COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION NO. 2084-CV-00855

STEPHEN FOSTER, et al.,
Plaintiffs,

v.

CAROL MICI, et al.,
Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' RESPONSE TO DEFENDANTS' STATUS REPORT ON THE IMPLEMENTATION OF A HOME CONFINEMENT PROGRAM

The plaintiffs' emergency motion is moot, and should be denied on the merits. Nothing argued by the plaintiffs in their response to the defendants' Status Report provides the Court with any reason to let the motion proceed.

A. THE PLAINTIFFS' CASE IS MOOT.

Despite the plaintiffs' most recent assertions, their motion is moot. No statute, case, or regulation requires Commissioner Mici to begin a home confinement program, let alone on any set timetable or with specific parameters. As explained to the Court, the Department of Correction is in the process of implementing a home confinement program that ensures public safety and the health and safety of inmates.

As argued in detail in the defendants' opposition to the plaintiffs' emergency motion, neither statute nor case law mandates that the Commissioner establish a home confinement program. G.L. c. 127, § 48 requires the Commissioner to "establish and maintain education, training and employment programs for persons committed to the custody of the department." . "Such programs shall include opportunities for academic education, vocational education,

vocational training, other related prevocational programs and employment, and may be made available within correctional facilities, or subject to the restrictions set forth in sections forty-nine [of G.L. c. 127] … at other places approved by the commissioner…" As noted in DOC's opposition, § 48 does not even mention home confinement, much less require it. Instead, it generally addresses educational and vocational programs and employment either within or outside of correctional facilities. The specifics, however, are left to the Commissioner's unfettered discretion. Similarly, G.L. c. 127, § 49 states in relevant part:

> The commissioner of correction, or the administrator of a county correctional facility, subject to rules and regulations established in accordance with the provisions of this section, **may** permit an inmate who has served such a portion of his sentence or sentences that he would be eligible for parole within eighteen months to participate in education, training, or employment programs established under section forty-eight outside a correctional facility . . . .

(emphasis added). In other words, once the Commissioner satisfies her legal duty to establish programs, it is she who determines the specifics of such programs. As § 49 further notes, it is the Commissioner who makes the rules and regulations regarding programs established outside correctional facilities; these rules and regulations "shall include provisions for reasonable periods of confinement to particular correctional facilities **before** a committed offender may be permitted to participate in such programs…" Id. (emphasis added).

As to the plaintiffs' reliance on Wolf v. Commissioner of Public Welfare, 367 Mass. 293 (1975), for the proposition that "voluntary cessation" keeps their claim alive, the facts here are far different. In Wolf, the plaintiffs brought a class action suit against a state agency for its failure to timely mail replacement welfare checks. The agency eventually sent out the checks, but the Supreme Judicial Court (SJC) ruled that the original case was not moot because it was possible the agency would, in the future, fail to properly send checks to the same recipients. The present case is not even remotely similar. In Wolf, the agency had an explicit legal duty, under

state and federal law and its own regulations, to immediately replace missing checks. The Department is simply not required by any statute, case, or regulation to offer home confinement. Voluntary cessation does not render the plaintiffs' motion a live issue.

B. THE DETAILS OF A HOME CONFINEMENT PROGRAM ARE ENTIRELY WITHIN THE COMMISSIONER'S DISCRETION.

It is indisputable that the Commissioner is responsible for maintaining the safety and security of the public. And, as explained in the Department's Status Report, G.L. c. 27, § 48 requires the Commissioner to implement community employment, education, or training programs, but no statute or case law directs her to release certain inmates, and nothing restricts the Commissioner's discretion as to which inmates may be eligible for community programs or release on a home confinement program. The Commissioner has to balance the safety of the public with the needs of committed and sentenced inmates.

As with many other aspects of corrections, the legislature wisely left the details of any community programming to the discretion of the Commissioner and other DOC staff with years of expertise running prisons and community corrections programs. Whether to implement a specific program that is not explicitly required by statute is a discretionary executive branch decision "with which, if otherwise constitutionally exercised, the judiciary may not interfere." See Commonwealth v. Cole, 468 Mass. 294, 302 (2014). In Cole, the Court stated that a court could not mandate that the Parole Board decide a certain case in a certain way, as the separation of powers doctrine requires that once a court has passed sentence, it is entirely the responsibility of the executive branch to implement it. Although the plaintiffs criticize DOC's plan to require inmates on home confinement to wear GPS devices, in Commonwealth v. Donohue, 452 Mass. 256 (2008), the SJC upheld the Middlesex County Sheriff's use of GPS home confinement, including such requirements as participation in education, training, and employment programs,

noting that "[nothing] set forth [G.L. c. 27] § 49 restricts the sheriff's ability to place an inmate in home confinement with a GPS monitoring bracelet." The Court also cited with approval the sheriff's adherence to the requirement in G.L. c. 27, § 49 that an inmate in a community program be within at least 18 months of potential release date.

In Donohue, the Middlesex Sheriff's Electronic Monitoring Program required inmates to have pre-approved community programs (AA, NA, or formal counseling) in place, as well as a "suitable home" and a community sponsor. Inmates were also required to have a job or participate in an educational program. Further, as the SJC noted, the Middlesex County Sheriff considered inmates for home confinement with a GPS bracelet based on their criminal and institutional records, including institutional behavior, demonstrated ability to conform to rules and regulations, length of time served on sentence, and participation in programs. Id. at 257. The SJC also approved the sheriff's reliance on eligibility reviews, including "current minimum security or pre-release status; no substance abuse related disciplinary infractions . . . any charge prohibited by state statute, no outstanding warrants, pending cases, active restraining orders . . . and not considered a risk to public safety." Id. at 257-258. These types of requirements, which are similar to those currently under consideration by the Commissioner, were accepted as appropriate by the SJC.

Among the Commissioner's discretionary determinations, as explained in the defendants' Status Report, is that home confinement would be limited to inmates classified to minimum security or pre-release status who are not serving time for sex offenses or first-degree murder. This is based both on the Commissioner's statutory duty to protect public safety and the language of the statutes. As shown in the defendants' Status Report, only about 25 inmates currently qualify for potential placement in home confinement based on their present

classifications to minimum or pre-release. Even if the program were to be made available to those medium security inmates who are within 18 months of possible release, age 50 or older (the CDC's standard criterion for higher COVID risk), and without the excluded categories, only about 50 inmates would potentially be eligible. Only two inmates housed in specialized health care units would be eligible if reclassified to lower security.[1] If an inmate, through program participation and institutional behavior, and based on the nature of his/her offense and sentence, is later classified to lower security, he/she may be suitable for participation in home confinement. The plaintiffs also misinterpret Deal v. Commissioner of Correction, 475 Mass. 307 (2016). Although the SJC did hold that DOC had to do individual evaluations of juvenile lifers for transfer to lower security, the Court specifically did not find constitutional violations because "there is no constitutionally protected expectation that a juvenile homicide offender will be released to the community after serving a statutorily prescribed portion of his sentence." Id. at 309. Instead, the SJC ruled that the relevant statute (G.L. c. 119, § 72B) specifically precluded "categorical" denials of reclassification to lower security, something not addressed in the statutes at issue here. In Deal, the SJC found that as long as DOC considered each offender individually for potential reclassification, it was complying with the statute. As noted in its Status Report and opposition, each DOC inmate receives a regular classification review, and inmates are frequently moved to lower security when their individual circumstances render them are appropriate for it.

[1] As the Department explained in its Status Report, it would be inappropriate to release inmates to the community while some correctional facilities have active COVID cases because of the risk to the public. Home confinement, as also explained, is not a pandemic mass release measure.

CONCLUSION

For the reasons stated above, and incorporating by reference the defendants' opposition to the plaintiffs' Emergency Motion to Order DOC to Implement Home Confinement and defendants' Status Report, the Court should declare the plaintiffs' motion moot and DENY it.

Respectfully submitted,
Defendants,
COMMISSIONER CAROL MICI and SECRETARY THOMAS TURCO III,

By their attorneys,
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Dated: December 7, 2020

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CERTIFICATE OF SERVICE

I, Bradley A. Sultan, hereby certify, under the penalties of perjury, that on December 7, 2020, I caused a true and accurate copy of the foregoing to be filed and served on counsel of record by email.

/s/ Bradley A. Sultan
Bradley A. Sultan