

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Mitchell, 2012 ONCA 804

DATE: 20121120

DOCKET: M41861

Weiler J.A. (In Chambers)

BETWEEN

Her Majesty the Queen

Respondent

and

Stacey Mitchell

Applicant

Erin Dann, for the applicant

Chris Dwornikiewicz, for the respondent

Heard: November 16, 2012

On a motion for an extension of time to file a notice of appeal from the finding of not criminally responsible on account of mental disorder on January 23, 2009 by Justice Richard D. Schneider, of the Ontario Court of Justice.

Weiler J.A. (in chambers):

[1] The applicant pled guilty to one count of uttering a threat to cause death, one count of weapons dangerous, two counts of mischief under \$5000, one count of theft under \$5000, and four counts of failing to comply with the conditions of her recognizance. On January 23, 2009, on consent, the applicant

was found not criminally responsible on account of mental disorder (NCRMD). She now seeks an extension of time to appeal this verdict.

[2] Despite the lapse of time of almost four years, an applicant is not barred from challenging a NCRMD finding. That said, finality concerns and the concern of the court that the mental disorder provisions of the Criminal Code operate effectively require a court to look closely at an application that would give the applicant the opportunity to resile by way of appeal from the NCRMD verdict. See *R. v. Guidolin*, [2011] 280 O.A.C. 387, at para. 11.

[3] Before granting an extension of time, the court will consider: 1) whether the applicant had a *bona fide* intention to appeal within the prescribed appeal period; 2) the applicant's explanation for the delay; and 3) the merits of the proposed appeal. Depending on the circumstances, other factors will include: whether the consequences of conviction are disproportionate to the penalty imposed; prejudice to the Crown; and whether the applicant has taken the benefit of the judgment. See: *R. v. Price*, 2010 ONCA 541, at paras. 19 and 20; *R. v. Menear* [2002] 162 C.C.C.(3d) 233. The list of factors is not closed. Other factors that inform the decision are the position of the defence at trial, whether the proceedings were consensual in nature and, more generally, whether the proceedings appeared to be fair and whether they were fair: *R. v. Closs* [1998] O.J. No. 172 (C.A.); *R. v. Kankis* [2012] 281 C.C.C. (3d) 113 at paras 37-38.

Overall, the court must consider whether the justice of the case requires that an extension of time be granted.

[4] I must now apply these considerations to this case. The applicant concedes that she did not form an intention to appeal within the 30 day appeal period. Her explanation for the delay is that she consented to the verdict because she knew she would be going to a hospital for treatment and not to jail. She says that she only learned about her ability to appeal the NCRMD verdict after speaking with a fellow patient at CAMH in April, 2012.

[5] While I do not doubt the sincerity of the applicant's belief respecting when she learned she could appeal the verdict, ineffective assistance of counsel is not alleged. Thus, at the time she was sentenced, the applicant who was fit to stand trial and who was represented by counsel, whom it is agreed is competent and experienced, agreed that she was NCRMD. She has been receiving treatment since that time. This same counsel also represented the applicant at all but one subsequent Ontario Review Board Hearings. The applicant does not say that she told this counsel at any time that the disposition made at trial was wrong.

[6] The respondent submits that the present application is more consistent with the applicant becoming frustrated at continuing to remain under the jurisdiction of the Ontario Review Board (ORB) and the fact that, at her most recent ORB hearing, the applicant was ordered to return to detention. I agree

with this submission. Overall, the applicant has not adequately explained the delay in initiating the appeal.

[7] That said, mental illness can present a hurdle to initiating legal proceedings that the average person does not have. The applicant's age at the time, 19, and her relative lack of familiarity with the criminal justice system are also factors to consider. Further, unlike the finite sentence that would have been ordered had the applicant been found criminally responsible, the NCRMD disposition does not have a specific time frame. If an error was made in the NCRMD disposition, the applicant continues to live that error by being subject to the ORB's jurisdiction. As a result, lack of an explanation for the delay cannot be determinative.

[8] The real issue is, therefore, whether the proposed appeal has merit such that the justice of the case requires that an extension of time be granted. In this case, the proposed ground of appeal is that the verdict of NCRMD was unreasonable and should be set aside pursuant to s. 686(1)(a) of the Criminal Code.

[9] Before dealing with this argument, a brief summary of the facts pertaining to the death threat and weapons charges will be helpful. I agree with the applicant's counsel's submission that, in relation to the theft charge, there is no evidence particular to that charge to indicate that the applicant did not appreciate

the nature and quality of her act. The charges were, however, all dealt with together and she concedes that, here, the application should stand or fall on all charges.

[10] The facts in relation to the other charges are summarized in *Mitchell (Re)*, [2011] O.R.B.D. No. 2691 (Ont. Review Bd) and are as follows:

Ms. Mitchell and the victim lived in the same apartment building, and were known to one another. During the weeks prior to the offences, Ms Mitchell had bothered the victim by knocking on his door and yelling incoherently. On October 4, 2008, Ms Mitchell attended the victim's apartment with another female and knocked on his door. When he did not answer, they kicked his door, causing damage. The victim contacted police, but Ms Mitchell was not located. Two days later, Ms Mitchell attended again, and knocked on the victim's door. When he opened the door, Ms Mitchell yelled "I'm gonna kill you" as she walked away. She was holding a knife at the time. She then slashed two tires on his car. The victim contacted the authorities, and Ms Mitchell was arrested. She was released by the Court on a Recognizance with conditions. Approximately 12 hours after her release from custody, she breached the conditions of her Recognizance by going to the victim's residence. She was arrested and once again released on a Recognizance on October 21, 2008. On October 30, 2008, she breached the conditions of this second Recognizance by going to the victim's residence again, in the company of another female, and communicating with him.

[11] According to the transcript of November 19, 2008, when the victim, Steve Pinnock, realized who was at his door, he told the applicant to leave and said he was going to call the police. About five minutes later, she again knocked on his

door. He again told her he was going to call the police and did so. While he was speaking to the police, the victim lost sight of the applicant and told the dispatcher to cancel the call. A short time later, the victim went to leave his apartment when he saw the applicant standing in the lobby of his building. He went out the back door to avoid her. The transcript continues:

While Pinnock was talking to some neighbours at the back of his building, the accused approached him and sat on the stairs near him. Pinnock then walked away to the front of the building and the accused followed him there. The building superintendent was present and he also told the accused to leave. The accused would not leave the premise so Pinnock decided to go back inside. The accused tried to follow him inside but Pinnock pushed her away and closed the door.

[12] Following the applicant's plea of guilty to the charges on November 19, 2008 the Crown sought to have the applicant detained for a period not exceeding 30 days for an NCR assessment. The applicant opposed the order but, on the basis of the applicant's conduct and the fact that she had been subject to a civil commitment for mental disorder, the court held that there were reasonable grounds to believe the applicant might not be criminally responsible and ordered the assessment. It was carried out by Dr. McDonald. Largely based on his report, the court's verdict was that the applicant NCRMD. Although there is no requirement that the applicant consent to this disposition, as I have indicated, the applicant consented to the proposed disposition at the time.

[13] The applicant was committed only on the basis that she did not understand the nature and quality of her act under s. 16(1) of the *Criminal Code*. She was not committed on the basis that she did not know the act was morally wrong.

[14] The applicant's counsel concedes that Ms. Mitchell suffers from a mental disorder that likely was the driving force behind these offences. She submits that there is nevertheless no basis for a NCRMD verdict because the evidence falls short with respect to whether the applicant understood the nature and quality of her acts. She emphasizes the following statement in *Guidolin*, supra, at para. 13 by Doherty J.A. on behalf of the court: "[I]f on a generous reading of the evidence, the NCRMD finding cannot pass the reasonableness standard, the finding cannot stand regardless of the negative impact an order setting it aside may have on the appellant's treatment and the protection of the public."

[15] The applicant's counsel's submissions are focussed on alleged shortcomings in the report of Dr. McDonald. She submits that nothing in the report of Dr. McDonald suggests that the applicant didn't understand the nature and quality of her acts; the report doesn't discuss the applicant's mental status in relation to the particular offences; Dr. McDonald did a general report and a conclusory opinion without sufficient reasons.

[16] In concluding that the applicant could not appreciate the nature or quality of her actions, Dr. McDonald's report included the following specific comments:

the issue of her fitness to stand trial was not raised, but I feel obliged to indicate that it could be a matter of concern;

she has at various times indicated that she has already pled guilty to her charges, or that that she hasn't. She has indicated that she was planning to move from her residence to avoid the victim prior to her arrest, or planning to move into his residence and live with him. She stated emphatically at one point "I never get paranoid", followed by "maybe I was paranoid";

the patient varies from stating that this neighbour is not a person of great consequence to her, or that indeed he is. She further varies from describing him as infatuated with her and following her around, involved in some kind of conspiracy against her, or having no great feelings about her at all;

on one occasion after being charged with slashing the neighbour's' tires by using a knife, she reported that "they" had attacked her. Whether she meant literally the tires or someone else was unclear and remains so;

at one point, she described that the owner of the car (and tires) was watching her commit this act, looking out his apartment window, only to acknowledge that the car would not have been within view of his apartment window;

with respect to her expectations of what may happen when she returns to court, she stated initially that she expected all charges to be dropped, even after she already stated that she had pled guilty to all of them. She then stated tangentially, "I never tried to kill him at all";

among the things she reported frequently enough that I have confidence in believing them, are that she was hearing voices or at least sounds coming from the upstairs apartment that she interpreted as threatening. These varied from constituting direct threats from a clear voice which she still believes is real, although she also episodically stated that she never heard a voice at all and that if she did, it "might have been delusional";

[17] In addition to the report of Dr. McDonald, facts that were brought to the court's attention including the following:

that police found the applicant rambling, crying, and not making sense after she was found near the entrance of the victim's apartment in breach of her conditions of recognizance;

that, in speaking to the police, the applicant referred to the victim as her baby father and continued to attempt to contact with him even though they were merely neighbours. She denied having any conditions to stay away from the place where the victim lived after having just received them.

that subsequent to her arrest, during the course of an interview with a mental health care worker, the applicant stated her intention to plead guilty to the allegations so she could get out of jail and "get a gun and kill him" (being the victim); and,

[18] Considered as a whole, the evidence was sufficient for a reasonable trier of fact to conclude, on a balance of probabilities that the applicant was unable to appreciate the nature and quality of her acts at the time she committed them. The applicant has failed to discharge her burden that there is reason to doubt the

correctness of the NCRMD verdict. The justice of the case does not require that an extension of time be granted. The application therefore fails.