

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough County

Hillsborough Superior Court Southern District

State v. Hernan Rijos-Calderon

226-2020-CR-00068

ORDER

A Webex hearing was held on today's date on the defendant's Expedited Motion to Amend Bail. The Court heard offers of proof from the parties as well as the testimony of Denise Hartley from the Hillsborough County House of Corrections ("HCHOC"). The defendant was assisted by an interpreter. The defendant argues that the Court should convert his bail from preventative detention to personal recognizance as a result of his illness from Covid-19, his underlying medical conditions which put him at high risk for serious illness or death, his lack of appropriate medical care at the HCHOC, and the prejudice he now faces as a result. Due to the emergent issues presented, the Court chooses to narrow its order, with less brevity than it might otherwise, to those things most germane to its ultimate decision to GRANT the defendant's request for relief.

The defendant has been quarantined since December 18, 2020. He has tested positive for Covid-19 as a result of testing performed on December 30, 2020. He claims to have had symptoms of the disease for thirty-two (32) days, and is presently confined to his cell for twenty-two (22) hours per day with another inmate who has also tested positive. He reports difficulty eating, vomiting, having blood in his vomit and stools, no sense of smell, difficulty breathing, coughing, and chest pain¹. He and his wife report that his symptoms are worsening. It is a fact that the defendant has underlying medical conditions that are known to put him at high risk for serious illness from Covid-19 according to the Center for Disease Control Guidelines. Specifically, he suffers from high blood pressure/heart disease and is known to have high cholesterol. This is supported by the fact that he remains on a series of medications for these conditions. Also important to the Court's decision is defense counsel's assertion that the defendant's ability to communicate in the English language "is limited at best."²

Although the HCHOC has taken recent steps to address its managing of Covid since the Court's December 31, 2020 Order (*Temple, J.*) in State v. William James (#226-2020-CR-00204), those steps do not establish that it is safe for this particular defendant to remain incarcerated on preventative detention. Ms. Hartley has indicated that she is without knowledge of the defendant's worsening symptoms, and only knew that he had complained of "headache and chest pain." Despite even those complaints, she reports that his oxygen levels have been within a normal range when his vital signs have been checked once a day at 8pm, and no further medical attention has been provided to him. Apparently a staff member checks the inmates for temperature, cough, shortness of breath, blood pressure and oxygen levels once a day. Of particular concern to the Court, is the fact that there is no evidence that inmates with high risk underlying conditions are checked more often or seen by a

¹ The Court takes judicial notice that periodically throughout the hearing the defendant was coughing, spitting into a bag, and clearly ill.

² The facts asserted by the defense were learned from the defendant's wife who informed counsel of same.

doctor upon testing positive for Covid or if they are symptomatic. It seems that unless the inmate himself complains, he will be subject to the routine once-nightly check and nothing more. Given the gravity of the potential implications for someone with known high risk underlying conditions, this seems abysmally inadequate. At the very least, these particular inmates with known underlying high risk conditions, should be checked on more than once a day, and certainly should be seen by a doctor to evaluate their condition once they are either symptomatic or test positive. The burden should not be on the inmate to complain enough to get appropriate attention. In this case the situation is exacerbated because of the defendant's language difficulties. It is unclear if he has the ability to adequately communicate with staff about his worsening condition. Despite Ms. Hartley's testimony that an inmate with mild symptoms would be referred to the internal clinic and someone with serious symptoms would be taken to a local emergency room, this defendant has not seen a Doctor since September 2020. That occurred when he apparently underwent a routine check-up for his known chronic medical conditions. According to the HCHOC's schedule, he won't routinely be seen again until March. But-for today's hearing, it is not clear to the Court that this defendant's medical condition would have been evaluated any further than it has been to date.

Lastly, the Court is troubled by the fact that neither the lawyers nor the Court had the benefit of the defendant's HCHOC medical records at today's hearing. It is clear that defense counsel made multiple requests over the course of the last week for them but did not receive any response. The Court strongly encourages the HCHOC to put a process in place that makes it reasonable for inmates, their counsel, or the State with appropriate authorization, to obtain such records in a timely manner. To the extent that the State or HCHOC takes exception to the Court's findings in this matter, that might have been alleviated by producing the records as requested.

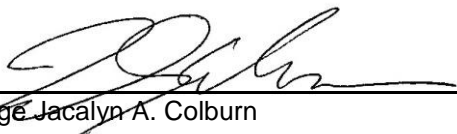
The defendant's bail is hereby converted to personal recognizance. He shall be released forthwith and shall remain on house arrest. He may only leave his home to attend medical appointments or legal appointments. Should he be found to violate this condition of bail, his bail will be revoked and he will be returned to the HCHOC. The Court recommends that upon release he immediately report to a local emergency room to be assessed by a doctor. All other prior bail conditions remain in full force and effect.

See Record.

So ordered.

January 13, 2021

Date



Judge Jacalyn A. Colburn