

CITATION: R. v. Cain, 2020 ONSC 2018
COURT FILE NO.: 19-2046
DATE: 2020/04/01

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HER MAJESTY THE QUEEN v. BRANDON CAIN

BEFORE: A.E. London-Weinstein J.

COUNSEL: Moiz Karimjee, for the Crown

Mark Ertel, for the Applicant

HEARD: April 1, 2020

PUBLICATION BAN

This Endorsement is subject to a publication ban under s. 520(9). However, due to the novelty of the subject matter, it may be published in its current format and may be used by these and other counsel in this and other Court proceedings.

ENDORSEMENT

[1] Mr. Cain seeks review of the detention order issued by Justice Phillips on February 10, 2020. This review was heard by teleconference with consent of the parties. Mr. Cain is facing very serious charges arising from a violent attack on two complainants. Mr. Cain is alleged to be the drug supplier to these complainants, who are middle aged, and vulnerable.

[2] The specific allegations involve Mr. Cain and a co-accused violently assaulting the complainants for stealing crack cocaine from him. Mr. Cain and his co-accused are alleged to have pistol whipped and tasered the complainants. Mr. Cain is facing a number of charges relating to the firearm and use of the taser, including assault causing bodily harm, forcible confinement, break and enter and threatening death. Mr. Cain is also accused of forcing the complainants to shoplift in order to pay off the drug debt for the stolen drugs. The index offences are alleged to have occurred on July 25.

[3] Mr. Cain was originally released by Justice Doody of the Ontario Court of Justice. The terms of that release were strict house arrest with his mother acting as a surety. Mr. Cain is alleged to have breached the terms of that release. The allegation of breach appears very strong on its face. Mr. Cain is alleged to have been pulled over in the early morning hours of January 16, 2020. He was driving his mother's car, apparently without her permission. He was in the company of a young woman who is not the proposed surety in this case. The material before me indicates that he initially tried to drive away from police, and then left his mother's vehicle with its passenger. Police attended at his home and he admitted his guilt and surrendered to police.

[4] Justice Phillips found that the proposed surety, Josey Marion, was a generally trustworthy surety and accepted her evidence that she would call the police if Mr. Cain were to breach the terms of his bail. Ms. Marion also has a security system in her home, which alerts her by email if a door or window is opened. The plan which was presented before Justice Phillips also involved Mr. Cain's brother acting as a residual support surety. The plan contemplated Joshua Cain taking his brother to the gym. Joshua Cain is a responsible and employed individual who is also a reservist in the Canadian Armed Forces. However, Justice Phillips was not satisfied that Mr. Brandon Cain was willing to follow court orders while on release, and detention was ordered on the secondary ground. In addition, Joshua Cain was a surety, along with his mother, at the time of the alleged breach of the release order fashioned by Justice Doody.

[5] In the intervening period since the bail review, the world has undergone a swift transformation through the rise of the Covid 19 virus. The criminal justice system is not immune from the changes being forced upon everyone living through this time. This hearing is being conducted by teleconference, for example. Mr. Cain is not physically before me in a court room, which six weeks ago, was unimaginable.

[6] The Crown has provided me with material suggesting that the Covid 19 situation is under control in the jail, that prisoners are being queried upon admission for signs of the virus. I take judicial notice of the fact that this virus is contagious before a person demonstrates signs of infection and that persons can be asymptomatic, yet highly contagious. These are facts which are well known in the community given the proliferation of media coverage on the subject of the virus.

I note also, how rapidly events have changed from week to week, with a corresponding rise in the numbers of individuals who are infected.

[7] I also take judicial notice of the fact that recommended social distancing and frequent hand washing which are required as protection against the virus, are not readily available while a person is in custody at the Ottawa Carleton Detention Centre (“OCDC”). This is not a criticism of the facility, it is merely a statement of the fact that prisoners cannot adequately socially isolate, nor wash their hands with frequency in the jail. Mr. Cain testified on this bail review that he is housed with another inmate and that he has moved cells in the last few months. Mr. Cain testified that in 2017 he was the victim of a stabbing and sustained an injury to the outer membrane of his liver. As a result of that injury, he is prone to infections.

[8] I am of the view that the existence of the Covid 19 virus in Ottawa constitutes a material change of circumstances such that it permits me to conduct a *de novo* hearing under s. 520. I agree with the reasoning of Copeland J., in *R. v. J.S.*, 2020 ONSC 1710. In that case, the court found that the greatly elevated risk posed to detained inmates from the Coronavirus as compared to being at home on house arrest is a factor that must be considered in assessing the tertiary ground. In *R. v. King*, 2020 ONSC 1935, Justice Goodman found the threat posed by the virus to also be relevant to secondary ground concerns. That being said, the existence of the Covid 19 virus is relevant, but not determinative as to whether an individual plan of bail meets the primary, secondary and tertiary criteria governing release. This particular plan of bail must be assessed to determine whether the secondary and tertiary ground concerns can be met. The threat the virus poses to those housed in the detention centre is one factor in the balancing which is required.

[9] Given that matters at the jail may become rapidly worse, if present events occurring elsewhere are any indication, the time to determine whether Mr. Cain can be released and the public adequately protected, is now, before matters have worsened.

[10] These offences are violent, and it is very troubling that Mr. Cain allegedly demonstrated so little regard for his bail conditions at the time of his arrest. Since that time, a deadly virus has been unleashed on the world. As a prisoner in the OCDC, Mr. Cain is vulnerable to infection. I am satisfied that the possibility of infection has had a salutary effect on the reasoning of Mr. Cain and will have an effect on his conduct. I reviewed the decision of *R. v. Nelson* 2020 ONSC 1728. In that case, given the very serious nature of the charges, including robbery of a jewelry store, and trafficking with a loaded firearm, the presiding justice found that public confidence in the administration of justice would be undermined if Mr. Nelson were released. The court also found that Mr. Nelson lacked any particular characteristic which would make him particularly vulnerable to the ravages of the virus if he were infected given his youth. At the end of the day, the accused in *Nelson* could not be released due to tertiary ground concerns.

[11] I do not find that Mr. Cain must satisfy me that he has some subjective personal characteristic in order to accept that he is at increased risk of infection by virtue of his incarceration at OCDC. I agree with the reasoning of Justice Conlan in *R. v. C.J.*, 2020 ONSC 1933. In that case, at para. 9, Justice Conlan wrote, “As to any suggestion that this Court may need “evidence” that C.J., is, while at the jail, more at risk of contracting COVID-19 than if he was not in the jail, I reject that submission. I accept what I already have as evidence from C.J., —Maplehurst Detention Centre has curtailed or eliminated altogether the few niceties that prisoners had available to them previously, such as family visits and religious services. Viewed strictly in the context of the virus, that is welcome news. But I also do not live in a bubble; it is incontrovertible that a jail setting is not conducive to the types of physical distancing and other safety measures being recommended by all of the health authorities to help protect oneself against the virus. To demand some “evidence” in support of that is, with respect to any contrarian view, unnecessary.”

[12] That being said, Mr. Cain has testified that his prior liver injury puts him at a higher risk of infections generally. I have no evidence to contradict his assertion on this point and I accept it.

[13] In my view, the arrival of the Covid 19 virus is a material change in circumstances triggering a *de novo* hearing and is also one of the relevant factors to be considered on the tertiary ground.

[14] In regard to the secondary grounds, when Justice Phillips conducted this hearing six weeks ago, Mr. Cain was not subjected to the threat of infection by the virus in jail. His trial has now been adjourned, and it may be some time before a trial date is reached. Justice Phillips found the sureties proposed to be generally trustworthy. I am satisfied that the home security camera installed will provide the ability for the surety to supervise Mr. Cain. I am also satisfied that despite the issues in regard to the secondary grounds which are attendant to the use of GPS bracelets, that the addition of the bracelet enhances the strength of the plan, and the public's view of the plan.

[15] Justice Phillips, like myself, did not find the weaknesses in the plan to lie with the surety, but with the accused. Mr. Cain demonstrated extraordinarily poor judgment in relation to the breach. That being said, the breach, while blatant, did not involve additional violence, weapons, nor drugs, nor was it in any way related to the original charges.

[16] The incident demonstrated an unwillingness to follow conditions. Mr. Cain is not legally a youth, but he is a younger person at age 27. He has a very limited record which is both somewhat dated and contains no violence. He has a conviction in 2013 for breaching an undertaking and obstruction of police, and a 2017 conviction for possession of drugs. He was not sentenced to jail for either of these convictions.

[17] In the circumstances, I am of the view that the passage of six weeks since the bail review, spent in the OCDC during which the world has experienced a life-threatening pandemic, has had a salutary effect on Mr. Cain's willingness to follow court orders. I am satisfied that given the change of events, that there has been an adjustment to the appreciation of following court orders in the mind of Mr. Cain. I accept his evidence that the three months he has spent in custody, at which time the virus has erupted in the community, have made him aware of the peril of not following court orders. The new plan of bail involves Ms. Marion as surety and a GPS monitoring bracelet with strict house arrest conditions. I am satisfied that based on Mr. Cain's time in custody under current conditions, and the addition of the GPS monitoring bracelet, that there is no longer a substantial likelihood that Mr. Cain will commit additional offences while on release. Conditions of strict house arrest will adequately protect the public.

[18] I appreciate that this is a review of the decision of Justice Phillips, who conducted an earlier review, and did not conduct a tertiary ground analysis as it was not necessary, given the concerns

on the secondary grounds. However, given the change in circumstances and that this is a case not only involving a firearm, but where the circumstances surrounding the case are very serious given the level of violence and exploitation, I have conducted the tertiary ground analysis, given that this is a *de novo* hearing.

[19] In regard to the tertiary ground set out in 515(10)(c), of the *Criminal Code*, I am required to consider determining whether detention is necessary to maintain confidence in the administration of justice, having regard to all of the circumstances, including

- i. the apparent strength of the crown's case;
- ii. the gravity of the offence;
- iii. the circumstances surrounding the commission of the offence, including whether a firearm was used, and
- iv. the fact that the accused is liable, on conviction for a potentially lengthy term of imprisonment, or, in the case of an offence that involves, or whose subject matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

[20] The crown's case appears strong on its face. That said, the credibility of the complainant's observations will be at issue in relation to the presence of a firearm. The complainant in this case has a wound which appears to be a taser burn. However, the only evidence of a firearm being present emanates from the observations of the complainants, both of whom are drug users, and who have criminal records.

[21] One of the complainants has a six-page criminal record which begins in 1985 and ends in 2018. It includes crimes of dishonesty. The female complainant in this case has a criminal record which begins in 1998 and ends in 2008.

[22] The offence is serious. There is a mandatory minimum of one year if convicted of the s. 85 offence. The circumstances surrounding the offence involve the allegation of the presence of a firearm and a pistol whipping within the complainant's home. Upon conviction, the accused is liable to a sentence in the low to mid penitentiary range.

[23] In short, all of the enumerated statutory factors involving the tertiary ground favour detention. While I am mandated to consider the four enumerated grounds, I am also required to consider all relevant factors. It is also not automatic that detention be ordered where the statutory grounds all favour detention *R. v. St-Cloud*, 2015 2 S.C.R. 328 para. 69.

[24] *St. Cloud* allows for the consideration of the personal circumstances of the defendant, including his physical or mental condition (at para. 71).

[25] I agree with Justice Copeland that the greatly elevated risk posed to detained inmates from the Coronavirus, as compared to being at home on house arrest is a factor that must be considered in assessing the tertiary ground. It is my view that the reasonable person described in the tertiary ground as being familiar with the fundamentals of our system of laws and *Charter* values, may also have concerns that an individual may pose a threat to the community if that person appeared unwilling upon release, to follow the social distancing and isolation mandates which are now in place.

[26] In all of the circumstances, I am satisfied that the tertiary ground concerns in this case can be met by the plan of bail proposed. In my view, the threat posed by the inability to self isolate also raises concerns regarding the guarantee to security of the person, as guaranteed by s. 7 of the *Charter* and I have considered this factor. I am satisfied also, based on his evidence before me, that Mr. Cain will self isolate, as he has promised, and follow the societal norms of social distancing which have become a part of our society at present.

[27] Mr. Cain shall be released on house arrest to the residence of Ms. Marion as the named surety. He shall be fitted for a GPS monitoring bracelet within 48 hours. The following conditions of release apply:

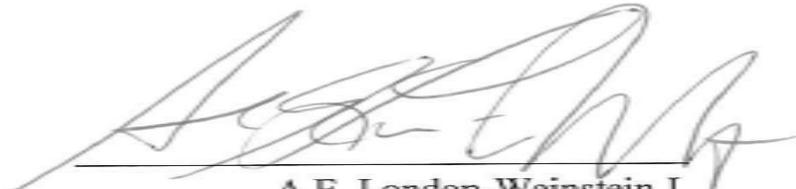
- 1) Reside at 16 Somero Private;

- 2) Remain in your residence at all times except:
 - a) if there is a medical emergency AND in the company of Josey Marion; and
 - b) if in attendance at court, or meeting with counsel AND in the company of Josey Marion, or Counsel Mark Ertel;
- 3) Accused should provide proof of medical emergency or court attendance or meeting with counsel if requested to do so by peace officer;
- 4) Do not contact or communicate in any way either directly or indirectly, by any physical, electronic or other means, with the following: Barry HAYES, Chantale BERTRAND-WALKER aka Chantale BERTRAND, or Eric CHARBONNEAU ROY;
- 5) Do not be within 100 metres of any place where you know any of the person(s) named above to live, work, go to school, frequent or any place you know the person(s) to be EXCEPT for required court appearances;
- 6) Do not attend at 374 Richelieu Street, Ottawa, ON;
- 7) Do not possess any weapon(s) as defined by the *Criminal Code* (for example, but not restricted to, a pellet gun, firearm, imitation firearm, cross-bow, 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);
- 8) Do not possess any weigh scales, hydroponic growing equipment or other drug paraphernalia which could be used for drug trafficking;
- 9) Keep the peace and be of good behavior;
- 10) Attached terms in GPS; and

11) The sureties will be:

1. Josey Marion \$1000 bond
DOB: August 13, 1991
16 Somero Private, Ottawa, Ontario; and

2. Joshua Cain \$10,000 bond
DOB: June 22, 1987
3 – 311 Blake Blvd., Ottawa, Ontario



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Released: April 1, 2020