COURT OF APPEAL FOR ONTARIO

CITATION: Williams (Re), 2021 ONCA 90
DATE: 20210212
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Feldman, Tulloch and Nordheimer JJ.A.

IN THE MATTER OF: Jerome Williams

AN APPEAL UNDER PART XX.1 OF THE *CODE*

Anita Szigeti & Maya Kotob for the appellant

Adam Wheeler, for the respondent, Attorney General of Ontario

Heard: February 5, 2021 by videoconference

On appeal from the disposition of the Ontario Review Board, dated May 27, 2020, with reasons dated May 27, 2020.

Nordheimer J.A.:

[1] Mr. Williams appeals from the disposition of the Ontario Review Board that continued the detention order against him. The appellant submits that the Board erred in not awarding a conditional discharge. For the following reasons, I would allow the appeal and direct a conditional discharge.

[2] The Board found that the appellant poses a significant threat to the safety of the public. The sole issue on appeal is whether that risk can be adequately addressed through the imposition of a conditional discharge rather than a detention order.

[3] The appellant has been under the auspices of the Board since January 2012. He is currently 33 years old. In 2009, the appellant was charged with certain robberies and related offences. On December 22, 2011, he was found not criminally responsible ("NCR") with respect to these offences.

[4] The appellant was admitted to the Centre for Addiction and Mental Health in a psychotic state. He was declared incapable of consenting to treatment. A substitute decision maker was appointed. Once the appellant received medication, there was a noticeable improvement in his mental state and, after dose increases, he was free of psychotic symptoms.

[5] Over the years, the appellant has experienced certain setbacks in terms of his treatment. He has also had some issues regarding his use of cannabis and cocaine – issues that appear to continue. However, for at least the past five years, there have been few behavioural problems, and the ones that have occurred have been minor in nature.

[6] In January 2019, the appellant was discharged into the community, but he remained under a detention order. He was discharged to the home of his then

girlfriend and her parents. Mr. Williams' girlfriend was nearly full term in her pregnancy with their son at the time of discharge. Mr. Williams' son was born on January 17, 2019.

[7] On March 2, 2019, the appellant had a verbal argument with his girlfriend and as a result, left her residence. Notably, however, the appellant returned to hospital, as he knew that he had to inform the hospital of his absence from the residence. The appellant's readmission to hospital was a short one: he was able to resolve the differences in his relationship and return to his girlfriend's home on March 21, 2019. Pursuant to his annual disposition review hearing on April 1, 2019, the Board issued a disposition dated April 11, 2019, maintaining the appellant on a general detention order with community living. On December 2, 2019, the appellant readmitted himself to hospital because he no longer wished to be in a relationship with his girlfriend.

[8] The appellant's detention in hospital became markedly more restrictive in March 2020, as a result of hospital wide COVID policies and restrictions. As of March 12, 2020, the appellant lost all of his indirectly supervised and community privileges. He was only allowed to access the secure yard on hospital grounds, while accompanied, for thirty minutes up to six times a day. The appellant was otherwise restricted to his unit. No one was allowed to visit the hospital – which meant that the appellant had not been able to see his eighteen-month-old son or his mother from mid-March up until the date of the hearing.

[9] At his review hearing in May 2020, the appellant sought to be released so that he could live in the community. He offered the homes of both his mother and a friend as two places at which he could live.

[10] The hospital felt that the appellant should only live in a place that provided supportive services. The preferred location, from the hospital's perspective, was Baldwin House, but it was not accepting new patients because of COVID-19. The hospital itself was not conducting assessments of potential alternative living places, also because of COVID-19. As a result, the appellant was left in limbo because, while the hospital would have agreed with him living in the community if they could approve the living arrangements, the hospital was not conducting any such assessments.

[11] The hospital also resisted a conditional discharge on the basis that, if the appellant stopped taking his medication, he might experience a rapid decompensation and the hospital would not be able to take action to bring him back into the hospital in a sufficiently short timeframe.

[12] The Board accepted the hospital's position. They rejected the appellant's request for a conditional discharge. In doing so, however, they made significant errors which resulted in their decision being unreasonable.

[13] First, the Board concluded that the appellant's "stay in the community was not successful". That finding is not borne out by the evidence. Indeed, the evidence

suggests the opposite. There were no apparent problems while the appellant was living in the community. Indeed, as noted above, when problems developed between the appellant and his girlfriend, the appellant returned to the hospital.

[14] Second, is that the Board made no inquiries regarding the hospital's stated position that it was not conducting any housing assessments because of COVID-19. The Board did not inquire into why such assessments were not being conducted in any form nor did the Board inquire how long it would be before the hospital resumed doing assessments. The appellant was simply left to wait.

[15] The Board has a responsibility to make such inquiries – "to search out and consider evidence favouring [the NCR accused's] absolute discharge or release subject to the minimal necessary restraints": *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at para. 54. The Board does not fulfill its responsibilities by simply accepting what the hospital says. If the timeframe for resuming assessments was uncertain, then the Board ought to have adjourned the appellant's hearing for a short period so the matter could be revisited with updated information. None of this was done.

[16] I would add that I do not accept that it was appropriate for the hospital to simply cease undertaking such assessments with the result that individuals continue to be detained when they might otherwise be able to live in the community. More importantly, the Board ought not to have accepted that situation

nor should it have made a disposition on that basis. Doing so results in a failure of the Board to ensure that the "least onerous and least restrictive" disposition is made: *Winko*, at para. 47.

[17] Third, I am also troubled by the attitude that the Board took to the two offers of housing for the appellant. Both offers were contained in short handwritten notes addressed to the Board. The Board's reaction was to characterize these offers as having been "presented in a very rudimentary and unprofessional format". That characterization is not only unfair, it fails to properly account for the lack of resources available to the appellant and the restrictions that the pandemic has imposed on people generally – restrictions, I note, that the Board was content to allow the hospital to rely upon for its cessation of assessments.

[18] Fourth, the Board accepted that there was a need for the hospital to be able to move quickly if the appellant suffered a rapid decline in his condition. However, there was no evidence before the Board that any such decline had occurred in the past. Indeed, the evidence of the appellant's psychiatrist was uncertain on this very point. When asked about this by the Board, the psychiatrist said, in part:

> I wouldn't necessarily be certain that he would voluntarily come in and to advise if he was, for example, starting to use substances, and advised to come in just to break that cycle or stabilize. Because often, as I mentioned before, at least initially, Mr. Williams will deny substance use or what have you. So, I can't really imagine a scenario where if he's presented with that, then he would just say okay, I, I will voluntarily come into hospital. <u>But again,</u>

> that's speculation and I, I, I don't know until that necessarily happens, but.... [Emphasis added].

[19] In this court's experience, the resort to detention orders as being necessary on the basis of a need for quick action is often relied upon by hospitals and the Board as justifying the rejection of a request for a conditional discharge. In considering this issue, I am mindful of the problems with the *Mental Health Act*, R.S.O. 1990, c. M.7, and the restrictions on its use, to address these situations. It would appear to be long past time for the government to review the operation of the *Mental Health Act* with respect to these, and other, issues that have arisen in its practical application in this context.[1]

[20] However, those failings cannot be permitted to justify the continued detention of individuals on the basis of expediency. Something more must be shown, and none is in this case. As this court said in *Valdez (Re),* 2018 ONCA 657, at para. 21, "given the least onerous and least restrictive test, something more is required than mere convenience to the hospital".

[21] I would add, on this point, that, in his evidence before the Board, the appellant's psychiatrist said that, if the appellant did begin to decompensate the *Mental Health Act* "would likely be sufficient" to manage the risk that the appellant would pose to the public. The psychiatrist's concern was that the *Mental Health*

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[1] This is not the first time that this court has identified these problems: see *Davies (Re),* 2019 ONCA 738, 380 C.C.C. (3d) 552, at paras. 34-39.

Act might not be sufficient earlier in the process where changes might be more subtle. That does not change the fact that while a detention order might be a better solution from the hospital's perspective, it is not the least onerous and least restrictive disposition.

[22] It must also be remembered that the appellant, as with any NCR accused who is conditionally discharged, is subject to the conditions imposed by the Board. The conditions imposed are enforceable under the *Criminal Code*, R.S.C. 1985, c. C-46. In particular, s. 672.91 of the *Code* allows for the arrest of a conditionally discharged NCR accused for the breach or anticipated breach of a condition, and ss. 672.92(1)(b) and 672.93(2) allow the Board to specify the place where the accused is to be returned.

[23] Consequently, I would allow the appeal and replace the Board's disposition with a discharge on the following conditions (all of which were proposed by the appellant to the Board):

1. You will reside with Laura Laufman,
2. You will report to your clinical team as required,
3. You will abstain from the non-medical use of drugs,
4. You will submit urine samples for the purpose of drug testing as directed by your clinical team,

5. With your consent, you will take all psychiatric medications as directed by your doctor,
6. Upon notice being given to you, orally or in writing, by the person in charge of St. Joseph's Healthcare Hamilton-West 5th Campus, you will immediately submit to attendance at and for readmission to hospital; and
7. You will notify the Board and your clinical team upon any change of address.

[24] I understand that the appellant is scheduled for his annual review on May 27, 2021. I wish to make it clear that this decision does not alter the need for that hearing. It is to proceed as planned. If any issues arise regarding the above conditions, they can be addressed before the Board at that annual review, or earlier if required.

Released: February 12, 2021 "KF"

"I.V.B. Nordheimer J.A."
"I agree. K. Feldman J.A."
"I agree. M. Tulloch J.A."