R. v. Conley, 2010 NWTSC 67
Date: 2010 0813
Docket: S-1-CR-2010000145

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN
Respondent

- and -

JERRY MICHAEL CONLEY
Applicant

Restriction on Publication: This matter is subject to a publication ban pursuant to sections 517 and 520(9) of the Criminal Code

MEMORANDUM OF JUDGMENT ON
BAIL REVIEW APPLICATION

The accused applies, pursuant to section 520 of the Criminal Code, for a review of a detention order made by a Territorial Court Judge on June 14, 2010. The review hearing proceeded on August 9, 2010 and I reserved my decision.

A) PROCEDURAL BACKGROUND

[1] The accused faces a number of charges arising from a complaint made by his spouse to the R.C.M.P. on May 5, 2010. These include charges of assault, unlawful confinement and careless storage of firearm alleged to have occurred on May 5, 2010 and two charges of assaults and one of uttering threats alleged to have occurred in 2009. The accused was arrested on those charges and released on a Recognizance by a Justice of the Peace on May 6, 2010. One of the conditions of the Recognizance was that he not have any contact with the complainant.

[2] On June 9, 2010 the complainant reported to the police that the accused had breached the no-contact condition. The accused was arrested the same day and taken before a Justice of the Peace, who adjourned the issue of bail to be addressed in Territorial Court on June 14.

[3] On June 14, the Crown proposed to have the accused released on a Recognizance on conditions similar to those that were included in the May 6 Recognizance. After having heard the allegations on the earlier charges, the allegations with respect to the breach and the submissions of counsel, the Territorial Court Judge disagreed with what the Crown was proposing. She concluded that the accused should be detained.

[4] At the conclusion of the show cause hearing the accused entered pleas of not guilty to all the charges, except the breach, for which he entered a guilty plea. His trials, and the sentencing hearing, were scheduled to proceed on July 19, 2010. On that date, at Defence's request, the matters were adjourned to September 8, 2010. On July 22, 2010 the accused filed a Notice of Motion seeking release.

[5] The accused argues that the detention order made by the Territorial Court Judge should be set aside because this Court has the benefit of additional evidence about the circumstances of the breach which demonstrates that, contrary to what the Territorial Court Judge inferred, that incident does not give rise to public safety concerns. The accused also notes that the Territorial Court Judge did not have the benefit of the authorities that were filed at the review hearing.

[6] The accused also argues that in her analysis of the secondary ground for detention, the Territorial Court Judge may have erred in her assessment of what constitutes a "substantial likelihood" that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice.

B) CROWN'S ALLEGATIONS

[7] The Crown relies on the allegations presented at the June 14 show cause hearing, as recorded in the transcript of those proceedings.

[8] The complainant and accused have been in a relationship for several years, although they each maintain their own residences. When she gave her statement to the police, the complainant said that she was afraid of the accused and that he had drug and gang associations. She said this was why she had not previously disclosed the earlier incidents involving him.

1. Allegations about incidents from 2009

[9] The complainant alleges that some time during the early part of the year 2009, she went to the accused's residence. An argument began and escalated to a physical altercation. The accused pushed the complainant down the stairs of the residence; she required medical attention and alleges the injuries she sustained still affect her today. No details were provided as to the nature of those injuries.

[10] The complainant alleges that during the summer or fall of 2009, the accused barged into her house unannounced, entered into one of the bedrooms and began taking a television. She confronted him about this and he pushed her to the ground. This was witnessed by her two daughters, who were 14 and 15 years old at the time, and a babysitter.

[11] She further alleges that later in the fall, she and the accused were preparing to go hunting. They started to argue. During the argument the accused told her he should just shoot her and kill her.

2. Allegations about incident of May 5, 2010

[12] The complainant alleges that just after midnight on May 5, she went to the accused's house. He became upset because she was supposed to be home no later than midnight. An argument ensued and escalated to a physical altercation.

[13] The complainant alleges that she was afraid, because of past incidents, and wanted to leave, but the accused grabbed her by the wrists and refused to let her leave. At one point he pulled her down the stairs by her feet. She fought back and hit him in the face. He continued to hold her down, telling her she was going to stay until the police arrived. She recalls him punching her in the arm. She was later observed to have bruises to her wrists and arms. Her injuries required medical attention as she was unable to sleep because of the pain in her shoulder.

[14] When the police attended the accused's residence to arrest him, they found seven firearms in the garage that were not secured with locking devices and were easily accessible.

3. Allegations about incident of June 9, 2010

[15] With respect to the breach , the complainant alleges that on June 9, 2010, she was walking to work; the accused pulled up in his vehicle and said something to her. All that she heard was the word "please". She quickly continued to walk away from him. She was frightened.

[16] At Paragraph 10 of the Affidavit he filed in support of his application for release, the accused sets out his version of what happened on June 9:

(...) On June 9, 2010, I spoke to the complainant, Ms. Simon, unaware that I was breaching my Recognizance earlier entered into as I simply wanted the return of the keys to my truck and mailbox and the words spoken by myself were to the effect of "could I please have the keys to my truck and mailbox returned to me" and when Ms. Simon appeared upset, I simply drove away and when I was later arrested and charged with the offence of breach of Recognizance, I was cooperative with the police and provided the police a statement.

[17] The accused's criminal record is attached to his Affidavit. The record is quite dated. The last entry is from October 28, 1988. Some of the convictions on it are serious: the record includes one conviction for aggravated assault, two convictions for assault with a weapon, three convictions for assault, all of which led to the imposition of jail terms.

C) THE POSITIONS OF THE PARTIES

[18] The Crown opposes the accused's release on the secondary ground. This position is different from that taken at the show cause hearing, where the Crown was prepared to consent to the accused's release on the terms of his earlier Recognizance. The Crown submits the position it took at the initial show cause hearing is not significant for the purposes of the review, because the question that arises in the context of a review hearing is not the same as the one that arises at the initial show cause hearing. The Crown also notes that, unlike what was the case at the show cause hearing, the breach is no longer merely an allegation, but something the accused has acknowledged through his guilty plea.

[19] The accused argues that he should be released on terms similar to those of the May 6 Recognizance. He submits that the additional information presented at the review hearing about the nature of the contact that occurred on June 9, and his cooperation with the authorities after he was arrested on that breach, removes any concerns that might exist that his intent in contacting the complainant was to interfere with the administration of justice. He argues that the circumstances of the breach and the words uttered show that it was an innocent, albeit misguided, act. The accused also points to the significant gap in his criminal record, and to his long standing connection with the community of Inuvik.

D) ANALYSIS

[20] The nature of a review held pursuant to section 520 of the Criminal Code has been the subject of much controversy. As Trotter writes in The Law of Bail in Canada, 2nd ed., Carswell, 1999, at p.305:

The body of cases that address the nature of the review under all these sections is chaotic, especially the cases that consider ss. 520 and 521. (...) There is little agreement about fundamental aspects of this process. Moreover, the use of certain terminology and jargon has obscured the analysis.

[21] In some cases, courts have approached these reviews as strictly an appeal on the record. In other cases, courts have treated them as de novo hearings. Other courts have adopted a hybrid approach to these hearings.

[22] In my view, the hybrid approach is preferable. It has been adopted by this Court in a number of cases. In R. v. Poitras 2003 NWTSC 22, at para. 6, Vertes J. described the nature of the inquiry in this way:

Since there is an obligation on the applicant (whether it is the prosecutor or the accused) to "show cause", the reviewing judge must give due consideration to the decision of the justice and not substitute his or her discretion for that of that justice unless it appears that the justice has exceeded his or her jurisdiction, made an error of law or erred in his or her appreciation of the facts or the proper inferences to be drawn from the proven facts. However, because the reviewing judge is entitled to hear "such additional evidence or exhibits as may be tendered" by the accused or the prosecutor, the decision of the justice should be examined in the light of any new evidence, and therefore in that sense it is a hearing de novo.

1. Error of law or misapprehension of the facts

[23] The first part of the analysis, then, is to determine whether, on the record of the show cause hearing, the Territorial Court Judge exceeded her jurisdiction, made an error of law or erred in her appreciation of the facts or in drawing inferences. The only issue that the accused raises in that regard, as I understand his submissions, is with the Territorial Court Judge's conclusion that the June 9 event gave rise to a substantial likelihood that the accused would commit a further offence or interfere with the administration of justice if he was released. He argues that "substantial likelihood" is a high standard that was not met in this case, where there was no indication of threatening or intimidating conduct towards the witness.

[24] The information presented to the Territorial Court Judge was that a month after having been released on the Recognizance, the accused approached the complainant on the street and spoke to her. All she heard was the word "please" because she walked away. This contact frightened her, and she reported the incident to the police the same day.

[25] It is apparent from the Territorial Court Judge's comments that she did not view the contact between the accused and the complainant as a trivial matter:

A little over a month later [after the accused's release on the Recognizance] I am told that Mr. Conley – or the allegations are that Mr. Conley did approach Erin Lee Simon. She was on her way to work. He was in his vehicle. He said something to her. She does not know what he said other than hearing the word "please". I certainly do not find that a minor breach or a polite breach simply because we have the word "please". The condition was clear. The allegations are serious.

(...)

I do not see how the same conditions [as the conditions in the previous Recognizance] meet my concern with the fact that from the allegations I find there is substantial likelihood that Mr. Conley will interfere with the administration of justice in approaching a witness, in approaching what I would say is the main Crown witness from the allegations that I have heard on this hearing. That is an important condition. And in the circumstances, I am not satisfied that his detention is not necessary to ensure that he does not interfere with the administration of justice or commit further criminal offenses.

[26] The Territorial Court Judge did not misstate or misapprehend the information that had been put before her at the hearing. She noted that the alleged breach had occurred just one month after the Recognizance had been entered into. She noted that the condition in the Recognizance was clear. She found the criminal record was "a terrible criminal record" but also noted that it was "very dated".

[27] She also noted that the allegations were serious. This was not an unreasonable characterization, considering that those allegations were of a pattern of physical violence and threats that had arisen over the course of over a year. One incident was alleged to have occurred in the presence of the complainant's teenage children; another involved death threats as the parties were preparing to go on a hunting trip; other incidents resulted in injuries.

[28] There is no basis to find that the Territorial Court Judge erred in her appreciation of the evidence that was before her. Nor was there anything unreasonable in her finding that a breach of a no-contact order with the main Crown witness raised significant concerns about interference with the

administration of justice. Breaches of no-contact orders raises such concerns, even in the absence of overt threats or other intimidating behaviour. The possible impact that contact between an accused and a witness is one of the reasons why no-contact orders are made in release orders. And preventing interferences with the administration of justice is an important component of what the secondary ground for detention is intended to address.

2. Impact of new information presented at the review hearing

[29] Having concluded that the Territorial Court Judge did not err in law or in her appreciation of the facts, the next issue I must consider is whether the new information presented at the review hearing is such that the order made at the show cause hearing should be set aside.

[30] As far as factual issues are concerned, the main change in circumstances is that there are now additional details about the nature of the utterance that the accused made to the complainant when he approached her on June 9. As already mentioned at Paragraph 16, the accused deposes that he said words to the effect "could I please have the keys to my truck and mailbox returned to me". When he saw that she appeared upset, he drove away.

[31] The accused argues that this additional information puts the interaction in far better context than the minimal information that was given to the Territorial Court Judge at the show cause hearing. He argues that it shows that this was a minor, almost innocent breach, that does not give rise to concerns about interference with the administration of justice.

[32] I disagree with that submission. The appreciation of what gives or does not give rise to concerns about interference with the administration of justice is highly contextual. Obviously, if an accused threatens or intimidates a witness, or tries to blackmail a witness, the attempt to interfere with the administration of justice is crystal clear, and can actually form the basis of a charge pursuant to section 139 of the Criminal Code, quite apart from the issue of breach of the no-contact order. But interference with the administration of justice can occur in much more subtle ways. The relationship between the parties involved is significant in assessing their conduct and discerning what effect that conduct might have.

[33] In dealing with this issue, Trotter writes:

With respect to the relationship between the accused and the victim, certain situations may lend themselves to the risk of interference more so than others. Consider the case of an accused alleged to have assaulted his spouse or sexually exploited a child to whom he stands in loco parentis. The opportunity for subtle and insidious dissuasion, apart from blatant intimidation, is tangible in either of those two situations.

G. Trotter, The Law of Bail in Canada, supra, at p.145

[34] I agree entirely with those comments. In my view, cases involving alleged spousal violence are among those where the potential for there to be interference with the administration of justice is the highest. No-contact conditions are imposed as part of release conditions in those types of cases to protect not only the witnesses, but also the integrity of the criminal justice process. For that reason, the additional details provided about what the accused said to the complainant do not assist him in alleviating the concerns arising from his breached the terms of a no-contact order, particularly in the context of a case involving allegations of family violence.

[35] In addition, one aspect of the accused's Affidavit gives rise to further concern. In the excerpt quoted at Paragraph 16, he deposes that he was unaware that he was breaching his Recognizance when he approached the complainant.

[36] The accused signed the May 6 Recognizance. He initialled the various conditions that were included in that Recognizance. One condition in the Recognizance prevented the accused from being within 20 metres (or 30 metres, it is difficult to read on Exhibit "C" to the accused's Affidavit) of the complainant's residence or her place of employment. The no contact condition reads as follows:

You shall not have any contact directly or indirectly with Erin Leigh Simon.

There is nothing ambiguous about these conditions.

[37] The accused was not cross-examined on his Affidavit so he did not have an opportunity to elaborate on why he was unaware that approaching the complainant would not constitute a breach of the no-contact condition. But his statement that he was not aware of the condition is of concern, because it shows very little attention being paid to his release conditions, or indifference about them. Neither are reassuring when considering the likelihood of his future compliance with those same terms.

[38] The accused argues that the time he has spent on remand since June 9 provided him with a stark reminder of the importance of taking his release conditions seriously. That argument might be more compelling if he was a youthful person with no prior experience with the criminal justice system. But the accused is a mature man who has had experience with the criminal justice system, albeit several years ago, including periods of incarceration.

[39] In summary, I do not find that the additional evidence about what the accused said to the complainant on June 9 changes much about the assessment of whether that conduct raises concerns pursuant to the secondary ground. What is significant is that a month after signing the Recognizance, he approached her and spoke to her, in clear violation of his release conditions. This frightened the complainant. This does give rise to concerns about interference with the administration of justice.

[40] I have also taken into account that another change in circumstances since the show cause hearing was held is that the accused has now pleaded guilty to the breach charge. He no longer benefits from the presumption of innocence on that matter, unlike what was the case when the Territorial Court Judge made her decision on the show cause hearing. That is a change in circumstances that does not assist him in his application for release.

[41] As for the fact that the Territorial Court Judge did not have the benefit of the case law that was presented at the review hearing, I do not find it makes a significant difference. Some of the authorities filed by the accused are cases where individuals breached their release process and were nonetheless granted bail again. But bail decisions involve the exercise of considerable discretion and are very fact specific. In addition, there are distinguishing elements to each of those cases. None of them arose in the context of alleged spousal violence. None of them involved breaches of a no-contact order. Finally, some of the cases filed involved the review of decisions denying bail at the first instance, as opposed to situations where the accused was released once and subsequently breached his or her process. While those cases are helpful in distilling the applicable legal principles, they are of limited assistance in deciding whether the accused, in this case, has met his onus.

[42] Any Court called upon to make a decision with respect to pre-trial bail must be mindful of overarching principles such as the presumption of innocence and the right not to be denied reasonable bail without just cause. Courts must be vigilant not to restrain liberty when it is not warranted.

[43] These principles were followed in this case: even though he faced a number of charges, and despite his criminal record, the accused was granted bail at the first instance. He was released on the most strict form of process available under the Criminal Code, a Recognizance of bail with a cash deposit of a significant amount of money. He breached that Recognizance a month later, by having contact with the person who is the alleged victim and main Crown witness on all the matters set for trial, except the charges for careless storage of firearms.

[44] At the June 14 show cause hearing, the onus then was on the accused to show that his detention was not required. The Territorial Court Judge found that the accused had not discharged that onus and that conclusion was justifiable on the record before her. And even with the benefit of the additional information presented at the review hearing, for the reasons I have already given, I see no basis for setting aside that decision.

[45] The detention order is confirmed, as well as the order made pursuant to section 515(12) of the Criminal Code.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
13th day of August, 2010

Counsel for the Applicant,
Jerry Michael Conley: Robert H. Davidson
Counsel for the Respondent: Barry Nordin

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THE HONOURABLE JUSTICE L.A. CHARBONNEAU