

Ontario Judgments

Ontario Superior Court of Justice

M.R. Labrosse J.

Heard: April 6, 2020.

Judgment: April 8, 2020.

Court File Nos.: 19-A9984, 20-A8523, 20-A8979,
20-A8999, 18-50418, 18-50477,
19-50013, 19-50031, 20-A9520

[2020] O.J. No. 1692 | 2020 ONSC 2171

Between Her Majesty the Queen, Applicant, and Colleen Cahill, Respondent

(45 paras.)

Counsel

Vanessa Stewart for the Provincial Crown and Geneviève McInnes for the Federal Crown.

Samantha Robinson, for the Respondent.

REASONS FOR RULING

RE: BAIL REVIEW UNDER S. 520 OF THE CRIMINAL CODE

M.R. LABROSSE J.

1 Colleen Cahill stands charged under 9 separate informations involving Federal and Provincial prosecutions, which have been summarized by the Federal Crown as follows:

Provincial Informations:

19-A9984: Theft Under (Chapters), Breach of Probation Order (Keep the Peace). Breach of the probation order imposed by Bourgeois J. on July 17th, 2018. Both offence dates June 12th, 2019.

20-A8523: Pssn of Property Obtained by Crime (Alan Brouse Credit Card), Unlawful Use of the Same Card, FTC-Probation (Keep the Peace). Breach of the probation order imposed by Bourgeois J. on July 17th, 2018. Both offence dates December 7th, 2019.

20-A8979: FTC-Probation (Keep the Peace). Breach of the probation order imposed by Bourgeois J. on July 17th, 2018. Offence date of the alleged breach is February 17th, 2020.

20-A8999: 5 x Break & Enter related charges, 1 x FTC-Probation (Keep the Peace). Breach of the probation order imposed by Bourgeois J. on July 17th, 2018. Offence date of all charges is February 16th, 2020.

Federal Informations:

18-50418: FTC-Probation 733.1 (Failure to report as directed). Breach of the probation order imposed by Bourgeois J. on July 17th, 2018. Offence date August 29th, 2018 -- September 10th, 2018.

18-50477: FTA-Court 145(5) (failed to attend court on October 15th, 2018).

19-50013: FTA 145(2)(b) (Failed to attend court January 8th, 2019)

19-50031: FTC-Probation 733.1 (Fail to report as directed). Offence date November 27th, 2018 -- January 15th, 2019. Breach of the probation order imposed by Bourgeois J. on July 17th, 2018.

20-A9520: Theft Under x 2 (complainants Debbie Xiao and Longruo Dai), Possession of Proceeds of Crime under x 2 (obtained from the thefts), and Possession of a Sch I Substance (1.1g Fentanyl). Offence date February 11th, 2020.

2 A bail hearing was held on February 26, 2020, before Justice Kehoe of the Ontario Court of Justice at which time the Provincial Crown showed cause for Ms. Cahill's continued pre-trial detention for the above provincial informations. She was detained on the primary and secondary grounds as a result of the proposed plan being deemed insufficient.

3 Ms. Cahill now applies under s. 520 of the *Code* to review the decision of Justice Kehoe. Being a bail review of a detention order, Ms. Cahill has the onus of refuting the presumption favoring her continued detention.

4 On the federal prosecutions, the Federal Crown does not oppose bail subject to certain conditions as these involve administration of justice offences.

THE FACTS

5 The facts are as set out in a number of Prosecution summaries:

- a. On June 12, 2019, the accused was arrested at a Chapters (Indigo) store for theft of two items of a total value of \$53.00. She was released on scene with a PTA/Undertaking. At the time, she was subject to a probation order to keep the peace and be of good behaviour;
- b. On Dec 7, 2019, the complainant, who had just returned from surgery, awoke to observe an unknown, uninvited female in his home. He asked her to leave and she eventually did. Later, he reported that his wallet had been stolen. The accused was then identified on a security video making purchases at a gas station nearby the complainant's residence. The accused in the video was wearing different clothing than that reported by the complainant thus it is uncertain if Ms. Cahill was the female in the home. At the time of the arrest, the accused was on probation for possession of drugs and failure to appear.
- c. On February 16, 2020, the accused was arrested for break and enter into a commercial building in the City of Ottawa. She is alleged to have stolen approx. \$600.00 in cash, keys and caused damage to the premises of a value of approx. \$5000.00. At the time, she was subject to a probation order to keep the peace and be of good behaviour.
- d. On February 17, 2020, the accused was arrested for break and enter into the home of an elderly female home owner who was home at the time. Ms. Cahill was found by police inside the home. At the time, she was subject to a probation order to keep the peace and be of good behaviour.

6 The accused's criminal record dates back to 2003 and contains several offences for theft under \$5000, possession of drugs and failure to appear. There is a 7-year gap from 2008 to 2015 where there are no offences.

7 The Applicant also provided an affidavit and testified at the bail review hearing where she advised the Court of the following:

- a. She has been in custody since February 17, 2020.
- b. She was diagnosed as HIV positive three years ago and suffers from chronic lung disease. She feels that she is at significant risk of contracting COVID-19 while incarcerated at the OCDC.
- c. She has struggled with drug addiction throughout her life. During the 7-year gap on her criminal record, she was caring for her children. She links the periods where she has committed offences to periods when she relapsed and was using drugs.
- d. She is an Ontario Disability Support Program ("ODSP") recipient.
- e. Since being incarcerated, she has gone back on the methadone program and she proposes to continue if released by attending at a pharmacy on a daily basis to receive her methadone. She is prepared to be supervised by the John Howard Society (JHS) and follow any recommendations.
- f. She is prepared to abide by conditions of house arrest. She has not proposed a surety.

8 Also relevant to this proceeding is Ms. Cahill's evidence of the inconsistency in her ability to be able to wash and have access to soap while at the OCDC. While she is currently alone in her cell, she shared a cell with another inmate approximately two weeks ago. She was not advised that she will continue to be alone in a cell and suggested that it depends on the number of female inmates in the OCDC.

9 She also testified that she has not been able to practice social distancing and that recently she was placed in proximity to an inmate who was frequently coughing on her.

10 Clearly, she is experiencing anxiety at being in the OCDC and feels vulnerable should other inmates become infected with COVID-19.

THE RELEASE PLAN

11 The Release Plan consists of Ms. Cahill's release to the John Howard Society Bail Supervision Program ("JHS") and to be under the direction and supervision of the program. The highlights of the Release Plan can be summarized as follows:

- a. Ms. Cahill will be released into the community and be subject to daily call-in's to the JHS;
- b. She is to reside at 5-91 James Street and that address is to be confirmed by her supervisor.
- c. She is prepared to comply with a house arrest condition with the exception to attend at the pharmacy to get her methadone.
- d. The Defence has also proposed a number of conditions to supplement the plan.

ISSUES

12 This application is brought under s. 520 of the *Code*. The Applicant has the onus of displacing the presumption favouring her continued detention. The Crown states that Ms. Cahill's continued detention is justified under ss. 515(10) (a), (b) and (c) of the *Code*, the so-called primary, secondary and tertiary grounds.

13 A reviewing judge may intervene where the justice who made the detention order erred in law, or gave excessive or insufficient weight to a relevant factor. A reviewing judge may also intervene where there is a material and relevant change in the circumstances of the case. In considering a bail review based on an asserted material change in circumstances, a reviewing judge should consider the new information following the *Palmer* criteria for fresh evidence, but applied flexibly and adapted to the bail context: see *R. v. St.-Cloud*, [2015] 2 S.C.R. 328, 2015 SCC 27 at paras. 120-138.

14 By operation of s. 11(e) of the *Canadian Charter of Rights and Freedom*, ("Charter"), all accused are constitutionally entitled to not be denied reasonable pre-trial bail without just cause. This also applies to those accused of serious crimes. Pre-trial bail for an accused is the general rule and detention is the exception: see *R. v. A.A.C.*, 2015 ONCA 483, at para. 41.

15 The primary ground considers the circumstances where the continued detention is necessary to ensure that the accused will attend her trial and any other court appearance where she is required.

16 The secondary ground addresses circumstances where the continued detention of the accused is necessary for the protection or safety of the public, having regard to all of the circumstances, including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice.

17 Finally, if the Court concludes that detention is not warranted on the primary or secondary ground, the Crown seeks to have Ms. Cahill detained on the tertiary ground which allows for a person to be detained where that detention is necessary in order to maintain confidence in the administration of justice having regard to all the circumstances.

18 The tertiary ground analysis requires that the Court consider four specific factors: (1) the apparent strength of the prosecution's case; (2) the gravity of the offence; (3) the circumstances surrounding the commission of the offence, including whether a firearm was used; and, (4) the fact that the accused could be liable, on conviction, for a potentially lengthy term of imprisonment. However, the relevant factors are not limited to the ones expressly specified in s. 515(10)(c) of the *Code* and the Court must consider all the circumstances in the analysis.

ANALYSIS

19 My analysis of Ms. Cahill's plan starts with the fact that her plan is dependant on her ability to avoid a relapse. I accept her evidence that her previous convictions were linked to her drug use and the type of individuals with whom she was associating with at the time of those offences. Thus, the focus of her plan must be on keeping her from relapsing and using the available resources to allow her to succeed. This is where the problem lies. In the circumstances of the current COVID-19 pandemic, the services available to assist Ms. Cahill are greatly diminished. The JHS bail supervision program is essentially limited to once per day call-in to the JHS together with some third-party monitoring by the JHS. As for the methadone program, this treatment is limited to attending at a pharmacy to pick up and take her methadone in the presence of the pharmacist. This is not ideal. Even Ms. Cahill admitted that she has benefited in the past from a more active supervision and reporting with the JHS.

20 However, I cannot ignore that she has now spent almost two months in detention at the ODCDC. Her evidence has impressed me whereby she is clearly very aware that her personal circumstances of being HIV-positive and having chronic lung disease places her at significant risk while detained. Although the Crown does not dispute the diagnosis of HIV-positive and lung disease, the Crown states that more evidence is required to conclude that she is at greater risk while detained. I disagree. This is not a circumstance where it is unclear as to how an illness may cause greater risk. I do not find that further medical evidence is required. Clearly, being HIV-positive and having chronic lung disease places Ms. Cahill at a significantly greater risk. While I appreciate that in normal circumstances, a court may have been justified to seek further medical evidence, the scarce availability of medical practitioners leaves the Court with Ms. Cahill's evidence as the best available evidence.

21 Regardless, I also adopt the views of Justice Conlin in *R. v. C.J.*, [2020 ONSC 1933](#) that the Court need not have evidence that while in jail, Ms. Cahill is more at risk of contracting COVID-19 than if she were not in jail. However, the presence specific medical issues is simply an additional factor to consider. Further, her ability to recover from the virus is clearly negatively impacted by her medical conditions.

22 I am also mindful that in normal circumstances, Ms. Cahill's release plan may be deemed insufficient as was noted by Justice Kehoe. However, the circumstances of that decision have clearly changed, and I am of the view that COVID-19 is a material change in circumstance, particularly when considered in light of Ms. Cahill's medical conditions that were not before Justice Kehoe. While this information may have been available to Ms. Cahill at her bail hearing, it did not have the same relevance as it does today in the context of the pandemic. The material change in circumstance has been established.

23 When considering the primary ground, Ms. Cahill's history of non-attendance for court dates has been problematic, to say the least. However, I accept that these circumstances were caused in large part to her addiction issues. The factor that underpins Ms. Cahill release is her need to remain on the methadone program and avoid relapsing. This is a requirement that is at least somewhat capable of being monitored.

24 Consequently, provided that Ms. Cahill can remain in regular contact with the JHS and that the JHS has the ability to assist in monitoring her continued involvement in the methadone program, I am of the view that her risk of not attending at her trial is mitigated. Moreover, in the current context of the COVID-19 pandemic which has restricted travel, coupled with Ms. Cahill having limited financial means, namely being on ODSP, her risk of flight is much lower. Ms. Cahill has thus discharged the onus that her detention is not necessary on the primary ground.

25 The secondary ground addresses circumstances where the continued detention of the accused is necessary for the protection or safety of the public, having regard to all of the circumstances, including any substantial likelihood that Ms. Cahill will, if released from custody, commit a criminal offence or interfere with the administration of justice.

26 Once again, Ms. Cahill's history works against her. Since 2019, she has had a series of theft and break and enter offences that show a pattern of reoffending. However, I also accept her evidence that these offences would generally have been linked to periods where she relapsed. When questioned in cross-examination that she could not link the specific dates of offences to specific periods of relapsing, I accept her general evidence that such was the case.

27 I agree with Justice Goodman in *R. v. King*, [2020 ONSC 1935](#), that the threat posed by COVID-19 is relevant to secondary ground concerns. The assessment of Ms. Cahill's plan on the secondary ground includes the existence of COVID-19 but it is certainly not determinative.

28 Ms. Cahill has now spent almost two months in detention and she has witnessed first-hand the extent to which she is unable to realize recommended standards for cleanliness, washing and distancing. She is at risk of contamination and also more susceptible to the effects of the virus. She has also diminished chances of surviving the virus given her medical conditions.

29 The effects of COVID-19 are also relevant to the opportunity that Ms. Cahill will have to reoffend. To start, she must self-isolate to protect herself. Her history of convictions is focussed on thefts and these opportunities are reduced in the current provincial shutdown. In addition, it is a factor that her history of criminal offences does not place her in substantial risk of committing violent crimes, weapons offences or drug trafficking.

30 In normal circumstances, I would have been challenged in considering the secondary ground in relation to Ms. Cahill in the context of her plan and history of criminal offences. However, in these circumstances, COVID-19 takes Ms. Cahill outside of being a substantial risk to reoffend. The circumstances have changed for her and her jeopardy has increased if she were to face incarceration once again. Provided that she can avoid a relapse, remain on the methadone program and respect the terms of her house arrest, Ms. Cahill is not a substantial risk to reoffend. I

therefore find that she has discharged her onus to show that her detention is not necessary on the secondary ground.

31 The tertiary ground allows for a person to be detained where that detention is necessary in order to maintain confidence in the administration of justice having regard to all the circumstances. Justice Kehoe did not need to do the analysis as the Crown had shown cause on the primary and secondary ground.

32 In *A.A.C.*, the Court of Appeal for Ontario referred to additional considerations that emerged from the Supreme Court of Canada's decision in *St-Cloud*:

- i. That the Supreme Court of Canada rejected an unduly restrictive interpretation of s. 515(10)(c). The applicability of the section is not limited to exceptional circumstances; and,
- ii. It is the combined effect of the four listed factors in s. 515(10)(c) that must be considered together with other relevant circumstances.

33 When I consider the four factors, I note that the Crown certainly has a strong case but much of it is based on identification evidence which can always be challenged. As such, the case against Ms. Cahill may not be as strong on some offences as others. Surely the break and enter where she was found in the person's residence is a strong case.

34 As for the gravity of the offences, break and enter into someone's home is serious as it challenges one's security while being in their residence. However, the offences do not involve violence, firearms or drug trafficking or mandatory minimum sentences.

35 When considering the circumstances of the offences, the Supreme Court of Canada in *St-Cloud* provided a non-exhaustive list of "possible circumstances surrounding the commission of the offence that might be relevant under s. 515(10)(c)" [paragraph 61]. They include "the fact that the offence is violent, heinous or hateful one, that it was committed in a context involving domestic violence, a criminal gang or a terrorist organization, or that the victim was a vulnerable person (for example, a child, an elderly person or a person with a disability)". Although the Crown argues that two of the informations involve vulnerable individuals, it is not alleged nor is there any evidence that firearms were used or that the offences committed were carried out in a violent fashion.

36 One must consider that Ms. Cahill has a history of drug addiction that to date she has not been able to overcome with the exception of a 7-year period from 2008 to 2015. While the February 17, 2020 arrest raises security issues, the balance of the offences continue to be property related or offences involving the administration of justice.

37 Finally, I am not convinced that if found guilty, Ms. Cahill would face significant jail time.

38 In addition, all the circumstances must be considered. This leaves for consideration the circumstances of the COVID-19.

39 I agree with the defence that it is not necessary for the accused to demonstrate that her particular circumstances place her at greater risk in the jail than other inmates. The realities of the detention facilities in Ontario are that steps have been taken to reduce occupancy and that the jails have adopted measures resulting from the COVID-19 virus. It remains nonetheless that the environment of the detention centre is not conducive to the types of physical distancing and other safety measures being recommended by the health authorities to protect detainees from the transmission of the virus. I agree with the reasoning of Copeland J., in *R. v. J.S.*, [2020 ONSC 1710](#) and that there is a greatly elevated risk posed to detained inmates as compared to being at home. In Ms. Cahill's situation, that risk is significant.

40 This leaves me to consider within the current COVID-19 environment, if the reasonably informed member of the

public will lose confidence in the administration of justice if Ms. Cahill were released given her personal circumstances, the circumstances of the offences and the likelihood that she will not be subject to a lengthy jail sentence. There is no doubt that Ms. Cahill's proposed plan is not ideal and that there are supervisory elements that could be improved. However, many of the shortfalls of the plan are associated with the current COVID situation.

41 As the Supreme Court of Canada has said in *R. v. Hill* [2002] 3 S.C.R. 309, bail can only be denied if I am "...satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice". When I consider the reasonably informed person who considers all the circumstances described above, and as mentioned earlier that detention is the exception, I conclude that the person will not lose confidence in the administration of justice if Ms. Cahill were released. Ms. Cahill has discharged her onus to show that her detention is not necessary on the tertiary ground.

Conditions of Release Plan

42 As for the Release Plan, I plan to make it stricter and improve the areas where supervision can be incorporated, hopefully by the JHS. I provide the following sample conditions, subject to hearing submissions from the parties:

- a. Report to the Bail Supervision Program (by way of telephone), on the date and time confirmed in the John Howard "Verification Report". A new report is likely required.
- b. Reside at the address approved of by the JH Society in their "Verification Report." Any change of address is to be approved of, in advance, by the Bail Program.
- c. Notify the Officer in Charge (or designate) by telephone within 24 hours of any change in your address.
- d. Attend and actively participate in any programs as directed by the Bail Supervision and sign all forms necessary for the Bail Supervision Program to monitor your progress.
- e. Do not contact or communicate in any way either directly or indirectly, by any physical, electronic or other means, with the following: Debbie XIAO and Longruo DAI or any other named persons associated with these offences.
- f. Do not be within 100m of any place where you know any of the persons named above to live, work, go to school, frequent or any place you know the persons to be, except for required court appearances.
- g. Do not attend at Yangtze Dining Lounge, located at 700 Somerset Street, Ottawa, Ontario.
- h. Do not attend at the McDonald's located at 670 Bronson Avenue.
- i. Remain in your residence at all times except:
 - i. Once daily to attend at the pharmacy to obtain your methadone. This must be done before 2:00 p.m. each day.
 - ii. On Saturdays, to attend at a grocery store to obtain the necessities of life. This must be done before 2:00 p.m.;
 - iii. Attend for a medical emergency, meet with her counsel, Samantha Robinson or attend court. The accused should provide proof of medical emergency or court attendance or meeting with counsel if requested by a peace officer;
- j. To continue on the current methadone program and follow the directions of your physician;
- k. Provide any requested consents from the JHS to monitor your ongoing participation in the methadone program and obtain information directly from the pharmacy on your daily attendance;

- i. Do not possess any weapon(s) as defined by the *Criminal Code* (for example, but not restricted to, a pellet gun, firearm, imitation firearm, crossbow, prohibited or restricted weapon or device, ammunition or explosive substance or anything designed to be used or intended for use to cause death or injury or to threaten or intimidate any person);
- m. Do not possess any weigh scales, hydroponic growing equipment or other drug paraphernalia which could be used for drug trafficking;
- n. Keep the peace and be of good behaviour.

43 Counsel for Ms. Cahill is to contact the JHS and inquire as to any additional supervisory services that they may offer to Ms. Cahill to assist her during her interim release.

44 The bail review will be reconvened by trial coordination to confirm the terms of the conditions.

Disposition

45 The bail review application is granted. Judicial interim release is granted with the conditions to be finally determined upon continuation of the bail review.

M.R. LABROSSE J.

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