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SJC-13083

COMMONWEALTH vs. KEITH HERRING.

Suffolk. October 4, 2021. - April 28, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker,  
& Wendlandt, JJ.

Supreme Judicial Court, Superintendence of inferior courts.  
Pretrial Detention. Bail.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on February 5, 2021.

The case was heard by Georges, J.

Vivianne Jeruchim (Joshua M. Daniels also present) for the defendant.

Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

Anthony D. Mirenda, Emily J. Nash, & Matthew F. Casassa, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

BUDD, C.J. Pursuant to G. L. c. 211, § 3, the Commonwealth petitioned a single justice of this court for review of a Superior Court judge's decision to grant pretrial release to the

defendant, Keith Herring.<sup>1</sup> A single justice of this court held an evidentiary hearing and, after de novo consideration, vacated the release order and ordered that the defendant instead remain in custody. Because the single justice acted pursuant to his broad powers and within his considerable discretion, we affirm.<sup>2</sup>

Background. The defendant was arraigned in 2017 on various charges, including murder in the first degree, and subsequently was held without bail. Following this court's decision in Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431 (2020) (CPCS), the defendant filed a series of motions for release based on the risk to his health posed by the 2019 novel coronavirus (COVID-19) pandemic and exacerbated by his serious heart condition.<sup>3</sup> The first four of these motions, filed between April and December of 2020, did not

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<sup>1</sup> For convenience, we refer to Herring as "the defendant" instead of "the respondent."

<sup>2</sup> We acknowledge the amicus letter submitted by the Massachusetts Association of Criminal Defense Lawyers in support of the defendant.

<sup>3</sup> The defendant suffers from a heart condition. As a result of his heart condition, the defendant experiences arrhythmia or atrial fibrillation (i.e., irregular heartbeat). Untreated atrial fibrillation results in an increased risk of heart attack, stroke, and heart failure. The defendant's heart condition also increases his risk of developing serious to fatal illness if he contracts COVID-19. Moreover, the defendant is at heightened risk of contracting COVID-19 because, following the recommendation of his treating cardiologist, he has not received the COVID-19 vaccine due to concerns about how it may interact with his heart medication.

result in the defendant's release. However, as a result of the fourth motion, the defendant was transferred from the Suffolk County house of correction to the Middlesex County house of correction in Billerica (BHOC), which was found to have "superior measures in place . . . to reduce the risk of COVID-19 transmission."

On February 3, 2021, the defendant filed yet another motion for release. Filed with the motion was an unsworn letter from the defendant's treating cardiologist at Massachusetts General Hospital (MGH), Dr. Doreen Defaria Yeh, and affidavits from the defendant and his counsel. The letter from Dr. Yeh identified several concerns with the defendant's care at BHOC, including delays in ordering medication and a heart monitor for the defendant, resulting in the postponement of a scheduled heart surgery. Dr. Yeh also identified concerns with how the defendant was monitored and when and how he was transferred from his cell to BHOC's medical unit or to MGH.

The judge "adopt[ed] as facts" the information in Dr. Yeh's letter and concluded that BHOC's "abject failure to address the [defendant's] most basic medical needs for his cardiac condition in the midst of a pandemic and without vaccination" had created a "risk level . . . so serious in and of itself that it warrant[ed] release to home confinement." Accordingly, the judge granted the defendant's motion the day after it was filed,

without holding an evidentiary hearing. The judge ordered that the defendant be released temporarily from pretrial custody subject to conditions including home confinement and global positioning system (GPS) monitoring.

In response, the Commonwealth filed with the single justice of this court an emergency motion to stay execution of the release order and an emergency petition under G. L. c. 211, § 3, seeking reversal of the order. The single justice stayed the order for one week, until the parties could convene for an evidentiary hearing via video conference. At that hearing, health services administrator of the Middlesex County sheriff's office, Kathleen Shultz, and a nurse practitioner on staff at BHOC with a subspecialty in cardiology, Kathleen Waterhouse, testified for the Commonwealth. No one testified for the defendant.<sup>4</sup>

According to the Commonwealth's witnesses, BHOC followed the COVID-19 transmission mitigation measures recommended pursuant to Department of Public Health guidance and met biweekly with an infectious disease specialist and epidemiologist to update best practices. As for the defendant's

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<sup>4</sup> It appears that defense counsel initially had intended to call Dr. Yeh to testify, and that the single justice had offered to hold an additional hearing at a separate time to accommodate Dr. Yeh's schedule. Ultimately, however, Dr. Yeh did not testify.

specific medical needs and COVID-19 exposure risk, he was housed in an isolation cell within the BHOC's health services unit, which contained a call button the defendant could use to speak with nurses. The defendant was monitored continuously by BHOC staff. If the defendant reported and testing confirmed an episode of irregular heartbeat, the defendant would be transported immediately by ambulance to the hospital.

After witness testimony concluded, the Commonwealth argued to the single justice that the concerns reflected in Dr. Yeh's letters were rebutted by the sworn testimony from its witnesses. It argued that the defendant was receiving appropriate medical care and that BHOC had in place appropriate measures to mitigate the COVID-19 transmission risk at BHOC. The Commonwealth pointed to the defendant's lengthy criminal record,<sup>5</sup> and emphasized that the defendant "is alleged to have committed this murder . . . while subject to GPS monitoring" as a condition of release for an "unrelated case involving a kidnapping and an attempted murder." The Commonwealth argued that its case against the defendant for these charges was strong,<sup>6</sup> and

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<sup>5</sup> The Commonwealth appended the defendant's criminal record to its supplement to its initial placeholder petition submitted to the single justice.

<sup>6</sup> The Commonwealth asserted that the alleged victim's girlfriend would testify that she witnessed "the defendant

contended that the risk the defendant would flee was high given the potential sentence of life without parole.

Defense counsel argued that the defendant had a plausible self-defense claim to the charges.<sup>7</sup> She insisted that the risk of COVID-19 transmission in BHOC remained high -- which, for the defendant, amounted to a risk of serious to fatal illness given the defendant's heart condition -- and opined that Dr. Yeh's medical opinion ought to be respected.

After the evidentiary hearing, the single justice reviewed the defendant's request for relief de novo. The single justice found:

"[A]lthough the defendant may have some COVID-19 exposure risk, particularly in light of his uncontroverted pre-existing medical condition, the staff and medical providers at the [BHOC] are following Centers for Disease Control [(CDC)] guidelines and protocols and utilizing their best medical judgment to minimize the risk to the defendant. When these efforts are weighed against the totality of the

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pull[] out a gun, demand[] drugs and sho[o]t the victim when he resisted." The Commonwealth further claimed that it could locate the defendant at the crime scene because of a GPS monitor he was wearing at the time (a condition of release for an unrelated case), and that it could prove through telephone records and cell site location information (CSLI) that the defendant had coordinated with a codefendant. Although the defendant's girlfriend had told police that she had witnessed the shooting and that the defendant had acted in self-defense, the Commonwealth claimed that the defendant's girlfriend was nowhere near the crime scene based on her social media activity and CSLI.

<sup>7</sup> Defense counsel noted that, at the time of the shooting, the alleged victim undisputedly was armed, had been using cocaine, and had no money. Defense counsel suggested that the defendant "is the one that was set up."

circumstances, the defendant's medical condition does not militate in favor of release. . . . While the Court does not take lightly the defendant's medical condition, the Commonwealth has demonstrated that the staff and facilities at the BHOC can appropriately manage the defendant's . . . treatment . . . ."

In light of these findings, the single justice vacated the Superior Court judge's order and ordered that the defendant continue to be held without bail at BHOC.<sup>8</sup> The defendant appealed from the single justice's judgment to the full session of this court.

Discussion. "[W]e review decisions of the single justice under G. L. c. 211, § 3, for clear error of law or abuse of discretion." Vasquez v. Commonwealth, 481 Mass. 747, 751 (2019). A decision constitutes an abuse of discretion where it results from "a clear error of judgment in weighing the factors" and consequently "falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

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<sup>8</sup> We do not discuss factual developments mentioned in the defendant's brief that postdate the single justice's decision. See Ernest E. v. Commonwealth, 486 Mass. 183, 191 (2020) (rejecting evidence outside record as "the Commonwealth did not have the opportunity to challenge the information or to present any evidence or testimony disputing" it). See also Love v. Massachusetts Parole Bd., 413 Mass. 766, 768 (1992), citing Mass. R. A. P. 16 (e), as amended, 378 Mass. 940 (1979); Mass. R. A. P. 8 (a), as appearing in 481 Mass. 1611 (2019). However we note, as did the single justice in his judgment, that the defendant is free to again petition the Superior Court for bail if the material facts have changed.

The defendant argues that the single justice abused his discretion in two ways: first, procedurally -- by holding an evidentiary hearing and then deciding de novo whether to release the defendant on bail based on the evidence newly adduced at that hearing; and second, substantively -- by deciding not to release the defendant on bail despite his medical condition and attendant heightened vulnerability to COVID-19.<sup>9</sup> We conclude that there was no abuse of discretion.

1. Procedure. "[B]ail decisions concerning defendants charged with murder in the first degree are subject to the discretion of the bail judge." Vasquez, 481 Mass. at 750. Consequently, a single justice ordinarily reviews a "bail judge's decision . . . for abuse of discretion or error of law."

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<sup>9</sup> The defendant argues in passing that the single justice abused his discretion by even reaching the merits of the Commonwealth's G. L. c. 211, § 3, petition because the bail determination did not present any "novel, systemic, or case-determinative issues," Commonwealth v. Fontanez, 482 Mass. 22, 26 (2019), but rather presented fact-bound issues collateral to the merits of the defendant's criminal case.

A single justice reviews the merits of a G. L. c. 211, § 3, petition where the subject matter is "sufficiently important and extraordinary as to require general superintendence intervention." Fontanez, 482 Mass. at 24-25. We have not previously limned which circumstances might render an order granting bail so extraordinary as to warrant this intervention. Nor do we have occasion to do so here, for the defendant waived the argument that his bail determination did not present such circumstances by failing to raise it before the single justice. See Leo v. Commonwealth, 442 Mass. 1025, 1026 n.2 (2004). See also Brangan v. Commonwealth, 477 Mass. 691, 698 n.12 (2017).



Id. Nonetheless, a single justice "has the discretionary power to make de novo bail decisions in certain circumstances." Id. at 751 n.4, citing Comnesso v. Commonwealth, 369 Mass. 368, 373 (1975). Here, the single justice exercised this discretion and the defendant challenges that exercise as improper. We reject the challenge.

In Comnesso, 369 Mass. at 372, we "uph[e]ld the jurisdiction of the single justice to review bail determinations" and then addressed the appropriate scope of that review. We explained:

"Bail determinations must often be done in haste, 'without that full inquiry and consideration which the matter deserves.' [Stack v. Boyle, 342 U.S. 1, 11 (1951) (opinion by Jackson, J.).] We therefore think that the single justice has the power to consider the matter anew, taking into account facts newly presented, and to exercise his own judgment and discretion without remanding the matter for reconsideration by the Superior Court judge. Ordinarily, however, where two judges, acting independently of each other, have determined that bail is required and have set bail in an amount which is not plainly excessive, a third exercise of independent discretion on the same facts will not contribute to the effective administration of justice. In the ordinary case, therefore, it is the practice of the single justice to review the matter only with reference to errors of law."

Id. at 373-374. This passage makes clear that the single justice has the power to hold fact-finding hearings and review bail decisions de novo, and that whether to do so is a matter for the single justice's discretion. See Vasquez, 481 Mass. at 751 n.4. However, it also emphasizes that this discretionary

power rarely will be exercised because where a defendant already twice has obtained de novo consideration of bail (by the District Court and then the Superior Court),<sup>10</sup> the marginal benefit of a third layer of de novo consideration would not justify its burden on the single justice. See Comnesso, supra. However, where the bail decision previously has received de novo consideration only once,<sup>11</sup> and was made quickly, "without that full inquiry and consideration which the matter deserves," de novo review by the single justice may be appropriate. Id. at 373, quoting Stack, supra. Circumstances rendering such review appropriate will be exceptional.

Here, the single justice exercised his discretion to hold a fact-finding hearing and render a de novo bail decision. We

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<sup>10</sup> Where an initial bail decision was made in the District Court, a defendant may seek de novo review in the Superior Court. See G. L. c. 276, § 58; Comnesso, 369 Mass. at 373. The defendant may seek review of the Superior Court's decision under G. L. c. 211, § 3, before a single justice of this court. See Comnesso, supra at 372. But see Supreme Judicial Court, Order Regarding Transfer of Certain Single Justice Matters During the COVID-19 Pandemic, No. OE-144 (June 8, 2020) (permitting defendants to seek review of District Court bail decisions directly with single justice).

<sup>11</sup> This will be the case where the initial bail decision was made in the Superior Court or if the Commonwealth is the party seeking review, in which case a petition under G. L. c. 211, § 3, is the sole means of obtaining review. See Brangan v. Commonwealth, 477 Mass. 691, 696-697 (2017), citing Comnesso, 369 Mass. at 372. See, e.g., Commonwealth v. Ray, 435 Mass. 249, 250-251 (2001) (Commonwealth filed petition under G. L. c. 211, § 3, for review of Superior Court bail decision).

reject the defendant's contention that this was an abuse of discretion. The defendant argues that the single justice ought to have deferred to the bail judge's decision because the bail judge was familiar with the defendant's criminal case and medical condition, having handled multiple motions for the defendant's release. However, the facts concerning the defendant's medical situation and the ongoing COVID-19 pandemic constantly were evolving, and the bail judge resolved the instant motion "in haste" and without an evidentiary hearing. Comesso, 369 Mass. at 373. In these circumstances, the single justice's decision to hold a fact-finding hearing and decide the matter de novo did not "fall[] outside the range of reasonable alternatives." L.L., 470 Mass. at 185 n.27.

Our decision in Commonwealth v. Hodge (No. 1), 380 Mass. 851 (1980), is not to the contrary. There, we discussed the standard of review for a single justice faced with a petition by the Commonwealth for review of an order staying a sentence pending appeal. Id. at 854-856. We determined that the single justice acted within his discretion when he declined to consider de novo whether the defendant was likely to succeed on the merits of his appeal. Id. at 856. We noted that, "[b]y releasing the defendant on bail, the trial judge has necessarily determined, on the basis of firsthand and complete information concerning the conduct of the trial, that the appeal is worthy

of presentation to an appellate court." Id. And we explained that, comparatively, the single justice was in a poor position to determine the likelihood that the defendant would succeed on appeal, for he did not even have a transcript of the trial or of the hearing on the motion to stay. Id. at 856 n.2.

By contrast, here, the bail judge ordered the defendant released on bail without complete or firsthand information on the conditions at BHOC, and the single justice had the opportunity to supplement that information and thereby to make a more informed decision whether to release the defendant on bail. We discern no abuse of discretion in the single justice's decision to take that opportunity.

2. Substance. When a judge is "deciding whether to admit a defendant charged with murder in the first degree to bail, the judge's exercise of discretion . . . should be based on a careful review of the specific details of the case and the defendant's history." Vasquez, 481 Mass. at 756. The main considerations are "the nature and circumstances of the offense" and "the defendant's risk of flight." Id. The defendant's flight risk is evaluated with reference to, among other things, "the strength or weakness of the Commonwealth's case," "the potential penalty," and "any [past] failure to appear at any court proceedings." Id. Although the severity of the potential penalty faced by defendants charged with murder in the first

degree always weighs against their release, this generic contribution to flight risk "should not be treated as automatically dispositive." Id. at 755. Rather, defendants charged with murder in the first degree, like all defendants, are entitled to "an individualized bail decision based upon [their] specific circumstances." Id.

During the COVID-19 pandemic specifically, we have instructed judges to additionally assess, as relevant here:

"the totality of the circumstances, including (1) the risk of the individual's exposure to COVID-19 in custody; (2) whether the defendant . . . would pose a safety risk to the victim and the victim's family members, witnesses, the community, or him- or herself if released; (3) whether the defendant is particularly vulnerable to COVID-19 due to a preexisting medical condition or advanced age; . . . and [(4)] the defendant's release plan."<sup>12</sup>

CPCS, 484 Mass. at 448.

The defendant argues that the single justice's determination that he should continue to be held pending trial was an abuse of discretion because the single justice failed to consider that the defendant faces COVID-19 exposure risk both generally as an inmate at BHOC and specifically as a person with a serious heart condition. But the single justice's decision

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<sup>12</sup> Although pretrial detainees charged with murder, like the defendant, are not entitled to the rebuttable presumption of release established by CPCS, they still may move for release based on their COVID-19 exposure risk, and a judge considering that motion will assess these same factors. See CPCS, 484 Mass. at 447 & n.18, 454.

clearly reflects his understanding that the defendant, like any inmate at BHOC, faced "some COVID-19 exposure risk," and that this risk was particularly heightened for the defendant because of his serious heart condition.

Second, the defendant argues that, in denying the defendant bail, the single justice improperly treated the defendant's murder charge as "automatically dispositive." Vasquez, 481 Mass. at 755. However, this contention is belied by the single justice's decision to hold an evidentiary hearing and by the attention reflected in the judgment to the defendant's medical condition and treatment.

Ultimately, the defendant suggests that the single justice made "a clear error of judgment in weighing the factors" relevant to the defendant's bail determination (quotation and citation omitted), L.L., 470 Mass. at 185 n.27, because his flight risk is minimal given that he has plausible defenses to the charges, see Vasquez, 481 Mass. at 755-756, and needs constant medical attention, whereas his risk of COVID-19 related death if he remains confined at BHOC is substantial. The defendant suggests that the risk to his health posed by continued confinement must outweigh the risk that he might flee if he is released.

We disagree that the single justice's contrary determination amounts to an abuse of discretion. Although the

defendant's underlying medical condition exacerbates his risk of serious illness if he contracts COVID-19, the single justice supportably found that BHOC was following CDC guidance to reduce COVID-19 transmission in its facility and was prepared to respond should the defendant experience a medical emergency. Moreover, given the potential life sentence that the defendant faces, the strength of the Commonwealth's case against him, and the defendant's imperfect history with conditions of release, the single justice's implicit determination that the defendant's flight risk was considerable was a reasonable one.<sup>13</sup> Considering the totality of the circumstances, see CPCS, 484 Mass. at 448, the single justice's decision to deny bail falls within "the range of reasonable alternatives," L.L., 470 Mass. at 185 n.27.

Conclusion. For the foregoing reasons, we affirm the judgment of the single justice denying the defendant release on bail.

So ordered.

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<sup>13</sup> The reasonableness of the single justice's determination that the defendant posed a considerable flight risk additionally is supported by the fact that the defendant initially was placed in pretrial confinement and then four times denied reconsideration of bail by two different motion judges.