

COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20120618
Docket: CA039979

Between:

Regina

**Respondent
(Plaintiff)**

And:

Randy Patrick Smith

**Appellant
(Defendant)**

**Before: The Honourable Mr. Justice Chiasson
(In Chambers)**

**On appeal from the Provincial Court of British Columbia,
(R. v. Smith, Western Communities Docket No. 15784-2-C, February 29, 2012)**

Oral Reasons for Judgment

Counsel for the Appellant:	R.L. Neary
Counsel for the (Crown) Respondent:	K.D. Madsen
Place and Date of Hearing:	Victoria, British Columbia June 18, 2012
Place and Date of Judgment:	Victoria, British Columbia June 18, 2012

(bail hearing)

[1] **CHIASSON J.A.:** Mr. Smith applies for judicial interim release pending the hearing of his appeal from conviction for the offences of possession of a firearm, possession of a weapon obtained through an offence and nine counts of possession of stolen property. On his appeal he contends that the trial judge erred by admitting evidence obtained in a search of his home despite finding two breaches of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. He also asserts that the judge erred in concluding the police acted properly in obtaining a tele-warrant in this case.

[2] In the case of a conviction appeal to this Court s. 679(3) of the *Criminal Code*, R.S.C., 1985, c. C-46, states the criteria to be considered on the application:

- (a) the appeal or application for leave to appeal is not frivolous;
- (b) he will surrender himself into custody in accordance with the terms of the order; and
- (c) his detention is not necessary in the public interest.

[3] The Crown does not assert that Mr. Smith's appeal is frivolous, but reserves its comments on the strength of his appeal to a consideration of the third criterion. It expresses reservations whether he satisfied the second criterion, but takes the position his detention is necessary in the public interest.

Background

[4] The evidence against Mr. Smith was obtained as a result of the search of his home pursuant to a tele-warrant. Part of the information provided to the Justice of the Peace to obtain the warrant was obtained by a police officer who trespassed on the property where Mr. Smith resided. Contrary to s. 487.1 of the *Criminal Code* a copy of the tele-warrant was not served on Mr. Smith prior to its execution. The judge found these to be breaches of s. 8 of the *Charter*. Mr. Smith also contended that it was not necessary to obtain a tele-warrant because the police, who applied for the warrant around 8:00 a.m. could have waited until 9:00 a.m. when the Victoria courthouse would have opened. The judge rejected this contention.

[5] The judge concluded that the *Charter* breaches he found did not warrant exclusion of the evidence found in Mr. Smith's home and dismissed his application to exclude it.

[6] Mr. Smith, who is 38 years old, has an extensive criminal record. He has been convicted previously of illegally possessing firearms and of disobeying lifetime orders banning him from possessing firearms. His record includes possession of stolen property, theft and a number of drug related offences. He has breached a conditional sentence order, failed to attend court, violated a recognizance and violated parole. Since he was 15 years old, Mr. Smith has struggled with substance abuse. Much of his criminal record is related to that.

[7] Relevant to the present applications is the fact Mr. Smith was released on bail in this matter on March 3, 2011. He was rendered by the sureties in July 2011 and re-released on August 11, 2011. He lived in his parents' home for 13 months while on bail until the date of his sentencing, May 4, 2012. His mother and his sister were his sureties. He complied with the conditions of his release. He was rendered by the sureties out a concern that he may have become involved with drugs. He also had one drug monitoring test that showed positive for opiates, but that was explained as likely related to a drug he was given by his sister to ease the side-effects of a methadone program which he was following. His bail supervisor reported that there were no compliance issues while he was under bail pending the trial of the present case.

[8] Mr. Smith's *Charter* application was dismissed on December 14, 2011. He was convicted on February 29, 2012. He remained on bail pending his sentencing on May 4, 2012. Counsel observes that knowing he likely would face a term of incarceration, Mr. Smith nevertheless appeared as required for his sentencing.

[9] Insofar as he has been gainfully employed, Mr. Smith generally has worked in his family's crab fishing business. This has become of particular significance due to the serious illness of his father, who has the commercial fishing licence. He is unlikely to be able to return to the business which Mr. Smith has been operating.

[10] Mr. Smith proposes that if he were released it would be on the same conditions as his previous release with condition five modified to reflect the fact that he now operates the crab fishing enterprise. Although opposing release, the Crown suggests an addition condition that Mr. Smith have no contact or communication directly or indirectly with Lara Davison.

Discussion

[11] I have considered the positions of the Crown and Mr. Smith on the strength of his appeal. The Crown contends that the appeal is weak; Mr. Smith asserts that it is strong, particularly with respect to the judge's treatment of the officer's trespass. On the limited information available to me, I do not consider the appeal to be strong, but it certainly is not frivolous.

[12] In my view, consistently ignoring and disobeying conditions of court orders raises concerns whether a person will surrender pursuant to the terms of a bail order. Mr. Smith's history on this count is poor, but I think I must take him as he is presented to me. His adherence to the terms of bail in the context of the present charges over a period of approximately thirteen months and his attendance when required to deal with sentencing, satisfy me that he is not a flight risk at this juncture and that he will surrender himself when required to do so. His present involvement in and responsibility for the family fishing business supports this conclusion.

[13] Appropriately, the Crown focuses on the tertiary criterion for granting judicial interim release. As was stated in *R. v. Mapara*, 2001 BCCA 234, the court must balance enforceability and reviewability; the interest of the state in ensuring that those who commit crimes are seen to be facing the consequences of their transgressions and the need to ensure that those who may have been wrongly convicted do not spend time in jail while the court examines those convictions. At the end of the day, the task is to strike a balance to ensure that the administration of justice is respected. That balance is not struck in the court of public opinion, but is achieved by considering what result would be acceptable to a member of the

community who is reasonable familiar with the facts and circumstances of the case in issue.

[14] Militating against Mr. Smith is the history of his criminal activities and his historical disregard of court orders. Although he previously was granted bail notwithstanding this history, at the time he was the beneficiary of the presumption of innocence. That no longer is the case.

[15] Strongly in his favour is his conduct over the 14 months pending his sentencing and the diligence with which his sureties undertook their responsibilities. The present circumstances of his family would benefit significantly from his participation in the family fishing business.

Conclusion

[16] I am satisfied that Mr. Smith's appeal is not frivolous, that he will surrender himself when required to do so and his detention at this time is not required in the public interest. I also am satisfied that the terms of his release must be stringent. These will include a requirement to proceed expeditiously with his appeal.

[17] I order that Mr. Smith is to be released on the conditions of his release pending his conviction and sentencing to which conditions I would add:

You are not to have contact or to communicate directly or indirectly with Lora Lianne Davison.

[18] In addition, Condition number five is to be modified to include the following requirements:

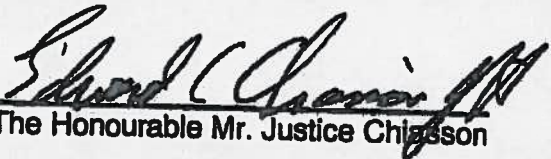
Mr. Smith is to be inside his residence at all times unless he is in the presence of his father or one of his sureties;

He may be absent unescorted from his home to attend to the family fishing business between hours agreed to by counsel or set by me if there were no agreement;

When absent from his home attending to the family fishing business, he must have on his person the written permission of his mother which shall be provided on each working day.

[discussion with counsel]

[19] I also direct the following: proof that the trial transcript has been order will be provided by June 30, 2012; the transcript and appeal book will be filed by August 31, 2012; Mr. Smith's factum will be filed by October 31, 2012; the Crown's factum will be filed by January 11, 2013; this appeal will be scheduled to be heard as soon as practicable, but in any event not later than May 31, 2013.


The Honourable Mr. Justice Chagnon