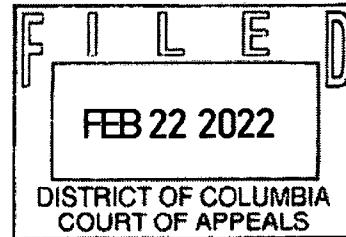


District of Columbia
Court of Appeals

No. 21-CO-707

KYWON A. DATHAM,
Appellant,

v.



2016 CF1 18087

UNITED STATES,
Appellee.

BEFORE: Glickman and Easterly, Associate Judges, and Washington, Senior Judge.

JUDGMENT

On consideration of appellant's motion for summary reversal, appellee's opposition and cross-motion for summary affirmance, and the record on appeal, it is

ORDERED that appellant's motion for summary reversal is denied. *See Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013) (citing *Oliver T. Carr Mgmt., Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979)). It is

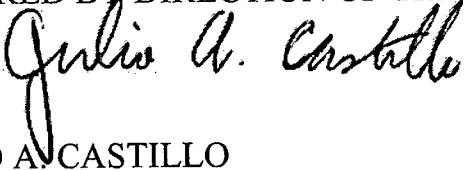
FURTHER ORDERED that appellee's cross-motion for summary affirmance is granted. *See id.* Contrary to appellant's argument, the trial court did not abuse its discretion when it denied compassionate release finding that appellant failed to meet his burden that he was either eligible under the statute or was not dangerous. On the issue of eligibility, appellant failed to present substantiated, specific evidence from which the trial court could reasonably conclude, by a preponderance of the evidence, that he suffered from a condition that made him acutely vulnerable to severe illness or death from COVID-19 or that after being vaccinated, he had any condition that would make the vaccine less effective. *See Page v. United States*, 254 A.3d 1129 (D.C. 2021) (stating trial courts have "discretion to consider any reasonable factor that directly impacts on the determination of whether an applicant is at risk of severe illness or death from COVID-19[,] including vaccination status); *see also Autrey v. United States*, 264 A.3d 653, 659 (D.C. 2021) ("[I]t is the prisoner's burden to demonstrate some acute vulnerability to severe illness or death from COVID-19 . . . , not the government's burden to disprove it, and not the trial court's obligation to independently research the matter.").

No. 21-CO-707

Further, in reviewing the trial court's dangerous finding, we conclude that the trial court did not abuse its discretion in denying appellant's motion for compassionate release because he failed to meet his burden that he no longer posed a danger if released. *See Griffin v. United States*, 251 A.3d 722, 723 (D.C. 2021) (applying abuse of discretion with regard to compassionate release appeals); *Bailey v. United States*, 251 A.3d 724 (D.C. 2021) (holding that a compassionate release movant bears the burden of proving non-dangerousness by a preponderance of the evidence). The record demonstrates the trial court acknowledged the recent positive developments in appellant's behavior and programming record, but concluded that such favorable evidence did not outweigh the serious and violent nature of the underlying crimes, his prior convictions, and his disciplinary record. To the extent that appellant challenges how the trial court weighed the factors, this decision falls within the court's discretion and appellant fails to identify a factor that was not considered. *See Johnson v. United States*, 398 A.2d 354, 363-67 (D.C. 1979) ("The court reviewing the decision for an abuse of discretion must determine 'whether . . . the reasons given reasonably support the conclusion.'"). The record makes clear the trial court viewed the factors through the lens of appellant's current dangerousness as required by *Bailey v. United States*, 251 A.3d 724 (D.C. 2021). It is

FURTHER ORDERED and ADJUDGED that the order on appeal is affirmed.

ENTERED BY DIRECTION OF THE COURT:


JULIO A. CASTILLO
Clerk of the Court

Copies e-served to:

Honorable Lynn Leibovitz
Director, Criminal Division

Chrisellen R. Kolb, Esquire
Assistant United States Attorney
Thomas Healy, Esquire

cml

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY
BRANCH

UNITED STATES

Case No.: 2016-CF1-018087

v.

KYWON A. DATHAM

Judge Lynn Leibovitz

ORDER

Before the court is Defendant's *pro se* motion for compassionate release, filed on June 4, 2021, defendant's Amended Motion for Compassionate Release, filed August 2, 2021, the government's Opposition to the motion, and the defendant's Reply. For the following reasons, the court will deny defendant's motion.

PROCEDURAL HISTORY

On February 23, 2017, the Defendant pleaded guilty to one count of attempted first-degree sexual abuse, one count of assault with a dangerous weapon, one count of kidnapping, one count of obstruction of justice, and one count of failure to register as a sex offender. The Defendant was sentenced on September 1, 2017, to a total of 156 months (13 years) in prison.

On July 9, 2018, defendant filed a *pro se* Motion for Modification of Sentence, requesting that a sentencing condition be removed. The court denied the motion and a motion for reconsideration, and the District of Columbia Court of Appeals reversed, *Kywon Datham v. United States*, 18-CO-838 & 18-CO-996, slip op. (D.C. December 12, 2018), ordering that the Judgment and Commitment Order be amended to correct a clerical error. Defendant's sentence was amended pursuant to the Order on remand on January 18, 2019. The length of sentence remained the same.

On January 4, 2019, defendant filed a *pro se* Motion to Withdraw Guilty Plea. The court denied the motion on March 6, 2019. The denial of defendant's Motion to Withdraw was affirmed on February 18, 2020. *Kywon Datham v. United States*, 19 CO 316, *Jm't*, (D.C. February 18, 2020).

In the instant motion, defendant requests that he be granted compassionate release in light of the COVID-19 health emergency, pursuant to D.C. Code § 24-403.04. He also seeks reduction of his sentence pursuant to Rule 35(b).

ANALYSIS

Compassionate Release:

Pursuant to D.C. Code § 24-403.04, notwithstanding any other provision of law, the court "shall modify a term of imprisonment imposed upon a defendant if it determines the defendant is not a danger to the safety of any other person or the community pursuant to the factors to be considered in 18 U.S.C. §§ 3142(g) and 3553(a) and evidence of the defendant's rehabilitation while incarcerated," and "(1) The defendant has a terminal illness, which means a disease or condition with an end-of-life trajectory; (2) The defendant is 60 years of age or older and has served at least 20 years in prison; or (3) Other extraordinary and compelling reasons warrant such a modification." D.C. Code § 24-403.04(a)(1)-(3). Other "extraordinary and compelling reasons" warranting a sentence modification include:

- (A) A debilitating medical condition involving an incurable illness, or a debilitating injury from which the defendant will not recover;
- (B) Elderly age, defined as a defendant who:
 - (i) Is 60 years of age or older;
 - (ii) Has served the lesser of 15 years or 75% of the defendant's sentence; and

(iii) Suffers from a chronic or serious medical condition related to the aging process or that causes an acute vulnerability to severe medical complications or death as a result of COVID-19;

(C) Death or incapacitation of the family member caregiver of the defendant's children; or

(D) Incapacitation of a spouse or a domestic partner when the defendant would be the only available caregiver for the spouse or domestic partner.

D.C. Code § 24-403.04(a)(3)(A)-(D).

Defendant claims in support of his Motion that he has asthma, which makes him vulnerable to COVID-19 and establishes an extraordinary and compelling reason for release within the meaning of the Compassionate Release Statute. Defendant further cites illness of his mother and her need for care as a separate extraordinary and compelling reason for release.

Defendant was 27 at the time of the offenses and now is 32 years old. He has served almost 5 years, or approximately 40%, of his 13-year sentence. He states that he is rehabilitated and able to re-enter society safely.

The government opposes defendant's Motion, arguing that defendant has not articulated health conditions establishing an extraordinary and compelling reason for release, and that his claim regarding his mother's health conditions also does not separately establish an extraordinary and compelling reason for release. The government further argues that, even if the defendant has established an extraordinary and compelling reason for release, the defendant has not met his burden to show that a reduction in sentence is warranted in light of the danger he would pose to the victim and to the community. The victim of defendant's offenses has submitted a letter in which she states that she is strongly opposed to defendant's release. G. Ex. F.

Applying the provisions of the Compassionate Release statute, including the statutory factors set forth in 18 U.S.C. §§ 3142(g) and 3553(a), the court concludes that defendant has not

met his burden to establish an extraordinary and compelling reason for release, or presented sufficient evidence, including evidence of rehabilitation, to establish that he is no longer a danger to the safety of any person or the community.

Health

Defendant is 32 years old and has served approximately 5 years, or 40%, of his 13-year sentence. Defendant argues that he has suffered from asthma for life. He referenced his condition in his interview with the Pre-Sentence writer in this case. The government argues that none of defendant's BOP medical records state any diagnosis of asthma or any prescription of an inhaler.

D. Ex. 3. The government is correct. There is a reference to asthma and inhaler in defendant's Custody Classification Form but, as the government notes, it is unclear whether this is a notation resulting from self-reporting rather than from examination or diagnosis by any medical professional. "Moderate to severe asthma" is on the list of conditions that the CDC reports may lead persons to be at increased risk as the result of COVID. G. Opp at 17.

Defendant's inmate profile reflects that BOP has classified him as Care Level One, meaning "stable or chronic care," the healthiest designation in BOP's four-level classification system. D. Ex. 8.

The government further argues that, assuming and notwithstanding a diagnosis of asthma, because defendant has received both doses of the Pfizer vaccine, he is not able to establish extraordinary and compelling reasons for release based on his health condition.

Defendant is fully vaccinated. Defendant received his first dose of the Pfizer vaccine on March 11, 2021, and his second dose on March 29, 2021. Def. Ex. 5. These facts do not exclude him from eligibility for consideration under the Compassionate Release statute. The court agrees with authority that suggests that an individualized determination of risk of infection and severe

effects therefrom, to the extent that this risk can be assessed, is proper. *Cf. United States v. Brown*, 2020 WL 7401617, at *7 (E.D. Wis. Dec. 17, 2020) (determination should be individualized and include “consideration of the prisoner’s specific medical problems and their severity, . . . and the conditions at his particular facility”).

The defendant has been tested numerous times for the virus and tested negative, and has been quarantined numerous times. D. Am. Mot. His facility thus is responsive to the risks that inmates might contract the virus. Although the court cannot find that defendant will not contract COVID or that he will not experience serious effects of the illness if he does contract it, on the current record, including CDC and other guidance regarding the efficacy of vaccines, particularly the Pfizer vaccine, the court concludes that it is very unlikely that defendant will contract COVID or that he will experience serious effects if he does contract the virus, or a variant. The defendant is a relatively healthy 32-year old. The court concludes, for all of these reasons, that defendant has not established an extraordinary and compelling reason for release.

Defendant further states that his mother is ill and that she needs more support in the community. She would like him to come home. Although the government argues that there is no documentation of defendant’s mother’s illness, Defendant did attach a letter from his mother and records of testing to his Reply. D. Ex. 13, 14. In her letter, defendant’s mother asserts that she has heart problems. The attached medical record is of an MRI of the lumbar spine reflecting a “hemangioma,” a benign tumor within the spine, and no other significant abnormalities. These exhibits do not describe incapacitating illness or need for a full-time caregiver. Moreover, defendant states that his sister calls and looks in on his mother, and has other sisters as well. He thus is not the only caregiver available to his mother. His mother also is not the sole caretaker of his children.

The court concludes that defendant therefore has not established an extraordinary and compelling reason for release pursuant to D.C. Code § 24-403.04(a)(3)(C) or (D). To the extent that defendant argues that his mother's circumstances establish a catch-all extraordinary and compelling reason for release, the court concludes that they do not.

Safety

Even if defendant has, *arguendo*, established an extraordinary and compelling reason for release, the court concludes that defendant has not met his burden to show that he is no longer a danger to the safety of any other person or the community. For purposes of considering whether the defendant is "not a danger to the safety of any other person or the community, pursuant to the factors to be considered in 18 U.S.C. §§ 3142(g) & 3553(a)," D.C. Code § 24-403.04, the court notes the synopsis of facts of this incident, as stated in defendant's plea proffer:

Had this case gone to trial, the Government's evidence would have shown beyond a reasonable doubt that the defendant, who is the father of complainant K.D.'s young child, agreed to give her [K.D.] a ride to retrieve an item around 8:30 p.m. on October 30, 2016. The complainant had recently ended her romantic relationship with the defendant and moved out of their shared residence. The defendant picked up the complainant, their child-in-common, and the complainant's male friend in a vehicle within the District of Columbia. After dropping off the boyfriend at the NoMa Metro Station in Washington, D.C., the defendant told the complainant that he was going to take her back to their previously-shared residence at 2666 Sheridan Road, SE, Washington, D.C. The complainant protested, and they began to argue, during which the defendant struck the complainant in the face. The defendant also told the complainant that unless she jumped out of the car, he was going to take her to their former shared residence at 2666 Sheridan Road, SE, Washington, D.C. The defendant said that the complainant would not be permitted to take their child with her.

The defendant then took the complainant and their child-in-common to 2666 Sheridan Road, SE, Washington, D.C. The defendant gave the child to a third party. The defendant tried to convince the complainant to resume their romantic relationship. The defendant then started kissing the complainant. The complainant told the defendant "no" several times, but she finally gave up and submitted. Once undressed, the defendant penetrated the complainant's vagina with his penis against her will. On October 31, 2016 at approximately 9:00 a.m., the complainant promised that she would come back and live with the defendant if he allowed her to leave with their child. The defendant then allowed her to leave

with the child. The actions taken by the defendant on October 30/31, 2016 were committed willfully, on purpose, not by mistake or accident, and without legal justification or defense.

On or about April 11, 2016 at 2666 Sheridan Rd. SE, Washington, D.C., the defendant bound the wrists of the complainant without her consent and beat her with an electrical cord about the back without her consent. As a result, the complainant had welts across her right shoulder and the small of her back. When the defendant struck K.D. with the electrical cord, he did so willfully, on purpose, not by mistake or accident, and without legal justification or defense.

On June 13, 2008, the defendant was convicted of Sex Offense 4th Degree in Anne Arundel County, Maryland in District Court for Anne Arundel County case 4A00188227. The defendant was sentenced to one year of confinement, of which three months was suspended, seven months and six days of supervised probation, and a \$1,000 fine, which was suspended. The defendant registered with the D.C. Sex Offender Registry on September 25, 2014, October 5, 2015, and October 5, 2016. Each time, he provided an address of 1723 Lang Place, NE, Washington, D.C. In approximately August or September 2015, the defendant moved from that address to 2666 Sheridan Road, SE, Washington, D.C. and continued to keep 2666 Sheridan Road, SE, Washington, D.C. as his residence, but never updated his registration with the D.C. Sex Offender Registry. The defendant willfully, voluntarily, and not by mistake or accident failed to update his change of residence within three days from 1723 Lang Place, NE, Washington, D.C. to 2666 Sheridan Road, SE, Washington, D.C. with the D.C. Sex Offender Registry.

At some point between November 5, 2016 and November 23, 2016, the defendant wrote a letter and mailed it via the U.S. Postal Service to his mother, Toni Datham, from the D.C. Jail located at 901 D Street, SE, Washington, D.C. In that letter, which was addressed to "Mom and Family," the defendant wrote:

... make her an offer not now wait like a week and a half tell her we can give her \$10,000 if she tell them she was lying[.] Yes[,] Mom[,] \$10,000. That[']s Ten Thousand dollars in cash. Please don't worry[,] I can give you like \$5,000 back from my tax money. I don't care if she take my stuff[,] just leave that alone if she want it let her have it. They talkin [sic] about 30 to 60 years with the new shit she said. Please just pay her but only if she go back in front of the grand jury with you and tell them everything was a lye [sic] lie.

The money described in the letter was to be paid by Ms. Datham to the complainant, K.D., which was established clearly in other portions of the letter. The defendant sent multiple letters of this nature to Ms. Datham as well as to the mother of the defendant's other child.

Proffer of Facts at 1-2. Defendant was age 27 at the time of these offenses. His victim was the mother of defendant's child. Defendant's offense conduct spanned a number of dates in 2016. He admitted to kidnapping and attempted first degree sexual abuse on October 16, 2016, assault with a dangerous weapon, an electrical cord, on April 11, 2016, later to failing to register as a sex offender after he moved in September 2016, and to obstructing justice in November 2016, when he sent his mother a letter instructing her to pay the victim to recant her testimony before the grand jury. Portions of the October 16, 2016, offense were committed in the presence of the defendant and victim's child in common.

Defendant is classified within the BOP as a high risk of recidivism and has a medium security classification. D. Ex. 9, Inmate Profile.

Defendant had a significant criminal record at the time of the instant offenses. *See* PSR, D. Ex. 1. In 2008, defendant was convicted of a fourth-degree sex offense in Maryland and required to register as a sex offender. In 2009, defendant was convicted of failing to register as a sex offender. In 2014, defendant was convicted of a domestic simple assault for beating a woman who is not the victim in this case, in Superior Court Case No. 13 DVM 2128. In each case defendant was placed on a period of probation and completed supervision without incident. He was not on supervision at the time of these offenses.

Defendant's disciplinary record while in the BOP has resulted in three citations for 100 level offenses. The defendant incurred two citations in 2018, one for possession of a weapon, a five and a half inch homemade knife found on his person, and one for "mail abuse," which arose from defendant's letters to his son and to the victim of this offense in violation of no-contact orders. *See* G. Ex. C. In 2020, defendant incurred another infraction for possession of a weapon, another

sharp object of seven and a half inches, which he claimed was possessed by his cellmate but admitted to his hearing officer was his.

Defendant's 2018 letter to the victim in this case is an attachment to the Government's opposition. *See G. Ex. C.* Defendant's letter, sent in or around January 2018, included abusive and threatening language. Defendant stated, apparently in response to a photograph he stated the victim posted on social media, "you know you wanted me to do them things to you[,] you asked me to rape you and tie you up and beat you with the belt, I have a video with you saying please beat me, please rape daddy and asking me to tie you up. I will send copy's of the pictures and videos or I could just post them like you." *Id.* He added, "P.S., write me back. Nobody can stop me I'm all the way up but you can ask me too."

Defendant's programming record in the BOP has strengths and weaknesses. Defendant obtained his GED while in the BOP, to his credit, after dropping out of high school in the 9th grade. Defendant's other educational programs were directed, rightly, at his anger and interpersonal challenges, and included anger management, secrets of self-control, parenting, victim impact panel, AIDS awareness and a cholesterol class. Defendant took a non-residential drug treatment program. Defendant has not, however, participated in any programming directed at vocational skills or that would aid him in attaining employment upon release.

Defendant acknowledges that he was diagnosed prior to the instant offenses with depression and "intermittent explosive disorder." Amended Motion at 3. He attempted suicide only two weeks before committing the kidnapping and sexual assault against the victim in this case. In the DC Jail in 2016, defendant was diagnosed with "mood-disorder-manic type." Defendant has participated in BOP mental health programming and psychological services, including two group therapy programs in 2019. His participation in those programs was described

as “good,” which was the best rating possible in those programs. His records state that his Adjustment Disorder with Depression was resolved in 2018. D. Ex. 3. Defendant’s serious disciplinary infractions have occurred in the period during and after defendant was receiving mental health services and when at least some of his mental health challenges were deemed to have been resolved.

Defendant worked consistently when in the community and has worked in a dining related assignment while in the BOP. Although a work history generally is one indicator of potential for successful reentry into the community, Defendant’s reentry plan is thin. He states he wants to live with his ailing mother. He plans to work at Tony’s Breakfast, a place where he worked prior to this offense. Otherwise, defendant has not articulated a detailed plan.

Defendant has served less than half of his sentence. He has a recent, serious disciplinary history, and a history of very serious domestic abuse of the victim in this case, which he continued by sending a letter with abusive and threatening language from prison in 2018, in violation of this Court’s sentencing order. Defendant committed a portion of the offense against the victim when the child in common was present. He had a serious criminal history before these offenses, which included a prior sex offense and a prior failure to register as a sex offender. The defendant also had a domestic violence conviction for assaulting another woman who is not the victim in this case. Defendant, in his *pro se* motion, represented that the victim would not oppose his motion. In fact, the victim has stated that she is terrified of the defendant, and fears that if he is released he will “hunt me down,” and harm her or her son. G. Ex. F. The court finds that defendant continues to represent a very specific and high risk of harm to the victim and the child in common, and also to the community.

For all of these reasons, the court concludes that the defendant has not met his burden to establish that there is an “extraordinary and compelling reason” to grant release, or that he is no longer a danger to the safety of any person or the community.

Rule 35(b):

Defendant also seeks a reduction of sentence pursuant to Crim. R. 35(b). The government objects and argues that defendant’s motion is untimely, as it was filed more than 120 days after the sentence was imposed. More generally, the government opposes defendant’s request for reduction of sentence.

Because the government objects to the untimely filing, the court concludes that it must reject defendant’s Rule 35(b) motion. *See Deloatch v. Sessoms-Deloatch*, ___ A.3d __; 2020 WL 3295312 (D.C. June 18, 2020); *Smith v. United States*, 984 A.2d 196, 201 (D.C. 2009). However, the court alternatively will address the merits of defendant’s motion.

Considering the merits of defendant’s Rule 35(b) motion, the court concludes for the reasons stated above that defendant’s sentence was fair and appropriate and remains so, and that the requested reduction is not warranted.

For all of the reasons stated, the court will deny defendant’s motion.

Accordingly, it is this 5th day of October, 2021, hereby

ORDERED that defendant’s Motion for Compassionate Release is **DENIED**.



Lynn Leibovitz
Associate Judge
(Signed in chambers)

cc:

Grace Richards
Assistant United States Attorney
Special Proceedings Division
Grace.richards@usdoj.gov
Counsel for the Government

Michelle Stevens
michellestevenslaw@gmail.com
Counsel for Defendant