

FOR PUBLICATION

In the Court of Appeals of the State of Alaska

**James Karr, Darrell Sam, and Erwin
Nashoanak,**

Appellants,

v.

State of Alaska,

Appellee.

Court of Appeals Nos. **A-13630/
A-13639/A-13640**

Order

Date of Order: **3/24/2020**

Trial Court Case Nos. **4FA-19-00872CR, 4GA-18-00034CR, 3KN-19-02098CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges

On March 11, 2020, the World Health Organization (WHO) officially classified COVID-19 as a pandemic.¹ The same day, Alaska Governor Michael J. Dunleavy issued a public health disaster emergency declaration for COVID-19 in the State of Alaska.² As of March 21, 2020, the novel coronavirus that causes COVID-19 had infected 292,142 people around the world and caused 12,784 deaths.³ As of March

¹ See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited Mar. 23, 2020); see also COVID-19 Emergency Declaration, available at: <https://www.fema.gov/news-release/2020/03/13/covid-19-emergency-declaration> (President declares national emergency) (last visited Mar. 23, 2020).

² See <https://gov.alaska.gov/newsroom/2020/03/11/governor-issues-public-health-disaster-emergency-declaration-for-covid-19/> (last visited Mar. 23, 2020); see also State of Alaska, Declaration of Public Health Disaster Emergency, available at: <https://gov.alaska.gov/wp-content/uploads/sites/2/COVID-19-Disaster-Packet.pdf> (last visited Mar. 23, 2020).

³ See https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200322-sitrep-62-covid-19.pdf?sfvrsn=f7764c46_2 (last visited Mar. 23, 2020).
(continued...)

22, 2020, Alaska had 32 confirmed cases,⁴ and as of 4:00 p.m. EST that day, the United States had 33,404 confirmed cases.⁵

James Karr, Darrell Sam, and Erwin Nashoanak each appeal the denial of their applications for a second or subsequent bail review hearing. In each case, the superior court determined that the current COVID-19 pandemic was not “new information” justifying a bail review hearing under AS 12.30.006(d)(1) and declined to hold a hearing. Karr, Sam, and Nashoanak each challenge this ruling. We consolidated their appeals for decision.

Article I, Section 11 of the Alaska Constitution entitles a person accused of a crime to be released on bail. This right is implemented through the provisions of Title 12, Chapter 30 of the Alaska Statutes. Under AS 12.30.011(b), a court is required to impose the least restrictive condition or conditions of release that will reasonably ensure the defendant’s appearance and protect the victim, other persons, and the community.

Alaska Statute 12.30.006(c) sets out a criminal defendant’s right to a first

³ (...continued)
2020, 3:00 p.m. AKDT).

⁴ *See* <https://www.adn.com/alaska-news/2020/03/23/10-more-covid-19-cases-confirmed-in-alaska-bringing-total-to-32/> (last visited Mar. 23, 2020, 3:01 p.m. AKDT).

⁵ *See* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-in-us.html (last visited Mar. 23, 2020, 3:04 p.m. AKDT).

bail review hearing.⁶ Under the following subsection, AS 12.30.006(d), a defendant is generally entitled to a second or subsequent bail review hearing only if the defendant provides “new information” to the court not previously considered at the first bail hearing.⁷

But because the underlying right of pretrial release is guaranteed by the Alaska Constitution, we have previously recognized that courts should narrowly construe the statutory restrictions on pretrial release set out by AS 12.30.⁸ Stated differently, courts should broadly construe what qualifies as “new information” for purposes of obtaining a subsequent bail review hearing under AS 12.30.006(d)(1).

The “new information” that was proffered by the Appellants — the existence of the COVID-19 pandemic — is information that is directly relevant to a court’s assessment of what bail condition or conditions are necessary to reasonably ensure the defendant’s appearance and to protect the community. In recent weeks, WHO, the Centers for Disease Control and Prevention (CDC), the United States, and the State of Alaska have each issued guidance or mandates designed to protect the public from the dangers presented by the spread of COVID-19.⁹ As a result of these actions,

⁶ See *Torgerson v. State*, 444 P.3d 235, 237-38 (Alaska App. 2019).

⁷ AS 12.30.006(d)(1).

⁸ See *Hanhaz v. State*, Bail Order, No. A-10106 (Alaska App. Jan. 22, 2008).

⁹ See, e.g., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> (last visited Mar. 23, 2020) (WHO’s “Coronavirus disease (COVID-19) advice for the public”); <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (continued...)

the structure of our society has transformed dramatically in a very short time and is likely to continue to change in the coming weeks and months. For example, travel is restricted, social contact is limited — with gatherings of more than ten people barred and a distance of at least six feet required — businesses have been ordered to suspend operations, working from home is encouraged, and self-quarantine is commonplace, if not mandated.¹⁰ Moreover, emergency room doctors in our State fear that the health care system may soon be overwhelmed and have called for an end to all non-essential travel into and out of the State of Alaska and for greatly limited in-state travel.¹¹

For these reasons, the trial court’s analysis of the risk to public safety and the risk of flight posed by releasing a defendant into the community is necessarily different now than it was several weeks ago. Several courts have recognized these changed circumstances.¹² Incarcerating a defendant under conditions that do not permit

⁹ (...continued)
(last visited Mar. 23, 2020) (CDC’s “Coronavirus Disease 2019 (COVID-19): How to Protect Yourself”); <https://gov.alaska.gov/home/covid19-healthmandates/> (last visited Mar. 23, 2020) (Governor Dunleavy’s “COVID-19 Health Mandates”); <http://dhss.alaska.gov/dph/Epi/id/Pages/COVID-19/default.aspx> (last visited Mar. 23, 2020) (Alaska DHSS Covid-19: Situation overview).

¹⁰ See State of Alaska COVID-19 Health Mandate 9 and 10 (March 23, 2020), available at: <http://dhss.alaska.gov/dph/Epi/id/Pages/COVID-19/default.aspx> (last visited Mar. 23, 2020).

¹¹ See <https://www.adn.com/opinions/2020/03/19/were-the-directors-of-alaskas-emergency-rooms-its-time-to-shut-down-nonessential-air-travel/> (last visited Mar. 23, 2020).

¹² See *United States v. Stephens*, __ F. Supp. 3d __, 2020 WL 1295155, at *1 (S.D.N.Y. Mar. 19, 2020) (finding that the “unprecedented and extraordinarily dangerous (continued...)”).

compliance with widespread health directives designed to halt the spread of the virus poses significant health risks not only to other inmates and to correctional facility staff, but also to the rest of the public.¹³ Experts have warned that the spread of the virus in our society — including in the jails — may soon overwhelm our health care system.¹⁴

Among other considerations, therefore, courts must now balance the public

¹² (...continued)

nature of the COVID-19 pandemic” constitutes “changed circumstances” for purposes of reconsidering defendant’s bail under federal law); *United States v. Martin*, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) (rejecting defendant’s specific bail proposal but recognizing that the health risk of COVID-19 constitutes new information “having a material bearing on whether there are conditions of release that will reasonably assure the appearance of detained defendants and secure the safety of the community”).

¹³ See *Stephens*, 2020 WL 1295155, at *2 (quoting with approval magistrate judge’s decision to allow defendant to remain on pretrial release out of recognition that “[t]he more people we crowd into that facility, the more we’re increasing the risk to the community” (citing *United States v. Raihan*, No. 1:20-CR-68-BMC-JO (E.D.N.Y. Mar. 12, 2020))); *Martin*, 2020 WL 1274857, at *2 (“With no known effective treatment [for COVID-19], and vaccines months (or more) away, public health officials have been left to urge the public to practice “social distancing,” frequent (and thorough) hand washing, and avoidance of close contact with others (in increasingly more restrictive terms)—all of which are extremely difficult to implement in a detention facility.”). See generally Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (Oct. 2007), available at <https://doi.org/10.1086/521910> (last visited Mar. 23, 2020) (noting that in jails “[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise”).

¹⁴ See <https://www.adn.com/nation-world/2020/03/22/38-positive-for-coronavirus-at-rikers-nyc-jails/> (last visited Mar. 23, 2020) (compiling quotes from public officials and advocates).

health safety risk posed by the continued incarceration of pre-trial defendants in crowded correctional facilities with any community safety risk posed by a defendant's release.¹⁵ Additionally, courts must re-evaluate the flight risk and safety risk posed by releasing a defendant into a community which now has fewer open businesses, fewer opportunities for travel, and more people staying at home.¹⁶

We therefore conclude that the COVID-19 pandemic qualifies as “new information” for purposes of AS 12.30.006(d)(1), and that the trial courts erred by declining to grant the Appellants a bail review hearing.

The State argues that the COVID-19 outbreak is a public health issue that transcends individual cases and should be addressed on a larger scale through uniform policy-making measures designed to limit the spread of the virus within the inmate population. We agree with the State that a uniform, coordinated approach may be preferable, and we strongly encourage the various stakeholders in the criminal justice system to work together to address these critical and time-sensitive issues. We note that other jurisdictions have started taking broad-based approaches to the unique risks posed by incarceration under these circumstances. These approaches include encouraging trial

¹⁵ See *Stephens*, 2020 WL 1295155, at *2; see also *United States v. Barkman*, No. 3:19-CR-52-RCJ (D. Nev. Mar. 17, 2020) (ordering suspension of intermittent confinement as probation condition in light of COVID-19 in order to protect defendant and inmate population), available at <https://www.leagle.com/decision/infeco20200318c90> (last visited Mar. 23, 2020).

¹⁶ See, e.g., *In The Matter Of The Extradition Of Alejandro Toledo Manrique*, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (ordering release of defendant on bond and discussing effect of COVID-19 travel restrictions on flight risk assessment).

courts to release low-level non-violent offenders,¹⁷ entering into a consent order suspending or commuting certain county jail sentences,¹⁸ holding mass bail and plea hearings to reduce the current jail population,¹⁹ and directing law enforcement officers to issue a summons to, rather than arrest, individuals charged with non-violent misdemeanors.²⁰

¹⁷ See Montana Supreme Court, *Letter from Chief Justice McGrath to Montana Courts of Limited Jurisdiction Judges* (Mar. 20, 2020) (encouraging release of low-level non-violent offenders in response to COVID-19 pandemic), available at <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333> (last visited Mar. 23, 2020); Ohio Supreme Court, *Guidance to Local Courts, COVID-19 Public Health Emergency* (Mar. 20, 2020), available at: <http://www.supremecourt.ohio.gov/coronavirus/resources/localCourtGuidance03.20.20.pdf> (last visited Mar. 23, 2020); see also Michigan Supreme Court, Order (Mar. 15, 2020) (urging trial courts “to take into careful consideration public health factors arising out of the present state of emergency . . . in making pretrial release decisions”), available at: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-03-15_FormattedOrder_AO2020-1.pdf (last visited Mar. 23, 2020).

¹⁸ See New Jersey Supreme Court, *In the Matter of the Request to Commute or Suspend County Jail Sentences*, available at <https://njcourts.gov/notices/2020/n200323a.pdf?c=G7G> (last visited Mar. 23, 2020).

¹⁹ See Cory Shaffer, *Cuyahoga County officials will hold mass plea, bond hearings to reduce jail population over coronavirus concerns*, Cleveland.com (Mar. 12, 2020), available at <https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html> (last visited Mar. 23, 2020).

²⁰ See *Local county jails making changes due to coronavirus outbreak*, WKBN Ohio (Mar. 12, 2020), available at <https://www.wkbn.com/news/coronavirus/> (continued...)

But the State has not pointed us to any similar measures being taken in Alaska to date. Accordingly, we have a duty to decide the bail appeals currently before us and determine, as a matter of statutory interpretation, whether the existence of the COVID-19 pandemic constitutes “new information” for purposes of AS 12.30.006(d)(1). For the reasons explained in this order, we conclude that it does.

The State also expresses concerns with the bail release plans proposed by these particular defendants and notes the absence of any specific evidence that the Department of Corrections is unable to adequately address the public health risk posed by current levels of incarceration. But at this point, the trial court has declined to conduct the requested bail hearings, so neither the defendant nor the State has had an opportunity to present any arguments or evidence. We hold simply that the defendants are entitled to hearings at which an individualized assessment of their bail release proposals, in the context of the COVID-19 pandemic, can occur.²¹

²⁰ (...continued)
[mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/](#) (last visited Mar. 23, 2020).

²¹ We note that in two of the cases on appeal, the defendants — Karr and Nashoanak — presented additional information to the court unrelated to the COVID-19 pandemic.

Nashoanak’s attorney informed the court that the complaining witness had contacted her office and requested contact with Nashoanak. This constitutes “new information” for purposes of AS 12.30.006(d)(1). *See Ferreira v. State*, Bail Order, No. A-13523 (Alaska App. Oct. 17, 2019) (request for contact from victim constitutes “new information” entitling defendant to bail hearing).

We therefore REVERSE the trial court orders denying the Appellants a bail review hearing, and we REMAND these cases to the trial court with directions to hold a bail review hearing in each case. At the hearing, the trial court shall conduct an individualized assessment to determine the least restrictive bail condition or conditions that will reasonably ensure the defendant's appearance in court and protect the victim, other people, and the community in light of the COVID-19 pandemic and any other new information that may be provided.

²¹ (...continued)

Karr entered a plea to a lesser included offense. We have previously held that a change in the level of charges can constitute new information relevant to the assessment of a defendant's flight risk prior to trial. *See James v. State*, Bail Order, No. A-13503 (Alaska App. Dec. 11, 2019). But Karr has now been convicted, and he is no longer entitled to bail under Article I, Section 11 of the Alaska Constitution. *See State v. Wassillie*, 606 P.2d 1279, 1282-83 (Alaska 1980). As a result, he is not directly similarly situated to Sam and Nashoanak.

That said, even though Karr does not have a constitutional right to bail, the trial court has wide latitude to grant bail pending sentencing under the provisions of AS 12.30, *See AS 12.30.040(a)* (authorizing a court to grant bail release to a defendant who is awaiting sentencing or has filed an appeal if the defendant makes the requisite showing); *State v. Dobrova*, 694 P.2d 157, 158-59 (Alaska 1985) (holding that trial courts have inherent authority to grant bail during a sentence appeal); *cf. Martin v. State*, 517 P.2d 1389, 1398 (Alaska 1974) (holding that, although the bail guarantee set out in Article I, Section 11 of the Alaska Constitution does not extend to probation revocation proceedings, trial judges have "wide latitude" in imposing conditions for prehearing release in probation revocation proceedings and bail should be withheld "only in unusual cases"). Neither party has suggested that Karr falls into a category of defendants who are ineligible for bail under AS 12.30.040(b) following an adjudication of guilt. Accordingly, Karr is entitled to a hearing at which the court can consider new information including the COVID-19 pandemic and the change in Karr's case status.

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We do not retain jurisdiction.

Clerk of the Appellate Courts

/s/ M. Montgomery

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