PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. L.*, 2015 NSPC 60

Date: 2015-09-09-2015
Docket: 2901891
Registry: Pictou

Between:

Her Majesty the Queen

v.

I.M.L.

DECISION REGARDING APPLICATION BY I.M.L. TO VARY BAIL CONDITIONS

Revised Decision:	The text of the original decision has been corrected on September 17, 2015 and this replaces the previously released decision.
Judge:	The Honourable Judge Del W. Atwood
Heard:	9 September 2015 in Pictou, Nova Scotia
Charge:	Para. 253(1)(a) of the Criminal Code of Canada
Counsel:	William Gorman for the Nova Scotia Public Prosecution Service I.M.L., on her own behalf

By the Court:

[1] I have decided to release written reasons in relation to this bail-variation application which I heard on 9 September 2015. The reasons for doing so are to elaborate upon and consolidate my oral reasons in what evolved into two separate applications, one by I.M.L. and another by the prosecution, under the provisions of sub-ss. 503(2.2) and (2.3) of the *Criminal Code*. Although there are no publication bans in place, I have anonymized the name of the applicant, as I believe that there has been enough prying into her personal details; however, the issues raised on this application are material enough to warrant a written decision being released by the court.

[2] I.M.L. was charged with one count of drug-impaired driving following her arrest by a member of the R.C.M.P. on 6 August 2015. Prior to her release, I.M.L. entered into a promise to appear in accordance with sub-s. 503(2) of the *Code*, returnable on 5 October 2015; in addition to issuing process to compel appearance, the arresting officer required I.M.L. to sign a form 11.1 undertaking, in accordance purportedly with sub-s. 503(2.1) of the *Code*. The central condition of that undertaking was that I.M.L. "abstain from the operation of any motor vehicle on any highway within the Province of Nova Scotia."

[3] I.M.L. filed with the court on 25 August 2015 an application to delete the driving prohibition imposed upon her in the form 11.1 undertaking. The prosecution opposed the application. I heard evidence from I.M.L. and the prosecution on 9 September 2015 and rendered a brief oral decision at the end of the hearing. These are my expanded reasons.

[4] I.M.L. gave sworn evidence in support of her application, describing her need drive in order to attend mental-health-treatment sessions, to attend counselling appointments, and to look after her personal needs and the needs of her infirm father. She described the inconvenience of having to rely on a friend to chauffeur her around, and explained that the cost of hiring taxis would be beyond her limited means. I.M.L. was cross-examined extensively on her mental-health history and her prescription-drug use—and intermittent abuse. What is clear to me from I.M.L.'s entirely candid and honest account of her history is that she has encountered a number of mental-health crises in the past—some having occurred very recently—but has sought consistently and cooperated with appropriate professional therapeutic intervention.

[5] The prosecution called the arresting officer. The prosecution did not ask any questions about the circumstances of the charge against I.M.L. (which would have been admissible most certainly as "relevant evidence" within the context of para.

518(1)(b) of the *Code*), but focussed instead on policing history involving I.M.L. unconnected with the charge before the court. The arresting officer described R.C.M.P. having to intervene on several occasions when I.M.L. was overcome with mental-health-related emergencies; police were genuinely concerned about I.M.L.'s wellbeing and safety. It was the officer's view that he was obligated to impose the form 11.1 condition that he did because s. 279A of the Motor Vehicle Act did not give him the authority to suspend I.M.L.'s licence as she was to be charged with drug-impaired driving, not alcohol-impaired driving, and because he believed that prohibiting I.M.L. from driving was necessary for the protection and safety of the public.

[6] I.M.L. cross examined the arresting officer briefly, but entirely effectively, as the officer conceded that on none of the occasions requiring police assistance prior to her drug-impaired-driving charge was I.M.L. trying to operate a motor vehicle.

[7] I dealt with I.M.L.'s application under the provisions of sub-s. 503(2.2) of the *Code*, which states:

> (2.2) A person who has entered into an undertaking under subsection (2.1) may, at any time before or at his or her appearance pursuant to a promise to appear or recognizance, apply to a justice for an order under subsection 515(1) to replace his or her undertaking, and section 515 applies, with such modifications as the circumstances require, to such a person.

[8] In my view, the burden of proof in an application under sub-s. 503(2.2) is upon the person who entered into the form 11.1 undertaking; the standard of proof is upon a balance of probabilities, which is the appropriate standard in a procedural matter that does not deal with actual criminal liability.

[9] Because form 11.1 bail is not judicially authorized bail (indeed, does not even require subsequent judicial confirmation), and is not entered into with the assurances of reasonable bail inherent in a forensic proceeding before an impartial judicial officer (and with a detainee entitled to, imagine, an actual hearing) the criteria to be applied by a court hearing a sub-s. 503(2.2) application should be, not whether there has been a change in circumstances since the form 11.1 bail was entered into, but whether the challenged bail is, first and foremost, legal, and whether it is reasonable, within the context of para. 11(e) of the *Charter*, as circumscribed statutorily in sub-s. 515(10) of the *Code*. This is underscored in the fact that sub-s. 503(2.2) requires a reviewing court to be guided by s. 515 of the *Code*.

[10] After hearing evidence, I called upon the prosecution to make submissions whether I.M.L.'s application ought to be granted. The prosecutor proposed addressing first the reasonableness of the driving prohibition imposed upon I.M.L. by the arresting officer. My view, however, was that the legality of the condition

ought to be addressed first, with particular reference to the powers of police to release detainees conditionally, as delineated in sub-s. 503(2.1) of the *Code*. Clearly, legality is a condition precedent of reasonable bail, as an illegal bail condition would be inherently unreasonable.

[11] After reviewing that provision of the *Code*, the prosecutor declined further comment on I.M.L.'s application, but then sought to have the court hear a prosecution application under sub-s. 503(2.3) of the *Code* to have I.M.L. placed on a judicial undertaking with a driving prohibition as part of it. I did not call upon I.M.L. to address the court because she had proven her case.

[12] In my judgment, the arresting officer had no authority to impose upon I.M.L. a driving prohibition as part of form 11.1 bail. The powers of police to release a detainee conditionally are described in sub-ss. 503(2) and (2.1) of the *Code* (and identically in sub-s. 499(2) when the release is by officer in charge in relation to a detainee picked up on a warrant):

> (2) If a peace officer or an officer in charge is satisfied that a person described in subsection (1) should be released from custody conditionally, the officer may, unless the person is detained in custody for an offence mentioned in section 522, release that person on the person's giving a promise to appear or entering into a recognizance in accordance with paragraphs 498(1)(b) to (d) and subsection (2.1).
>
> (2.1) In addition to the conditions referred to in subsection (2), the peace officer or officer in charge may, in order to release the person, require the person to enter

> into an undertaking in Form 11.1 in which the person undertakes to do one or more of the following things:
>
> (a) to remain within a territorial jurisdiction specified in the undertaking;
>
> (b) to notify the peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;
>
> (c) to abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, or from going to a place specified in the undertaking, except in accordance with the conditions specified in the undertaking;
>
> (d) to deposit the person's passport with the peace officer or other person mentioned in the undertaking;
>
> (e) to abstain from possessing a firearm and to surrender any firearm in the possession of the person and any authorization, licence or registration certificate or other document enabling that person to acquire or possess a firearm;
>
> (f) to report at the times specified in the undertaking to a peace officer or other person designated in the undertaking;
>
> (g) to abstain from
>
> (i) the consumption of alcohol or other intoxicating substances, or
>
> (ii) the consumption of drugs except in accordance with a medical prescription; or
>
> (h) to comply with any other condition specified in the undertaking that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

[13] None of paras. 503(2.1)(a)-(f) would admit of a driving prohibition. Para. 503(2.1)(h) is an expansive basket clause that would admit of conditions intended to protect a witness to or a victim of an alleged crime, but could not be contorted in any way to have authorized the arresting officer to require of I.M.L. an undertaking prohibiting her from driving.

[14] As the arresting officer noted, s. 279A of the Motor Vehicle Act did not give him the authority to suspend immediately the licence of someone arrested for drug-impaired driving. That provision of the Act states:

> 279A (1) Where
> (a) a peace officer
> (i) by reason of an analysis of the breath or blood
> of a person, has reason to believe that the person *has consumed alcohol* in such a quantity that the concentration
> thereof in the person's blood exceeds 80 milligrams of alcohol
> in 100 millilitres of blood, or
> (ii) has reason to believe that a *person while having alcohol in their body* failed or refused to comply with a
> demand made on that person to supply a sample of the person's
> breath or blood under section 254 of the *Criminal Code*
> (Canada); and
> (b) the occurrence is in relation to the operation of or having
> care or control of a motor vehicle as defined in the *Criminal Code*
> (Canada),
> the peace officer on behalf of the Registrar shall
> (c) where the person holds a valid driver's license issued
> pursuant to this Act to operate the motor vehicle,
> (i) take possession of the person's driver's license
> and shall, subject to subsection (2), issue a temporary driver's
> license that expires seven days from the effective date or on
> the expiry of the license seized by the officer, whichever is the
> earlier, and
> (ii) suspend the person's driver's license by serving
> on the person a notice of intention to suspend and order of
> suspension effective seven days from the date of the notice

> and order;
> (d) where the person holds a valid temporary driver's license issued pursuant to subclause (c)(i),
> 190 motor vehicle R.S., c. 293
> MAY 1, 2014
> (i) take possession of the person's temporary driver's license, and
> (ii) immediately suspend the person's driver's license by serving on the person an order of suspension;
> (e) where the person holds a valid driver's license to operate a motor vehicle issued other than pursuant to this Act, suspend the person's right to operate a motor vehicle in the Province and privilege of obtaining a driver's license by serving a notice of intention to suspend and order of suspension on the person effective seven days from the date of issue of the notice and order; or
> (f) where the person does not hold a valid driver's license to operate a motor vehicle, immediately suspend the person's right to operate a motor vehicle in the Province and privilege of obtaining a driver's license by serving a notice of intention to suspend and order of suspension on the person. [Emphasis added in para. 279A(1)(a).]

[15] That concept of not having authority ought to have operated as forward guidance to the officer, rather than acting as a proxy of the Nova Scotia Legislature and seeking essentially to update the statute unilaterally. There were legal choices available to the officer. He could have consulted with a colleague, or sought legal advice. He could have dealt with I.M.L.'s case through the justice of the peace centre. He could have sought to present medical information to the registrar of

motor vehicles under the provisions of s. 278C of the Motor Vehicle Act, thus allowing the registrar to make a legal decision whether I.M.L. might be suspended from driving.

[16] None of those other routes was followed, and I was satisfied that I.M.L. ought never to have been placed under a driving prohibition by the arresting officer.

[17] I proceeded then to dismiss the prosecution's application under sub-s. 503(2.3) that I.M.L. be placed on a judicial undertaking with such a prohibition. First of all, the proposition that the court expunge the form 11.1 no-driving clause as being, without a doubt, an overreaching act of policing authority in imposing it, only to turn around and re-impose it judicially, would have amounted in my view to an abuse of the process of the court. Secondly, it was my view that there was no basis for prohibiting I.M.L. from driving under any of the grounds in sub-s. 515(10) of the *Code*. The prosecution had not put before the court any evidence outlining the circumstances of the offence, which it could have done most certainly under sub-s. 518(1) of the *Code*. Further, the evidence that I did hear satisfied me that I.M.L. was dealing properly with her health-related issues; finally, as the arresting officer had acknowledged on cross examination, I.M.L.'s mental-health

crises arising from the misuse of prescription drugs had never involved her driving a car.

[18] The prosecution also sought a condition that I.M.L. keep the peace and be of good behaviour. In my view, such a condition was inappropriate, given the good guidance offered to bail courts in *R. v. Doncaster* 2013 NSSC 328 which cautioned against treating the discretionary bail condition to "keep the peace" as a mandatory, checklist-like item. I have followed *Doncaster* in a number of cases; two that come to mind are *R. v. Thompson* 2013 NSPC 124 and *R. v. Denny* 2015 NSPC 49. In this case, I ask myself why should someone with no record for past offences be required automatically to keep the peace?

[19] As far as I was concerned, I.M.L.'s promise to appear was the equivalent of an undertaking without conditions. I cancelled the form 11.1 undertaking, and continued the promise to appear.

[20] That I.M.L. was put through this in an effort to prop up unauthorized police-imposed bail is unfortunate. I.M.L. has a mental-health illness. She is self-aware, has a good self-concept, has sought and is participating fully in appropriate treatment. Based on the evidence which I heard, she does not require anyone making *parens-patriae*-like judgments about what might be good for her. The

public does not need to be protected from her. In *Winko v. British Columbia (Forensic Psychiatric Institute)* [1999] S.C.J. No. 31, the Supreme Court of Canada dealt with the constitutionality of s. 672.54 of the *Code,* a provision which conferred upon provincial review boards the authority to discharge, conditionally or unconditionally, persons who had been tried for criminal offences and found not criminally responsible. At paras. 36-39 of her opinion, concurred in by the majority of the panel who heard the appeal, McLachlin J. (as she then was) underscored the importance of dispelling erroneous stereotypes about members of the public who have mental illnesses. The assumption that those who are mentally ill pose a danger to the public is not supported by the vast body of medical and social-science evidence that has developed over the past quarter of a century. It is necessary for the proper administration of criminal justice that we not lose sight of this certain knowledge. *See e.g.*, Melody S. Sadler, Elizabeth L. Meagor & Kimberly E. Kaye, "Stereotypes of mental disorders differ in competence and warmth" (2012) 74:6 Social Science & Medicine 915-922.

[21] I must leave to be addressed at some later time the issue of whether form 11.1 bail, as it is being administered currently—given that, under sub-s. 523(1) of the *Code*, it is as enduring as judicially authorized bail, and that its violation under sub-s. 145(5.1) of the *Code* carries the same potential penalty as the violation of judicially authorized bail under sub-s. 145(5)—is constitutionally compliant with the provisions of para. 11(e) of the *Charter*.

JPC