

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McIntyre, 2018 ONCA 210

DATE: 20180301

DOCKET: M48758

Epstein J.A. (Motions Judge)

BETWEEN

Her Majesty the Queen

Respondent (Respondent)

and

Leon McIntyre

Applicant (Appellant)

Breana Vandebeek, for the applicant

Carmen Elmasry, for the respondent

Heard: February 6, 2018

REASONS FOR DECISION

[1] Following a guilty plea, the applicant was convicted of robbery while using a restricted firearm, assault causing bodily harm, possession of a loaded restricted firearm when not a holder of an authorization or licence, possession of a restricted firearm knowing that he is not the holder of a licence, pointing a firearm, dangerous driving and possession of a firearm while prohibited. On December 2, 2016 the sentencing judge dismissed the applicant's challenge to the five-year mandatory

minimum sentence in s. 344(1)(a) of the *Criminal Code* and sentenced him to six years' imprisonment, less credit for pre-sentence custody.

[2] The applicant seeks an extension of time to seek leave to appeal his sentence and bail pending appeal. The respondent opposes both. The respondent's position is that the applicant has not adequately accounted for the delay in appealing sentence, that there is no merit in the proposed appeal, and that detention of the applicant is necessary in the public interest given the serious and violent nature of his offences.

[3] For the reasons that follow, the application for an extension of time to appeal is allowed. The application for release pending appeal is also allowed.

BACKGROUND FACTS

[4] On August 18, 2014, the victim was in his driveway fixing the door of his car. His four-year-old son was on the porch, watching. The applicant and another youth came onto the driveway. Their purpose was to steal the car. The applicant was armed with a loaded handgun. The applicant ordered the victim to hand over the car keys. The victim resisted. A struggle ensued during which the applicant hit the victim in the head with the gun and cut the victim's finger while wrestling the keys from his hand.

[5] As a result of the struggle, the victim briefly lost consciousness. The wound to the victim's head required 13 staples. The injury to the victim's finger left him

with permanent impairment to the use of the finger. The victim was off work for two months. He continues to suffer effects of the assault, including pain while working and while engaging in daily physical activities.

[6] The two perpetrators drove off with the car. The victim's wife and neighbours arrived on the scene and notified the police. Two officers noticed the applicant, an unlicensed driver, driving the stolen car at a high rate of speed in a manner dangerous to the public. The applicant was ultimately arrested in a high-risk takedown. The applicant was searched. He was found in possession of a handgun loaded with a magazine containing nine rounds of 9mm Luger ammunition.

[7] At the time he pleaded guilty, the applicant had been in custody for 744 days. The Crown sought a global sentence of six years in jail. Counsel for the applicant argued that a two to three year sentence was appropriate. A six year sentence was imposed, less credit for time served of 3 years and 21 days. When the applicant was sentenced in December, 2016 he had 2 years and 11 months left to serve.

ANALYSIS

(1) Should an Extension of Time to File a Notice of Appeal be Granted?

[8] It appears that on December 8, 2016, six days after he was sentenced but before the reasons dismissing his constitutional challenge were released on January 16, 2017, the applicant told his parole officer that he had appealed his conviction and sentence. However, he had not filed an inmate notice of appeal.

The applicant contacted counsel at the law firm of Rusonik, O'Connor, Robbins, Ross, Gorham, Angelini, LLP in February to retain them to complete an opinion letter to Legal Aid. Legal Aid provided a certificate authorizing full funding for the appeal on July 7, 2017.

[9] After acknowledging the legal aid certificate on July 28, 2017, the lawyer at the Rusonik law firm who was originally involved in the file was delayed in moving the matter forward due to other work-related and personal commitments. Early in October 2017 that lawyer asked appellate counsel at the firm to take the matter over and bring a bail application to ensure that the sentence appeal did not become moot. Affidavits were prepared and were signed by the applicant and by his proposed sureties. This took some additional time given the applicant was incarcerated in New Brunswick. It was not until early December 2017, when counsel began to assemble the materials for the bail application, that it was realized that no solicitor or inmate appeal had been filed. When the applicant was contacted he advised counsel that he believed the notice of appeal had been filed by counsel. All this time counsel believed the applicant had filed an inmate notice of appeal.

[10] This motion for bail and for an extension of time to appeal was immediately brought.

[11] The three factors to consider in determining whether to grant an extension of time to file a notice of appeal are (i) whether the applicant has shown a *bona fide* intention to appeal within the appeal period; (ii) whether the applicant has accounted for or explained the delay; and (iii) whether there is merit to the proposed appeal: *R. v. Stirling*, 2005 CarswellOnt 10611 (C.A., In Chambers), at para. 7. Justice Feldman put it this way in *Stirling*, “Above all, the main consideration is whether the applicant has demonstrated that justice requires that an extension of time be granted.”

[12] The respondent, quite fairly, concedes that the applicant formed an intent to appeal within the requisite time.

[13] However, the respondent submits that the applicant is unable to adequately explain the delay in filing the notice of appeal.

[14] Although counsel for the applicant, once retained, should have been more diligent in checking the Court of Appeal records to ensure that a notice of appeal had been filed, I conclude that the delay has been adequately explained and that the justice of the case requires an extension of time.

[15] Finally, the respondent contends there is no merit to the proposed appeal. I will deal with this argument in considering whether bail pending appeal should be granted, below.

(2) Should Leave to Appeal Sentence be Granted?

[16] To grant the applicant judicial interim release pending his sentence appeal, I must first determine whether he should be granted leave to appeal his sentence: *Criminal Code*, s. 679(1)(b); *Criminal Appeal Rules*, SI/93-169, r. 31; *Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario*, 7.2.11 (March 1, 2017).

[17] The respondent challenges the applicant's request for leave on the basis that the proposed appeal does not raise viable grounds of appeal. However, in the circumstances of this case, I am satisfied that leave should be granted.

[18] The applicant advances two main grounds of appeal: (i) that the sentencing judge failed to consider relevant mitigating factors in sentencing, including the applicant's youth and his significant family dysfunction; and (ii) that the judge erred in dismissing the applicant's challenge to the constitutional validity of the five-year minimum sentence contained in s. 344(1)(a) of the *Code*.

[19] As I will describe below, although I have some concern about the merits of the pending appeal – and have factored those concerns into my consideration of the bail application that follows – I am satisfied that the appeal is not so devoid of merit as to fail the low bar required to obtain leave to appeal sentence. It is at least “arguable” that the sentence is unfit: The Honourable Justice Gary T. Trotter, *The Law of Bail in Canada*, 3rd ed. (Toronto: Carswell, 2010), at 10-38.

[20] Having granted leave, the applicant is entitled to have his bail application considered on the merits: *Criminal Code*, s. 679(1)(b).

(3) Should the Applicant be Released Pending his Appeal?

[21] Having granted the applicant leave, I now turn to determining whether he should be granted bail pending his sentence appeal: *Criminal Code*, s. 679(1)(b). I may only grant bail if I am satisfied that: (1) the applicant's appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody; (2) he will surrender himself into custody in accordance with the terms of the order; and (3) his detention is not necessary in the public interest: *Criminal Code*, s. 679(4). The respondent does not contest the second element of the test, so I will focus my analysis on (1) and (2).

[22] The respondent disputes whether the applicant has satisfied the first element, which calls for a threshold inquiry into the merits of his pending appeal, and an assessment of the hardship the applicant would experience if bail were denied: *R. v. Hassan*, 2017 ONCA 1008, at para. 18. The respondent also asserts that granting bail pending appeal would be contrary to the public interest.

[23] After viewing these factors in conjunction, I have concluded this application should be allowed.

[24] As I said in *R. v. Hassan*, at para. 19, the threshold assessment of merit mandated by s. 679(4)(a) has been described by some courts as a search for

“arguable merit”: *R. v. Ewanchuk*, 2000 ABCA 303, 271 A.R. 118 (C.A.), at paras. 5-6; *R. v. Figiel*, 2015 ABCA 19, 588 A.R. 372 (C.A.), at para. 4. The court asks whether the appeal has “some hope or prospect of success”: *Ewanchuk*, at para. 5. I also expressed the view that the standard established in s. 679(4)(a) is more stringent than the test for leave to appeal sentence: *The Law of Bail in Canada*, at 10-38.

[25] As previously indicated, the applicant’s sentence appeal relies on two alleged errors made by the sentencing judge. First, the applicant submits that in imposing sentence the sentencing judge erred by failing to properly take into account relevant mitigating factors including the applicant’s youth and his significant family dysfunction. Second, the applicant argues that the judge erred in dismissing the applicant’s challenge to the constitutional validity of the five-year minimum contained in s. 344(1)(a) of the *Code*.

[26] With respect to the first argument, the applicant was just months past his 18th birthday at the time he committed the offences. He is a black youth who has endured significant family dysfunction. The applicant submits that these factors, particularly the significant details of his societal circumstances, were not properly taken into account by the sentencing judge.

[27] Although I accept the respondent’s argument that looking at the record as a whole, including the sentencing judge’s references to the pre-sentence report and

the comments it contains about the applicant's dysfunctional background, it is clear that the sentencing judge was alive to these factors, I cannot say that there is no arguable merit to this ground of appeal, particularly in the light of this court's comments in *R. v. Borde* (2003), 63 O.R. (3d) 417 (C.A.), at paras. 2, 30-33. While the sentencing judge summarized some of those factors in his reasons, he did not identify them as mitigating factors or expressly consider them when determining the appropriate sentence for the applicant.

[28] With respect to the second argument, the applicant points out that there has been no pronouncement on the constitutional validity of s. 344 of the *Code* by this court since *R. v. McDonald*, (1998) 40 O.R. (3d) 63 (C.A.), where this court upheld the then four year mandatory minimum sentence for the offence of armed robbery. Since that decision was released there have been changes in the law that may impact this court's assessment of gross disproportionality. First, following *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, constitutional challenges can be argued on the basis of reasonable hypotheticals involving the "best offender". This was not available when *McDonald* was decided. As well, the minimum sentence has been increased by one year to five years, something that may prompt a reassessment of the minimum sentence.

[29] The Crown correctly points out that the sentencing judge conducted an analysis of the constitutionality of s. 344 of the *Code*, including using reasonable hypotheticals and considering this court's decision in *McDonald*. However,

notwithstanding the sentencing judge's thorough reasoning, the five year minimum sentence in issue has not been the subject of any review by this court. There appears to be at least *arguable* merit to the constitutional challenge in the circumstances. Further, the inflationary floor from the mandatory minimum sentence is arguably relevant to the applicant's circumstances: without that inflationary floor, an appropriate sentence may be lower than the six years given by the sentencing judge: *R. v. Delchev*, 2014 ONCA 448, 323 O.A.C. 19, at para. 18.

[30] In my view, an assessment of the merits of the appeal indicates that it has "some hope or prospect of success", and weighs in favour of granting bail.

[31] I am required under s. 679(4)(a) to consider not only the merits of the applicant's sentence appeal, but also whether denying the applicant bail pending appeal would cause him "unnecessary hardship". The two factors are inter-related: the weaker the merits of a pending appeal, the harder it will be for an applicant to show that hardship caused by continued incarceration is "unnecessary": *Hassan*, at para. 32. My above observations regarding the merits of this particular appeal therefore weigh in favour of a finding of "unnecessary hardship".

[32] The applicant can show unnecessary hardship if he is able to demonstrate that his appeal is sufficiently meritorious such that, if judicial interim release is not granted, he will have spent more time in custody than what is subsequently

determined to be fit: *The Law of Bail in Canada*, at 10-39. Accordingly, I will therefore consider whether, if the applicant is ultimately successful on appeal, it is likely that he will have served more time in custody than he ought to have spent.

[33] The applicant appears to have been in custody since his sentencing on December 2, 2016. He seeks to have his sentence varied to a maximum of three years. If he were successful on appeal to this extent, he would be eligible for release now. That is the case as well if this court were to reduce the sentence to four years. Even if his sentence were reduced to five years, there would be a risk that he will end up serving more time in custody than he ought to have spent. Particularly in the light of the demands of a constitutional challenge, I am not confident the appeal can be disposed of on an expedited basis. Consequently, there is a real risk that the applicant will have spent more time than necessary in custody if he succeeds, or is even partially successful on appeal. In these circumstances, the applicant's continued detention would cause "unnecessary hardship".

[34] However, an applicant cannot obtain bail pending sentence appeal simply by pointing to possible hardship, such as the appeal being moot by the time it is heard. Section 679(4)(a) requires an applicant to establish "unnecessary" hardship. Whether potential hardship suffered by the applicant will be "unnecessary" must be determined with reference to the merits of the pending appeal: *The Law of Bail in Canada*, at 10-39; *R. v. Johnston*, 2014 NSCA 78, 349

N.S.R. (2d) 122, at para. 21; *Hassan*, at para. 32. As Bryson J.A. explains in *Johnston*, at para. 21:

It is important to emphasize the connection between "sufficient merit" and "unnecessary hardship" in s. 679(4)(a). Some cases give the impression that simply pointing out the mootness of appeal, owing to delay, creates unnecessary hardship which satisfies this section. But there is no unnecessary hardship in serving an appropriate sentence. Only if the appellant raises arguable issues can incarceration constitute an unnecessary hardship in such circumstances [Emphasis added].

[35] I agree with this passage. It is consistent with the observation in *Hassan*, at para. 32, that “the weaker the merits of a pending appeal, the harder it will be for an applicant to show that hardship caused by continued incarceration is ‘unnecessary.’” As I outlined above, I view both of the applicant’s proposed grounds of appeal as having arguable merit. Accordingly, there is a risk of “unnecessary hardship” such that the protection of the integrity of the appellate process militates towards granting bail: *The Law of Bail in Canada*, at 10-39.

[36] The respondent also argues that, in any event, it is contrary to the public interest to grant the applicant bail pending appeal. As the respondent points out, when release pending appeal is sought the competing interests are enforceability and reviewability: *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at paras. 36-49. The respondent submits that in the circumstances of this case, the need for enforceability is paramount to maintenance of the public’s confidence in the

administration of justice. This submission is based on the violence that the applicant inflicted – injuries to the victim, the involvement of a loaded restricted firearm, and the traumatization of a child.

[37] The first and third branches of the s. 679(4) analysis overlap to an extent: the merits of the appeal are also relevant to the public interest inquiry under s. 679(4)(a): *The Law of Bail in Canada*, at 10-38-10-40. For the reasons articulated above, this militates in favour of granting bail. Further, although the offence at issue is undeniably serious, the applicant is a first time offender who was 18 at the time of sentence and has already served several years' custody. Accordingly, in my view the public interest favours granting bail in the circumstances.

[38] Here, given my conclusion that both grounds of appeal have some merit, that the hardship the applicant would suffer qualifies as "unnecessary" due to the potential mootness of the appeal, and my related conclusion that the applicant's continued detention is not necessary in the public interest, the requirements of s. 679(4) have been satisfied.

DISPOSITION

[39] For these reasons, the application is allowed. The applicant is to be released on the terms contained in the draft release order filed with me at the time of the hearing of this application.

“Gloria Epstein J.A.”