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1 COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 20-00855-D
SJC 2020-0212

STEPHEN FOSTER, et. al,
Plaintiffs,
vs.

CAROL MICI, as Commissioner of Correction, et. al,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR
ORDER REQUIRING IMPLEMENTATION OF HOME CONFINEMENT PROGRAM

The plaintiffs, a class consisting of all prisoners held at Department of Correction
("DOC") facilities, moved for an injunction requiring DOC to implement a program of pre-
release home confinement to reduce the prison population in light of the COVID-19 pandemic.
Plaintiffs argue that G. L. c. 127, §§ 48, 49, and 49A, as interpreted by the Supreme Judicial
Court ("SJC") in *Foster v. Mici*, 484 Mass. 698 (2020) (*Foster I*), require DOC to implement a
program of pre-release home confinement. Defendants Carol Mici, in her capacity as
Commissioner of Correction, and Thomas Turco III, in his capacity as Secretary of the Executive
Office of Public Safety and Security, opposed the motion. The Court heard oral argument on
December 8, 2020. For the below reasons, the motion is **DENIED**. However, on or before
January 8, 2021, DOC shall submit a further status report to the Court on its efforts to create a
home confinement program.

Procedural History of this Motion

Plaintiffs filed the pending motion on October 30, 2020, and a hearing was originally
scheduled for November 19, 2020. However, on November 19, 2020, plaintiffs' counsel
informed the Court that, the previous day, Commissioner Mici had informed state legislators that

DOC intended to implement a home confinement program within 30-60 days. Plaintiffs' counsel, reasonably deciding that voluntary implementation of a home confinement program would better serve their clients' interests than litigation, asked this Court to defer consideration of the motion and require that DOC submit a status report within one week. The Court gave DOC slightly less than two weeks, until December 1, 2020, to submit a status report addressing the issues of (1) whether DOC would be implementing a home confinement program; (2) if so, by what date; and (3) who would qualify for consideration. The Court scheduled a status conference for December 2, 2020.

DOC submitted Defendants' Status Report on the Implementation of a Home Confinement Program ("Status Report") on December 1, 2020. The Status Report informed the Court that few if any inmates would be released to home confinement in the next 60 days, and further stated:

Unfortunately, the COVID-19 pandemic and especially the recent spike in Massachusetts cases, has made implementation of a home confinement program much more difficult...DOC expects that in 2021, either when COVID-19 abates or a vaccine is widely available, it will expand the home confinement program for participation by eligible and suitable inmates.

Status Report at 2-3.

Based upon DOC's response, plaintiffs requested at the December 2, 2020 status conference that their motion for injunctive relief promptly be heard. The Court requested expedited briefing on the issue of whether DOC's intention to create a home confinement program rendered plaintiffs' motion moot. Based on the parties' submissions, on December 8, 2020, the Court ruled that the motion was not moot and heard oral argument. The Court requested further expedited briefing on the issue of the legal standard for ordering implementation of a home confinement program in the absence of a

constitutional violation. Plaintiffs and defendants submitted their briefs respectively on December 11, 2020 and December 16, 2020.

COVID-19 Infection Rates and Changes in Prison Population

Every week beginning April 5-11, 2020, the Special Master appointed by the Supreme Judicial Court (“SJC”) in *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, 484 Mass. 431 (2020) has issued a weekly report on total inmate population and COVID-19 testing, infections and deaths in DOC facilities and county jails. When the SJC issued its opinion in this case on June 2, 2020 denying plaintiffs’ motion for a preliminary injunction, reported new inmate COVID-19 infections at DOC facilities had been dramatically dropping from a high of 101 new cases the week of May 4-10, 2020 to 11 new cases the week of May 26-31, 2020. Moreover, between April 5, 2020 and May 31, 2020, the total inmate population in DOC facilities dropped by more than 400 inmates, from 7,642 to 7,233.

For almost four months following issuance of the SJC’s opinion, new reported inmate COVID-19 infections in DOC facilities almost disappeared; there were never more than three newly reported infections in any week between June 1, 2020 and September 23, 2020. Unfortunately, there has been a sharp spike in new COVID-19 infections in DOC facilities since late September, even more so since late October, corresponding to an increase in overall infection rates across the Commonwealth, though even more dramatic, in part because of the very low rate of new COVID-19 infections in DOC facilities throughout the summer. During the seven weeks from October 29, 2020 to December 16, 2020, there has been an average of over 160 new inmate infections per week, reaching a high of 259 new infections the week of December 3-9, 2020, before dropping to 128 new infections in the past week. There have been three new reported inmate deaths from COVID-19 in the past two weeks.

Between May 31, 2020 and December 16, 2020, the total inmate population at DOC facilities further decreased by an additional 569 inmates, from 7,233 to 6,664.

Discussion

A. The Legal Standard

Plaintiffs argue that, by failing to establish a home confinement program, DOC is violating G. L. c. 127, §§ 48, 49, and 49A. In this regard, plaintiffs are asking the Court to order DOC to enforce these Massachusetts statutes by establishing such a program. Plaintiffs make clear that they are not seeking this relief as a remedy for any constitutional violation. See Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Emergency Motion (filed Dec. 11, 2020) at 5.

"When...a suit is brought either by the government or a citizen acting as a private attorney general to enforce a statute or a declared policy of the Legislature irreparable harm is not required." *LeClair v. Town of Norwell*, 430 Mass. 328, 331 (1999). If the court finds a statutory violation, it must also decide whether "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Id.* at 331-332. Where, as here, permanent injunctive is sought, plaintiffs must establish actual success on the merits, not a likelihood of success. *See Caroline T. v. Hudson School Dist.*, 915 F.2d 752, 755 (1st Cir. 1990). Therefore, plaintiffs must prove that DOC is violating G. L. c. 127, §§ 48, 49, and 49A.

B. Application of the Legal Standard

In *Foster I*, the SJC ruled that "G. L. c. 127, §§ 48, 49, 49A, and this court's holding in *Donohue*, 452 Mass. at 265 . . . would *allow* the commissioner to release certain individuals who currently are serving a sentence in a prison or house of correction to home confinement, under specified conditions, prior to the completion of their

committed sentences, for certain educational, employment, and training programs.” 484 Mass. at 733 (emphasis added). Having authority to take certain action, however, is fundamentally different from being required to take such action. G. L. c. 127, sec. 49 provides in relevant part that the commissioner of correction:

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). Plaintiffs point to no provision in G. L. c. 127, §§ 48, 49, or 49A containing mandatory language with regard to the creation of a home confinement program, and this Court has found no such provision.

Plaintiff’s reliance on *Commonwealth v. Donohue*, 452 Mass. 256 (2008) to argue that DOC is required to establish a home confinement program is misplaced. In *Donohue*, the SJC ruled that a county sheriff had authority under G. L. c. 127, § 49 to release inmates to home confinement during the last 18 months of their sentences before parole eligibility, notwithstanding the objection of a Superior Court judge. The Court noted:

Generally, ...once a judge has sentenced a defendant, authority over the defendant passes from the judicial branch to the executive branch of government in that the defendant [sentenced to a house of correction] becomes subject to the sheriff’s control.

452 Mass. at 264. The gravamen the holding is that the executive branch has the authority to implement a home confinement program over judicial objection, not that a home confinement program is required. Interpreting *Donohue* to require DOC to implement a home confinement program would misread both the relevant statutes and the SJC’s holding in *Donohue*.

Absent a finding of a constitutional violation, this Court's authority is limited to ensuring that DOC follows the mandates of G. L. c. 127, §§ 48, 49, and 49A. Those mandates are clearly inconsistent with releasing inmates to home confinement based primarily on conditions within the prisons.

G. L. c. 127, §§ 48, 49, and 49A do not expressly address home confinement; they create the opportunity for education, training, and employment programs outside of prisons, during which an inmate might be subject to home confinement. G. L. c. 127, §48 provides that the Commissioner "shall establish and maintain education, training and employment programs for persons committed to the custody of the department." These programs "may be made available within correctional facilities or, *subject to the restrictions set forth in sections forty-nine and eighty-six*¹, at other places approved by the commissioner." (emphasis added). G. L. c. 127, §49 in turn places numerous restrictions on DOC's ability to allow inmates to attend education, training and employment programs outside of its facilities. First, only inmates eligible for parole within 18 months may be considered for programs outside DOC facilities. Second, inmates convicted of certain crimes are excluded from such programs or face additional limits on their ability to be considered. Third, "[b]efore any inmate may be considered for participation in education, training, or employment programs established under section forty-eight outside a correctional facility, or in any other program outside a correctional facility exclusive of parole, he shall first demonstrate that he is responsible and deserving of these opportunities." Fourth, the rules and regulations adopted by DOC to implement programs outside of DOC facilities "shall include provisions for reasonable

¹ G. L. c. 127, § 86F applies to county sheriffs, and is therefore not applicable to this motion.

periods of confinement *to particular correctional facilities* before the committed offender may be permitted to participate.” (emphasis added) DOC has rationally interpreted this provision to require confinement at a minimum security or pre-release facility before being considered for programs outside DOC facilities.

All of these restrictions make clear that the Legislature did not intend for G. L. c. 127, §§ 48, 49, and 49A to serve as a vehicle for significantly reducing the Commonwealth’s prison population as a response to a public health crisis.² That being said, the SJC made clear in *Foster I* that DOC has some responsibility to explore various alternatives for reducing the prison population during the pandemic. *See* 484 Mass. at 733 (“specific measures the defendants might choose to reduce the number of incarcerated individuals in DOC custody are not as important as the goal of reduction...”). The Court interprets this language in *Foster I* as requiring DOC to make good-faith efforts to explore various options for reducing the inmate population, including but not limited to home confinement in conjunction with participation in education, training and employment programs outside DOC facilities. Therefore, on or before January 8, 2021, DOC shall submit a further status report to this Court on its efforts to create a home confinement program.

Conclusion and Order

² DOC reports that only around 25 inmates currently qualify for education, employment, and training programs outside of prison under DOC’s rules and regulations implementing G. L. c. 127, §§ 48, 49, and 49A. *See* Status Report at 4. Even if DOC were to expand its criteria, for example, considering some inmates at medium security facilities with high vulnerability to COVID-19, the number of inmates released to home confinement would almost certainly be a small fraction of the overall reduction in inmates in DOC custody that has occurred during the pandemic, a decrease in total inmate population of 978 inmates from 7,642 to 6,664 inmates, between April 5, 2020 and December 16, 2020.

Plaintiffs' Emergency Motion to Require Defendant Mici to Establish a Home Confinement Program (Docket # 70) is **DENIED**. On or before January 8, 2021, the Department of Correction shall submit a further status report to this Court on its efforts to create a home confinement program.³

Dated: December 18, 2020



Robert L. Ullmann
Justice of the Superior Court

³ This Court has considered the December 17, 2020 letter of plaintiffs' counsel and the December 14, 2020 decision of the SJC cited therein, *Commonwealth v Nash*, SJC-12976, and *Commonwealth v. Elibert*, SJC-12990. The decision addresses how judges should handle motions for a stay of execution of sentence in light of COVID-19. It does not support the relief requested by plaintiffs in the pending motion.