CITATION: *R. v. Nguyen*, 2018 ONSC 4470
DATE: 20180720

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN	
Respondent	*D. MacDonald and I. Glasner*, for the Respondent
– and –	
THANH TUNG NGUYEN	*R. Litkowski*, for the Applicant Thanh Tung Nguyen
Applicant	
	R. Golec, for the Applicant Kevin Tran
AND BETWEEN:	
HER MAJESTY THE QUEEN	
Respondent	
– and –	
KEVIN TRAN	
Applicant	
	HEARD: July 18, 2018

Restriction on Publication
Information contained in this judgment is subject to a publication restriction under section 517(1) of the *Criminal Code*. This judgment shall therefore not be published in any document or broadcast or transmitted in any way before such time as: (a) a preliminary inquiry is held and the accused in respect of whom the proceedings are held are discharged; or (b) the end of the trial in this matter.

REASONS FOR DECISION ON BAIL REVIEW

SCHRECK J.:

[1] In October 2017, Thanh Tung Nguyen and Kevin Tran were arrested and charged with extremely serious drug and firearms offences. Following separate contested bail hearings, both were released on bail on very strict conditions. About two months later, the Crown brought an application before a judge of this court ("the reviewing judge") to have those decisions reviewed. The reviewing judge concluded that the Justices of the Peace at both bail hearings had made errors of law and that there had been a material change in circumstances. He granted the Crown's application and ordered both individuals detained.

[2] Mr. Nguyen and Mr. Tran now apply for a further review. As a result of the statutory scheme in the *Criminal Code*, the result is that I am called upon to review the correctness of a decision made by one of my colleagues, contrary to the usual situation of having decisions reviewed only by judges of higher courts. Although this is a task I do not relish, I have reluctantly come to the conclusion that the reviewing judge erred and ought not to have interfered with the decisions made at the initial bail hearings. As a result, the applications are granted and Mr. Nguyen and Mr. Tran are ordered released on the same terms and conditions as the initial bail orders, with the exception that the amount of Mr. Tran's recognizance is to be larger.

I. OVERVIEW OF THE ALLEGATIONS

[3] The applicants, Thanh Tung Nguyen and Kevin Tran, were the subject of a police investigation in October 2017. On October 23, 2017, both applicants were observed entering a residential premise on Sherway Gardens Road in Toronto. Mr. Nguyen was later seen leaving the premise carrying a bag, which appeared to be heavy. He entered his car with the bag and drove to an underground parking garage in Markham. Mr. Nguyen was arrested soon after. The bag was no longer in his car and the police believed that he had given it somebody else in the garage. Mr. Nguyen had $1,355 in cash in his possession at the time of his arrest. Mr. Tran was also arrested.

[4] Search warrants were later executed at the residences of both applicants as well as the premise on Sherway Gardens Road. Nothing of note was found in Mr. Nguyen's residence. In Mr. Tran's residence, the police seized $25,000 in cash as well as marijuana, cocaine and MDMA. There was approximately 500 g of each substance.

[5] At the Sherway Gardens premise, the police seized approximately 1 kg of MDMA, 1.45 kg of cocaine, approximately 500 g of heroin, 1.45 kg of fentanyl and 808 pills which the police believed at the time to be OxyContin. After the initial bail hearings but before the first review, an analysis of the pills revealed that they contained fentanyl, not OxyContin.

II. HISTORY OF THE PROCEEDINGS

A. The Initial Bail Hearings

[6] On October 31, 2017, Mr. Nguyen had a bail hearing before a Justice of the Peace, at the conclusion of which he was released on a $100,000 recognizance with one surety and "house arrest" conditions.

[7] On November 14, 2017, Mr. Tran had a bail hearing before a different Justice of the Peace and was released on a $32,000 recognizance with three sureties and "house arrest" conditions.

B. The First Review

[8] The Crown brought applications pursuant to s. 521 of the *Criminal Code* seeking to review the release orders of both Mr. Nguyen and Mr. Tran. Both applications were heard by the same the reviewing judge, with Mr. Nguyen's being heard on January 19, 2018 and Mr. Tran's on January 22, 2018. On the latter date, the reviewing judge gave brief oral reasons granting both applications. In accordance with s. 521(8)(*e*), he made an order pursuant to s. 515(6) detaining both applicants. Further written reasons were released on January 29, 2018.

[9] At the time of the Crown's application, Mr. Nguyen had been on bail for approximately two and a half months and Mr. Tran for approximately two months. There is no suggestion that either failed to abide by their bail conditions during this time.

[10] Since the bail review, both applicants have elected to be tried in the Ontario Court of Justice. Their trial is scheduled to begin on November 29, 2018.

III. ANALYSIS

A. The Nature of the Review

[11] Both applicants brought applications for a further review pursuant to s. 520 of the *Criminal Code*. Their applications were heard together on July 18, 2018. Section 520(1) provides as follows:

> 520 (1) If a justice ... makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(*b*), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

Since the detention order being reviewed was that made by the reviewing judge, this is a review of that decision, not the initial bail decisions. The parties are in agreement that although the decision being reviewed was made by a judge of this court, I nonetheless have the jurisdiction to review his decision, as was made clear in *R. v. Durrani,* 2008 ONCA 856, 94 O.R. (3d) 350, at para. 29:

> Section 520 clearly envisions more than one opportunity to bring a bail review application and contemplates that different judges of the superior court will sometimes hear these applications. The hearing will often be a blending of the original material and the material before the judge on any prior review and the order made by that judge with new material that has arisen subsequent to the initial hearing: see *R. v. Saracino* (1989), 47 C.C.C. (3d) 185 at 190-91 (Ont. H.C. per Doherty J.). In other words, s. 520 of the *Code* explicitly contemplates that, in reviewing an order made at a show cause hearing under s.520, one superior court judge may consider

> the order made by another judge of the same court on a prior review application.

While I have the jurisdiction to conduct a review, s. 520 "should not be a forum in which a disappointed party to the initial review seeks a fresh exercise of judicial discretion, or a re-determination of findings of fact made on the initial review": *R. v. Saracino* (1989), 47 C.C.C. (3d) 186 (Ont. H.C.), at p. 192.

[12] There are generally two circumstances in which it would be appropriate for one judge of this court to re-visit a determination made by another judge of this court: (1) where the judge making the first decision made an error of law or an error in principle; and (2) where there has been a material change in circumstances: *Durrani,* at paras. 28-30; *Saracino,* at pp. 191-192.

[13] Both applicants submit that the reviewing judge made errors of law. Counsel for Mr. Tran also submits that there has been a material change in circumstances because a trial date has been set since the reviewing judge made his decision. I do not view this as a material change in circumstances. While no trial date had been set at the time of the initial review, it was obvious that one would be set at some point and the reviewing judge would have had some idea as to how long proceedings of this nature take in this jurisdiction. That having been said, I note that any order that I make will be of limited duration.

[14] The real issue, as I see it, is whether the reviewing judge erred in law. The correctness of decisions made by a judge are usually reviewed by a different level of court and having a decision reviewed by a member of the same court as the judge who made the decision is unusual. It is a situation which I confess causes me some discomfort, especially where, as here, the reviewing judge is very experienced. Nevertheless, it is what the *Criminal Code* requires, as was explained in *R. v. Zeneli* (2003), 174 C.C.C. (3d) 477 (Man. C.A.), at p. 480 (and adopted in *Durrani,* at para. 30):

> ... [J]udges of the Court of Queen's Bench will fulfil their responsibilities of finding judicial error if error indeed exists and by exercising an independent discretion if the circumstances call for an independent review.

B. The Positions of the Parties

[15] The central issue at the initial bail hearings and before the reviewing judge was whether the applicants had met their onus of establishing that their detention was not required on the tertiary ground. The Justices of the Peace at the initial bail hearings concluded that each applicant had met his onus. The reviewing judge found that the Justices of the Peace had each made two errors warranting a *de novo* consideration. As well, in relation to both applicants he was of the view that the fact that the pills initially thought to be OxyContin were found to contain fentanyl was a material change in circumstances which also required a *de novo* reconsideration. After conducting such a *de novo* reconsideration, the reviewing judge concluded that the detention of both applicants was required on the tertiary ground.

[16] The applicants submit that the Justices of the Peace did not err and that the reviewing judge erred in concluding otherwise and in concluding that there was a material change in circumstances.

Counsel for the Respondent concedes that the reviewing judge was in error with respect to one aspect of his review of Mr. Tran's initial bail decision, but that he was correct with respect to the remaining errors and the material change in circumstances.

[17] Given the positions taken by the parties, I must consider whether the reviewing judge was correct in concluding that the Justices of the Peace committed the errors he found and in concluding that there was a material change in circumstances. If the reviewing judge was correct, then he was entitled to conduct a *de novo* consideration and his conclusions are entitled to deference. If I conclude that he was not correct, then no deference is owed to his conclusions as he ought not to have conducted a *de novo* consideration.

C. The Applicant Nguyen

(i) The Adequacy of the Justice of the Peace's Reasons

(a) The Reviewing Judge's Conclusions

[18] As noted, the reviewing judge concluded that the Justice of the Peace had made two errors. The first was a failure to provide adequate reasons, as required by ss. 515(6) and (6.1) of the *Criminal Code* and the well-established principles outlined in *R. v. Sheppard,* 2002 SCC 26, [2002] 1 S.C.R. 869 and *R. v. Braich,* 2002 SCC 27, [2002] 1 S.C.R. 903. The reviewing judge stated:

> Admittedly, the justice of the peace made reference to certain factors to be taken account of in considering the tertiary ground, but he made no mention of what the public perception would be if the accused were to be admitted to bail in the circumstances before him or how the release he envisioned would address the public's legitimate concerns.

(b) The Requirement to Give Reasons

[19] I agree with the reviewing judge that the principles set out in *Sheppard* apply in the context of a bail hearing: Hon. G. Trotter, *The Law of Bail in Canada,* 3rd ed. (Toronto: Thomson Reuters, 2016), S. 5.6. In the portion of *Sheppard* cited by the reviewing judge (para. 24), the Court stated:

> In my opinion, the requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.

As noted in *Sheppard,* the scope of the duty to give reasons varies depending on the context. Given the liberty interests at stake, judicial officers conducting bail hearing are expected to provide reasons far more expeditiously than would be expected of a judge rendering a decision following a trial or an appeal. As noted by Hill J. in *R. v. Brooks* (2001), 153 C.C.C. (3d) 533 (Ont. S.C.J.), at p. 548:

> It has never been suggested that the judicial official presiding in a busy Bail Court, in providing reasons for detention, need deliver breathless prose or slavishly track the wording of one or more of the paragraphs of s. 515(10) of the *Code*. However, the text of the reasons must, in some meaningful and coherent fashion, expose analysis related to the primary, secondary or tertiary grounds described in that statutory provision.

(c) The Justice of the Peace's Reasons

[20] In this case, the Justice of the Peace recognized that the tertiary ground was the central concern. He began his reasons by stating:

> This is a very serious case and there are substantial tertiary ground concerns. There is that deadly combination of illicit drugs and weapons. The allegations really paint a picture of an illegal pharmacy, a variety of very deadly drugs; one of which is fentanyl. And in substantial quantities, and the street value, or the potential street value depending upon how the items would be sold would be easily in the hundreds of thousands of dollars.
>
> . . . .
>
> This is very sophisticated ... and it comes dangerously close to a detention order under the tertiary grounds, but I'm not going to make one. Let me explain why, [Crown counsel] is entitled to an explanation. You are facing a reverse onus, so I have to actually justify everything I say, so that's just going take a few minutes.

The Justice of the Peace then expressed the view that "It's hard to envision an innocent explanation for this sort of situation and the connection that your client had to this" and concluded that "at first glance this is a very serious case".

[21] The Justice of the Peace then considered the potential sentence the applicant faced if convicted and said "I would be surprised if there isn't a substantial penitentiary sentence". Given that this relates to the second alleged error by the Justice of the Peace, I will discuss his reasons on this issue later.

[22] The Justice of the Peace then continued as follows:

> Now, the question for me, Mr. Litkowski, is do I have to detain your client? And the short answer is I don't think so, not in these particular circumstances. The reality is that I cannot emphasize to you how close you came to detention, but the reality is I think in these circumstances there are some factors that would prompt me to use my judicial experience to fashion and craft some suitable and appropriate conditions, which I think will go a long way to address the very legitimate Crown concerns, and the Court concerns. I must

> say, most of the comments made by [Crown counsel] and most of the concerns expressed are shared by the Court, so I want you to be aware of that. Now, that having been said, I really do believe that detention is not necessary.
>
> One of the factors that has led me to believe that is, in this particular case … Mr. Nguyen, the accused has no criminal record. He has no outstanding charges. These are significant factors.
>
> . . . .
>
> I think that the best way to address all of my concerns, which are substantial, is to impose a strict house arrest bail. … So there will be a, a strict house arrest bail, this should go a long way, [Crown counsel], to addressing your very legitimate concerns.

(d) The Sufficiency of the Reasons

[23] An assessment of the sufficiency of reasons requires a pragmatic, functional approach: *R. v. M.(R.E.)*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 37, 40-41; *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, [2007] 3 S.C.R. 129, 2007 SCC 41, at para. 101. Intervention will not be warranted simply because the jurist did a poor job of expressing himself. Ultimately, the issue is whether the reasons explain the basis for the decision that was reached and why the court arrived at the conclusions that it did: *Spar Roofing and Metal Supplies Ltd.v. Glynn,* 2016 ONCA 296, 401 D.L.R. (4th) 318, at para. 22.

[24] In this case, the reasons of the Justice of the Peace disclose that he considered the factors enumerated in s. 515(10)(*c*), namely, the strength of the Crown's case ("It's hard to envision an innocent explanation for this sort of situation"), the gravity of the offence ("This is a very serious case and there are substantial tertiary ground concerns"), the circumstances surrounding the commission of the offence ("There is that deadly combination of illicit drugs and weapons …, a variety of very deadly drugs; one of which is fentanyl. And in substantial quantities …."), and that the applicant was liable to a potentially lengthy term of imprisonment ("I would be surprised if there isn't a substantial penitentiary sentence"). Having considered these factors, he concluded that because the applicant did not have a criminal record or outstanding charges, the tertiary ground concerns could be addressed by the imposition of strict bail conditions.

[25] The applicant's lack of criminal record is a legitimate tertiary ground consideration, as was made clear in *R. v. St.-Cloud,* 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 71. The conditions of a release plan are also relevant to the tertiary ground, as was made clear by Trotter J. (as he then was) in *R. v. Dang,* 2015 ONSC 4254, 21 C.R. (7th) 85, at para. 58:

> A reasonable and knowledgeable member of the community may take a different view of a case in which an accused person charged with a violent offence is released into the community with virtually no supervision, compared to a situation where a strict plan has been put in place to monitor the accused. The plan goes to the core of s. 515(10)(*b*), but it may also impact on the application of s.

> 515(10)(*c*). The bail decision does not involve a stark choice between absolute freedom on one hand, and detention on the other. Realistically, it is a choice between release on conditions and detention. I see nothing wrong with this reality being reflected in s. 515(10)(*c*).

See also *R. v. Fleming,* [2015] O.J. No. 4380 (S.C.J.), at paras. 21-22; *R. v. Maleki,* 2018 ONSC 2728, at paras. 23-24; *R. v. Ahmad,* [2017] ONSC 3364, at para. 28; *R. v. A.B.* (2006), 204 C.C.C. (3d) 490 (Ont. S.C.J.), at para. 32.

[26] With respect, I fail to see how the reasons in this case are insufficient. They explain what factors the Justice of the Peace considered, the conclusion he reached and the reasons why he reached it. The reviewing judge's concern was that "he made no mention of what the public perception would be if the accused were admitted to bail in the circumstances before him or how the release he envisioned would address the public's legitimate concerns". While the reasons may not have explicitly addressed these issues, they did so implicitly. The Justice of the Peace was clearly of the view that the public perception would be that confidence in the administration of justice could be maintained if the applicant was released but subject to strict conditions. Based on the foregoing, I must conclude, with respect, that the reviewing judge erred in finding the reasons to be inadequate.

(ii) The Consideration of the Potential for a Lengthy Term of Imprisonment

[27] The second error found by the trial judge was that the Justice of the Peace failed to consider whether the applicant was liable to a potentially lengthy term of imprisonment if convicted, as required by s. 515(10)(*c*)(*iv*). The reviewing judge stated:

> In this case, at pp. 141-42 of the transcript, the justice of the peace stated:
>
> > There is the gravity of the offences to be considered, there is the aggravating circumstances of the amounts of the drugs involved and the great potential for profits. These are significant, and there is a number of factors that I need not specifically mention, but the important point is if there is a conviction, as I suspect there will be but that is a completely gratuitous comment, but just at first glance, unless there's something deficient in the information to obtain the search warrant which led to the finding of this evidence, I would be very surprised if there isn't a substantial penitentiary sentence, we'll see.
> >
> > . . . .
> >
> > Now, if the allegations are true, and if the Crown's case is as strong as I suspect it is, looking at it at first

> glance, he will be acquiring a criminal record in the near future, *and he will be facing some significant criminal liability; but again, that's a question for a different court on a different day*. [Emphasis added].
>
> With respect, whereas the sentence the accused would *actually* receive, if convicted, was "for a different court on a different day", the sentence he would *likely* receive was not; rather, that was a question for the justice of the peace to consider that day. By holding as he did, the justice of the peace effectively declined to consider a factor he was statutorily obliged to consider. Having erred in this fashion, the decision the justice of the peace reached in Nguyen's case was "clearly inappropriate" and is, thus, not entitled to deference. [Emphasis in original].

[28] With respect, given that the Justice of the Peace clearly stated that he would be "very surprised if there isn't a substantial penitentiary sentence", I am unable to understand how the reviewing judge came to the conclusion that he failed to consider whether the applicant was liable to a potentially lengthy term of imprisonment if convicted, as required by s. 515(10)(*c*)(*iv*).

[29] The second part of the quote reproduced in the reviewing judge's reasons does not relate to the potential for a lengthy term of imprisonment but, rather, to the issue of whether the applicant would be convicted. What the Justice of the Peace referred to as being "for a different court on a different day" was the determination of whether the Crown's case is as strong as it appears and whether the applicant's *liability,* that is, his guilt, will be proven.[1]

D. The Applicant Tran

(i) The Justice of the Peace's Reference to "Hysteria"

[30] The reviewing judge also found two errors in the reasons of the Justice of the Peace who heard Mr. Tran's bail hearing. The first related to the following portion of the Justice of the Peace's reasons:

> Ultimately, having considered all of this, I have to ask myself, "What would a reasonable member of the public think if you were released?" And I have to mention, I think, because fentanyl has been discussed so much in this particular hearing, there was an expert witness, which is not usual, brought to discuss that. I have to keep myself out of the public fray. I also have to not succumb to the hysteria that I think is out there. And I do not mean that hysteria is not warranted. But there is a lot of concern in the public for this particular drugs [*sic*]. When an expert says that the comparable amount of two grains of rice [*sic*][2] would kill 50 per cent of the

[1] The *Oxford English Dictionary* defines "liability" as "the state of being legally responsible for something."
[2] The expert compared a potentially lethal dose of fentanyl to two grains of salt, not rice.

> population, of course that strikes fear in the heart of the community. But I have to keep in mind a reasonable member of the community, who understands the presumption of innocence, who understands the *Charter* right to bail, who understands that you have no record, and who understands how a plan of release would lessen that concern and restore their faith in the administration of justice.

[31] The reviewing judge's analysis of this portion of the reasons was as follows:

> The foregoing passage reflects two errors, in my view. First, "hysteria" is defined in the *Concise Oxford English Dictionary,* 10th Ed. (New York, Oxford University Press, 2002) as "exaggerated or uncontrollable emotion or behaviour." Albeit there was evidence of public concern with the epidemic of drug overdoses, there was no evidence before the justice of the peace of hysteria among the general public. Then, having erred by drawing a conclusion for which there was no basis in the evidence, she compounded that error by taking the position that she must keep herself "out of the public fray." To the contrary, albeit the "public" to be considered is "usually the average person in the community, *but only when that community's current mood is reasonable"* (*R. v. Collins,* [1987] 1 S.C.R. 265, at pp. 282-83, cited in *St.-Cloud,* at para. 78; emphasis added), the justice of the peace was obliged, nevertheless, to "adopt the perspective of the public in determining whether detention [was] necessary": *St.-Cloud,* at para. 4. Indeed, a "justice's balancing of all the circumstances under s. 515(10(*c*) must always be guided by the perspective of the 'public'": *St.-Cloud,* at para. 72.

[32] Crown counsel very fairly concedes that the Justice of the Peace did not err in the manner suggested by the reviewing judge. The Justice of the Peace misused the word "hysteria" (a word best avoided in any event, given the sexist connotations associated with it) and was clearly referring to the public concern about the prevalence of fentanyl. As she made clear in her reasons, she was clearly alive to the requirement that she consider the perspective of "a reasonable member of the community."

(ii) Conflation of the Secondary and Tertiary Grounds

[33] The second error identified by the reviewing judge was that in his view, the Justice of the Peace "gave inordinate weight in relation to the tertiary ground to her conclusion that Tran could be curtailed from committing further offences by virtue of the house arrest conditions of the bail order she was about to fashion". In his view, this was similar to the error in *R. v. E.W.M.* (2006), 223 C.C.C. (3d) 407 (Ont. C.A.) (as cited in *St.-Cloud*, at para. 23):

> *Public fear and concern about safety, while relevant, are not the exclusive considerations in assessing the public's confidence in the administration of justice.* The effect of the accused's release on

> confidence in the administration of justice must be considered more broadly.
>
> *Limiting the analysis of confidence in the administration of justice to the public's safety concerns results in the tertiary ground amounting to little more than a recapitulation of the secondary ground... .*
>
> Here, the bail judge placed decisive weight on the quality of the respondent's bail arrangements. By doing so, he erred by not considering whether the tertiary ground established a separate and distinct basis for denying bail. Having quite appropriately considered the level of public concern about safety in this case, the bail judge erred by not going on to consider the effect the release of the respondent would have more broadly on the public confidence in the administration of justice. [Emphasis added in *St.-Cloud*].

[34] The reviewing judge based his conclusion on the following portion of the Justice of the Peace's reasons:

> There is nothing to suggest that you would not be supervised, that you would not submit to that supervision, and there is a place for you to go. And I think with three sureties who are supporting each other, with high quantums that are meaningful to them at risk, and under a house arrest release, it would be virtually impossible for you to acquire the quantities of drugs, or any drugs, or firearms, of the nature and type of these narcotics to traffic. *And for those reasons, I believe that the plan that is being proposed meets any concerns on the tertiary grounds for the reasons that I have just stated.* And so I make that connection, which gives me reason to believe that a reasonable member of the public, who understands everything that I am saying, would understand that that would give them confidence that the administration of justice has been dealt appropriately in this case. [Emphasis added by the reviewing judge].

[35] While this portion of the reasons seems to support the reviewing judge's conclusion when read in isolation, the reasons have to be read as a whole and in the context of the evidence that was heard and the submissions that were made. The Justice of the Peace's reasons occupy 15 pages of transcript. In them, she reviews the allegations in detail and considers the factors in s. 515(10)(*c*). She does so after hearing comprehensive submissions from Crown counsel on the tertiary ground. A reading of her reasons as a whole makes it clear that she did not "limit the analysis of confidence in the administration of justice to the public's safety concerns", nor was this her "exclusive consideration".

[36] While the primary, secondary and tertiary grounds are distinct, there can be overlap between them. Indeed, the reviewing judge recognized this, as he noted that one of the circumstances to be considered on the tertiary ground is "public confidence that the accused will

appear for trial", which is, of course, the focus on the primary ground. While the tertiary ground is encompasses more than concerns about public safety, public safety would undoubtedly be a relevant consideration for a reasonable member of the public determining his or her level of confidence in the administration of justice.

[37] Furthermore, while Crown counsel did not seek detention on the secondary ground, he did make the following submission:

> ... [T]he concerns remain valid in that, you know, not only are we clearly dealing with high value items, but now we are in a situation where within the drug subculture there is many tens of thousands of dollars that are now unaccounted for, and very large quantities of drugs that are unaccounted for, and there's a responsibility for those amounts in some way. And while I can't specifically allege in which way that responsibility would fall, I think it is fair to make the inference that there is a risk there, that there is a pressure to rectify that missing product and missing cash by virtue of further activity.

The Justice of the Peace's comments that the conditions being imposed would make it impossible for the applicant to acquire drugs to traffic was responsive to this concern.

[38] As well, as outlined earlier, the conditions of a release plan are a relevant consideration in assessing the tertiary ground: *Dang*, at para. 58; *Fleming*, at paras. 21-22; *Maleki*, at paras. 23-24; *Ahmad*, at para. 28; *A.B.*, at para. 32.

E. Material Change in Circumstances

[39] The reviewing judge found that the fact that the pills which the police thought were OxyContin turned out to contain fentanyl was a material change in circumstances. I would agree if the applicants had previously been facing only allegations of having possessed less harmful drugs. However, that was not the case. The applicants were already facing charges of possessing almost a kilogram and a half of fentanyl.

[40] Crown counsel submits that it is not the additional quantity of fentanyl that constitutes a material change in circumstances, but rather the evidence of deception that arises from the discovery that the seized pills contain fentanyl. Crown counsel submits that evidence that the applicants were passing fentanyl off as OxyContin is a different and more serious allegation than that of simply possessing fentanyl for the purpose of trafficking. There are two reasons why I do not accept that submission.

[41] First, there was no evidence that the applicants or anybody else were holding the pills out as being OxyContin. There is no evidence in the record as to any markings on the pills. The fact that the police mistakenly believed them to be OxyContin is not evidence that anybody intended to hold them out as such.

[42] Second, the prospect of the fentanyl being sold as OxyContin was not new and had been raised at the initial bail hearings. During both bail hearings, the Crown's expert, Det. Margetson, testified about the use of fentanyl to make counterfeit OxyContin pills. Given the large quantity

of fentanyl that was seized, the inference that it could be used for this purpose was clearly available.

F. Conclusion

[43] Given my conclusions that the Justices of the Peace did not err and that there was no material change in circumstances, it follows that the reviewing judge ought not, with respect, to have considered the question of bail *de novo*. It was suggested during oral argument before me that if I reach this conclusion, I should conduct my own *de novo* assessment. Subject to one exception which I will discuss shortly, I disagree. If the Justices of the Peace did not err and if there was no material change in circumstances, then their conclusions are entitled to deference. If it was inappropriate for the reviewing judge to conduct a *de novo* assessment, then it is equally inappropriate for me to do so.

[44] The Justices of the Peace concluded that releasing the applicants on "house arrest" bail conditions would not undermine public confidence in the administration of justice. In my view, while many jurists could reasonably have come to a different conclusion, that conclusion was nonetheless open to them on this record. I am fortified in this conclusion by two aspects of this case. The first is that while the applicants were on bail prior to the first review, they abided by all of their conditions. The second is that the trial will begin in just over four months, so the amount of time that the applicants will be on bail will be relatively short. Once the trial begins, the trial judge will of course have the jurisdiction to vary or cancel the applicants' bail at any time, should circumstances dictate such action.

[45] The one exception to my conclusion that the initial decisions should not be interfered with relates to the quantum of Mr. Tran's recognizance, which was set at $32,000.00. I am in complete agreement with the reviewing judge that this amount is wholly inadequate in the circumstances of this case. I note that the prospective sureties are now willing to pledge up to $65,000.00. In my view, it is appropriate that they do so.

IV. DISPOSITION

[46] For the foregoing reasons, both applications are granted. Both applicants are to be released on recognizances on the same terms and conditions as at the initial bail hearings except that Mr. Tran's recognizance is to be in the amount of $65,000.00.

Schreck J.

Released: July 20, 2018.

CITATION: *R. v. Nguyen*, 2018 ONSC 4470
DATE: 20180720

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

THANH TUNG NGUYEN

AND BETWEEN:

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– and –

KEVIN TRAN

REASONS FOR DECISION ON BAIL REIVEW

P.A. Schreck J.

Released: July 20, 2018.