In the Court of Appeals of the State of Alaska

Jeremy Fichtner, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-13928** **Order** Motion for Release Prior to Judgment Date of Order: **March 08, 2022**

Trial Court Case No. **3SW-20-00276CR**

Before: Wollenberg, Harbison, and Terrell, Judges.

Jeremy Paul Fichtner appeals from the bail order issued in this case on November 15, 2021. For the reasons explained in this order, we remand this case for reconsideration of Fichtner's proposed third-party custodian, Mary Fichtner.

Background facts and proceedings

On December 3, 2020, Jeremy Paul Fichtner was charged with one count each of second-degree, third-degree, and fourth-degree misconduct involving a controlled substance, and five counts of second-degree misconduct involving weapons.[1] He was subsequently released to the third-party custody of his sister, Cozilynn Fichtner. The court required him to remain with his third-party custodian at all times, post a $10,000 cash performance bond, and comply with Pretrial Enforcement Division (PED) supervision including electronic monitoring and drug monitoring.

[1] AS 11.71.021(a)(1), AS 11.71.030(a)(9), AS 11.71.040(a)(1), and AS 11.61.195(a)(1), respectively.

The court later amended Fichtner's conditions of release by adding an additional third-party custodian, Fichtner's father, John Fichtner. The court also reduced the performance bond amount to $5,000 cash and ordered Fichtner not to possess controlled substances except with a valid prescription. There was no change to the PED electronic and drug monitoring requirements.

Approximately five months later, on June 1, 2021, Fichtner was charged, in the same case, with violating the conditions of his release.[2] The complaint adding this new charge alleged that Fichtner reported to the PED office and submitted to a urine analysis which was positive for opiates. At Fitchtner's arraignment on this charge, the court required Fichtner to post an additional $500 performance bond and to be supervised by a new third-party custodian.

On November 15, 2021, the court conducted a bail review hearing to determine whether to approve Fichtner's mother, Mary Fichtner, as a third-party custodian.[3] Mary testified at the hearing that she understood her duties as a third-party custodian and was willing to perform them. She also testified that she had never been arrested and had no prior criminal convictions. She proposed to live with Fichtner at her own mother's residence in Anchorage, and she explained that John and Cozilynn Fichtner would continue living at a separate residence in Wasilla. She agreed, several times, that if her son violated the court's conditions for his release, she would

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[2] AS 11.56.757(b)(1).

[3] In this order, we will refer to members of Fichtner's family by their first names in order to avoid confusion.

immediately report the violation to the police.

In response to questioning from Fichtner's attorney, Mary testified that, when Fichtner was growing up, he was taught to have his parents present before saying anything to law enforcement officers. She said that he was taught to be polite and answer any questions but to refrain from volunteering any information.

The judge followed up with his own questions regarding Fitchner's upbringing. The judge informed Mary that at a recent evidentiary hearing, Fitchner testified that his parents raised him "not to talk to cops." Mary confirmed that this was a fair statement, and clarified that her son "was raised not to talk with cops by himself" (*i.e.* without his parents present). Mary further explained that she herself had been raised to believe that "you never talk to cops unless your parents were around."

After hearing Mary's testimony, the court expressed concern about the Fitchner family's "attitude of talking to cops." The court explained that there was "extensive testimony from Mr. Fitchner himself [at the recent evidentiary hearing] as to how he was raised when it comes to law enforcement." The court recounted that Fichtner was previously on bail release, with his father and his sister as third-party custodians, and that this arrangement preceded Fichtner's testimony at the evidentiary hearing.

The trial court then denied Fichtner's request to approve his mother as a third-party custodian. The court explained that since Fitchner had previously been released to one parent who "didn't call in for any sort of a violation" and did not have Fitchner "within 24-hour sight and sound in the sense that Mr. Fichtner had enough time

to sort of be away on his own to come up positive on a UA," he could not trust the other parent to inform law enforcement of violations.

Immediately after this ruling, Fichtner's attorney objected, stating that it was not "appropriate for the court to be judging Ms. Fichtner based off the prior conduct of the other third-party custodians," *i.e.* Fitchner's father and sister.

In response, the court explained,

> Mr. Fichtner testified at an evidentiary hearing, "I was raised by my parents – never talk to police, period; you don't talk to police" – that was his testimony. . . . And so you know, now what we did was we released to his father, and he came up hot on a UA without a call to law enforcement. To say, oh, this is a completely different situation, I just don't see it. . . .
>
> I mean, when somebody signs on to be a third party, they are agreeing that they will call the police – that they will, in fact, talk to the police. . . . I mean, when Mr. Fichtner testified that, you know, my parents raised me this way and we've already given one half of that equation the opportunity to be the third party and here we are and he was not reported to police, it does not make sense to me to give the other half of the equation the same opportunity.

Fichtner now appeals the trial court's ruling, arguing that the court erred when it declined to approve Mary Fichtner as a third-party custodian. He argues that the trial court erred when it (1) discounted Mary Fichtner's credibility simply because she urged her son to exercise his constitutional right to remain silent, (2) "treated Mr. Fichtner's parents as one entity" rather than separately considering Mary's

qualifications,[4] and (3) credited Fichtner's testimony at the evidentiary hearing even though, at the evidentiary hearing itself, the court found that this same testimony was not credible (and, relying in part on that finding, denied Fichtner's motion to suppress). For the reasons we are about to explain, we agree with Fichtner's third claim, and we accordingly decline to reach the others.

Why we remand this case for reconsideration of Mary Fichtner as a third-party custodian

"The critical question [with respect to the approval of third-party custodians] is whether the proposed third-party custodians are willing and able to fulfill the supervisory duties that will be required of them."[5] In this case, the trial court found that Mary Fichtner would not fulfill the supervisory duties required of her as a third-party custodian. In reaching this conclusion, the trial court repeatedly referenced Fichtner's testimony from an evidentiary hearing that had been conducted shortly before the bail hearing.

The evidentiary hearing was conducted after Fichtner filed a motion to suppress evidence in this case. In particular, Fichtner argued, *inter alia*, that he had not

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[4] Relatedly, Fichtner points out that it is not clear from the record whether Fichtner violated his conditions of release while in the third-party custody of his sister, rather than his father, nor is it clear whether either of them realized that he had accessed controlled substances.

[5] *Francis-Fields v. State*, 2020 WL 9173374, at *1 (Alaska App. Dec. 17, 2020) (unpublished bail order).

consented to a search of his backpack that was conducted by a police officer and that the evidence seized from the backpack should be suppressed.

At the hearing, the court heard testimony from Fichtner and from the police officer who conducted the search. The officer had been dispatched to Fichtner's hotel room after receiving a report of a drug overdose. According to the officer, he found Fichtner and an unconscious woman in the room. Fichtner told the officer that the woman had overdosed and the officer observed fresh needle marks on the woman's arm. The officer wanted to locate the drugs that the woman had taken. He asked Fichner where the needles were, and Fichtner responded that they were in his bag. According to the officer, Fichtner gave the officer permission to look for needles in the bag.

But when Fichtner testified, he disputed the officer's assertion that he consented to a search of his backpack. According to Fichtner, he gave the officer permission to search the woman's belongings, but he specifically told the officer to stay out of his (Fichtner's) belongings. Fichtner explained that he grew up in a family where he was taught never to talk to the police. He claimed that he had been asked by police for consent to search his belongings many times in his life, and he had never consented to such a search, including on the day in question.

In its written order denying Fichtner's motion to suppress, the trial court noted this testimony. The court also noted that "Fichtner testified that he told [the officer] to stay out of his belongings" and also that Fichtner wrote in his affidavit accompanying the motion to suppress that he told the officer, "[D]on't touch my shit, you are here for her." The trial court then stated that it "did not find Fichtner's testimony credible." The court explained:

> Fichtner testified that he grew up in a family where he was taught to despise the police, never talk to them, and that he had always refused to consent to have his belongings searched. The turning point for the court regarding his credibility came when he testified that despite this upbringing, he did in fact give Officer Armstrong permission to search [the woman's] belongings "because she was not able to give consent herself." If this were in fact his upbringing, the court believes that Fichtner would have also refused to allow Officer Armstrong to search his girlfriend's belongings knowing that they contained drugs.

We agree with Fichtner that this passage shows that, at the evidentiary hearing, the court specifically ruled that Fichtner's testimony about his upbringing was not credible, and that this appeared to be the basis for its related finding that Fichtner consented to the officer's search of his bag.

Notwithstanding this ruling discounting Fichtner's testimony about his upbringing, the same judge nevertheless accepted the truth of Fichtner's testimony for purposes of the bail hearing. The court then relied on this testimony to find that Fichtner's mother would not contact the police to report Fichtner if he violated a condition of his release.

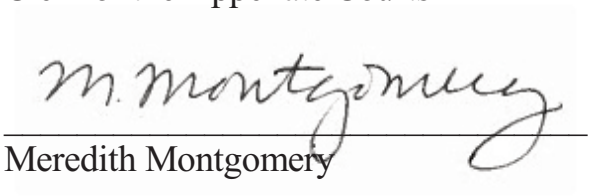
Because the trial court's treatment of this testimony was inconsistent, we cannot determine what facts were actually found by the trial court when it rejected Mary Fichtner as a third-party custodian. We accordingly must remand this case for clarification of the court's findings with regard to Fichtner's testimony and for reconsideration of Fichtner's proposal to be released to his mother's third-party custody.

Conclusion

This case is REMANDED to the superior court for clarification of its findings and for reconsideration of Fichtner's request to appoint his mother, Mary Fichtner, as his third-party custodian.

Entered at the direction of the Court.

Clerk of the Appellate Courts



Meredith Montgomery

cc: Judge Gist
Trial Court Clerk

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