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SJC-13002

SEAN BOISVERT vs. COMMONWEALTH.

May 26, 2021.

Supreme Judicial Court, Superintendence of inferior courts.
Bail.

The petitioner, Sean Boisvert, appeals from a judgment of a single justice of this court denying his petition pursuant to G. L. c. 211, § 3, seeking bail review. Boisvert was indicted, in 2016, on numerous charges including assault with a dangerous weapon, in violation of G. L. c. 265, § 15B (b); intimidation of a witness or juror, in violation of G. L. c. 268, § 13B; rape of a child aggravated by a five-year age difference, in violation of G. L. c. 265, § 23A; indecent assault and battery on a child under the age of fourteen, in violation of G. L. c. 265, § 13B; and possession of child pornography, in violation of G. L. c. 272, § 29C. A judge in the Superior Court initially set cash bail at \$100,000 (initial bail decision).

Approximately two years later, Boisvert, who has been unable to pay the cash bail and remains in pretrial detention, sought review of the bail determination. At a hearing in May 2018, his counsel noted that the request for bail review was being made on the basis of this court's decision in Brangan v. Commonwealth, 477 Mass. 691 (2017). Specifically, counsel asked the court to consider Boisvert's financial circumstances and to make written findings in light of Brangan. At the conclusion of the hearing, the judge (a different judge from the one who had set the initial cash bail of \$100,000) reduced the cash bail to \$30,000; the judge did so from the bench and without any findings or explanation, oral or written (bail reduction decision).

Boisvert thereafter sought to have his bail reviewed again, in the trial court, on at least three different occasions, including in November 2019, to no avail. Then, in March 2020, and in light of the COVID-19 pandemic, he filed a "Motion for Bail Hearing and Personal Recognizance Based on Health Concerns of Emergency Nature and Recent Change in Laws." After a video hearing, the motion was denied, in April 2020. The judge (yet again a different judge from the two judges who had made the initial bail decision and the bail reduction decision) completed a preprinted form entitled "Findings and Order on Request for Release on COVID-19 Grounds," finding that Boisvert was not entitled to a rebuttable presumption of release, checking off the boxes indicating that he had considered the risk of Boisvert's exposure to COVID-19 if he remained in custody; whether Boisvert would pose a safety risk if released; and Boisvert's release plan. The judge maintained the \$30,000 cash bail and explained that Boisvert had acknowledged that he was homeless and would be unemployed if released; that he would face significant mandatory time if convicted; and that he had, during the course of the trial court proceedings, discharged a number of appointed attorneys. As to the latter point, Boisvert has appeared mostly pro se (as he does in this court), but he has had court-appointed standby counsel throughout. It appears from the trial court docket that he has had at least five different attorneys.

Then, in July 2020, Boisvert filed his G. L. c. 211, § 3, petition, seeking bail review. In the petition he argued, among other things, that the cash bail amount of \$30,000 was excessive; that the judge who reduced his bail to that amount failed to make specific written findings, or even oral findings, as Brangan requires, setting forth the reasons for setting bail in that amount; that denying without a hearing his subsequent bail requests (until his most recent COVID-19-based request) was a violation of his constitutional rights; and that his ongoing pretrial detention, which has now extended into its fifth year, was punitive and amounted to detention on the basis of dangerousness. The single justice denied the petition without a hearing, and Boisvert appeals.

"When a party appeals from an adverse judgment by the single justice under G. L. c. 211, § 3, we review the single justice's order for clear error of law or abuse of discretion." Brangan, supra at 697, and cases cited. Additionally, where the petition concerns a request for bail relief, we also consider the propriety of the underlying bail order. See id. "In reviewing both the single justice's judgment and the bail

judge's order, we must consider the legal rights at issue and independently determine and apply the law, without deference to their respective legal rulings." Id., citing The Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 603 (2000).

As the single justice noted, Boisvert was seeking to challenge, in his petition, both the initial and reduced cash bail amounts; the November 2019 decision denying a request for a bail review hearing (one of the several bail review requests that, as noted above, Boisvert filed and that was denied); and the over-all length of his pretrial detention. The single justice rightly concluded that Boisvert did not articulate any changed circumstances that would warrant relief from the \$30,000 cash bail. See G. L. c. 276, § 58, tenth par. ("if any court, in its discretion, finds that changed circumstances or other factors not previously known or considered, make the order of bail or recognizance ineffective to reasonably assure the appearance of said defendant before the court, the court may make a further order of bail"); see also Comnesso v. Commonwealth, 369 Mass. 368, 374-375 (1975) (discussing "changed circumstances" in context of G. L. c. 276, § 58). The single justice also noted that the length of Boisvert's pretrial detention was due at least in part to the fact that Boisvert has been unable to work cooperatively with any of the attorneys so far assigned to represent him (a point that Boisvert himself recognizes). It was also, presumably, due in part to trial court closures stemming from the COVID-19 pandemic.¹

That said, we do agree with Boisvert on one point: the judge who reduced the cash bail from \$100,000 to \$30,000 should have made findings for that decision, but she did not; nor did she provide any explanation, either oral or written. In Brangan, 477 Mass. at 693-694, we held that "where it appears that a defendant lacks the financial resources to post the amount of bail set, such that his indigency likely will result in a long-term pretrial detention, the judge must provide written or orally recorded findings of fact and a statement of reasons for the bail decision." Such is the case here. That

¹ To the extent that Boisvert now argues, in his appeal to this court, that the judge who considered his most recent motion for bail review, in April 2020, erred in denying the motion and in declining to release him pursuant to Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431 (2020), this was not an issue that he raised before the single justice, and we need not address it. See Carvalho v. Commonwealth, 460 Mass. 1014 (2011).

the judge reduced the bail amount significantly does not relieve the judge of this responsibility, particularly where the reduced amount is still more than Boisvert could pay.

Although the initial bail decision was made before this court decided Brangan, the bail reduction decision came after Brangan. Indeed, Boisvert's counsel at the time specifically stated at the hearing that they were looking for a "Brangan-type" hearing. Boisvert has been detained for more than five years on a cash bail that he cannot afford to pay with no explanation as to why "alternative nonfinancial conditions" would not "adequately assure his appearance for trial." Brangan, 477 Mass. at 701. He is entitled to clear consideration of that issue. See Walsh v. Commonwealth, 485 Mass. 567, 594 (2020) ("a judge should provide sufficient information to enable the parties and the appellate courts to recognize that the judge has undertaken the analysis required by our holding in Brangan and its codification in the bail statutes before imposing a bail that is beyond what a defendant can reasonably afford").

For these reasons, we remand the case to the county court for entry of an order directing the judge who made the bail reduction decision to make the required findings for that decision, pursuant to Brangan, or, should the judge choose to do so, to reconsider the decision and make any necessary accompanying findings. In all other respects, the decision of the single justice is affirmed.

So ordered.

The case was submitted on briefs.

Sean Boisvert, pro se.

Jane A. Sullivan, Assistant District Attorney, for the Commonwealth.