STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 26, 2020)

STATE OF RHODE ISLAND	**:**	
VS.	**:**	**P1/19-0038B**
STEVEN SILVA	**:**	

DECISION

KRAUSE, J. Defendant Steven Silva, who has twice, in short order, been adjudged a bail violator for violent misconduct, complains in this appeal that Magistrate Richard D. Raspallo has impermissibly denied him bail. Silva's lamentation is baseless. For the reasons set forth herein, this Court denies his appeal.

On January 4, 2019, a grand jury indicted Silva and Deborah Testa on four offenses which they allegedly committed in Pawtucket on August 7, 2018: (1) the capital offense of burglarizing Christine Guenette's residence, (2) unlawfully breaking and entering Guenette's residence, (3) assaulting her with a dangerous weapon, a knife, and (4) conspiring to commit that burglary. Silva was arraigned on January 23, 2019 before Magistrate Raspallo, who set bail at $5,000 with surety. He was released from the Adult Correctional Institutions after posting bail on March 1, 2019.

Silva was also charged singly with breaking and entering a Portsmouth dwelling on July 26, 2018 (N2/19-0066A). He was arraigned before Associate Justice Brian Van Couyghen on March 14, 2019, who set bail at $5,000 with surety, which was posted that day, and Silva was again released.

Between December 18, 2019 and February 28, 2020, Silva violated his bail twice. *See* Rule 46(d) and (g), Super. R. Cr. P. He did not contest the December violation, but he pursued,

unsuccessfully, a hearing on the February violation. Both the December and February breaches were premised on, *inter alia*, assaults upon Testa, his codefendant in the pending Pawtucket burglary indictment. Silva has appealed the Magistrate's bail revocation order entered after a lengthy hearing and demands that he be released on bail at once. He is entitled to no such forthwith forbearance.

The February 28, 2020 Bail Revocation

After serving a sixty-day penalty at the Adult Correctional Institutions as a result of admitting the December 18, 2019 bail violation, Silva was again released, with this Court's assent, on the same $5,000 surety bail on February 14, 2020. The Magistrate presciently warned him, however, that any additional misstep would result in nullifying that bail. Silva acknowledged that admonition in open court but failed to heed it.

Soon after his February 14, 2020 release from the ACI, Silva was charged with another bail violation, alleging that on February 28, 2020, he had again assaulted Testa (a third domestic offense and therefore a potential felony). It was also alleged that Silva had obstructed her use of a telephone and that he had violated a District Court no contact order. Silva did not strenuously contest violating the two latter charges, and on April 29, 2020, the Magistrate easily found that Silva had committed them. (Tr. 81-83, 87, Apr. 29, 2020.) Silva did, however, dispute the February 28, 2020 assault allegation.

Magistrate Raspallo conducted a violation hearing over a number of days during which Testa testified under the protection of an immunity order and recounted how Silva had beaten her. The state also presented a responding police officer who had observed her injuries and produced photographs of trauma to her face and to her shoulder and arm areas.

Silva presented two witnesses who knew him well: his employer Scott Coit, and Leslie Parker, a close friend of Silva's brother, who testified that although she didn't get along with Silva particularly well, she nonetheless didn't want him to get in trouble, either. (Tr. 14-15, Apr. 29, 2020.) They both said that they had seen him about two days after February 28 with significant facial injuries, including deep, fresh lacerations to his face and neck, and a half-closed, puffy eye. Parker agreed that the deep gouges across his face looked like he had been attacked by a wolverine. (Tr. 278-83, Apr. 28, 2020; Tr. 7-8, Apr. 29, 2020.) Silva declined to testify, and he offered no direct evidence as to how the injuries reported by Coit and Parker had occurred.

* * *

Silva claims that the Magistrate improperly allowed the state to reopen its case after it had rested. The contention is without merit.

The Rhode Island Supreme Court has historically recognized that trial courts are in the best position to determine the appropriate order of presenting evidence. Even an occasional difference of opinion among the justices, in uniquely narrowed circumstances, has not altered that precedent: "The cases cited by the dissent do not compel this Court to change its practice of vesting trial justices with the discretion to conduct proceedings as they see fit. The justices of the Superior Court are in a far better position than this Court to determine the best procedure to justly resolve the issues that confront them." *State v. Bojang*, 83 A.3d 526, 536 (R.I. 2014) (affording the trial judge, upon remand, the discretion to admit additional evidence in a suppression hearing).

Accordingly, the Supreme Court has consistently entrusted trial justices with significant discretion to grant motions to reopen cases, whether at trial, where a court hews most closely to the rules of procedure and evidentiary standards than at any other juncture of a criminal proceeding, *State v. Austin*, 642 A.2d 673, 679 (R.I. 1994) (reopening permitted at trial after the

state's closing argument); or in the more flexible settings of violation and pretrial proceedings. *State v. Benevides*, 420 A.2d 65, 68 (R.I. 1980) (allowing the state to reopen at a probation violation hearing after having rested). The concept is hardly novel and can be traced to Rhode Island decisional law more than a century old. In *Benevides*, the Court said:

> "As we have noted on previous occasions, the regulation of the order of proof at trial rests within the sound discretion of the trial justice. In his discretion he may admit competent evidence at any stage of the trial. *State v. LaPlume*, 118 R.I. 670, 681, 375 A.2d 938, 943 (1977); *State v. Mattatall*, 114 R.I. 568, 571, 337 A.2d 229, 232 (1975); *State v. Falcone*, 41 R.I. 399, 402, 103 A. 961, 962 (1918). Thus, a motion to reopen a case to introduce additional evidence is addressed to the discretion of the trial justice and a decision made in the exercise of such discretionary power will not be disturbed by this court on appeal absent a showing of an abuse of that discretion. *Marshall v. Tomaselli*, 118 R.I. 190, 198-99, 372 A.2d 1280, 1285 (1977); *Vigneau v. LaSalle*, 111 R.I. 179, 182, 300 A.2d 477, 479 (1973); *State v. Shea*, 77 R.I. 373, 377, 75 A.2d 294, 296 (1950). We have said that we will not find such an abuse of discretion unless it is affirmatively shown that the party offering the evidence was guilty of trickery or that substantial prejudice resulted from the order of proof. *State v. Mattatall*, 114 R.I. at 571, 337 A.2d at 232; *Gillogly v. New England Transp. Co*., 73 R.I. 456, 463, 57 A.2d 411, 414 (1948)." *Benevides*, 420 A.2d at 68.

Nothing in the record indicates that the state engaged any artifice or trickery to induce the Magistrate to grant its motion to reopen, and Silva has asserted none in his memoranda. He complains, however, that allowing the state to reopen impermissibly prejudiced him. The Court disagrees.

In the first place, the state's request to reopen was not made after an expanded period of time, but essentially right after it had rested and the prosecutor had concluded his argument at 1:08 p.m. Shortly thereafter, and during the lunch break, counsel for the parties met in chambers with the Magistrate, and the state's attorney explained his reason for reopening. The proceedings were then immediately adjourned to the courtroom so that the state could explain, upon the record, that its purpose in reopening was to more accurately identify and date some photographs of Silva (already admitted as full exhibits) taken by a particular police officer about nine days after the

February 28, 2020 incident. (Tr. 63-67, Apr. 29, 2020.) Indeed, the Magistrate expressed his own interest in the proffered testimony because it would benefit his analysis of the photographs. *Id*. at. 66-68. This Court discerns no abuse of discretion by the Magistrate in authorizing the state to reopen its case in order to ensure accuracy of the record, which, importantly, assisted the Magistrate in making his determinations. [1]

After reviewing the photographs, the Magistrate concluded that they simply did not square with the testimony of Coit and Parker, who, he said, had catalogued Silva's wounds as "tremendous injuries," "so deep and raw … across his face, and a cut under his… eye." (Tr. 89, Apr. 29, 2020.) Given the severity of the injuries which Coit and Parker professed to have seen, the Magistrate examined the images for any residual evidence of their purported grimness. Finding none, he concluded:

> "I would expect that, quite frankly, those injuries as they were described would have lasted a lot longer than nine days. And [from] this photo, the way I see it, his face is completely clear. I see no injuries or evidence of injuries whatsoever in these photos. Not even any bruising or discoloration…that happens and lingers for well after something scabs over. There's not even any scabs…Mr. Silva is not a minor. He is an older guy like me…I see no evidence of any sort of injuries whatsoever consistent with the really strong testimony as to how bad they say the injuries were." (Tr. 89-90, Apr. 29, 2020.)

[1] Silva's unwise reliance on *Ex parte Hergott*, 588 So.2d 911 (Alabama 1991) (Reply Mem. at 3), as purported support to discredit the Magistrate's decision permitting the state to reopen is misleading and entirely inappropriate. *Hergott* and other such cases were unsuccessfully advertised by the dissent in *Bojang* and were expressly rejected by the majority as inconsistent with *Benevides* and Rhode Island precedent affording trial judges wide discretion to grant motions to reopen. *Bojang*, 83 A.3d at 536–37. This Court is as much troubled by Silva's ill-advised disregard of *Bojang*'s refusal to accept *Hergott* as it is disturbed by the state's utter failure, in an appellate setting no less, to cite *any* authority whatsoever in support of its barren, conclusion that the Magistrate properly exercised his discretion in granting the state's motion to reopen its case. (Mem. at 9.)

Accordingly, the Magistrate discounted the testimony of Silva's witnesses, and he also rejected any suggestion that Silva had acted in self-defense. *Id*. at 86, 88-90. Although the Magistrate acknowledged that there was an unsavory history between Testa and Silva, and that Testa herself had acted violently in the past, he nonetheless readily found that Silva had failed to keep the peace and had not maintained good behavior, the hallmark prerequisites to remaining on bail. This Court finds that the record supports those conclusions.

* * *

Silva professes that because the state promoted Testa's credibility, and since the Magistrate accorded reliability to her statements, his revocation of Silva's bail is flawed because Testa said that with respect to the burglary charge she had entered the Guenette residence by invitation, not forcibly. From that, Silva somehow concludes that the state is "estopped" from pursuing the burglary count; and, that absent evidence of that alleged capital offense, he says that he cannot now be held without bail.

Silva not only significantly misreads the record before the Magistrate, he also cannot escape the unwelcome results of the July 30, 2020 proceedings before Associate Justice Kristin E. Rodgers, who flatly rejected his demand to dismiss the burglary indictment in a motion premised on the same deficient reasons he presents in this appeal.[2]

After finally persuading the Magistrate to allow him to ask Testa about the Pawtucket burglary, Silva actually devoted only cursory attention it, as reflected by the meager number of

[2] "[A] court may take judicial notice of its own records including issues and decisions in a prior proceeding involving the same parties." *In re Michael A*, 552 A.2d 368, 369 (R.I. 1989) (citing *Perez v. Pawtucket Redevelopment Agency*, 111 R.I. 327, 302 A.2d 785 (1973); *Morrissey v. Piette*, 96 R.I. 151, 190 A.2d 1 (1963)); *See* Rule 201, R.I. Rules of Evid. Silva made but a passing reference to Judge Rodgers' unfavorable ruling (Mem. at 4), and he has failed to address its adverse impact on his present ill-conceived effort to revive his "estoppel" theory here.

transcript pages from the lengthy violation hearing. The state never inquired about it during Testa's direct examination and only slightly so on redirect to clarify her responses during cross-examination. More importantly, the Magistrate never adverted to the merits of the burglary charge, nor to any of the other indicted offenses. At no time did he ever assess or even address Testa's credibility as to the burglary allegation. He carefully limited his comments to Silva's behavior during the February 28, 2020 incident, which was, after all, the sole basis for the bail violation, and he ranged no further. (Tr. 81, 83-86, Apr. 29, 2020.) In his April 29, 2020 ruling, the Magistrate said:

> "My question that I have to answer simply, has the State proven by a preponderance of the evidence that Mr. Silva failed to keep the peace and be of good behavior while on bail? And I do find that's the standard for this purpose, that did he assault her in fact, and that he failed to keep the peace and be of good behavior not only for that, but for engaging in any sort of combat with her to begin with, whether she started it or not. He should not have been there. ***
>
> "After Ms. Testa was granted immunity, everything that she testified to afterwards, not only on direct examination, but even more so on cross-examination, when she was challenged by Mr. Kando, and he challenged her well….And I think quite frankly, some of the challenging to her, testing whether she was telling the truth ***about Mr. Silva assaulting her***, dug her heels in and that she was going to not be challenged that way without clarifying that she was telling the truth. So I found her credible." *Id.* at 86-88 (emphasis added).

Indeed, Silva's attempt to draw the Magistrate into a discussion about the merits of the burglary during the bail revocation proceeding was properly rebuffed. Refusing to engage in that dialogue, the Magistrate replied:

> "Well, Mr. Kando, we are not here to argue the facts and the State's ability or what tack they were going to take in the trial on this [burglary] matter. What we're here for is that Mr. Silva, for the second time in less than five months, first time being December 18, 2019, which he admitted that he didn't keep the peace and be of good behavior. Now, the second time, for some reason the events of February 28, 2020, it's the second time he's violated the terms of his bail. ***

> "He's now got a pattern of two findings of violation in a three-month period, December to February. Apparently, the bail conditions which had been set on him are not enough to ensure that he keeps the peace and remain[s] of good behavior." *Id*. at 92-93.

On June 8, 2020, Silva again entreated the Magistrate to consider the merits of the burglary count and to reset bail. The Magistrate declined to engage in that colloquy, reiterating that he had revoked Silva's bail based on his assault of Testa on February 28, 2020, which was unrelated to the merits of the alleged burglary. (Tr. 18, June 8, 2020.) And he reminded Silva that the narrow issue which had been presented to him was a bail violation premised on the February 28, 2020 events: "My question that I have to answer simply, has the State proven by a preponderance of the evidence that Mr. Silva failed to keep the peace and be of good behavior while on bail?" (Tr. 86, Apr. 29, 2020.) The Magistrate again underscored, as did Judge Rodgers at the July 30, 2020 hearing (Tr. 15, July 30, 2020), that his findings relating to Testa's credibility were confined to the assault charge, not the alleged August 7, 2018 burglary:

> "In this particular case not only was there a violation of a no-contact order, this Court specifically found that Ms. Testa's ***testimony on the assault*** that was at that time alleged for purposes of the bail violation hearing, and that standard of proof, preponderance of the evidence, this Court believed her, found her credible." (Tr. 18, June 8, 2020) (emphasis added).

Silva's attempt to engraft his "judicial estoppel" theory to the adverse violation proceedings, which he criticizes as "Hocus Pocus" (Reply Mem. at 3, 5), has not even a gloss of plausibility.

Aside from this Court's having found Silva's flawed estoppel theory meritless, it was also previously dismissed by Judge Rodgers at the July 30, 2020 hearing. As Judge Rodgers noted, Testa's marginal testimony is inconsequential, as it does not exculpate Silva in the burglary case. Rejecting his argument depreciating the burglary charge, Judge Rodgers explained:

> "In any event, her testimony ***helps her, not Mr. Silva***. She offered no clear testimony, nor did the state argue or the Court conclude that Mr. Silva was given permission to be in Ms. Guenette's residence at nighttime, that he did not have an

> intent to commit a felony therein, or that he assaulted Ms. Guenette with a knife. Thus Ms. Testa's testimony, the State's argument, and the Court's findings from the bail violation hearing do not in any way preclude the State from pursuing the four charges ***against this defendant*** set forth in this indictment.***
>
> "The State does have the opportunity to present all of its evidence as it relates to each and every one of the four charges against Mr. Silva. The State is not obligated to rely solely upon evidence from a bail violation hearing[;] that is an unrelated matter and derived from a domestic violence assault." (Tr. 16, July 30, 2020.)

In any case, quite apart from this Court's unreserved rejection of Silva's estoppel thaumaturgy, or "hocus pocus" as he dubs it at pages 3 and 5 of his reply memorandum, Judge Rodgers' July 30, 2020 denial of Silva's dismissal motion, which was bottomed on the same grounds he advances here, assuredly invites application of the law-of-the-case doctrine in this appeal. *See State v. Presler*, 731 A.2d 699, 705 (R.I. 1999) ("The law-of-the-case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" (quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-16 (1988) and *Arizona v. California*, 460 U.S. 605, 618 (1983) (Flanders, J., concurring)); *State v. DiPrete*, 468 A.2d 262, 265 (R.I. 1983); *Salvadore v. Major Electric & Supply, Inc.*, 469 A.2d 353, 355–56 (R.I. 1983) (holding that although the doctrine does not have the finality of *res judicata*, "[n]evertheless it is one that generally ought to be adhered to for the principal reason that it is designed to promote the stability of decisions of judges of the ***same court***). *Id*. at 356 (quoting *Payne v. Superior Court*, 78 R.I. 177, 184-85, 80 A.2d 159, 163, *reh'g denied*, 78 R.I. 188, 82 A.2d 167 (1951) (emphasis added). Because the record has not been expanded, application of the doctrine is distinctly appropriate here. *See State v. Oliveira*, 882 A.2d 1097, 1121 n.12 (R.I. 2005).

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As with any violation, be it bail or probation, the test is not whether the defendant actually committed a criminal offense. Remaining on bail or probationary status turns on whether the defendant has kept the peace and maintained good deportment. Super. Ct. Bail Guidelines § I; Rule 32(f), Super. R. Cr. P. *See State v. Mosley*, 173 A.3d 872 (R.I. 2017). The Magistrate rightly focused on Silva's behavior on February 28, 2020, and he found, with good reason, that Silva's conduct did not at all measure up to those uncomplicated standards. He characterized Silva's conduct as assaultive, not to mention willfully noncompliant with a District Court order which enjoined him from having any contact with Testa. It is also noteworthy that during the bail violation proceedings, Silva could not even behave appropriately in the courtroom and had to be admonished by the Magistrate as well as by his own attorney. (Tr. 50, Apr. 29, 2020.)

Having adjudged Silva a bail violator and a serious risk to reoffend, and in view of the Magistrate's justifiable concern that if released again, Silva unquestionably would pose a continuing danger to Testa, the Magistrate recognized the futility of allowing him to remain at liberty. Under the circumstances presented in this record, it is abundantly clear that the Magistrate did not act arbitrarily or capriciously. The evidence fully supports his decision to revoke Silva's bail.

Bail Hearing - the Burglary Charge

Despite his overtures, at no time was Silva's violation hearing transformed or expanded into an Article 1, Section 9 constitutional bail hearing to determine whether proof of guilt on the burglary charge was evident or the presumption great. As Silva explained to Associate Justice Maureen B.

Keough on May 29, 2020, the proceeding before the Magistrate was *not* a bail hearing; it was a "[v]iolation hearing. 46(g) violation hearing." (Tr. 10, May 29, 2020.)[3]

Silva has also acknowledged to this Court, as he did before Judges Rodgers and Keough, that no bail hearing on the indictment has ever taken place. In fact, the court file is devoid of any formal request filed by Silva to convene such a hearing. Assuming he still maintains an interest in a bail hearing, as it so appears from his memoranda, Silva need simply confer with the Magistrate and the prosecutors to schedule a date which, within the pandemic court protocols, is convenient to Magistrate Raspallo, all counsel for the parties, and all of the witnesses. It is within that arena, rather than in a bail revocation proceeding, that the Magistrate may determine whether proof of Silva's guilt in the alleged burglary is evident or its presumption is great. If the Magistrate determines that the state has satisfied that test, he may – or may not – grant Silva bail as a matter of discretion. *Fountaine v. Mullen*, 117 R.I. 262, 269, 366 A.2d 1138, 1143 (1976).

In any case, Silva's present imprecation that the Magistrate impermissibly revoked his surety bail and ordered him held without bail is entirely delusive. Put plainly, Silva's circumstances are decidedly self-propelled and arise, not at all from his unsound complaints of a skewed judicial system, but from an obstinate disinclination to curb his assaultive conduct and his

[3] On May 29, 2020, Silva had urgently implored Judge Keough, without any evidence, to order his immediate release because the ACI had denied him medical treatment for his diabetic and cardiac issues, and that he was at imminent risk of contracting the coronavirus at the prison. After Judge Keough had satisfied herself that the purported exigency was not at all as Silva represented, he unsuccessfully raised it again before Magistrate Raspallo on June 8, 2020. He has apparently abandoned that argument here, as it is entirely bereft of reference in both memoranda he has filed in this appeal. Even if Silva were to pursue it for yet a third time, this Court would also veto it and defer to the sensible reasons provided by both Magistrate Raspallo and Judge Keough for declining Silva's unsupported demand for medical release. (Tr. 14-18, May 29, 2020; Tr. 22, June 8, 2020.) In any event, if circumstances at the ACI change adversely, Silva may renew his concerns in the appropriate forum.

purposeful disobedience of court orders, including arrogantly ignoring the explicit warnings of the very Magistrate he now criticizes.

This Court finds that ample grounds existed to abrogate Silva's bail and deny him release, pending a bail hearing under Article 1, Section 9 of the Rhode Island Constitution at a date to be set by the Magistrate. Silva's appeal from the Magistrate's present order revoking and denying him bail, however, is hereby denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Steven Silva**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 26, 2020**
JUSTICE/MAGISTRATE:	**Krause, J.**

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