

COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodomyr Zhukovskyy

19-CR-078

MOTION FOR RECONSIDERATION

NOW COMES the accused, Volodomyr Zhukovskyy, by and through counsel, Jay Duguay, Esq., and Steve Mirkin, Esq., and respectfully moves the Court pursuant to Rule 43 of the New Hampshire Rules of Criminal Procedure to reconsider its ruling of April 7, 2020, denying his Motion for Evidentiary Bail Hearing herein. As grounds for such Motion, the accused states as follows:

1. By Motion filed on March 27, 2020, he sought an evidentiary hearing on the issue of the continuing need for preventive detention. The State submitted its written objection thereto on April 6, 2020.
2. The Court entered its Order on April 7, 2020, denying the defense's Motion, "for the reasons set forth in paragraphs 1-10 of the State's Objection", with no further elaboration.
3. The accused respectfully submits that the Court, in so ruling, has overlooked or misapprehended points of law and fact, and particularly points of fact that would be presented and developed at an evidentiary hearing, as will be set forth herein.
NHRCP Rule 43(a).

4. At the outset, it should be noted that the accused has been in custody under detention since on or about June 24, 2019. Trial herein is currently scheduled for November 2020, by which time, unless released on bail, he will have been in custody for more than sixteen months. This assumes no further delays owing to the complexity of the issues herein, to the ongoing indefinite shutdown of many court and other operations due to coronavirus, or to other unforeseen causes. The accused reasserts his right to reasonable bail as guaranteed by the Eighth and Fourteenth Amendments, and by Part I, Article 33 of the State Constitution.
5. It should further be noted that the analysis commissioned by the State and conducted by The Crash Lab, Inc., which substantially contradicted the State Police's reconstruction analysis of the collision giving rise to these charges, was not completed until February 14, 2020, and was provided to the defense on February 27, 2020.

A. “[T]he defendant was impaired on June 21, 2019”

6. In ¶ 1 of its Objection, the State alleges “Nothing about the discovery provided by the State, that forms the basis of the defendant’s motion, changes the fact that the defendant was impaired on June 21, 2019; ...” In fact, as would be developed at an evidentiary hearing, the accused’s “impairment” at the time of the crash is far from an established fact.
7. **Multiple trained law enforcement officers had contact with the accused directly after the crash; none noted any indication of impairment on his part.**

According to discovery from the State these include, but are not necessarily limited to, the following:

- Off. Brian Lamarre, Northumberland PD (retired Gorham PD), the first officer on the scene and first to speak with the accused;
- Off. Patrick Riendeau, Gorham PD, spoke to him at scene;
- Off. Norman Brown, Jefferson PD, spoke to him at scene;
- Corp. Mitchell Doolan, Coos County Sheriff's Office, spoke to him at scene, transported him to Jefferson Fire Dept., and was with him for more than an hour;
- Capt. Keith Roberge, Coos County Sheriff's Office, spoke to him at scene;
- Sgt. Matthew Favreau, NHSP, spoke to him at scene;
- Tpr. Derek Newcomb, NHSP, met him at Jefferson Fire Dept. approximately an hour after the crash, drove him to Weeks Hospital in Lancaster, was with him during the two blood draws, took him to Lancaster Police Department and interviewed him for well over an hour, then took him to Coos Motor Inn, was with him for more than four hours;
- Sgt. Michael Cote, NHSP, interviewed him with Tpr. Newcomb, was with him at least 1½ hours;
- Tpr. Jeremy Brann, NHSP, served subpoena on him in motel room, spoke directly to him for eight minutes.

8. Several civilians had contact with the accused immediately before and after the crash; none noted any sign of impairment on his part. According to discovery from the State these include, but are not necessarily limited to, the following:

- Steven Landers, Berlin City Auto, who transacted business with him shortly before the crash and described him as “coherent and not intoxicated”;
- Tad Duarte, Jarheads MC, confronted him face-to-face immediately after the crash;
- Michael McEachern, Jarheads MC, had direct contact with him immediately after the crash and before Off. Lamarre arrived;
- Emma Stone, RN, Weeks Hospital, conducted two blood draws approximately an hour apart;
- Sarika Patel, Coos Motor Inn, spoke with him on two occasions when he arrived there with Tpr. Newcomb, said he “acted normal”;
- Christine Janvrin, Big Apple Store, Lancaster, spoke with him after he checked into Coos Motor Inn.

9. The State in its ¶ 3 references certain conclusions of blood analysis to support its contention that the accused was impaired at the time of the crash. Specifically, the

State noted in footnote 2 that 6-monoacetylmorphine (6-MAM) was detected, which the State says, “when present, is generally indicative of recent heroin use”. *Id.*, fn. 2

10. On June 24, 2019, the NH State Forensic Lab tested the blood collected from Mr. Zhukovskyy. Those results came back negative for 6-MAM. The blood samples were then sent to NMS Labs for further analysis. Analyses on both samples were originally reported to be negative for 6-MAM as well. 12 days after the original report was issued by NMS, a second report was issued which included a positive result for 6-MAM at less than 1 ng/ml in one of the samples.
11. According to NMS labs’ policy for reporting results, a positive result will not be reported unless the substance is present at a level above the limit of detection. The limit of detection is generally defined as the lowest quantity at which a substance can be reliably detected and is determined by the precision of the equipment and methodology used for the test. For 6-MAM, the NMS Labs limit of detection is 1 ng/ml. Reporting a positive result for 6-MAM at a level below the limit of detection of 1mg/ml contravenes NMS Labs’ own policy.
12. Whether, and if so to what degree, blood analysis indicates that the accused was impaired at the time of the crash, is a determination that can only be made pursuant to an evidentiary hearing.
13. As to the accused’s statements referenced in the State’s Paragraphs 3 and 4, statements made to police by him on June 21 and 24 were in the context of two lengthy interrogations, and do not represent the total of his responses on the subject; rather, his responses were inconsistent on the question of whether and to what extend he was feeling the effects of drug use at the time of the crash, and to

this extent the State is “cherry-picking” certain of his comments to the exclusion of others. Indeed, the statement cited by the State in ¶ 3, to the effect that he could feel the effects of cocaine at or near the time of the crash, is inconsistent with the NMS Labs analysis of his blood samples. As to the statements attributed to him by Coos County House of Corrections personnel on June 25, 2019, the accused states that said account is not accurate, and further is inconsistent with the evidence in this case.

B. “Nothing in [the Crash Lab] report changes the facts cited by the State...”

14. The essential component of the State’s case is the repeated allegation that the accused “cross[ed] into the opposite lane of travel, thereby causing a collision” which resulted in the deaths of the various decedents. The Crash Lab report, **commissioned by the State**, concludes that that did not happen; rather, the collision between the accused’s truck and Mr. Mazza’s motorcycle occurred *directly over* the center line, and that one immediate result of that collision was a “catastrophic air loss” in the truck’s left front tire, which caused the truck to pull further to the left into the opposite lane. Additionally, toxicology reports provided by the State establish that Mr. Mazza was well above the *per se* standard for driving while impaired by alcohol, RSA 265-A:2 (1)(a). None of this was known at the time of the accused’s arraignment, but these facts now bear directly on the strength of the State’s case, in ways that can only be evaluated after an evidentiary hearing.

C. Prior Criminal History.

15. The State asserts the accused’s prior criminal history as grounds for continued detention. The accused does not contest the allegation in ¶ 5 that at the time of the

crash herein he was on bail for a DUI charge in Connecticut, although he does not accept all of the factual characterizations contained therein. ¶ 6 references a DUI offense that occurred more than six years ago, when he was 17 years of age. ¶ 7 references a Possession conviction from 2018, although discovery received does not document the fact of a conviction on such charge, and a Possession of Paraphernalia charge in Texas, for which the State does not allege he has been convicted. This criminal history, while not particularly commendable, is no worse than those of numerous defendants who are routinely released on bail without the State alleging that their very presence in the community would endanger the public safety.

D. Application of RSA 597:2

16. The bail statute, RSA 597:2, IV(a), provides that the Court may order detention *only* if it “determines by clear and convincing evidence that release will endanger the safety of [the accused] or the public.” Even upon such a determination, the court may still order restrictive conditions in lieu of detention. RSA 597:2, IV(b) permits the accused to have a hearing featuring live testimony at a bail hearing subsequent to his initial appearance. The accused hereby makes such a request.
17. The accused respectfully submits that the State has not shown by “clear and convincing evidence” that his release would endanger his safety, or that of the community. If the State has such evidence, it should be presented in open Court, and subjected to cross-examination and the presentation of evidence in opposition. The accused’s fundamental Constitutional right to reasonable bail is at stake.

18. The State relies on “the facts surrounding the crash on June 21, the fact that the defendant was on bail, the defendant’s drug use, and his prior criminal history”, Objection, ¶ 8, to support its claim that “only preventive detention will be sufficient to protect the public and the defendant.” *Id.* As shown herein, the “facts surrounding the crash on June 21” are very different than what the State put forth initially, as will be further demonstrated at an evidentiary hearing. The remaining factors are not of the sort that have historically justified preventive detention in this Court.
19. The accused respectfully submits that, by summarily denying his request for an evidentiary bail hearing herein, the Court has misapprehended the workings of RSA 597:2, IV, and has overlooked and misapprehended the nature of the “evidence” asserted by the State, and particularly the dramatic change in such evidence brought by the Crash Lab report.
20. RSA 597:2, IV(b) requires the accused to move in writing for evidence at a bail hearing to be presented in-Court. The accused hereby makes such Motion.
21. Finally, to the extent that the Court may find “clear and convincing evidence” of dangerousness should he be released, the accused states that the Court may still impose less restrictive conditions than preventive detention. The State’s concern appears to be that he would drive again, and would do so under the influence of alcohol and/or drugs. Certainly the accused will not be hired as a driver by anyone; his name is now prominently known throughout New England. The Court could order, and the accused would assent to, conditions including GPS monitoring, a ban on driving (upon information and belief his license is now under suspension), and regular alcohol and drug screens.

22. As the Court specifically excluded the State's ¶ 11 as a basis for its Order, and as NHRCP 43(a) limits motions such as this to no more than ten pages, the accused will not herein address the allegations made in ¶ 11.

WHEREFORE, the accused respectfully prays that the Court:

- A. Reconsider its Order of April 7, 2020, denying his Motion for Evidentiary Bail Hearing;
- B. Schedule such a hearing, and direct pursuant to RSA 597:2, IV(b) that evidence therein be presented live and in-Court;
- C. Order his release on Personal Recognizance or on an unsecured appearance bond subject to reasonable non-financial conditions; and
- D. Provide such further relief as may be just.

Respectfully submitted,

/s/ Steve Mirkin

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