

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0637

State of New Hampshire

v.

Christina A. Hill

Appeal Pursuant to Rule 7 from Judgment
of the Cheshire County Superior Court

DEFENDANT'S REPLY BRIEF

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(Fifteen-minute oral argument)

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QUESTION PRESENTED

1. Whether a court may set cash bail in an amount it knows will detain the defendant, where the court found that the defendant was not dangerous.

Issue preserved by argument and ruling. T 10-19.*

* Citations to the record are as follows:
“App.” refers to the appendix to this brief;
“T” refers to the transcript of the bail hearing;
“DB” refers to the defendant’s brief;
“SB” refers to the State’s brief.

STATEMENT OF THE CASE AND FACTS

Hill relies on the Statements of the Case and Facts in her opening brief.

I. A COURT MAY NOT SET CASH BAIL IN AN AMOUNT IT KNOWS WILL DETAIN THE DEFENDANT, WHERE THE COURT FOUND THAT THE DEFENDANT WAS NOT DANGEROUS.

The State argues that the Court should construe the new bail statute to authorize pre-trial detention on unattainably high cash bail if the court finds, by a preponderance of the evidence, that a defendant's release poses a risk of flight. SB 17, 19-28. It also argues that (1) a statutory construction precluding such a result violates the doctrine of separation of powers; and (2) because this Court construes statutes to uphold their constitutionality whenever possible, the Court should reject Hill's argument. SB 29-31. Hill addresses these points in turn.

A. Statutory construction.

When construing a statute, the Court looks to the plain meaning of its terms. State v. Mfataneza, __ N.H. __ (decided May 10, 2019). If, after that exercise, the statute is ambiguous, the Court will consider other interpretive sources, such as legislative history. State v. Keenan, 171 N.H. 557, 561 (2018).

The new bail statute authorizes detention where the court has found, by clear and convincing evidence, that the defendant's release poses a risk of danger to herself or the community. RSA 597:2, IV. It does not otherwise allow pretrial detention. Had the legislature intended to authorize

detention where the court also predicted flight risk, it could have said so. See, e.g., 18 U.S.C.A. § 3142(f) (detention allowed if needed to “reasonably assure the appearance of the person as required and the safety of any other person in the community”); D.C. Code Ann. § 23-1325(a) (“if such risk of flight or danger is believed to exist, the person may be detained”); Fla. R. Crim. P. 3.131 (“If no conditions of release can reasonably protect the community from risk of harm [or] insure the presence of the accused at trial . . . the accused may be detained.”); N.J.S.A. § 2A:162-19(e)(3) (court may detain defendant if no amount of bail or conditions “will reasonably assure the defendant’s appearance in court when required [or] the protection of the safety of any other person in the community”). The State asks this Court to rewrite the statute to include authority the legislature did not confer. See State v. Dor, 165 N.H. 198, 203-04 (2013) (“[R]ewriting statutes is a task reserved for the legislature.”).

In addition, had the legislature intended to authorize detention in both situations, it would have established the same burden of proof in each circumstance.¹ Where the State seeks detention based on a prediction of danger, it must prove dangerousness by clear and convincing evidence. RSA

¹ Or, alternatively, it would have allowed detention on a prediction of dangerousness based on a lesser burden of proof than that needed for flight risk, since defendants predicted to be dangerous pose a greater risk of harm to the public.

597:2, IV. If flight is proven by a preponderance of the evidence, the court can take some action, RSA 597:2, III(a), (e), such as setting cash or surety bail in an amount consistent with the defendant's financial circumstances. RSA 597:2, III(e). The State does not explain why the legislature would allow the detention of defendants predicted to pose a flight risk based on a lesser burden than that required for detention based on a prediction of dangerousness.

The State's statutory construction argument begins with RSA 597:2, III(a), which requires the court to release the defendant "unless the court determines by a preponderance of the evidence that such release will not reasonably assure the appearance of the person as required." The State reasons that detention, apart from that authorized for defendants predicted to be dangerous in RSA 597:2, IV, must be permissible because RSA 597:2, III(d) provides that "the court shall issue on the record findings of fact that document the basis for its [detention] decision." SB 22. However, Paragraph IV contains no requirement that the court make a record to support its detention decision. Thus, despite the placement of Paragraph (d) in Section III, Paragraph (d) must modify Paragraph IV. Otherwise, the legislature would have authorized detention under Paragraph IV but not required the court to make findings in support of its decision. Or, it would

have required findings for detention orders under Paragraph III, but not Paragraph IV. Neither scenario makes sense.

The State then confronts RSA 597:2, III(e), which provides, “[i]f the court . . . determines by a preponderance of the evidence that the release described in this paragraph will not reasonably assure the appearance of the person, the court shall issue an order. . . .” (Emphasis added); see SB 23-28. The underscored language is identical to that in Paragraph (a), supra, which does not expressly authorize the detention of defendants predicted to pose a risk of flight. An order issued under Paragraph (e) must include the condition that the defendant not commit a crime, may require the defendant to post and potentially forfeit property or cash, and may require the posting of bail. RSA 597:2, III(e)(1)-(3).

Missing from the list of options in RSA 597:2, III(e) is detention. Instead, Paragraph (e) provides that the court’s authority to issue bail orders is limited by RSA 597:2, III(b)(1), which states that the court “[s]hall not impose a financial condition that will result in the pretrial detention of a person solely as a result of that financial condition.” The State characterizes this a conflict between Paragraphs (e) and (b)(1), to be resolved by permitting detention if flight risk is proven by a preponderance of the evidence. SB 25-28. In this circumstance, the State reasons, the court is permissibly detaining the defendant for a reason other than her financial

condition, i.e., her predicted risk of flight if released. SB 26-27.

This construction ignores that Paragraph (e) does not authorize detention where the court predicts flight risk. Moreover, the State's characterization of Paragraph (e) as in conflict with Paragraph (b)(1) is belied by the fact that the legislature intended to make every order under Paragraph (e) subject to the limitation of Paragraph (b)(1). While this Court has considered conflicts between statutory provisions, see, e.g., State v. Philbrick, 127 N.H. 353, 355 (1985), it makes no sense to conclude that the legislature purposely placed conflicting provisions in the same paragraph of the same statute. Rather, in such a circumstance, it is especially appropriate to achieve consistency in interpreting the provisions. See In re Craig, 171 N.H. 281, 283 (2018) ("We interpret statutory provisions in the context of the overall statutory scheme."); State v. Cheney, 165 N.H. 677, 682 (2013) ("Where reasonably possible, statutes should be construed as consistent with one another.").

Paragraphs (e) and (b)(1) can reasonably be read together. The legislature foresaw that the release of some defendants would pose a risk of flight and recognized the need for a special order on bail, as described in Paragraph (e). The incorporation of Paragraph (b)(1) into Paragraph (e) avoids the consequence of the defendant's detention on a bail

amount she cannot post. These provisions balance the need for increased leverage over defendants predicted to pose a risk of flight with the strong preference in favor of release of defendants predicted to pose no danger.

The State's proposal invites unjust results. See State v. Carpentino, 166 N.H. 9, 20 (2014) ("This court will avoid construing statutes in a manner that would produce an unjust and seemingly illogical result."). Allowing detention on high cash bail will result in incarceration due to a person's financial condition. Based on the State's argument, if two people are otherwise similarly situated in that both pose the potential risk of flight if released, a judge might set bail at \$10,000 cash on each. One person, who has very little money, would be detained pretrial in lieu of that bail. The other, who is a millionaire, would be released. The first person would be detained solely due to her financial circumstances.

Under the defendant's construction, both people would be released, but the amount of bail required would reflect their respective financial conditions. For the first defendant, it might be \$300. For the second, it might be \$300,000. In each case, the court will have set bail under Paragraph (e), subject to the limitation of Paragraph (b)(1). Each amount of bail would be significant enough to motivate the rich and poor defendants to appear for court, without bail being so high as

to detain a defendant not predicted to be dangerous. The poor defendant would not be detained due to her financial condition, and the rich defendant would be required to post a significant but attainable sum. As discussed in Hill's brief, DB 18, if either subsequently fails to appear for court, there are many ways to address the breach.

The State's argument also perpetuates arbitrariness in setting an amount of bail. Under the State's construction, if the court finds by a mere preponderance that the defendant's release poses a risk of flight, whether that risk is great, medium, or small, the court can set bail in any amount. With Paragraph (b)(1) as a limitation, however, the amount of bail set will depend on an objective and verifiable factor, the defendant's financial condition.

Pretrial detention is a severe consequence. The legislature knew how to make clear the circumstances under which detention is possible. It did so in Paragraph IV, with dangerousness, but it did not expressly provide for detention as an option in any other instance. To the extent the plain language is not clear on this point, the legislative history reveals an intention to overhaul bail procedures that too often resulted in detention based on a person's financial condition. This Court should reject the State's proposed statutory construction, and rule that under the new bail statute, a court cannot set unattainably high cash bail on the sole basis

of a prediction that the defendant's release poses a risk of flight.

B. Separation of powers.

The State argues that an interpretation of the new bail statute preventing the court from ordering pretrial detention where the court predicts that the defendant is a risk of flight violates the principle of the separation of powers. SB 29-31. It contends that a statute precluding the court from detaining a class of defendants based on a court's prediction of flight risk would impermissibly interfere with the court's duty to insure the orderly administration of justice. SB 29-31.

Under Part I, Article 37 of the New Hampshire Constitution, "[i]n the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit." The separation of powers doctrine "is violated by an improper imposition upon one branch of constitutional duties belonging to another, or, an encroachment by one branch upon a constitutional function of another branch of government." In re Judicial Conduct Committee, 151 N.H. 123, 125 (2004) (quotation omitted). Such impropriety occurs "[w]hen the actions of one branch of government defeat or materially impair the inherent functions of another branch. . . ." Id.; see also N.H. Health Care Assoc. v. Governor, 161

N.H. 378, 386 (2011) (“[T]he New Hampshire Separation of Powers Clause is violated only when one branch usurps an essential power of another.”).

As applied to statutes governing judicial proceedings, the Court found a violation of the separation of powers doctrine where the legislature enacted a statute allowing law enforcement officers to wear firearms in court. State v. LaFrance, 124 N.H. 171 (1983). The court held that the statute infringed on its “power . . . to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court. . . .” Id. at 179. In State v. Carter, 167 N.H. 161 (2014), the Court found no violation of the doctrine where the legislature promulgated a statute granting a defendant the right to pre-indictment discovery. “[W]ere it truly the case that the legislature lacked power to enact laws addressing judicial procedure, innumerable long-standing sections of the Revised Statutes Annotated that address matters of court practice and procedure would be called into question.” Id. at 167. “[T]he statute preserves the court’s power to regulate pre-indictment discovery, tailoring it to the facts and circumstances of the particular case.” Id. at 169.

The State does not argue that the legislature cannot pass a statute governing the court’s administration of bail. Just as the legislature can proscribe the sentences imposed

upon convictions of crimes, RSA 651:2, II, to include mandatory sentences in some instances, see, e.g., RSA 651:2, II-a, the legislature can set conditions and limitations on the court's ability to release defendants before trial.

The State's essential point is that the bail statute violates separation of powers because the court's inability to detain defendants predicted to pose a risk of flight without bail is an affront to its authority to uphold the dignity and insure the orderly functioning of the judicial process. SB 31. That argument rests on the premise that if those defendants are released after posting an amount of bail they can afford to post, they will, in significant measure, not appear for court.

The chronic absence of defendants would hinder the court's ability to swiftly adjudicate criminal cases. However, the assumption underlying the State's claim has not been proven. Indeed, it is speculative to conclude that the new bail statute will result in an epidemic of flight. Studies have shown that most defendants appear for court without the need for cash bail. See [Bail Reform: A Guide for State and Local Policymakers](#), at 12 (Report of the Harvard Law School Criminal Justice Policy Program, February 2019) (citing studies in Santa Clara County and Washington, D.C.) (available for download at [http://cjpp.law.harvard.edu/assets/Bail Reform_WEB.pdf](http://cjpp.law.harvard.edu/assets/Bail_Reform_WEB.pdf)). The legislature clearly intended to address the issue of

unnecessary pretrial detention, and to reform how bail is set in this state. A conclusion that a defendant predicted to be a flight risk may be required to post cash bail based on her financial condition is consistent with the new bail statute's language and intent. This Court should issue an opinion upholding that interpretation.

CONCLUSION

WHEREFORE, Ms. Hill requests that this Court hold that under the new bail statute, only a defendant whose release on bail poses a danger may be preventively detained.

Undersigned counsel requests 15 minutes oral argument.

This brief complies with the applicable word limitation and contains 2490 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief shall be served on the State of New Hampshire and Senior Assistant Attorney General, Lisa L. Wolford, through the New Hampshire Supreme Court's electronic filing system.

/s/ David M. Rothstein
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DATED: June 6, 2019