



May a Magistrate Impose Conditions on a Defendant's Conduct While in Pretrial Detention?

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Date : November 13, 2017

This question in the title of this post came up in a recent class. The specific context involved a domestic violence defendant who was in jail waiting for a judge to set conditions of release pursuant to the 48 hour rule established in G.S. 15A-534.1. But a similar issue arises whenever a magistrate sets conditions of release for a defendant who is unable to make bond and so remains in pretrial detention. An example of a common condition is that the defendant not contact the alleged victim.

[Update: The court of appeals ruled in [State v. Mitchell](#) (June 5, 2018), that a no-contact provision of a release order was "not conditioned on defendant's release or commitment [and] was required as long as the Order was in effect," including while the defendant was in pretrial detention. That condition formed the basis of a felony charge of stalking in violation of a court order. *Mitchell* is contrary to the analysis below and, unless reversed, is the law. Shea Denning posted about *Mitchell* [here](#).]

I don't think that a magistrate is authorized to impose such a condition on an incarcerated defendant. No statute expressly allows a magistrate to impose conditions of detention on a defendant, whether during the period of time that a domestic violence defendant is waiting to appear before a judge for a bond hearing or during the period of time that a defendant has failed to satisfy financial or other conditions of his or her release. To the contrary, the various bond statutes consistently refer to the authority of various judicial officials to impose "conditions of pretrial release." G.S. 15A-534(a) (a judicial official may limit a defendant's travel, associations, conduct, etc., "as conditions of pretrial release"); G.S. 15A-534.1 (providing that in domestic violence cases, the "conditions of pretrial release" shall be set by a judge, unless one is not available within 48 hours, and listing various "conditions on pretrial release" that a judge may impose).

So long as a defendant remains in custody, any conditions of release would not apply. *See State v. Orlik*, 595 N.W.2d 468 (Wisc. Ct. App. 1999) (ruling that conditions of release set by a judicial official do not apply to a defendant who has not been released: "[T]he phrase 'conditions of release' . . . is used consistently and repeatedly in the [relevant statutes]. . . . We conclude the only reasonable interpretation of this language is that the conditions the court is authorized to impose . . . are conditions that govern the release of the defendant from custody. The court may impose monetary conditions the defendant must meet before release and other conditions the defendant must meet when the defendant is released, but the statute does not suggest that the court has authority to enter orders governing the defendant's conduct if he is not released because he cannot post bail."); *State v. Ashley*, 632 A.2d 1368 (Vt. 1993) (reversing a pretrial detainee's conviction for violating a condition of release that prohibited him from contacting certain persons; the state could not establish "defendant's guilt on the charge of violation of a condition of his release when, in fact, he was still in custody at the time the alleged violation occurred"). *Cf. State v. Romero*, 687 P.2d 96 (N.M. Ct. App. 1984) (rejecting the state's argument that a defendant violated a pretrial release condition limiting him to a specific county when he was transported to another county during his pretrial detention, and stating that "[i]nasmuch as defendant was in custody at all pertinent times, the conditions of release are not applicable"). *But see State v. Gandhi*, 989 A.2d 256 (N.J. 2010) (where a defendant argued that "he never violated [a judicial no-contact order] because the no-contact provision was a condition of bail and [he] was never released on bail," the court found that "[t]he no-contact orders in defendant's bail orders did not lose their character as judicial no-contact orders merely because bail

consequences could attach for their violation. As judicial no-contact orders, defendant was obligated to strictly comply with them.”). A discussion of this issue may be found in the [relevant section](#) of the Defender Manual.

Of course, the relevant statutes could be amended to give the necessary authority to magistrates. That’s what happened in Vermont, where the *Ashley* case cited above has since been effectively reversed by a statutory amendment. The law now provides that no-contact orders imposed as part of conditions of release “take effect immediately, regardless of whether the defendant is incarcerated or released.” 13 V.S.A. § 7554(a)(3). See *State v. Tavis*, 978 A.2d 465 (Vt. 2009) (explaining that the statutory change was prompted by *Ashley*).

Perhaps one could argue that a magistrate has some inherent authority to regulate the behavior of a defendant in pretrial custody. I am not aware of authority for or against such an argument, but in light of the detailed statutes regarding pretrial release and related matters, it strikes me as a stretch. While judges perhaps have greater inherent authority than magistrates, the same basic analysis would appear to apply to judges as well.

Of course, none of this means that a defendant is free to contact an alleged victim without repercussions. Many jails have policies and procedures in place that limit inmates’ ability to call victims of or witnesses to their alleged offenses. And, depending on the content of the communication, the defendant may violate the laws against communicating threats, harassing phone calls, stalking, obstruction of justice, or witness intimidation by contacting a person involved in the defendant’s case. Finally, if threatening or otherwise inappropriate contact between the defendant and the alleged victim is brought to the attention of the judicial official who eventually sets, or has authority to modify, the defendant’s conditions of release, the conduct could support more restrictive conditions of release because it would suggest a greater safety concern.

It would be fair for a magistrate or other judicial official committing the defendant to jail or setting conditions of release to inform the defendant of these possible ramifications of the defendant’s conduct. But as far as ordering the defendant not to contact the alleged victim or otherwise restricting the defendant’s conduct while in pretrial detention, I don’t see the authority for that.