CITATION: R. v. M.K., 2019 ONSC 2511
COURT FILE NO.: CR-15-1150-00BR
DATE: 20190423

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Her Majesty the Queen	)	J. Mathurin, for the Crown
	)	
	)	
	)	
- and -	)	
	)	
	)	
	)	
M.K.	)	J. McCulligh, for the Accused
	)	
	)	

REASONS FOR DECISION

BARNES J.

INTRODUCTION

[1] M.K. is charged with five counts of criminal harassment and seven counts of failure to comply with recognizance. Ms. Keller is presumed innocent of these charges. The circumstances of these allegations exemplify instances where criminal law and treatment intersect. Ms. M.K. was detained after a bail hearing.

She seeks a review of the detention order on the basis that Justice of the Peace Florence failed to recognize her mental illness and the necessity of treatment in determining if detention is necessary to prevent her from reoffending.

BACKGROUND FACTS

[2] Ms. M.K. is charged with failing to comply with a term of her recognizance on or about June 14, 2014; criminal harassment on or about August 4, 2014; failure to comply with a term of probation on or about August 4, 2014; criminal harassment on or about September 23, 2014; failure to comply with recognizance on or about September 23, 2014; failure to comply with probation on or about September 23, 2014; criminal harassment on or about November 21, 2014; failure to comply with recognizance on or about November 27, 2014; failure to comply with recognizance on or about May 23, 2015; and failure to comply recognizance on or about May 23, 2015. The victim of all of these allegations is Ms. J.D., a police officer.

[3] Ms. M.K. met Ms. J.D. at a gym in 2008. They were members of the gym and became acquaintances. Ms. M.K. believed that their relationship was more intimate. Ms. J.D. did not share that view.

[4] Ms. M.K. began to make unwanted contact with Ms. J.D. The frequency and nature of such contact escalated until Ms. M.K. was charged with criminal harassment on February 13, 2013. A forensic psychiatrist assessed Ms. M.K. and diagnosed her with a

delusional disorder which includes *erotomania* – a delusion in which a person believes that another person is in love with them. The target of Ms. M.K.'s *erotomania* is Ms. J.D. The forensic psychiatrist could not rule out the possibility that Ms. M.K. suffers from schizophrenia. This diagnosis is the root cause of Ms. M.K.'s behaviour and these allegations.

[5] On April 14, 2014, Ms. M.K. was convicted of criminal harassment and breach of an undertaking. Ms. M.K. received a conditional discharge followed by three years' probation, one of the terms of which was to have no contact whatsoever with Ms. J.D.

[6] Ms. M.K. is charged with failing to comply with the terms of her probation. The allegations are that on June 14, 2014, at 12:35 p.m., Ms. M.K. went to the parking lot of Ms. J.D.'s place of employment – a police station. She sat in her vehicle screaming and yelling. She was released on a $5000 dollar surety bail. Her mother was her surety. A term of Ms. M.K.'s release was to have no contact with Ms. J.D.

[7] While on bail, Ms. M.K. was again charged with breaching the terms of her release. The allegations are that on August 4, 2014, a Peel regional police officer saw cue cards on a marked police cruiser. There were handwritten notes about Ms. J.D. on the cards. The notes were of a derogatory nature. Ms. M.K.'s

fingerprints were found on the notes. She was released on a bail of $7,500, once again with her mother as her surety. A term of the release was not to contact Ms. J.D.

[8] Ms. M.K. is alleged to have breached the no-contact term of her bail for a third time. On September 23, 2014, a police officer observed a handwritten note under the windshield wiper of a marked police cruiser. This was the inscription on the note:

> [M.K.] does not want a relationship with you.[M.K]. does not want to marry you. M.K. lied about being in love with you and thinking that you're attracted. [M.K.], my father, is dead. 22 Division pricks.

[9] The police concluded that the note was left by Ms. M.K. She was charged with criminal harassment and breach of the terms of her bail. Ms. M.K. was released for a third time. This time the recognizance was set at $10,000. The surety was Ms. M.K.'s godmother. The terms of the bail once again included a condition to have no contact with Ms. J.D.

[10] Peel regional police received an email on November 21, 2014, at 5.35 p.m. The email had been sent from an email address which belonged to Ms. M.K.'s godmother's husband. The police allege that the email was sent by Ms. M.K. The contents of the email were as follows:

> [J.D.] is an empty, selfish Dyke, who can't get laid because she's scared of pussy and human contact. She's a coward and her badge is dog shit.

[11] A second email was sent on November 27, 2014, at 12:30 a.m. to Peel regional police. Police allege that this email was also from Ms. M.K. This was the message in the email:

> Constable [J.D.] is a piece of shit and I wish her unhappiness. I hope she dies. I want to be charged and I want to go to jail. Cops are untrustworthy pricks.

[12] Ms. M.K. was arrested on December 1, 2014, and charged with two counts of criminal harassment and one count of breaching her recognizance. She was released for the fourth time. The amount of the recognizance was $2,500. Her godmother was her surety once again. Terms of release included a term to have no contact with Ms. J.D.

[13] On May 23, 2015, at 8:39 p.m., Peel regional police received a third email. The police allege that this email was from Ms. M.K. She was arrested and charged with two counts of breach of recognizance. The email had this message:

> Officer [J.D.] is a fuckin' coward, a selfish fuckin' heartless coward. I hate every single cop that works for Peel perverted pricks Police.

[14] These are the circumstances of the alleged offences committed by Ms. M.K. at the time Justice of the Peace Florence considered her application for bail

and ordered her detention. It is not disputed that the allegations against Ms. M.K. stem from her mental disorder. This is an example of an instance where criminal law and treatment intersect.

DETENTION REVIEW

[15] A review of a detention order pursuant to s. 520 of the *Criminal Code* is not a bail review *de novo.* It is not an opportunity for the reviewing judge to undertake a fresh analysis of the evidence and substitute her views on the detention or release for that of the justice at first instance. The detention order under review shall not be set aside unless there has been an error in law; there is new evidence that shows a material and relevant change in the circumstances of the case; or the decision is clearly inappropriate: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 6, 121, 139. With regards to new evidence, if it is admissible, the judge may repeat the analysis under s. 515 as if he or she is the initial decision-maker: at para. 138.

[16] The onus and burden of proof lies on the applicant (M.K.) to “show cause” why she should be released on an application for review: *Criminal Code*, s. 520(7)(e). Ms. M.K. was detained on the secondary ground pursuant to s. 515(10)(b) of the *Code*. According to s. 515(10)(b), an accused can be detained:

> Where the detention is *necessary for the protection or safety of the public*, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all 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. [Emphasis added.]

[17] "Substantial likelihood" is explained by the Supreme Court of Canada in *R. v. Morales*, [1992] 3 S.C.R. 711, at p. 737, as follows:

> Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "*substantial likelihood*" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous. [Emphasis added.]

[18] An assessment under s. 515(10)(b) of whether the accused will commit another offence or interfere with the administration of justice cannot be based on speculation, mere conjecture or possibility: *R. v. Le*, 2006 MBCA 68, 205 Man. R. (2d) 41, at para. 30, cited in *R. v. Young*, 2010 ONSC 4194, at para. 19. In *R. v. Manasseri*, 2017 ONCA 226, at para. 87, the Ontario Court of Appeal states:

> Second, in connection with the specified circumstances encompassed by the clause "including *any substantial likelihood* that the accused will, if released from custody, commit . . . ", the italicized words refer to a probability of certain conduct, not a mere possibility. And the probability must be substantial, in other words, significantly likely.

[19] Under s. 11(d) of the *Charter*, an accused is always presumed innocent until proven guilty. Per s. 11(e) of the *Charter*, an accused is entitled to reasonable bail and not to be denied bail without just cause. Sections 515(1), (2) and (2.1) of the *Code* sets out alternative forms of judicial interim release. Each subsequent form of release is more onerous. Section 515(3) of the *Code* requires a justice to first consider the least onerous form of release before considering the next alternative form of release, and the Crown has the onus to justify a more onerous form of release. This process must be followed until the most appropriate form of release is identified. This has been referred to as the "ladder principle": *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, at para. 4. Section 515(4) of the *Code* specifies the types of conditions that can be imposed when an accused is placed on a judicial interim release.

[20] In *Antic*, at para. 67, the Supreme Court of Canada set out principles and guidelines to be applied when considering whether to grant bail:

> (a) Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail.
>
> (b) Section 11(*e*) guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms.
>
> (c) Save for exceptions, an unconditional release on an undertaking is the default position when granting release: s. 515(1).
>
> (d) The ladder principle articulates the manner in which alternative forms of release are to be imposed. According to it, "release is favoured at the

earliest reasonable opportunity and, having regard to the [statutory criteria for detention], on the least onerous grounds". This principle must be adhered to strictly.

(e) If the Crown proposes an alternative form of release, it must show why this form is necessary. The more restrictive the form of release, the greater the burden on the accused. Thus, a justice of the peace or a judge cannot impose a more restrictive form of release unless the Crown has shown it to be necessary having regard to the statutory criteria for detention.

(f) Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a justice or a judge to order a more restrictive form of release without justifying the decision to reject the less onerous forms.

(g) A recognizance with sureties is one of the most onerous forms of release. A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate.

(h) It is not necessary to impose cash bail on accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court to justify their release. A recognizance is functionally equivalent to cash bail and has the same coercive effect. Thus, under s. 515(2) (d) or s. 515(2) (e), cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable.

(i) When such exceptional circumstances exist and cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should not be beyond the readily available means of the accused and his or her sureties. As a corollary to this, the justice or judge is under a positive obligation, when setting the amount, to inquire into the ability of the accused to pay. The amount of cash bail must be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case.

(j) Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They

> must not be imposed to change an accused person's behaviour or to punish an accused person.
>
> (k) Where a bail review is applied for, the court must follow the bail review process set out in *St-Cloud*. [Citations omitted.]

DID THE JUSTICE OF THE PEACE COMMIT AN ERROR OF LAW OR RENDER A DECISION THAT WAS CLEARLY INAPPROPRIATE?

[21] Ms. M.K. submits that the Justice of the Peace failed to recognize the extent of her mental disorder and the necessity for treatment instead of detention to prevent M.K. from reoffending. I disagree.

[22] At the bail hearing, Ms. M.K. had no criminal record; she had no substance abuse problems; she had a mental disorder; the mental disorder was the primary reason for her criminal behaviour; Ms. M.K. had a very supportive family network which included her mother, aunt and godmother; her mother had been her surety on two occasions; she breached the terms of her release on one occasion while her mother was her surety; and Ms. M.K.'s godmother had been her surety during a previous breach and was her surety during the most recent breach allegations.

[23] Ms. M.K.'s mother and godmother constructed a supervisory framework that took into account the importance of treating her mental disorder. Her mother arranged for her treatment and coordinated with all the professionals treating Ms. M.K. Her godmother is retired and supervised M.K. around the clock.

Ms. M.K.'s mother and godmother arranged for her to move to Stratford to live with her godmother, so that she could be away from Brampton and from the complainant Ms. J.D.

[24] Ms. M.K.'s mother tirelessly sought treatment for Ms. M.K. She enlisted the help of a well-known local writer and several professionals at the Huron/Perth Healthcare Alliance Centre; she arranged for Ms. M.K. to see and be treated by three psychiatrists; she secured a case worker for Ms. M.K. from the Huron/Perth Healthcare Alliance Centre; and Ms. M.K. began working with a support worker from the same Centre.

[25] Ms. M.K.'s mother liaised with Ms. M.K.'s probation officer. As noted previously, Ms. M.K. was assessed by a forensic psychiatrist who diagnosed her mental disorder. While Ms. M.K. lived in Brampton, she was treated by a psychiatrist who prescribed some medication for Ms. M.K.'s mental disorder. She stopped taking the medication because she said it made her sick.

[26] Ms. M.K. lived in Stratford. With these supports and under the watchful eye of her godmother and her husband, she was doing well. Ms. M.K. was volunteering and she had obtained employment. Despite all these supports and the progress she made, it is alleged that Ms. M.K. used her godmother's husband's email to

send one of the subject emails to Ms. J.D. During the same period, she is alleged to have used her own email to send another email.

[27] Ms. M.K. has breached court orders in relation to Ms. J.D. five times, with at least two of those breaches occurring while she was living in Stratford with her godmother. Due to a misunderstanding over the bail conditions, Ms. M.K.'s godmother mistakenly allowed her access to a cellphone in violation of the terms of her release.

[28] The nature of the new allegations suggest that even though the forensic psychiatrist who diagnosed her with the mental disorder opined that the mental disorder – *erotomania* – does not result in violent behavior, there is an escalating violent tone in Ms. M.K.'s communications to Ms. J.D.

[29] The justice of the peace appreciated the impact of treatment on Ms. M.K.'s recurring criminal behavior. The plan had treatment and supervisory components with these main features: increased physical distance from Ms. J.D. by moving from Brampton to Stratford; good supervision by her godmother with the assistance of her husband; as-needed treatment sessions with a psychiatrist; the involvement of a counsellor and a case worker; her mother's coordination of treatment services and a probation officer; and Ms. M.K.'s participation in employment and volunteer activities.

[30] This plan sought to tackle the underlying cause of Ms. M.K.'s criminal behavior – mental disorder (*erotomania*) – and to eradicate or severely reduce her opportunity to contact the complainant Ms. J.D. Despite this plan, there were new allegations of ongoing criminal behavior with the same victim as the target. There was evidence before the justice of the peace that Ms. M.K. was unwilling to accept and treat the mental disorder. Under all of these circumstances, the justice of the peace found the existing supervisory plan to be inadequate in addressing secondary ground concerns. No new plan to adequately address these concerns was proposed.

[31] The justice of the peace was alive to the importance of treatment to reduce the likelihood of Ms. M.K. reoffending. The decision is not inappropriate. The justice of the peace considered the mental disorder and the need for treatment and reasonably concluded that the current plan of supervision was not working. On the record, this was a reasonable conclusion open to her to reach. The decision to detain was not unreasonable in all of the circumstances and there was no error of law. Therefore, there is no basis to interfere with the detention order.

IS THERE EVIDENCE SHOWING A MATERIAL CHANGE IN CIRCUMSTANCES?

[32] I have previously described the comprehensive supervision and treatment plan Ms. M.K. put before Justice of the Peace Florence. The parties agree that

should Ms. M.K. show cause as to why she should be released, the appropriate form of release is a surety release. As noted previously, she has been subject to several related previous surety releases.

[33] Ms. M.K.'s criminal behaviour is caused by her mental disorder. In such an instance, there is an intersection between the criminal law and treatment. This circumstance is summarised in *R. v. Briscoe*, 2019 ONSC 2471, at para. 19, as follows:

> Because other community networks or institutions have not effectively treated and supported the mentally ill [drug-addicted]—because community-based safety nets have failed—they enter the criminal justice system, usually involved in minor, nuisance, and quality of life offences. Often, by then, they have other serious problems—such as alcohol or other drug addiction, housing employment and physical health problems—that also have not been addressed. In many instances, the mentally ill or disabled [or drug-addicted] find themselves in criminal justice primarily because of their mental illness [drug addiction] and their inability to connect with or stay in supportive community-based treatments.[1]

[34] A "problem-solving approach" is well suited for instances where the criminal law and treatment intersect. Such an instance warrants a plan that has both a supervisory and treatment component. The plan proposed adopts a "problem-solving approach" in an effort to satisfy a justice or judge that there is no "just cause" for the offender's continued detention in custody. Grounds for

[1] John S. Goldkamp & Cheryl Irons-Guynn, *Emerging Judicial Strategies for the Mentally ill in the Criminal Caseload: Mental Health Courts* (Washington, DC: U.S. Department of Justice, Bureau of Justice Assistance, April 2000) at p. xv.

detention constitute a “just cause” for detention only if the reason for detention falls under one of the criteria prescribed by s. 515(10) of the *Code.*

[35] The “problem-solving approach” is explained in *Briscoe*, at para. 34, as follows:

> The term “problem-solving court [approach]” is used to describe a court [approach] which seeks:
>
> > [A] more comprehensive resolution of the legal problem [which in this case is whether detention is justified under s. 515(10) of the Code] by resolving underlying issues such as substance abuse, intimate partner violence, mental health issues and other offending-related issues. [Footnotes omitted.]

[36] The plan as constructed in this case seeks to address the underlying cause of Ms. M.K.’s criminal behaviour. The objective is not to compel Ms. M.K. to take treatment she does not want. Rather, the objective is to assess the supervisory and treatment plan to determine whether it provides Ms. M.K. with an effective opportunity for treatment so as to address any secondary ground concerns. The inextricable link between mental disorder and criminal behaviour creates a circumstance where an adequate and effective treatment plan is necessary “to address concerns related to the statutory criteria for detention and to ensure that the accused (Ms. M.K.) can be released”: *Antic*, at para. 67.

[37] Such a plan will enable the justice to fashion a form of release which includes a condition “that the justice considers necessary to ensure the safety and

security of any victim (Ms. J.D.) or witness to the offence'': *Criminal Code*, s. 515(4)(e.1). Ms. M.K.'s frequent violation of court orders and increasing violent tone is causing the complainant Ms. J.D. significant anxiety.

[38] An order compelling an accused to undergo treatment has been held to exceed a justice's power: *Keenan v. Stalker* (1979), 57 C.C.C. (2d) 267 (Que. C.A.); however, in circumstances where a mental, physiological or physical condition is inextricably linked to the ''*substantial likelihood* that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice" (emphasis added) under s. 515(10)(b), it is appropriate to consider the accused's willingness to participate in treatment as a factor in assessing whether the proposed supervisory plan can adequately address secondary ground concerns.

[39] The proposed changes relate to the supervisory portion of the plan. Ms. M.K.'s godmother's husband, who has recently retired, is available and is proposed as an additional surety. The sureties will ensure that Ms. M.K. has no access to any telecommunications device. Further, Ms. M.K. states that she is now willing to engage in treatment.

[40] The proposed sureties are suitable. They understand their responsibilities and are committed to supervising Ms. M.K. diligently. An effective supervisory plan

has been in place for some time; however, by her own antecedents, Ms. M.K. has demonstrated that the current version of the treatment component of the plan is inadequate to address secondary grounds concerns.

[41] The current unstructured treatment regime has been shown to be ineffective. Questions remain as to how often Ms. M.K. will see her case worker, counsellor and her psychiatrist. How will the treatment by the various professionals be coordinated? How will the treatment assist Ms. M.K. to control her mental disorder and thus her criminal behaviour? How will Ms. M.K. participate in treatment? And how will her sureties assist her in that regard? These answers could have been provided to the justice of the peace in the first instance; they are relevant and could certainly have affected the result. M.K. ‘s willingness to accept treatment has arisen after the initial bail hearing, In any event, without answers to these questions, the plan as currently proposed does not constitute a material and relevant change in the circumstances.

[42] Participation in a mental health court would provide answers to these questions and would constitute a material and relevant change in circumstances:

> Accused who elect to participate in mental health court will typically be required to comply with an individually tailored treatment program designed by the mental health court team. The benefit of a multidisciplinary team is that treatment can take a variety of forms and is not limited to medication; it can include psychological therapies, educational training, occupational training, housing and access to social

> services, and budgetary counselling, to name a few. As previously noted, a primary goal of mental health courts is to reconnect and reintegrate individuals in need of treatment with the appropriate services. In this way mental health courts form bridges to various services within the community. Assisting individuals to manage their mental disorders through the provision of mental health and social services reduces the likelihood that they will commit subsequent offences and, in this way, mental health courts also seek to curb the disproportionately high rate of recidivism in that segment of the population. By reducing recidivism, the courts make our communities safer for everyone to enjoy.[2]

[43] Hopefully, in addition to mental health courts, there are government or private networks and institutions which can assist the sureties in constructing and implementing a supervisory and treatment plan which will answer the questions I have posed and provide the same or better structure and support as a mental health court.

[44] These additional clarifications are not intended to create onerous conditions that Ms. M.K. cannot meet, in effect frustrating efforts to release her on bail, nor are they intended to change her behavior or punish her. Rather, it is apparent from Ms. M.K.'s antecedents that answers to the questions posed are necessary to permit a fulsome assessment of whether the supervisory plan is sufficient to address secondary ground concerns.

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[2] R.D. Schneider, H.Y. Bloom & M. Heerema, *Mental Health Courts – Decriminalizing the Mentally Ill*, (Toronto: Irwin Law, 2007), at pp. 6-7.

[45] At the current time, Ms. M.K.'s continued detention is necessary on secondary grounds for the protection of the public. Should the sureties address the concerns raised with the plan, I will be willing to reconsider my decision. This application is therefore dismissed.

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Barnes J.

Released: April 23, 2019

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Her Majesty the Queen

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M.K.

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