

THE STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS.
SOUTHERN DISTRICT**

**SUPERIOR COURT
No. 2019-CR-00814**

State of New Hampshire

v.

Dale Holloway

ORDER ON PENDING MOTIONS

The defendant, Dale Holloway, is charged with two counts each of attempted murder and first degree assault, as well as one count each of being a felon in possession of a firearm, second degree assault, and simple assault. There are currently a number of pending motions in this case. The Court will address each one in turn.

I. Defendant's Motion to Compel Mental Health Court (Court Doc. 215)

The Southern Judicial District of Hillsborough County Superior Court does not currently offer a mental health court. Accordingly, the defendant's motion is DENIED.

II. Defendant's Motion to Compel HCA Records (Court Doc. 219)

As far as the Court is aware, the defendant has currently received all of the pertinent discovery from the State. This motion is therefore DENIED.

III. Defendant's Motion to Compel Production of *Laurie* Listed Officers (Court Doc. 220)

As the Court stated in its September 6, 2023 Order, the State has reviewed the EES and has represented that none of the law enforcement witnesses in this case are on the EES. This motion is accordingly DENIED.

IV. Defendant's Motion for Sanctions (Court Doc. 235)

This motion is DENIED.

V. Defendant's Motions for Services (Court Docs. 228, 232, 233)

These motions are all DENIED.

VI. Defendant's (Apparent) Motion to Subpoena Attorney Lee (Court Doc. 231)

The defendant has received all of the discovery and other legal materials from his previous attorneys. Thus, to the extent this filing can be construed as a motion, it is DENIED.

VII. Defendant's Motion to Be Remanded to Valley Street Jail for Trial (Court Doc. 378)

The Court defers to the Department of Corrections as to where to house the defendant before, during, and after trial. Accordingly, this motion is DENIED.

VIII. Defendant's Motion for Protective Order for Discovery Files (Court Doc. 380)

The defendant moves for an order prohibiting the Department of Corrections "from sharing or further disseminating information in the discovery files." (Def.'s Mot. ¶ 8.) As far as the Court is aware the Department of Corrections is not "disseminating" information from the discovery files to anyone other than the defendant. However, out of an abundance of caution, the Court will enter the following limited order. The Department of Corrections shall only disseminate the defendant's discovery materials and the information therein to the defendant and not to any outside parties. The Department of Corrections or its employees is not otherwise prohibited from examining, storing, handling, possessing, or transporting the defendant's discovery in a manner consistent with its own policies and procedures.

IX. Defendant's Motion to Compel NHDOC to Provide Discovery Files (Court Doc. 381)

The defendant seeks an order requiring the Department of Corrections to "return and/or release his legal papers, personal papers, and all discovery files" to him. (Def.'s

Mot. Prayer for Relief ¶ A.) However, this Court previously ordered the Department of Corrections “to provide the defendant with access to the laptop” containing his legal materials “on an immediate basis.” (Sept. 29, 2023 Court Order.) In light of this prior ruling, the Court does not find that any additional relief is necessary. This motion is therefore DENIED as MOOT.

X. Defendant’s (Apparent) Motions for Subpoenas (Court Docs. 388, 389, 390)

To the extent these filings can be construed as motions, they are DENIED. The time for discovery has closed. Furthermore, the defendant has not shown how the records sought, which all relate to his incarceration in Massachusetts on prior charges, are at all relevant to these proceedings.

XI. Defendant’s (Apparent) Motion for Subpoena (Court Doc. 391)

As the Court has informed the defendant on numerous occasions, the Court does not issue subpoenas to parties. However, to the extent this filing can be construed as a motion for discovery, it is GRANTED as follows: If the State seeks to admit any of the defendant’s phone calls or text messages that were made/sent while he was incarcerated, the State shall provide the defendant with: (1) a copy of the actual message or phone call; and (2) the transaction history of his account showing the cost of any such text message or phone call. The Court finds the transaction history is relevant because it directly relates to the authenticity of the calls and messages.

XII. State’s Motion in Limine to Admit Evidence of Murder of Luis Garcia through Judicial Notice (Court Doc. 394)

This motion is DENIED. While the State is free to reach a stipulation with the defendant as to the facts surrounding the death of Mr. Garcia, the Court finds it would be inappropriate to take judicial notice of those facts in this case.

XIII. Defendant's Motion for Compensation of Photocopy Costs (Court Doc. 395)

The defendant is incarcerated, indigent and proceeding pro se. The Department of Corrections charges inmates \$.20 per page for photocopies of legal materials. Although this Court has encouraged the Department of Corrections to provide the defendant free access to photocopies, they continue to assess him this fee. The defendant now moves for reimbursement in the amount of \$37.20 for the costs of photocopying legal materials used in the preparation of this case as well as an order requiring the Department of Corrections to provide him free photocopies in the future.

RSA 604-A:6 recognizes "that an indigent is entitled to the services necessary for an adequate defense, at reasonable cost to the public, as guaranteed by both State and National Constitutions." In re Allen R., 127 N.H. 718, 720 (1986). In addition, the supreme court has held that indigent pro se defendants are eligible to receive "funds for services other than counsel," State v. Brouillette, 166 N.H. 487, 492 (2014), so long as "the services requested are necessary" for the preparation of the defense. Indeed, "to bar a pro se defendant from recovering costs would be tantamount to placing an impediment on a defendant's right to proceed pro se." United States v. Feldman, 788 F.2d 625, 626 (9th Cir. 1986).

Here, the Court finds that the defendant's requests for photocopying costs are both reasonable and necessary for his defense. His motion for reimbursement of those costs therefore will be GRANTED so long as the defendant completes the standard judicial branch motion for authorization to obtain services other than counsel (Form NHJB-4037-Se). The clerk's office is directed to mail a copy of this form with its notice of this decision. To the extent the defendant requests an order requiring the

Department of Corrections to begin providing free photocopies to the defendant throughout the pendency of this case, the Court is not aware of any authority that would allow it to enter such an order. His request for an order requiring the Department of Corrections to provide him unlimited photocopies is therefore DENIED.¹

XIV. Defendant's Motion to Sever (Court Doc. 396)

The defendant moves to sever the indictment charging him with being a felon in possession of a firearm ("FIP") (Charge ID 1678544C; see Court Doc. 53) from the remaining charges. The State objects. As a threshold matter, "[t]he deadline for filing . . . motions for joinder or severance of offenses . . . shall be sixty days after entry of a plea of not guilty or fifteen days after the dispositional conference, whichever is later." N.H. R. Crim. P. 15(b)(1). Here, the defendant entered his not guilty pleas on October 15, 2019—nearly *four* years ago—and the last dispositional conference was held on June 9, 2020. Thus, according to Rule 15, this motion should have been filed by June 24, 2020. While the Court acknowledges that it extended the pretrial motion deadline in its April 28, 2022 case structuring order (see Court Doc. 262), which arguably covered motions to sever, it only extended the deadline until September 15, 2022. As such, regardless of whether Rule 15 or the Case Structuring Order governs, the defendant's motion, filed on September 25, 2023, approximately just one month before the start of trial, is untimely. See State v. Young, 159 N.H. 332, 336 (2009) (affirming trial court's denial of defendant's motion to sever FIP charge where motion was untimely filed).

However, in the interest of thoroughness, the Court will briefly address the merits of the motion to sever. New Hampshire Rule of Criminal Procedure 20 governs the

¹ However, nothing in this order shall prohibit the defendant from submitting additional requests for reimbursement in the future.

joinder of criminal offenses and distinguishes between charges that are related and charges that are unrelated. The rule defines three categories of related offenses:

Two or more offenses are related if they:

- (A) Are alleged to have occurred during a single criminal episode; or
- (B) Constitute parts of a common scheme or plan; or
- (C) Are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

N.H. R. Crim. P. 20(a)(1) (emphasis added). A “single criminal episode” as used in Rule 20(a)(1)(A) means “an uninterrupted criminal occurrence or series of occurrences that are connected in some way.” State v. Rivera, 175 N.H. 496, 500 (2022).

Here, the FIP charge is alleged to have occurred “at the same time and place” as the remaining charges, id. at 501—that is, at the New England Pentecostal Church in Pelham on October 12, 2019. In addition, the firearm that forms the basis for the FIP charge is alleged to have been used in the commission of the alleged attempted murder. On these facts, the Court finds that the alleged conduct underlying the FIP charge and the other charges occurred during the same criminal episode. As such, the charges are “related” for the purposes of Rule 20. See id. at 501 (holding that drug possession and assault charges occurred during same criminal episode where “the defendant possessed the cocaine on his person at the same time that he assaulted and threatened the victim”); State v. Orme, No. 2018-0284, 2019 N.H. LEXIS 173, at *8 (Aug. 20, 2019) (non-precedential order) (holding that FIP charge was related to drug charges where “the gun and the drugs were found in the same apartment at the same time” and “two shotgun shells were found in the living room close to where the defendant had been seated and the drug-related evidence was found”).

Having found that the charges are “related,” the Court must next determine whether trying the charges together would not be in the “best interests of justice.” N.H. R. Crim. P. 20(a)(2). “Under [the] ‘best interests of justice’ standard, charges should be tried separately whenever it is deemed appropriate to promote a fair determination of the defendant’s guilt or innocence — in essence, when conducting a single trial would jeopardize the defendant’s right to a fair trial.” Rivera, 175 N.H. at 502 (cleaned up). “In making a ‘best interests of justice’ determination, trial courts must evaluate whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently to each offense.” Id. (cleaned up). The Court may also consider other factors, including whether:

some charges are likely to unusually inflame the jury against the defendant; the evidence in support of some offenses is weak while the proof of others is strong; the defendant’s available defenses for different crimes are inconsistent; or the defendant wishes to testify as to one offense but not as to others.

Id.

Here, the defendant argues that “evidence of any prior convictions” necessary to prove the “felon” element “will cause the jurors to automatically assume guilt in the other charges.” (Def.’s Mot. ¶ 2 (cleaned up).) The defendant’s argument is not without merit. Indeed, many courts “agree that trying a felon in possession count together with other felony charges creates a very dangerous situation because the jury might improperly consider the evidence of a prior conviction when deliberating about the other felony charges.” United States v. Nguyen, 88 F.3d 812, 815 (9th Cir. 1996). That risk is particularly heightened in this case because the predicate felonies identified in the

FIP indictment—“Assault and Battery with a Dangerous Weapon” and “Assault to Kill”—are very similar to the non-FIP charges in this case.

Nonetheless, there are several things that can be done to reduce the risk of unfair prejudice. The most common method is a defense stipulation to the prior felony conviction. See generally State v. Cardin, 129 N.H. 137, 139 (1987); see also Orme, 2019 N.H. LEXIS 173, at *8–9 (holding that joinder of FIP charge not unfairly prejudicial where “parties stipulated to the defendant’s prior felony conviction so that when the indictment was read to the jury, the nature of the prior felony was not read as part of the indictment”).² In addition, the Court can (and will) issue an instruction directing the jury to only consider the prior felony conviction evidence in connection with the FIP charge. See Orme, 2019 N.H. LEXIS 173, at *8–9 (joinder of FIP charge not unfairly prejudicial where “the trial court instructed the jury that the prior conviction was only relevant to the felon in possession charge”); accord United States v. Belk, 346 F.3d 305, 311 (2d Cir. 2003) (stressing “the importance of a proper curative instruction explaining to the jury that it may only use proof of the prior conviction to satisfy the prior-conviction element of the crime”). The Court can also issue an order limiting the evidence “of a prior conviction to be narrowly tailored to the fact of the conviction itself” as “the underlying facts of the conviction are completely irrelevant” and therefore “the jury has no need to know the nature of the prior conviction.” Belk, 346 F.3d at 311.

If, however, the defendant believes that these remedies will be insufficient, the Court will consider, at the defendant’s request, the bifurcated procedure followed by many other courts for these types of charges. Under that procedure:

² The Court notes that the State only appears to agree to a partial stipulation—that is, it still wants the Court to read the stipulation to the jury, rather than remove the issue from the jury’s consideration entirely.

[T]he jury will first hear evidence and deliberate on the counts that do not relate to or require, as an element of the offense, proof of a defendant's prior disqualifying conviction. In the next phase of the trial, the jury will hear necessary evidence of the defendant's prior convictions . . . , and deliberate on charges such as possession of a regulated firearm by one with a prior felony conviction[.]

Hemming v. State, 229 A.3d 825, 853–54 (Md. 2020). This procedure addresses the concern that “the necessity of introducing evidence of the defendant's criminal record in order to prove the weapons possession charge would prejudice the defendant during the jury's deliberations on other counts.” United States v. Joshua, 976 F.2d 844, 848 (3d Cir. 1992). Specifically, “[t]he defendant's criminal past is not made known to the jury until after they have reached a verdict with respect to the other charges.” Id. “At the same time, this procedure is considerably more efficient than conducting an entire new jury trial on the weapon possession charge at a later date.” Id. The Court would like the parties to be prepared to address this issue at the final pre-trial conference.

In short, because the defendant's motion is untimely and there are adequate ways to ensure that the defendant receives a fair trial short of severance, the defendant's motion to sever the FIP charge is DENIED.

XV. Defendant's Motion for N.H. Law Directory and Daybook (Court Doc. 401)

This motion is DENIED. The defendant has not shown that the requested material is necessary to his defense.

XVI. Defendant's Motion for Higher Reimbursement Rate (Court Doc. 402)

The defendant moves for court-appointed counsel to receive a higher hourly rate. This motion is DENIED for two reasons. First, the judicial council is responsible for finding and appointing counsel. Second, the defendant has elected to proceed pro se. As such, there is no need to address the court-appointed counsel's hourly rate.

XVII. Defendant's Motion to Introduce Evidence Relevant to Weight and Credibility (Court Doc. 406)

After reviewing this motion, the Court is unable to discern what specific evidence the defendant is attempting to admit. The Court therefore will reserve ruling on the defendant's "weight and credibility" evidence until trial. This motion is accordingly DENIED WITHOUT PREJUDICE.

XVIII. Defendant's Motion in Limine to Prohibit Any Testimony Related to Pornography (Court Doc. 407)

As the Court noted in its September 29, 2023 Order, "[t]he State and the defendant agree that [evidence regarding the defendant's pornography and musical endeavors] should be excluded from trial." Because the Court has already ruled on this evidentiary issue, this motion is MOOT.

XIX. Defendant's Motion in Limine Regarding "Trap House," "Drug House," and/or Heroin Distribution (Court Doc. 408)

This motion is GRANTED. The Court notes that the State has filed a notice that it does not object to the exclusion of this evidence. (See Court Doc. 416.)

XX. Defendant's Motion in Limine Regarding Gang References (Court Doc. 409)

This motion is GRANTED. The Court notes that the State has filed a notice that it does not object to the exclusion of this evidence. (See Court Doc. 417.)

XXI. State's Motion to Compel Discovery (Court Doc. 424)

The defendant has filed a notice of an insanity defense. To support that defense, it appears the defendant retained Dr. Eric Mart to perform an insanity evaluation. Dr. Mart authored a report based on his examination and disclosed the report to the defense. As of July 19, 2023, the defendant and his former attorney were still deciding whether to call Dr. Mart as a witness. Thus, the defense had not disclosed

the report as of that date. The State now moves to compel the defendant to disclose the report. After due consideration, the State's motion is GRANTED.

New Hampshire Rule of Criminal Procedure 15(3)(F) gives the trial court "the authority in a criminal case to require the parties to exchange . . . reports or statements of experts." State v. Drewry, 139 N.H. 678, 682 (1995) (citing former rule); see generally State v. Chagnon, 139 N.H. 671, 677 (1995) (noting that trial court has discretion to order reciprocal discovery in criminal cases). Pursuant to this broad authority, the Court finds that the State is entitled to a copy of Dr. Mart's report should the defendant seek to call him at trial.³ Now, with trial scheduled to begin in less than one month, the time has come for the defendant to either: (1) disclose Dr. Mart's report; or (2) elect to forgo calling Dr. Mart as a witness to support his insanity defense. As such, the defendant shall, as soon as possible, provide a copy of Dr. Mart's report to the State⁴ or file a response indicating that he no longer intends to call Dr. Mart.

XXII. State's Motion in Limine to Admit Prior Convictions (Court Doc. 425)

The State moves to introduce evidence that the defendant was previously convicted of three felonies, but only should he elect to testify at trial. Specifically, the

³ See, e.g., United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975) ("The government was entitled to medical reports which the defendant intended to produce at the trial."); United States v. Yawson, No. CRIM. 13-271, 2014 WL 3401663, at *5-6 (W.D. Pa. July 10, 2014) (ordering defendant to disclose expert report(s) on insanity defense thirty days prior to trial); State v. Nichols, 877 S.W.2d 722, 729 (Tenn. 1994) (agreeing "with the trial court's conclusion that the interview reports [of defense psychologist] were properly discoverable"); State v. Vilvarajah, 735 S.W.2d 837, 839 (Tenn. Ct. Crim. App. 1987) (holding that State was entitled to discovery of defense psychiatrist's expert report on issue of insanity so long as defendant "intends to call [psychiatrist] as a witness, and [psychiatrist's] reports relate to the testimony he is to give at the trial").

⁴ To the extent the defendant, who is pro se, is unable to produce a copy of the report due to his incarceration, he shall bring a copy of the report to the next hearing so that the State may photocopy it. If the defendant fails to do that, the Court will require him to execute a waiver of any privileges he may have for the purposes of permitting Dr. Mart to disclose the report directly to the State. See United States v. Cohen, 530 F.2d 43, 46 (5th Cir. 1976) (holding that trial court properly required defendant to execute waiver where defense counsel was unable to produce defense expert report on insanity issue as part of reciprocal discovery).

defendant was convicted of the following offenses in Massachusetts: (1) armed assault to murder on or about May 14, 2003; (2) assault and battery by means of a dangerous weapon on or about September 26, 2006; and (3) intimidation of a witness on or about July 27, 2015. The State contends that these prior convictions are admissible at trial to impeach the defendant's credibility pursuant to New Hampshire Rule of Evidence 609.

Under Rule 609, "[p]rior convictions are admissible to impeach a defendant even if the crimes do not directly involve a lack of veracity." State v. Mayo, 167 N.H. 443, 458 (2015). Such evidence is admissible because "[j]urors ought to be informed of what sort of person is asking them to take his word, and lack of trustworthiness may be evinced by a defendant's abiding and repeated contempt for laws which he is legally and morally bound to obey." Id. (emphasis omitted). The rule provides, in pertinent part:

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

...
(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant[.]

N.H. R. Ev. 609(a)(1)(B). However, Rule 609 imposes limitations on the use of older felony convictions for impeachment purposes. Relevant here, "[i]f more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later[,]" then "[e]vidence of the conviction is admissible only if . . . its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect[.]" N.H. R. Ev. 609(b).

In this case, the State has not demonstrated that the armed assault to murder or the assault and battery by means of a dangerous weapon convictions satisfy the ten-year rule. It is clear that the dates of those convictions occurred well over ten years ago, and the State has not indicated when the defendant was release from confinement arising from those convictions. In the absence of such a showing, the Court concludes that the State may only introduce evidence of those convictions if “their probative value, supported by specific facts and circumstances, substantially outweighs [their] prejudicial effect.” N.H. R. Ev. 609(b)(1) (emphasis added). The State, however, has not identified any such specific facts or circumstances. Accordingly, the State’s motion to admit those prior convictions for impeachment purposes is DENIED. As to the 2015 conviction for intimidation of a witness, the Court finds that: (1) the conviction occurred less than ten years ago; and (2) the prejudicial effect of the conviction is outweighed by the probative value of the conviction as it relates to the defendant’s credibility. See Mayo, 167 N.H. at 458. The State’s motion to admit the defendant’s intimidation of a witness conviction for impeachment purposes should the defendant testify is therefore conditionally GRANTED.⁵

XXIII. Defendant’s Motion to Depose Dr. Bader (Court Doc. 428)

The defendant moves to depose Dr. Bader, an expert witness who evaluated the defendant for the purposes of his insanity defense. As a threshold matter, it does not

⁵ The Court uses the word “conditionally” because the State has not provided the Court with a certified copy of the conviction. The Court assumes that the State will obtain a certified copy of the conviction before seeking to introduce it at trial. Likewise, to the extent the State only intends to question the defendant about his prior conviction, the State has not provided any proof of those convictions to the Court, such as a record of his criminal history or a “rap” sheet, that would give it a sufficient basis to inquire about the convictions. The Court cautions the State that it must have such proof at trial before pursuing this line of inquiry. See generally State v. Doran, 117 N.H. 491, 494–95 (1977) (holding that State’s effort to impeach witness about prior inconsistent statements was proper where State had evidence that such statements had been made).

appear to be a feasible way to arrange her deposition prior to fast-approaching trial. And, even if the taking of the deposition were logistically possible, the Court does not find that the defendant has established the need for it. The defendant has acknowledged that he has a copy of Dr. Bader's expert report, and he will be able to test her conclusions through cross-examination at trial. This motion is thus DENIED.

XXIV. Defendant's Motions to Depose Witnesses (Court Docs. 429, 430)

The defendant moves to depose all of the State's witnesses and all of his own witnesses because of the COVID-19 pandemic. The Court finds that the defendant has failed to demonstrate the need for the requested depositions. These motions are therefore DENIED.

XXV. Defendant's Motion to Waive Filing Fees (Court Doc. 431)

The defendant moves to waive the filing fees in this case. However, as far as the Court can discern, he has not been charged any filing fees in this case. To the extent the defendant seeks waiver of sheriff's fees and costs, he has not articulated why he would incur any such fees or costs in this case. This motion is thus DENIED.

XXVI. Defendant's Motion to Require COVID-19 Testing (Court Doc. 432)

The defendant moves to require each of the State's witnesses to undergo COVID-19 testing before testifying at trial. This motion is DENIED. The defendant, however, is free to wear a face mask in the courtroom during trial if he is concerned about contracting COVID-19.

So ordered.

Date: October 11, 2023



Hon. Charles S. Temple,
Presiding Justice