has punished the defendant by making an unreasonably high plea offer after the August 2 hearing.

"The disqualification of Government counsel is a drastic measure and a court should hesitate to impose it except where necessary." United States v. Bolden, 353 F.3d 870, 878 (10th Cir. 2003). Disqualification of the entire prosecutor's office involves serious separation of powers concerns. Id. In fact, every Federal Circuit Court of Appeals to consider the issue has reversed the lower court order for disqualification of the entire U.S. Attorney's Office. See United States v. Moreno, No. 3:20-CR-29 WBS DLB, 2020 WL 6685520, at *2 (D. Nev. Nov. 12, 2020) ("Notably, the court is unaware of any case, and defendant has cited none, where the disqualification of an entire United States Attorney's Office has been upheld on appeal."). Instead, the courts will consider the disqualification of a specific prosecutor if that person has a conflict of interest. "[D]isqualifying conflicts of interest appear to concern some type of personal or pecuniary interest the attorney has in the outcome of the case." Moreno, 2020 WL 6685520, at *2.

As the basis for the motion to disqualify the HCAO, the defense cites the original prosecutor's belief that the case may result in a non-conviction resolution such as a conditional nolle pross agreement. After the August 2 hearing, the current prosecutor made a plea offer for the defendant to plead guilty to a felony with a 2-to-4-year stand-committed state prison sentence. While these two positions are dramatically different, defense counsel acknowledged that she had not received a formal plea offer from the original prosecutor assigned to the case. Thus, there is no indication that that

prosecutor's opinion of the outcome of the case had been vetted internally within the HCAO.

More importantly, there is no reason to believe the HCAO would punish Carlos Marsach by insisting on an unreasonably high plea offer. The office faced sanctions initiated by this Court, and not the defendant or defense counsel. The HCAO has nothing to gain by redirecting its displeasure about the sanctions it was facing to the defendant. Even if that were the case, the defendant cannot establish he is prejudiced by the HCAO's position. See People v. Carlin, 53 N.Y.S.3d 881, 886 (N.Y. Co. Ct. 2017). A defendant is not entitled to any particular outcome in plea negotiations. He can reject the plea offer if he believes it is too high and either enter a naked plea or take the matter to trial. Disqualification of the HCAO is not an appropriate remedy in this case.

For the reasons set forth above, the Court fines the Hillsborough County Attorney's Office $1000 as a sanction for the violations of court rules and orders identified above. This fine is suspended for a period of six months on the condition that the HCAO complies with N.H. Superior Court Rule 12(b)(3). If a prosecutor cannot comply with the requirements within the timeframes established by the rule, the prosecution must file a motion requesting appropriate relief and establishing good cause for the inability to comply with the rule.

SO ORDERED.

N. William Delker
Presiding Justice
November 16, 2021

Clerk's Notice of Decision
Document Sent to Parties
on 11/16/2021