COURT OF APPEAL FOR ONTARIO

CITATION: Valdez (Re), 2018 ONCA 657
DATE: 20180720
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Lauwers, Miller and Fairburn JJ.A.

IN THE MATTER OF: Joel Valdez

AN APPEAL UNDER PART XX.1 OF THE *CODE*

Anita Szigeti, for the appellant

Justin Reid, for the respondent Attorney General of Ontario

Logan Crowell, for the respondent Person in Charge of Ontario Shores Centre for Mental Health Sciences

Heard: June 8, 2018

On appeal from the disposition of the Ontario Review Board, dated September 27, 2017, with reasons dated October 12, 2017.

REASONS FOR DECISION

[1] On December 3, 2015, Mr. Valdez (the appellant) was found not criminally responsible (NCR) by reason of mental disorder on a charge of arson and failure to comply with a probation order. Mr. Valdez has since been diagnosed with "Schizophrenia, undifferentiated subtype". He is treated monthly with injectable medication. Mr. Valdez has displayed no signs of psychosis since receiving his treatment and has been residing since November 2016 in the community, with his family, without incident. Following Mr. Valdez's annual hearing on September 19,

2017, the Board ordered him to be detained on the general forensic unit of Ontario Shores Centre for Mental Health Sciences under a detention order and continue with his same level of privileges.

[2] Mr. Valdez appeals. He maintains that the Board erred by failing to impose an absolute discharge. In the alternative, and at a minimum, Mr. Valdez maintains that he should have been conditionally discharged.

[3] The respondents submit that Mr. Valdez remains a significant threat to the public and the majority's decision not to order a conditional discharge is reasonable.

[4] While we agree with the Board that Mr. Valdez was not entitled to an absolute discharge, we would remit for the Board's consideration whether Mr. Valdez should receive a conditional discharge.

Index Offence and Detention History

[5] On December 25, 2014, Mr. Valdez set fire to his parents' home, including setting fire to three separate couches and three separate beds. He was found NCR for these offences on December 3, 2015.

[6] Mr. Valdez had previously been convicted of forcible confinement, uttering threats and assault with a weapon, all directed at his wife.

[7] On November 1, 2016, Mr. Valdez was moved from the hospital to his family home, as permitted at the discretion of the hospital and under the terms of his

detention order. He has resided there since that time with his wife, three children, and his wife's parents. Mr. Valdez's parents live in close proximity. Mr. Valdez does some work around the house and has been able to find employment from time-to-time. There has been no evidence of psychotic symptoms since his return to the family home.

The Decision under Appeal

[8] The Board unanimously agreed that Mr. Valdez remains a significant threat to public safety. Based on Dr. Pearce's evidence, the Board found that:

> Mr. Valdez has absolutely no insight into his need for medication and accept further that if he were not under the Board's jurisdiction he would stop medication and within a few months become psychotic and…likely to act out in an aggressive manner.

[9] On this basis, the Board refused to grant Mr. Valdez an absolute discharge, which was the remedy he sought.

[10] However, the Board was divided on the issue of the necessary and appropriate disposition. Four of the five members of the Board accepted the Crown's position that Mr. Valdez should continue to be subject to a detention order, largely on the basis that it would be easier to have Mr. Valdez returned to hospital under a detention order than under a conditional discharge. The majority's reasoning on this point was brief:

> The evidence of Mr. Valdez's stated intention to stop his medication as soon as he is no longer under an ORB

> disposition leads not only to the conclusion that he is a significant threat to public safety, but also to the conclusion that the necessary and appropriate disposition is a Detention Order. In the Board's experience, as confirmed both by Crown counsel and by defence counsel, it is substantially easier to bring about a return to hospital for individuals who are under a Detention Order. The Board understands that there is a warrant that will always be acted upon by the police if the police are required to bring about a return to hospital. In the majority's opinion, public safety would be compromised in a situation where Dr. Pearce or any other doctor is forced to negotiate with the patient and to threaten hospitalization in order to have Mr. Valdez accept his medication. In the majority's opinion, the necessary and appropriate disposition is a Detention Order.

[11] The minority would have accepted the hospital's recommendation of a conditional discharge as "the least onerous and least restrictive disposition consistent with public safety". In reaching this conclusion, the minority relied on Dr. Pearce's evidence that Mr. Valdez could remain medically compliant without a detention order. Dr. Pearce cited several reasons for this opinion including: (1) his interactions with Mr. Valdez in the past; (2) the support of Mr. Valdez's family; and (3) the available enforcement mechanisms under a conditional discharge.

Absolute Discharge

[12] Before us, Mr. Valdez argues that the Board erred in failing to impose an absolute discharge. We disagree. That decision was squarely rooted in the evidentiary record. Indeed, Dr. Pearce stated that an absolute discharge is likely "years and years off". The Board's decision that Mr. Valdez remains a significant

threat to public safety was within the range of reasonable outcomes. We defer to that finding.

Conditional Discharge

[13] Mr. Valdez argues alternatively that he should receive a conditional discharge. He asserts that the Board is obliged to determine the necessary and appropriate disposition and that it failed to do so. The evidence of Dr. Pearce supports the conclusion that Mr. Valdez's mental illness is well controlled by long-acting injectable drugs. Given his more recent treatment history and his strong family support, he is likely to attend at the hospital and receive his monthly injection. If Mr. Valdez fails to attend for his monthly injection, the hospital would be immediately aware of this; because he would not decompensate for one to two months, there would be sufficient time for the hospital to respond effectively before decompensation occurs.

[14] The respondent Crown maintains that the majority's decision is reasonable given: (1) Mr. Valdez's lack of insight into his mental illness; (2) his stated desire to stop taking medication; (3) the historical difficulties with getting him to take his medication; and (4) the danger he presents without medication.

[15] Although the hospital supported a conditional discharge at the hearing, it takes the position on appeal that the Board's decision was reasonable and it was

within its power to conclude that it is easier to return a person to hospital for treatment when a warrant of committal under a detention order is in place.

Analysis

[16] Part XX.1 of the *Criminal Code* establishes the legislative regime for mental disorders and dealing with NCR accused. As Bastarache J. observed in *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para 32: “the primary purpose of the legislative scheme is to protect the public while minimizing any restrictions on the NCR accused's liberty interests”.

[17] The Board is charged with the responsibility for determining the necessary and appropriate disposition, meaning least onerous and least restrictive disposition necessary to protect the public: *R. v. Winko*, [1999] 2 S.C.R. 625, at para. 47. The Board is a specialized, expert body and its decisions are owed a significant degree of deference: *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 95. Appellate courts are “‘not [to] be too quick to overturn’ a review board’s ‘expert opinion’ on how best to manage a patient’s risk to the public”: *R. v. Conway,* 2010 SCC 22, [2010] 1 S.C.R. 765 at para. 95. See also, *Owen,* at para. 69.

[18] The issue on this appeal is whether the Board’s decision falls within a range of reasonable outcomes: *Owen*, at para. 33. A decision will be considered unreasonable when the reasons do not “bear even a somewhat probing

examination": *Saikaley Re*, 2012 ONCA 92, 287 O.A.C. 200, at para. 35; *Mazzei,* at para. 17. Our task is somewhat hampered by the Board's reasons, which are sparse in their application of the least onerous/restrictive test: *Re Marchese*, 2018 ONCA 307, at paras. 16-23.

[19] In our view the majority's decision is unreasonable.

[20] The Board was right to be concerned that Mr. Valdez would decompensate if he failed to take his medication. We accept the Board's finding, based on Dr. Pearce's evidence, that if Mr. Valdez "were not under the Board's jurisdiction he would stop medication and within a few months become psychotic and likely … act out in an aggressive manner."

[21] However, we have difficulty with the majority's cursory consideration of whether Mr. Valdez's risk to the public could be managed under a conditional discharge. The majority reasoned that "it is substantially easier to bring about a return to the hospital for individuals who are under a Detention Order" and that a warrant will always be acted upon to bring a person back to the hospital if necessary. However, this would always be true and could always be used to justify the refusal of a conditional discharge. But, given the least onerous and least restrictive test, something more is required than mere convenience to the hospital.

[22] The ease of returning an individual to hospital will not always justify a detention order as the necessary and appropriate disposition. As discussed in

Young Re, 2011 ONCA 432, 278 O.A.C. 274, at para. 26, there are multiple ways in which to secure someone's attendance at the hospital when they fail to comply with a condition of their discharge. For instance, the person could be returned: (1) by convening a new hearing under s. 672.82(1) of the *Criminal Code*; (2) by resorting to the breach provisions of the *Criminal Code;* or (3) through the committal provisions available under the *Mental Health Act,* R.S.O. 1990, c M.7.

[23] The Board had a duty to assess the evidentiary record in context, including taking into consideration in this case: (1) the risk of non-attendance for medication; (2) the mechanisms for securing someone's attendance at hospital under the conditional discharge framework; (3) the length of time that any such steps may take; (4) the effect of that delay on Mr. Valdez's mental health; and (5) the risk to public safety posed by any delay in treatment.

[24] The majority's reasoning does not demonstrate that it took these considerations into account. Although Mr. Valdez appears to be a significant risk to public safety when off of his medication, the Board found he would not decompensate for at least a month, if not more, from the time of him missing an injection. This is not a case like *R. v. Breitwieser*, 2009 ONCA 784, 99 O.R. (3d) 43, in which the appellant was responsible for administering his own medication, which could therefore not be monitored, and failing which, he would quickly decompensate. There is no evidence here that any short delay in the

administration of Mr. Valdez's medication would be critical to public safety. The evidence on the record is to the contrary.

[25] For these reasons, we return the matter to the Board to consider whether, in light of all of the relevant factors, Mr. Valdez should be subject to a conditional discharge rather than a detention order.

"P. Lauwers J.A."
"B.W. Miller J.A."
"Fairburn J.A."