

Decisions of the Court of Appeal

Summers (Re)

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Judges: Roberts, Lois B.; Nordheimer, Ian V.B.; Coroza, Steve A.

Subject: Criminal

COURT OF APPEAL FOR ONTARIO

CITATION: Summers (Re), 2023 ONCA 698

DATE: 20231024

DOCKET: COA-23-CR-0441

Roberts, Nordheimer and Coroza JJ.A.

IN THE MATTER OF: Dakota Summers

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

Anita Szigeti and Michael Baltzan Schloss, for the appellant

Samuel Mazzuca, for the respondent Attorney General of Ontario

James P. Thomson, for the respondent Person in Charge of St. Joseph's Healthcare Hamilton

Heard: October 17, 2023

On appeal against the disposition of the Ontario Review Board, dated March 15, 2023, with reasons dated March 29, 2023.

REASONS FOR DECISION

[1] On May 28, 2013, the appellant was found not criminally responsible by reason of mental disorder (NCR) on charges of possession of a weapon for a purpose dangerous to the public peace, robbery, failure to comply with a probation order, and possession of a controlled substance (marijuana). He has a significant psychiatric history dating to about his 20s, resulting, as the Ontario Review Board (ORB) noted in its reasons, “in bizarre and dangerous behaviour” and numerous hospital admissions. His current diagnoses are Schizophrenia, Cannabis Use Disorder, in remission in a controlled environment, and Stimulant Use Disorder, in remission in a controlled environment. He is incapable with respect to his treatment. In addition to the index offences, he has a youth and adult criminal record, including several convictions for assault and failure to comply with probation and other court orders. The appellant is 32 years old. He has been under the jurisdiction of the ORB for over ten years since the NCR date.

[2] The appellant appeals his current disposition. The ORB unanimously found that he represents a significant threat to the safety of the public, which he did not concede. However, the panel differed on the appropriate disposition. The majority ordered that he be detained on terms and with privileges, including permission to “enter the community of Province of Ontario, indirectly supervised” and “live in the community in accommodation approved by the person in charge”. The minority would have ordered a conditional discharge with strict terms.

[3] The appellant submits that the ORB unreasonably found that he poses a significant risk of serious harm and that he should be granted an absolute discharge. Alternatively, he submits that the minority’s proposed conditional discharge disposition was correct and represents the least onerous and least restrictive option commensurate with public safety. In

the further alternative, the appellant says that the disposition should be amended to reflect the majority's reasons to order culturally appropriate programs, housing and care.

The appellant poses a significant threat to public safety

[4] We do not accept the appellant's submission that the ORB's unanimous conclusion was based on a speculative risk of harm. Rather, the ORB accepted the opinions of the appellant's treating psychiatrists and hospital team that the appellant posed a significant threat. The ORB's conclusion and the psychiatrists' opinions were founded on numerous material risk factors grounded in the record: the appellant's significant psychiatric and criminal history; his instability, partial treatment response, fluctuations in his progress, flaring up of active psychotic symptoms, and limited coping skills resulting in irritable and aggressive behaviour, including during the reporting year leading up to the ORB hearing; his lack of insight into his illness and need for medication; and the real likelihood that if discharged, he would cease to take his medications and decompensate very quickly to the state in which he committed the index offences. There is no basis to interfere with the ORB's conclusion.

A detention order is the least onerous and restrictive disposition

[5] Nor are we persuaded that the majority of the ORB erred in ordering the appellant's continued detention. We note that the majority expanded the appellant's privileges to the entirety of the province of Ontario in order to facilitate the appellant's potential move to appropriate, approved accommodation in Owen Sound or another community where his cultural needs can be addressed.

[6] As the majority explained in its reasons, the appellant has a significant history of breaching court orders. The majority accepted that a conditional discharge was not sufficient to deal with the risk the appellant poses and quoted the hospital's opinion that, "[a]bsent significant supervision from a Forensic Psychiatric Team ordered by the [ORB], [the appellant] will likely stop his medications and/or relapse in substance use, as has been the case in the past (most recently in September 2020), which would lead to rapid decompensation in his

mental status and significantly increase his risk to reoffend in the same manner seen at the time of the index offences”.

[7] The majority’s concerns with respect to the appellant’s history of non-compliance can only be achieved in a detention order. It is not certain that his grandmother’s house is appropriate to meet the appellant’s needs. While his grandmother is willing to provide the appellant with a home for a couple of years until he is accepted into other housing, she is not certain that he will take his medications as required. The majority noted that the appellant has previously put pressure on his family members to say he did not need to take medication.

[8] Although it would have been preferable for the majority to address the Box B[1] criteria for re-admission, its reasons explain why only a detention order would permit the appellant’s immediate readmission to hospital following his expected rapid decompensation in the very likely event he ceased taking his medications.

[9] It was therefore reasonable for the majority to conclude that a conditional discharge would not be sufficient to adequately control the risk to public safety that the appellant poses at this time. We dismiss this ground of appeal.

The disposition requires amendment

[10] We take a different view with respect to the appellant’s third ground of appeal. The detention order lacks the majority’s requirement that the hospital explore culturally appropriate programs, housing and care for the appellant. This represents a material omission.

[11] The appellant’s Indigenous identity, heritage and community are extremely important to him and, while not necessarily lessening his level of risk, are of acknowledged assistance to his health and well-being. He is registered with the Chippewas of Nawash Unceded First Nation, an Anishinaabe First Nation community, and members of his family reside in nearby Owen Sound. He has accessed a variety of Indigenous supports in Hamilton, enrolled in a residential substance use program consisting of Indigenous cultural components in an effort to remain abstinent, and, on his own initiative, connected with the Southwest Ontario Aboriginal

Health Access Centre (SOAHAC) in Owen Sound to help him join housing wait lists and facilitate connections to traditional healers in anticipation of moving there. He is close to and regularly exercises passes to visit his family members in Owen Sound, who are very supportive of him. Chippewas of Nawash Unceded First Nation is about 56 kilometres north of Owen Sound and about 240 kilometres north of St. Joseph's Healthcare Hamilton.

[12] As noted by the majority in its reasons, the application of *Gladue* principles to ORB dispositions requires a consideration of “the unique circumstances and background of aboriginal NCR accused”: *R. v. Sim*, 78 O.R. (3d) 183, at para. 19; see also *Mitchell (Re)*, 2023 ONCA 229, at paras. 22-23.

[13] The majority noted that the appellant's “connection to his culture is positive, and it seems to be having beneficial effects”. It also indicated that it was “mindful that the hospital must, in order to recognize and apply *Gladue* principles, follow a more liberal approach to [the appellant's] conditions”. As a result, the majority reasons direct, among other conditions, that the appellant's approved accommodation could be anywhere in Ontario, and, in particular, “in Owen Sound or in an area where [the appellants'] cultural needs can be more appropriately addressed” and that “[t]he hospital is to investigate housing and care options in Owen Sound”, with the following additional particulars:

The hospital is to ensure culturally appropriate programs are available to [the appellant]. It is also to work with SOAHAC, Grey Bruce Health Services, and any other appropriate agency to develop, to the greatest extent possible, a plan of care for [the appellant]. It is to liaise with appropriate mental health professionals in Owen Sound, including Dr. Grey, to determine if the care needed by [the appellant] can be provided there.

[14] These requirements are important and necessary to enable the appellant to transition towards a move and, hopefully, an eventual discharge into Owen Sound, where he has the support of his family and, as the minority explained, the customs, traditions, ceremonies and language of his home community, which he trusts and which “will watch over him and support his efforts to maintain stable mental health”.

[15] Importantly, the majority's reasons provide clear directives to the hospital to make inquiries that respond to the hospital's concerns about the absence of community and psychiatric supports in Owen Sound. To be fair, while the hospital has principally focussed on Hamilton for services and accommodation for the appellant, the appellant requested that the hospital cease contact with community supports in both Hamilton and Owen Sound. As a result, the majority's directives provide needed clarity going forward.

[16] In submissions, counsel for the hospital indicated that the hospital would have no difficulty with the amendment of the detention order to include the directives in paragraphs 60 to 61 of the majority's reasons.

Disposition

[17] Accordingly, we order that the ORB's detention order be amended to include the above-referenced directives set out in paragraphs 60 and 61 of the majority's reasons. We note the reference in the majority's reasons to "Dr. Grey" should be to "Dr. Shah", and that the detention order should reflect that change. To the extent that it is necessary to allow the hospital to carry out its inquiries, the appellant is to provide his consent and cooperation to allow the hospital to make the necessary investigations regarding appropriate services and accommodation for him, in particular in Owen Sound, if appropriate services and accommodations can be found in that community.

[18] The appeal is otherwise dismissed.

"L.B. Roberts J.A."
"I.V.B. Nordheimer J.A."
"S. Coroza J.A."

[1] "Box B" on Form 1, issued pursuant to s. 15(1.1) of the *Mental Health Act*, R.S.O. 1990, c. M.7, provides criteria for psychiatric assessment of incapable persons who have suffered from recurrent mental disorders that have responded to treatment in the past.