

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

SJC-13034

JAHİ MALARY vs. COMMONWEALTH.

January 22, 2021.

Supreme Judicial Court, Superintendence of inferior courts.
Practice, Criminal, Motion to suppress, Continuance.

The petitioner, Jahi Malary, appeals from a judgment of a single justice of this court denying his petition pursuant to G. L. c. 211, § 3. In the petition, he sought relief from a Superior Court judge's order denying his motion to continue the third day of an evidentiary suppression hearing that began in November 2019. We affirm.

In August and September 2018, Malary was indicted on several charges, including trafficking a person for sexual servitude, in violation of G. L. c. 265, § 50 (a), and deriving support from prostitution, in violation of G. L. c. 272, § 7. He pleaded not guilty and was released on bail with certain conditions. In September 2019, he filed a motion to suppress, and the first day of an evidentiary hearing on the motion was held in November 2019. The second day of the hearing was held on February 12, 2020. A third day was scheduled for February 26, 2020, but was continued at the Commonwealth's request. According to the Commonwealth, the hearing was scheduled to resume on March 18, 2020. Due to the COVID-19 pandemic, the hearing did not take place and was later rescheduled for July 29, 2020.

On July 23, 2020, a judge in the Superior Court ordered Malary to choose between proceeding on July 29 in person or via video conference. The following day, Malary filed an "objection to conducting an evidentiary hearing by video conference or an

in-person evidentiary hearing," in which he argued against both options. An in-person hearing could not safely be held because, in his view, the Trial Court's existing protocols to safeguard against COVID-19 were inadequate. A video conference, on the other hand, was also unacceptable because, again in his view, it would violate various of his constitutional rights. The judge continued the July 29 hearing date and rescheduled it for September 15. At a video status conference on September 8, Malary continued to object to proceeding with the third day of the suppression hearing either in person or via video conference and requested a continuance until such time as the risks of appearing in person were, in his view, reduced.¹

In an order issued on September 15, the judge denied Malary's request to continue the third day of the hearing indefinitely, ordered that the hearing take place in October, and ordered Malary to choose whether to appear in person or via video conference. The judge also gave Malary the choice of two different court houses if he chose to appear in person or, if he chose to appear via video conference, the choice whether to be in the same physical location as his counsel. Malary thereafter filed, in the Superior Court, a motion for further relief, in which he argued that he could not choose whether to appear in person or via video conference without additional information related to the Trial Court's COVID-19 safety protocols.² The judge denied the motion. In doing so, she noted that the Trial Court had already made significant information regarding its safety protocols publicly available.

Malary then filed his G. L. c. 211, § 3, petition in the county court, in which he argued that the Trial Court has failed to provide adequate safety protocols and has failed to provide transparent information about the steps taken to evaluate the risks of appearing in person in a court house. He also argued that "compelling" him to submit to a video conference would

¹ The Commonwealth was amenable to moving forward with the suppression hearing either in person or via video conference.

² Malary sought information related to, among other things, "the current Minimum Efficiency Reporting Values . . . ratings for recirculated air levels;" the "cubic feet per minute . . . for outside air pumped into the courtrooms;" and "the percentage of air that is 'return' v. 'make-up.'" He also requested "reports or opinions of medical experts retained or consulted by the Trial Court regarding the risk of Covid-19 transmission at in-person court proceedings."

violate several of his constitutional rights, including his right to be present "in the courtroom;" his right to confront witnesses against him; and his right to effective assistance of counsel. In the petition, Malary asked the court to reverse the judge's order directing him to choose between appearing in person or via video conference and to allow Malary's motion to stay the proceedings. The single justice denied the petition without a hearing on the basis that there was no claim of a violation of a substantive right and no extraordinary circumstance that warranted the exercise of this court's authority pursuant to G. L. c. 211, § 3.

The case is now before us pursuant to S.J.C. Rule 2:21, as amended, 434 Mass. 1301 (2001), which requires a showing that "review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means." S.J.C. Rule 2:21 (2). It is questionable whether Malary can make such a showing. He argues that he does not have an adequate appellate remedy because if he appears in person for the suppression hearing, the issue whether the hearing was conducted safely, particularly if Malary contracts COVID-19, will be moot after a trial. Additionally, in his view, if he is compelled to choose between appearing in person and appearing via video conference, a postjudgment appeal will not provide an adequate appellate remedy because "the basis for raising [the] issues will not be properly analyzed . . . during the actual motion to suppress hearing."³

³ In his memorandum filed pursuant to rule 2:21, Malary focuses primarily on issues related to appearing in person for the suppression hearing. As to issues related to holding an evidentiary suppression hearing via video conference, he "adopts" the arguments made by the defendant in Vazquez Diaz vs. Commonwealth, SJC-13009, which is currently pending before this court. Relying on arguments made by a party in a case wholly separate from his own does not amount to adequate appellate argument. In any event, the issues raised in the Vazquez Diaz case, which involve whether, in the context of the COVID-19 pandemic, the constitutional considerations attendant to a suppression hearing may be satisfied by a hearing via video conference, are not what is at issue here. In the Vazquez Diaz case, a Superior Court judge ordered that the evidentiary suppression hearing take place via video conference. Here, Malary was given a choice, albeit one which he has not yet made.

Malary's request for relief from this court is premature. His arguments themselves emphasize the point. Even assuming for the sake of discussion that, if he chooses one forum or the other, the related issues would later be moot, Malary has not in fact made any choice. His arguments about what rights might be violated if he chooses one forum or the other are, at this stage, conjectural. The simple act of the judge ordering Malary to choose a forum for the suppression hearing was not a violation of Malary's rights. The order did not, for example, bear on any substantive issue or right at stake in the proceedings or prevent the case from proceeding in a particular way. Cf. Commonwealth v. Dilworth, 485 Mass. 1001, 1003 (2020) (single justice did not err in denying Commonwealth's G. L. c. 211, § 3, petition seeking relief from trial court judge's interlocutory discovery ruling; preliminary ruling requiring Commonwealth to provide discovery did not foreclose Commonwealth's ability to prosecute or have any detrimental effect on prosecution). Malary is not being forced to appear in person or being forced to appear via video conference; he is simply being directed to make a choice.

The only issue before the single justice was whether that directive to Malary, to make a choice, was sufficiently important and extraordinary as to warrant the exercise of this court's extraordinary power pursuant to G. L. c. 211, § 3. On that point, the single justice permissibly decided that it was not. He did not err or abuse his discretion in doing so. If and when Malary is ordered to appear either in person or by video, he can assert whatever substantive challenges he has at that time.

Judgment affirmed.

The case was submitted on the papers filed, accompanied by a memorandum of law.

Aviva Jeruchim for the petitioner.