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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Wright, 2022 ONCA 151
DATE: 20220216
DOCKET: M53129

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

Her Majesty the Queen

Respondent

and

Robert Steven Wright

Applicant

Michael Lacy and Bryan Badali, for the applicant

Jeremy D. Tatum, for the respondent

Heard: February 11, 2022 by video conference:

REASONS FOR DECISION

[1] The applicant is charged with second degree murder in relation to the death of a young woman on January 27, 1998. The victim was found brutally stabbed to death in a store where she worked. The applicant was a young man at the time of the murder.

[2] The applicant was arrested on December 11, 2018 and has remained in custody since. His trial is currently scheduled to commence in the fall of 2022.

[3] Bail was first denied on March 27, 2019 (“first bail application”). A material change in circumstances application was brought, with a *de novo* hearing taking place on May 4 and 5, 2020 (“second bail application”). The material change was the COVID-19 pandemic. A new release plan was put forward at that time, but the application was dismissed. The same judge heard the first and second bail applications. I will refer to him as the “original bail judge”.

[4] A second material change in circumstances application was brought (“third bail application”), following a pre-trial ruling where the trial judge concluded that the applicant will be permitted to raise a third-party suspect defence at trial. The third-party suspect is John Fetterly.

[5] The third bail application was dismissed on January 17, 2022. I will refer to the judge presiding over that application as the “most recent bail judge”. The dismissal was predicated upon the fact that there has been no material change in circumstances and, in any event, even if there had been jurisdiction to conduct a

de novo bail hearing, the most recent bail judge would have dismissed the application.

[6] This is an application pursuant to s. 680(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, for a direction that a panel of this court review the dismissal of the third bail application.

[7] The applicant contends that the most recent bail judge erred in a few respects, but describes the overarching error as failing to appreciate and give effect to the clear material change in circumstances arising from his success on the third-party suspect application. This material change should have given rise to a *de novo* bail hearing, which in turn should have resulted in bail.

[8] The respondent disputes that there has been a material change, arguing that the most recent bail judge was right to dismiss the application on the basis of want of jurisdiction. In the alternative, the respondent points to the fact that the most recent bail judge provided his views regarding why, had he conducted a *de novo* bail hearing, he would have denied bail in any event. The respondent says that the alternative reasons are compelling and should result in the dismissal of this application.

[9] Section 680(1) of the *Criminal Code* establishes a two-step procedure. At the first stage, the applicant must obtain the direction of the Chief Justice or acting Chief Justice as a precondition to review by a panel of this court. While s. 680(2)

allows a single judge of the court to exercise the powers of a panel should a review be directed, this can only be done with the consent of the parties. While the applicant offered his consent to this procedure, the respondent did not. Therefore, the sole question before me is whether it is "arguable that the [most recent bail] 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): *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 64. If the answer to that question is yes, then consideration should be given to directing a review. For the following reasons, I find the answer to that question is yes and direct a review.

[10] In determining whether something constitutes a material change in circumstances, sufficient to trigger a *de novo* hearing, the question is whether the new information is "such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise" that the original bail judge engaged in: *R. v. St. Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 137. The new evidence must, therefore, be significant.

[11] Given the stage of this s. 680 proceeding, I do not intend to review the evidence at length. I will only do so to the extent necessary to explain why this matter is referred to a panel.

[12] Mr. Fetterly was originally arrested for the murder shortly after it occurred. At the time of his arrest, it was believed that a fingerprint found on the cash tray in the store where the victim was killed was a match for Mr. Fetterly. Soon after his arrest, multiple fingerprint examiners excluded Mr. Fetterly as a contributor of that fingerprint. Mr. Fetterly was then released and a public apology issued. That was in 1998.

[13] In December 2018, the applicant was charged. He retained the same counsel who represented Mr. Fetterly back in 1998. That counsel represented the applicant at his first and second bail hearings. Between those two bail hearings, the Crown brought an application to remove counsel of record on the basis that counsel was in a conflict of interest because of having previously represented Mr. Fetterly. While the trial Crown was careful to point out a perceived lack of merit to any suggestion that Mr. Fetterly committed the murder, the Crown still posited a scenario where the applicant could try to point at Mr. Fetterly as an alternative suspect. Accordingly, the trial Crown attempted to get ahead of things and ensure that any potential conflicts were addressed in an efficient manner.

[14] In the ruling dismissing the trial Crown's conflict application, the judge hearing the conflict application made the following observation: "Defence counsel have stated that they have reviewed all disclosure pertaining to Mr. Fetterly and that, in their opinion, no competent defence counsel would advance Mr. Fetterly

as a third-party suspect in the murder…. I agree." That ruling is dated February 10, 2020.

[15] A few months following the dismissal of the conflict application, the applicant's counsel (Mr. Fetterly's former counsel) brought the second bail application for a *de novo* bail hearing based on a material change in circumstances. As before, that application was denied.

[16] At some point following the dismissal of the second bail application, counsel appear to have changed their previous, unequivocal view that Mr. Fetterly would never be advanced as a third-party suspect. This change in position apparently resulted from disclosed material that defence counsel had only recently come to appreciate, including that a civilian had seen a man enter the store around the same time as the murder. He was shown a photo lineup and identified Mr. Fetterly as that man. Although the civilian's degree of certainty has waned with time, at the time of the photo lineup, he was "positive" that Mr. Fetterly's photo matched the person he had seen entering the store.

[17] Other evidence pointing to Mr. Fetterly as a third-party suspect includes: he has confessed to two people that he killed the victim; he has a violent past; he has a known affinity for knives; he was in a dire financial situation at the time of the murder; one fingerprint examiner maintains the position that one of the fingerprints at the cash is a match for Mr. Fetterly; and a shoe print left in the blood at the

scene is consistent with a type of shoe Mr. Fetterly wore at the time and his foot size. The size of that shoe print does not match the applicant's foot size.

[18] Without determining the actual admissibility of any of this evidence, some of which will undoubtedly face strong admissibility hurdles at trial, the key is that the trial judge has found that based upon this body of evidence, there is an air of reality to the third-party suspect defence. Accordingly, it can no longer be said that the defence is one that no competent defence counsel would advance but, rather, one that will in fact be advanced at trial. This change in circumstances can only be described as material, at least to the trial. So material is the change that it triggered an obvious need for a change in counsel. That change in counsel has now occurred and it is the applicant's new counsel who brings this application.

[19] That is the factual backdrop against which the third bail application was brought by the applicant.

[20] The most recent bail judge correctly identified the question he had to answer as "whether the new evidence could have affected the balancing exercise engaged" by the original bail judge. He found that there was no material change in circumstances from a bail perspective and, therefore, he had no jurisdiction to conduct a bail hearing *de novo*. Read in context, that conclusion appears to have been reached, at least partly, on the basis that the original bail judge was aware of the existence of Mr. Fetterly and discounted it, largely because of what the

original bail judge saw as the strength of the Crown's forensic case against the applicant. Therefore, even with the new information regarding Mr. Fetterly and the third-party suspect defence, there was no material change in circumstances.

[21] It is true that the Crown's case is a forensically formidable one and includes: the applicant's DNA under the victim's fingernails; his fingerprint close to the cash; and the DNA of his family members and the victim on pieces of clothing found close to the murder scene.

[22] Even so, read contextually, I conclude that it is arguable that the most recent bail judge imposed too high a threshold by focussing upon whether the new information would have changed the original bail judge's decision. The test for whether the new information meets the material change in circumstances requirement is not informed by whether the new information would have changed the original bail judge's view of the ultimate result, but whether it could have done so. Without in any way commenting or wishing to be taken as weighing in on the ultimate question of bail in this case, it is "arguable" that the now viable third-party suspect defence and all that underpins it, reflects a material change in circumstances, one that should have, at a minimum, resulted in a *de novo* bail hearing, and one that was denied because of too heavy an emphasis on what the original bail judge would have done in light of his view of the forensic strength of

the Crown's case. Therefore, it is arguable that the most recent bail judge erred when he concluded he did not have jurisdiction to conduct a *de novo* bail hearing.

[23] The respondent's alternative argument is that the most recent bail judge provided alternative reasons suggesting why he would not have granted bail had he conducted a *de novo* hearing and that this conclusion is dispositive. I do not agree that this is a reason not to refer this matter to a panel.

[24] First, in stating the alternative conclusion, the most recent bail judge did not engage in the full balancing that would have been required had a material change in circumstances been found.

[25] Second, in expressing why he would not have granted bail in any event, the most recent bail judge addressed the over 3-years the applicant has spent in custody. The most recent bail judge commented that the applicant is responsible for much of that passage of time, especially given that he chose not to advance the third-party suspect application until recently and resisted the Crown's conflict application. The force of this reasoning is diluted by the fact that the applicant's former counsel was in a clear conflict of position.

[26] In conclusion, the threshold test on this application is low. The trial judge's ruling makes out a viable third-party suspect defence. That is entirely new, particularly when contrasted with the reasons emerging from the conflict application. While the forensic evidence underpinning the prosecution's case

remains formidable, this does not leave the applicant without the presumption of innocence, potential defences and even potential explanations one day. He is entitled to have this court determine whether there was in fact an error relating to material change and, if so, whether bail should be granted.

[27] Accordingly, pursuant to s. 680(1) of the *Criminal Code*, this matter will be referred to a panel of this court.

[28] The application is allowed.

[29] The parties are to arrange a case conference call with me within the next week.

"Fairburn A.C.J.O."