COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Francois, 2025 ONCA 177
DATE: 20250306
DOCKET: M55805 (COA-25-CR-0152)

Hourigan J.A. (Motion Judge)

BETWEEN

His Majesty the King

Respondent

and

Augustus Francois

Applicant/Appellant

Elek Reitsma, for the applicant/appellant

Owen Goddard, for the respondent

Heard: March 4, 2025

ENDORSEMENT

A. INTRODUCTION

[1] The applicant pled guilty to one count of conspiracy to commit robbery and one count of robbery before Puddington J. of the Ontario Court of Justice. On January 16, 2025, he was sentenced to imprisonment for 30 months. The applicant brings this application seeking bail pending the sentence appeal and leave to appeal sentence.

[2] The applicant submits the sentencing judge committed several errors in imposing a sentence, most notably in failing to impose a conditional sentence. As

a corollary, the applicant argues that if he is not released pending appeal, he will suffer unnecessary hardship in serving more time in custody than is subsequently determined to be fit. The applicant also submits that his track record on bail has shown his willingness to comply with a release order and his detention is not necessary in the public interest.

[3] The Crown opposes bail for two main reasons: (1) the appeal has insufficient merit such that the applicant cannot demonstrate that detention would create unnecessary hardship; and (2) the applicant's detention is necessary in the public interest. The Crown does not oppose leave to appeal sentence.

[4] For the reasons that follow, leave to appeal sentence is granted but the application for bail pending appeal is dismissed.

B. FACTS

[5] The applicant, along with at least three other individuals, conspired to perpetrate a series of robberies and attempted robberies from May 27, 2022 to June 6, 2022. Specifically, the convictions relate to the following incidents. The first occurred on May 27, 2022, when the applicant participated in a carjacking at a shopping center. He and his co-conspirators swarmed the complainant and stole her vehicle. Similarly, on June 3, 2022, the applicant and his co-conspirators attempted a second carjacking in the same manner, but they were ultimately unsuccessful because the complainant was able to drive to safety.

[6] On June 6, 2022, the applicant and his co-conspirators planned to attempt two more carjackings, but their plans were frustrated by police intervention, as the police were surveilling the applicant and his co-conspirators for some time. The applicant was ultimately arrested on June 6, 2022. He pled guilty after his preliminary inquiry.

C. ANALYSIS

[7] An applicant seeking to appeal against sentence only must first be granted leave to appeal before a judge may order release from custody pending the determination of the appeal: *Criminal Code*, R.S.C. 1985, c. C-46, s. 679(1)(b); *Criminal Appeal Rules*, r. 22(17). A motion for leave to appeal sentence and an application for release pending appeal may be brought at the same time before a judge, as was the case here: *Criminal Appeal Rules*, r. 22(18).

(i) Leave to Appeal Sentence

[8] There is little case law from this court on the appropriate test for granting leave to appeal sentence. That said, in *R. v. D.W.*, 2023 ONCA 638, at para. 13, the motion judge granted leave to appeal sentence in a case in which the grounds of appeal were “not frivolous”. Similarly, in *R. v. Hewitt* (February 16, 2018), Toronto, M48770 (Ont. C.A.), the motion judge observed that “[t]he test on a motion for leave to appeal sentence is not onerous. The appellant need only establish that the appeal is not frivolous or, equivalently, that it has an arguable

basis." In any event, the Crown does not oppose leave, so leave to appeal sentence is granted.

(ii) Bail Pending Sentence Appeal

[9] A judge may order that an applicant be released pending the determination of the sentence appeal or until otherwise ordered by a judge of the Court of Appeal if the applicant establishes the three elements set out in s. 679(4) of the *Criminal Code*:

> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if the applicant were detained in custody;
>
> (b) the applicant will surrender into custody in accordance with the terms of the order; and
>
> (c) the applicant's detention is not necessary in the public interest.

[10] Under s. 679(4)(a), the applicant must show that the appeal has sufficient merit such that, in the circumstances, it would cause unnecessary hardship if the applicant were detained in custody. This standard is more stringent than the test for leave to appeal sentence: *R. v. Hassan*, 2017 ONCA 1008, at para. 19, citing Justice Gary T. Trotter, *The Law of Bail in Canada*, 3rd ed. (Toronto: Carswell, 2010) at p. 10-38. The merits inquiry under s. 679(4)(a) focuses on whether "it is more probable than not that a successful sentence appeal would result in a significantly lower sentence": *R. v. Hewitt*, 2018 ONCA 293, at para. 18 ("*Hewitt II*").

[11] The link between sufficient merit and unnecessary hardship in s. 679(4)(a) is inextricable. The applicant must demonstrate that the appeal is sufficiently meritorious such that, if not released from custody, the applicant will have already served the sentence as imposed, or what would have been a fit sentence, prior to the hearing of the appeal: *Hewitt II*, at para. 10; *D.W.*, at para. 6; *R. v. Weir*, 2022 ONCA 674, at para. 10. This threshold requirement works to prevent the applicant from serving more time in custody than what is later determined to be appropriate: see Trotter, at pp. 10-39 to 10-40.

[12] An applicant, however, cannot obtain bail pending sentence appeal simply by pointing to possible hardship – s. 679(4)(a) requires an applicant to establish "unnecessary" hardship: *R. v. McIntyre*, 2018 ONCA 210, at para. 34. Whether potential hardship suffered by the applicant is "unnecessary" must be determined with reference to the merits of the pending appeal: *McIntyre*, at para. 34. There is no unnecessary hardship in serving an appropriate sentence: *McIntyre*, at para. 34, citing *R. v. Johnston,* 2014 NSCA 78, 349 N.S.R. (2d) 122, at para. 21. The weaker the merits of a pending appeal, the harder it will be for an applicant to establish that hardship caused by continued incarceration is unnecessary: *Hassan*, at para. 32.

[13] In the present case, the applicant submits that the sentencing judge erred in not ordering a conditional sentence, failing to use restraint in sentencing a youthful first-time offender, failing to consider collateral immigration consequences, treating

the prevalence of car theft in the region as an aggravating factor, and failing to consider *Morris* factors. It is difficult to gauge the argument regarding the *Morris* factors because the parties have not filed the transcript from the sentencing submissions. The record is also unclear on whether the relevant collateral immigration consequences were argued. Regardless, *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739, at para. 24, provides that even if it was not argued, an appellate court has the authority to intervene. The difficulty the applicant faces is that he needs to demonstrate a legal error that would warrant appellate interference to the extent that his sentence will be set aside, and a conditional sentence, or at the very least a much reduced sentence, will be imposed. Counsel for the applicant was only able to find one trial court decision where a conditional sentence was imposed with respect to a carjacking: see *R. v. Ngabirano*, 2023 ONSC 1706. Even in that case, the sentencing judge imposed a sentence with both a custodial and community component: *Ngabirano*, at para. 51.

[14] The facts of this case are particularly aggravating. The applicant engaged in a spree of carjackings and attempted carjackings as part of a criminal conspiracy. He was only stopped because he was under police surveillance. I agree with the comments of Dawson J. in *R. v. Cassanova-Alman*, 2023 ONSC 1470, at para. 50, that “carjacking is a particularly serious form of robbery given that people expect to be able to travel in safety and privacy in their own motor vehicles” and that “typically sentences for carjacking are from about three and a half to five years in

length.” There is nothing in the circumstances of this case that would suggest a fit sentence is lower than that range.

[15] The applicant has not persuaded me that it is more probable than not that a successful appeal would result in a significantly lower sentence than that imposed by the sentencing judge. I am not satisfied the applicant discharged his onus under s. 679(4)(a). There is no reason why the appeal cannot be perfected within weeks and scheduled for a hearing shortly thereafter. All that needs to be done is to order the sentencing transcript and revise the factum that was filed on this motion. If the applicant’s counsel wants this case to move forward expeditiously, the ball is in his court. There is no undue hardship in serving a fit sentence.

D. DISPOSITION

[16] Leave to appeal sentence is granted, but the application for bail pending appeal is dismissed.

“C.W. Hourigan J.A.”