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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Williams, 2021 ONCA 705
DATE: 20211008
DOCKET: M52774

Strathy C.J.O. (Motion Judge)

BETWEEN

Her Majesty the Queen

Respondent

and

Robert Williams

Applicant

Zachary Kerbel, for the applicant

Karen Papadopoulos, for the respondent

Heard: September 22, 2021 by video conference

REASONS FOR DECISION

[1] This is an application pursuant to s. 680(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 for an order directing a review by a panel of this Court of a decision denying the applicant bail pending his trial on a charge of second degree murder

contrary to s. 235(1) of the *Criminal Code*. The applicant's trial is scheduled to begin on November 15, 2021.

[2] At the conclusion of submissions, I advised counsel that the application would be dismissed with reasons to follow. These are my reasons.

Factual overview

[3] In the early morning hours of May 26, 2018, Dereck Szaflarski was killed in an altercation with the applicant on Richmond Street in London, Ontario. The events were captured on a video security camera.

[4] After exchanging words with Mr. Szaflarski, who had walked across the street in front of the applicant's moving car, the applicant got out of his car holding an object in his left hand. Mr. Szaflarski charged at him and a violent confrontation ensued. It ended with Mr. Szaflarski lying stabbed and dying on the opposite sidewalk. He was taken to hospital, where he was pronounced dead.

[5] Mr. Szaflarski died from a stab wound to his chest. He had a total of five wounds in all, three in his chest and two in his arm. The wounds were close together and evidenced the use of considerable force. The wound that perforated his lung and heart was 15 cm deep. Other wounds penetrated his liver and cut through bone.

[6] There was evidence that the applicant abandoned his vehicle and burned his clothing after the incident. The applicant could not be excluded as the source

of DNA retrieved from the car and the scene of the altercation. The applicant surrendered to police four days after the event.

The decisions of the bail judges

[7] The applicant was denied bail on his first application before Templeton J. (the "first bail judge") on April 8, 2019. The first bail judge expressed concerns relating to each of the three grounds for justifying detention of an accused under s. 515(10) of the *Criminal Code*. With respect to the primary ground – whether detention is necessary to ensure attendance in court – he was concerned about the ability of the sureties to supervise the applicant and the risk of the applicant absconding to the United States (he had a U.S. passport that he said he was unable to locate). As for the secondary ground – whether detention is necessary for the protection or safety of the public – the first bail judge highlighted prior criminal incidents (a 2006 conviction for drug trafficking, a parole violation related to that conviction, and an uncharged driving incident) and determined that the applicant's "lack of judgment prior to action" established a substantial likelihood that he would reoffend if released. With respect to the tertiary ground – whether detention is necessary to maintain confidence in the administration of justice – he took into account the potential availability of a self-defence argument, but concluded that the gravity of the offence and the fact that it was committed in a public area rendered detention necessary.

[8] The applicant subsequently brought a second s. 522 application, arguing that there had been a change in circumstances due to (a) his improved release plan; and (b) the health risks and delays posed by the COVID-19 pandemic. That application was brought in July 2021, some 16 months after the onset of the pandemic.

[9] The application was heard by Grace J. (the "second bail judge") on July 19-20, 2021. The applicant did not challenge the correctness of the first bail judge's decision. His application was based entirely on material changes in circumstances.

[10] The second bail judge denied the application because he found that the applicant's new release plan and the COVID-19 pandemic did not constitute material changes in circumstances. The new release plan did not adequately mitigate the risk that the applicant would abscond. He also noted that the findings of the first bail judge with respect to the secondary and tertiary grounds were unaffected by the changed circumstances, because they were rooted in Mr. Williams' personal history and the nature of the offence.

[11] The second bail judge referred to this Court's decision in *R. v. J.A.*, 2020 ONCA 660, 153 O.R. (3d) 593 for guidance on the impact of the pandemic on the issue of material change. In *J.A.*, this Court stated that the COVID-19 pandemic may be considered a material change warranting a new bail hearing where the circumstances of the pandemic are both relevant and material to the particular

applicant. The second bail judge found that the COVID-19 issues were addressed "almost as an afterthought from an evidentiary perspective" and noted that he would have expected testimony and even documentary evidence addressing the COVID-19 issues as they pertained to the applicant. He concluded that more was needed to constitute a change in circumstances.

[12] Finally, the second bail judge noted that the time to get a case to trial can, on its own, necessitate a review of a detention order, citing guidance by Nordheimer J.A. in *J.A.* and by the Supreme Court of Canada in *R. v. Myers*, 2019 SCC 18, [2019] 2 S.C.R. 105. However, he found that the delay in this case did not fit within the category of concern discussed in *J.A.* or *Myers*.

Submissions of counsel

[13] Counsel for the applicant submitted that the second bail judge erred in law in concluding that the new release plan and the COVID-19 pandemic did not constitute material changes in circumstances.

[14] He submitted that the applicant's new release plan answered the first bail judge's concerns about the primary and secondary grounds. He argued that if the second bail judge had properly appreciated the strength of the new release plan, it would likely have affected his conclusions.

[15] The applicant's counsel argued that the pandemic is relevant to the primary and tertiary grounds. He submitted that the risk of the applicant absconding to the

United States was mitigated by the closing of the U.S./Canada border. Second, he argued that the first bail judge's conclusions on the tertiary ground could have been affected by the applicant's uncontradicted evidence that he suffers from conditions that render him immunocompromised. He noted that the second bail judge accepted that the applicant was immunocompromised and maintained that immunocompromised individuals are at a heightened risk of contracting COVID-19.

[16] Citing *R. v. St. Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, counsel for the respondent submitted that the new evidence must be significant and in this case the applicant was required to demonstrate error in relation to all three grounds for detention. She argued that the applicant had a pattern of acting without judgment, which impacted the first application judge's findings on the secondary ground, and which has not been addressed by the new release plan or by the applicant's evidence concerning his health issues and the COVID-19 pandemic. Counsel argued that the conclusion on the tertiary ground was a result of a balancing of various factors, including the strength of the Crown's case.

[17] Turning to the COVID-19 pandemic, counsel for the respondent argued that, in accordance with *J.A.*, the evidence concerning the impact of the pandemic would need to be relevant to the particular applicant in his particular circumstances. She noted that the second bail judge found that the evidence related to COVID-19 was presented almost as an afterthought and that there was

no documentary evidence to support the argument. Counsel also noted that there was no dispute that the applicant had serious health conditions, but there was no evidence that they would be impacted by the pandemic.

Analysis

[18] As has been frequently observed, in an application pursuant to s. 680(1) of the *Code*, the Chief Justice or their designate performs a screening function – one that should take into account the nature of the review and the standard that will be applied by a panel of this Court, should the matter be referred to a panel: *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 55. The principles that guide the panel were set out by Moldaver J. in *Oland*, at para. 61:

> First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted. [Emphasis added.]

[19] The test for referral to a panel under s. 680(1) of the *Criminal Code* was described by Moldaver J. in *Oland*, at para. 64:

> In short, the chief justice should consider directing a review where it is arguable that the judge committed material errors of fact or law in arriving at the impugned decision, or that the impugned decision was clearly unwarranted in the circumstances. [Emphasis added.]

See also *R. v. K.M.*, 2017 ONCA 805, 137 O.R. (3d) 721, at paras. 13-14.

[20] Here, the applicant sought to vary the order of the first bail judge based on material changes in circumstances. In *St. Cloud*, the Supreme Court of Canada considered the application of the *Palmer* factors to bail reviews under ss. 520 and 521 of the *Code*. Wagner J. (as he then was) observed that for that purpose, the fourth *Palmer* factor should be modified as follows: "the new evidence must be such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice under s. 515(10)(c) [of the *Criminal Code*]": at para. 137.

[21] In *J.A.*, this Court (per Thorburn J.A., Nordheimer J.A. dissenting) provided guidance on assessing material changes in circumstances, at paras. 25-26:

> Where new evidence is submitted to demonstrate a material change in circumstances, that evidence should be considered together with the considerations that underpinned the first bail judge's refusal of bail to determine whether the alleged change in circumstance is both material and relevant to the case at hand such that a hearing *de novo* is warranted.
>
> If the alleged change in circumstance is one that could reasonably be expected to have affected the result in this case, the reviewing judge is authorized to conduct a new hearing and conduct a fresh analysis on the bail application as if he or she were the initial decision-maker. [Citations omitted.]

[22] This Court also provided guidance in *J.A.* on the impact of the pandemic in assessing material changes in circumstances, at paras. 55-56:

> The COVID-19 pandemic constitutes a material change warranting a new bail hearing where the circumstances of the pandemic are "relevantly material" to *this* respondent in *these* circumstances. The effect of COVID-19 must be "significant" in the sense that when considered along with the other evidence on the bail proceeding, it could reasonably be expected to have affected the result.
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> …
>
> Moreover, proportionality is an overarching consideration that can affect the grounds for detention by virtue of the s. 11(e) *Charter* right to reasonable bail. [Citations omitted.]

[23] I do not find it necessary to determine whether the second bail judge erred in concluding that the applicant's new release plan was nothing more than "the deck simply being reshuffled without any substantive change." The plan was unquestionably more robust, but had some gaps identified by the second bail judge. I am not satisfied, however, that there were material changes as a result of either the new release plan or the pandemic that could have reasonably affected the result with respect to the secondary or tertiary grounds.

[24] With respect to the secondary ground, the first bail judge found there was a substantial likelihood that the applicant would reoffend or interfere with the administration of justice if released because, among other things, his conduct and an institutional assessment report disclosed a lack of judgment prior to action and a tendency to act precipitously without thinking. I agree that there was nothing in

the applicant's new release plan that could reasonably have affected the first bail judge's conclusion in this regard.

[25] As to the tertiary ground, the first bail judge found that there was overwhelming evidence of the applicant's involvement in the offence. Whether there was an air of reality to the self-defence argument would be for another judge to decide. The gravity of the offence of second degree murder was at the top of the scale and a conviction in the circumstances of this case would attract a lengthy period of incarceration. A reasonable member of the community, with knowledge of all the circumstances and the applicable law, would be satisfied that the denial of bail was necessary to maintain public confidence in the administration of justice.

[26] The next question before the second bail judge was whether the evidence concerning the applicant's health, having regard after the incident to the COVID-19 pandemic, constituted a material change warranting a *de novo* hearing. He found that the evidence was simply insufficient to constitute a material change and was presented "almost as an afterthought from an evidentiary perspective", in the applicant's *viva voce* evidence, without any reference in his affidavit and without any documentary support or evidence from third parties.

[27] The applicant has not demonstrated that the second bail judge made a material error of fact or law in arriving at this conclusion or that his decision was clearly unwarranted. While the applicant testified that he has some serious health

challenges and referred to obvious concerns in light of the pandemic, he acknowledged that he had received a single dose of the COVID-19 vaccine. His counsel advised that he has now received a second dose. His evidence does not demonstrate that the effect of the pandemic on him, is of sufficient concern, in his case, to have affected the second bail judge's decision on the tertiary ground.

[28] For these reasons, the application was dismissed.

"G.R. Strathy C.J.O."