R. v. T.S., 2013 NWTTC 10
Y-1-YO-2013-000048

IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

T. S. (A Young Person)

Transcript of the Reasons for Bail Release by The Honourable Chief Judge R. D. Gorin, at Yellowknife in the Northwest Territories, on April 23rd A.D., 2013.

APPEARANCES:

Ms. W. Miller: Counsel for the Crown

Ms. C. Wawzonek: Counsel for the Accused

THE COURT: This is my decision on the Crown's request that T.S., a young person, be detained until his charges are dealt with in full. Mr. S. is charged with five offences, all of which arise out of an incident that occurred on or about March 10th of this year in Yellowknife. He is charged with

1. Possessing a restricted firearm, without a permit or license, contrary to Section 95(a) of the Criminal Code.

2. Carrying a firearm for a purpose dangerous to the public peace contrary to Section 88 of the Criminal Code.

3. Carrying a concealed weapon contrary to Section 90 of the Criminal Code.

4. Knowingly possessing a restricted firearm in a motor vehicle contrary to Section 94 of the Criminal Code.

5. Possessing cocaine for the purpose of trafficking contrary to Section 5(2) of the Controlled Drugs and Substances Act.

The newly enacted subsections (2) and (3) of Section 29 of the Youth Criminal Justice

Act set out requirements that must be fulfilled in order for the Court to order a young person detained pending his trial.

Subsection (3) of Section 29 provides that

the onus of satisfying the Court that the necessary requirements have been fulfilled is on the prosecution. This new provision, along with the fact that the former subsection (2) has been replaced with a complete process on determining interim judicial release of young persons, greatly simplifies matters. There no longer exists the complex and somewhat confusing regime concerning what could, for example, result in the defence bearing the onus on the primary and tertiary grounds, set out in Section 515(10) of the Criminal Code, and the Crown bearing the onus on the secondary ground, all in the same hearing. The new provisions appear to be a considerable improvement in terms of clarity and simplicity.

Subsection (2) of Section 29 provides that

number of requirements must be fulfilled in order for the Court to order a young person detained pending his trial.

The first requirement is set out in subsection (2)(a) of Section 29.

(2) A youth justice court judge or justice may order that a young person be detained in custody only if

(a) the young person has been charged with

(i) a serious offence, or

(ii) an offence other than a serious offence, if they have a history that indicates a pattern of either outstanding charges or findings of guilt.

So in order to detain a young person, he must be charged with either a serious offence or have a history that indicates a pattern of outstanding charges or findings of guilt.

In this case, Mr. S. has no past criminal record and no outstanding charges. The Crown

relies on the fact that the charges alleged are "serious offences". As conceded by defence counsel that requirement is met.

Section 2 of the Act defines a "serious offence" as being an indictable offence under on a act of Parliament for which the maximum punishment is imprisonment for five years or more.

Given the wording of this definition, the maximum punishment referred to is of course the maximum punishment for an adult. As stated, all five of Mr. S.'s charges fit within the foregoing definition.

The next requirement that must be fulfilled is set out in subsection (2)(b) A young person cannot be detained unless

(b) the judge or justice is satisfied on a balance of probabilities,

(i) that there is a substantial likelihood that, before being dealt with

according to law, the young person will not appear in court when required by law to do so,

(ii) that detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a serious offence, or

(iii) in the case where the young person has been charged with a serious offence and

detention is not justified under subparagraph (i) or (ii), that there are exceptional circumstances that warrant detention and

that detention is necessary
to maintain confidence in the
administration of justice,
having regard to the
principles set out in Section
3 and to all the
circumstances, including
(A) the apparent strength of
the prosecution's case,
(B) the gravity of the offence,
(C) the circumstances surrounding
the commission of the offence,
including whether a firearm
was used, and
(D) the fact that the young
person is liable on being
found guilty for a potentially
lengthy custodial sentence.

So the subsection states that in order for the Court to detain the young person, the Court must find, on a balance of probabilities, and once again I paraphrase,

that either there is a substantial likelihood that a young person will not show up for court; or, that the young person's detention is necessary to protect the safety of the public, including any victim or witness to the offence, having regard to all the circumstances, including the substantial likelihood that the young person will, if released, from custody commit a serious offence (which has previously been defined); or, where there are exceptional circumstances that warrant detention and detention is necessary to maintain confidence in the administration of justice, having regard to the principles set out in Section 3 of the Youth Criminal Justice Act, and to all the circumstances including, but not limited to, certain enumerated factors which I won't repeat.

For the purpose of analysis, I think that there are a number of phrases used in subsection (2)(b) that requires some clarification. The first is the term "substantial likelihood" which appears twice in subparagraph (2)(b). Some may think it interesting that the wording of the subsection requires that the Court find, on a balance of

probabilities, that a substantial likelihood exists. However the word "likelihood" can be differentiated from the word "likely".

A likelihood can be described as a chance, risk, threat or danger. Certainly that was the view expressed by the Alberta Court of Appeal in the case of R. v. Link, 1990 ABCA 55.

As stated by Justice Herradence speaking for the entire Court,

> We do not understand the word "likelihood" in Section 515(10)(b) of the Criminal Code to be synonymous with the word "probability". That term is often used in the law meaning more likely than not. We are of the view that substantial likelihood in the section means simply a substantial risk. The only reasonable conclusion in the circumstances of this case is that such risk exists. The order of the learned chambers judge must be

set aside and the respondent is ordered detained.

So I must first ask myself whether or not

there is a substantial risk that the accused will not show up for court if bail is granted.

Certainly the Crown has alleged no criminal record; however, Mr. S. also has no ties to the community of Yellowknife. He resides outside of the Northwest Territories in British Columbia. He is only 18 years old and it is not clear whether on his own he has the means, or at least the legitimates means, to travel from his place of residence in BC to Yellowknife where his court proceedings would take place. I have not been advised of any assets that he could liquidate and these factors cause me to conclude that, without adequate safeguards, there is a substantial risk that he would not attend court when required to do so.

Next, I must ask myself whether it has been established that detention is necessary to protect the public. Once again I must

consider that Mr. S. has no criminal record whatsoever. However, I also take into account the fact that the Crown alleges that the accused young person was involved in gang-related activity.

I also bear in mind the specific nature of the allegations which involve the use of a

firearm which Mr. S. is said to have possessed. It is alleged that he possessed it and passed it to his co-accused Mr. Petten, who was the far more threatening of the two during the circumstances which led to their arrest.

In answering whether Mr. S.'s detention is necessary to protect the public, I am required to consider whether there is a substantial risk that he would commit a serious offence if released. I think that the allegations strongly suggest that Mr. S. is involved, to at least some degree, with organized crime as that term is defined in the Criminal Code. His co-accused, an adult, stated that he, that

is the adult, was a member of the Nomads who the Crown described as an "outlaw motorcycle gang".

Mr. S., along with Mr. Petten, is said to have banged on the door to the Raven. Mr. Petten is alleged to have yelled "you want some heat?" and "who wants to get shot?" while patting his belt line. The Crown says that witnesses observe the two passing a firearm between them. Obviously the circumstances that are alleged were very threatening.

It is alleged that the two left in a cab following this incident. The Crown advises that the taxi driver saw Mr. Petten pass the gun back to Mr. S. while in the taxi.

The two were eventually arrested. The handgun, a 45 calibre semiautomatic Remington, was found on the floor of the cab along with six bullets loaded in the magazine. Mr. Petten was found with a cell phone and a substantial amount of cash. Mr. S. was found holding two baggies of powder cocaine weighing

2 grams and five baggies of crack cocaine weighing 2.7 grams.

As stated, there is a strong suggestion that the accused is associated with organized crime, whether or not he is associated with the actual organization referred to by his co-accused.

Due to this factor and given the allegations and the strength the Crown's case, which appears, on its face, to be solid, I find that if the accused were left to his own devices, there would exist a substantial risk that he would commit a serious offence if released. This concern is such that I find that, without adequate safeguards, his detention is necessary in order to protect the

public.

Next I must consider the application of subparagraph(2)(b)(iii). Subparagraph(2)(b)(iii) requires in order for it to apply that detention must not be justified under subparagraph (i) or (ii).

I take this to mean that for subparagraph (2)(b)(iii) to apply, the accused must not ultimately be ordered detained on either the primary or secondary ground. It would result in an absurdity if the tertiary ground could not apply to a situation where the risks referred to in subparagraph (2)(b)(i) and (ii) (the primary and seconday grounds) are made out but where the accused would otherwise be released on conditions that adequately address those risks.

Having said that, I find that the tertiary ground set out in subparagraph (2)(b)(iii) does not apply in the present case.

R. v. W. (R.E.) (2006), 205 C.C.C. (3d) 183, 36 C.R. (6th) 134 (Ont. C.A.) is a case that deals with the application of the "exceptional cases" gateway to custody provided for by Section 39(1)(d) of the Youth Criminal Justice Act. However, it is a useful decision in determining what the term

"exceptional circumstances", as it is used in subsection 29(2)(b)(ii) requires.

The Court considered the interpretation of the word "exceptional" at length. The Court held that the bulk of the existing jurisprudence was consistent with the term "exceptional" meaning the "clearest of cases". The Court ultimately held that exceptional cases, as the term is used in Section 39(1)(d), are limited to the clearest of cases where a custodial disposition is obviously the only disposition that can be justified.

For the reasons articulated by the Ontario Court of Appeal in R. v. W.(R.E.), I find that the term "exceptional circumstances" used in subsection 29(2)(b)(iii) limits application of the tertiary ground set out in that subparagraph to the clearest of circumstances. The fact that a particular crime is rare will not in and of itself bring it within the scope of the exceptional circumstances requirement. Nor will the fact that a crime is not rare necessarily remove it from the exceptional circumstances requirement.

As I have stated, the Crown's case appears solid and the offences are serious and a firearm is alleged to have been used. However

the accused's actions and involvement appear to have been far less threatening than those of his alleged accomplice.

As far as the prospect of a lengthy custodial term being imposed is concerned, the Crown is, I am told, not attempting to deal with Mr. S.'s matters in adult court. Ms. Wawzonek contends that even if Mr. S. were convicted on all of the counts on the court, the Keinapple principle might well prevent convictions from being entered on all of those counts. Under the circumstances I find it unnecessary to determine whether Ms. Wawzonek is correct in that regard. All of the charges arise from the same set of circumstances. Even if Keinapple does not apply, it would seem clear that if Mr. S. were convicted on all counts and custody were imposed on all counts, a number of the custodial terms would be concurrent.

I do not think it has been established that this matter falls within the clearest of cases where detention is required in order to maintain confidence in the administration of justice.

The allegations are certainly very

disturbing; however, I find that the present

circumstances are not such that a reasonable and fully informed individual, appreciating the presumption of innocence, the Charter right but not to be denied reasonable bail without just cause, the factors set out in Section 3 of the Youth Criminal Justice Act, and the specific factors enumerated in subparagraph (2)(b)(iii), including the alleged use of the firearm, would lose confidence in the administration of justice were Mr. S. released. I think that a reasonable person would appreciate that, where circumstances permit, a person accused of even a serious crime should not be, in effect, punished prior to being found guilty.

After having gone through the analysis required by Section 29(2), I find that the necessary requirements for a detention order set out in subparagraphs (2)(a) and (b) are present. However, in order to detain the accused young person I must also find that the

requirements of subparagraph 2(c) are met.
That subparagraph requires that
(c) the judge or justice is
satisfied, on a balance of
probabilities, that no condition
or combination of conditions of

release would, depending on the
justification on which the judge
or justice relies under paragraph (b)
(i) reduce, to a level below
substantial, the likelihood
that the young person would
not appear in court when
required by law to do so,
(ii) offer adequate
protection to the public from
the risk that the young
person might otherwise
present, or
(iii) maintain confidence in
the administration of
justice.
Subparagraph 2(c)(iii) is not applicable

since I have already found that the tertiary ground does not apply. I therefore need only consider whether the Crown has established, on a balance of probabilities, that subparagraph (2)(c)(i) or 2(c)(ii) are not made out.

The first question that I must ask myself is whether or not it has been established, on a balance of probabilities, that there is no release plan that would reduce the risk that the accused will not show up to court to a

level that is not substantial.

Defence counsel proposes that during weekdays Mr. S. reside with a close family friend Ms. Duggan in Aldergrove, British Columbia. His stepmother, who has acted as his parent for many years, also lives in Aldergrove with two other brothers of Mr. S. It is proposed that Mr. S. live with her on weekends when he is not working, should he find work. Ms. Wawzonek also proposes that a round-trip ticket be purchased and a copy of the ticket be provided to the clerk of the

court in order to demonstrate that Mr. S. has the financial ability to return for court in the future. She proposes that both the mother and Ms. Duggan act as sureties. She proposes a telephone reporting condition to the RCMP in Yellowknife. She requests that Mr. S. be required to surrender himself to the RCMP, in Yellowknife, 48 hours before his next required court appearance. She states that if he does not so report or surrender, he can be immediately arrested.

I find that the foregoing plan does not completely eliminate the risk that Mr. S. will not attend court. But that is not the question that I must answer. I must consider

the plan and ask myself whether or not I am satisfied on a balance of probabilities that a practicable release plan will not reduce to a level below substantial the risk that Mr. S. will not attend court as required.

I find that in this instance, notwithstanding Ms. Miller's capable efforts, the Crown has not met its onus. However, I

also find that in addition to what defence counsel originally proposed, significant financial sureties are required, from each of the personal sureties suggested, in order to lessen the risk to the required level.

Next, I have to ask myself whether or not it has been established on a balance of probabilities that any viable release plan would not adequately protect the public.

Placed within the context of my previous analysis under subparagraph (2)(b)(ii), the question might be framed as being whether a release plan could reduce the risk of Mr. S. committing a serious offence to the point that it is not a substantial risk.

Once again the fact that Mr. S. has no criminal record is of importance when assessing whether or not the risk of him committing serious offences can, through

conditions of release, be reduced to a level below substantial.

The absence of a record shows that he has

previously been of good behaviour.

The fact that Mr. S. will be in British Columbia, except when he attends Yellowknife Court and surrenders himself to the RCMP detachment, will actually afford protection to witnesses and any alleged victims.

Defence counsel further proposes that Mr. S. be under house arrest unless he is working or in one of his sureties' immediate company.

Once again, I think with adequate financial sureties provided by each of the personal sureties, the proposed plan considerably lessens the risk that further crimes will be committed by Mr. S.

Given his apparent association with organized crime, the possibility of further crimes was my primary concern. I think that the conditions proposed lessen the risk of further serious offences to a level below substantial. They also reduce my already limited concerns that Mr. S. might pose a threat to the safety of witnesses or alleged victims.

After considering the conditions proposed

by defence counsel, I find that, with the personal sureties suggested and with the further monetary sureties that I think are necessary, the Crown has not discharged its onus. I find that at the end of the day I am not satisfied that it has been established on a balance of probabilities that the proposed plan would not offer adequate protection to the public from the risk that Mr. S. might otherwise present.

Therefore I order him released on conditions. The conditions will, to a large extent, be those suggested by defence counsel.

Mr. S. will be released upon his entering into a recognizance. Ms. Duggan and his stepmother are to both act as sureties and both are to deposit $250 and pledge $1500 as monetary sureties.

He is to provide a copy of a return ticket in his name, both to and from British Columbia, to the clerk of the court. This will have to be done in order to perfect the recognizance.

The acknowledgment of surety forms will also need to be signed off in the amounts that I have indicated in order for the recognizance to be perfected.

He is to reside with Ms. Duggan at her place of residence from Monday to Friday. That will be at the address referred to by counsel.

He is to reside with his stepmother on the weekends, also at the address provided by counsel.

He is to report to the RCMP detachment in Yellowknife by telephone each Friday between the hours of nine in the morning and 4:30 in the afternoon.

He is not to be outside of his place of residence at any time except for the purpose of going to and from and attending his place of employment in Aldergrove, British Columbia should he obtain employment. And to be clear, that will be half an hour before work begins and half an hour after work ends.

The other exception will be to travel to Yellowknife for court.

He is not to attend his father's place of residence under any circumstances.

He is to have no contact whatsoever

indirectly or indirectly with Mr. Petten.
What was the full name? In any event, you can provide that, Ms. Miller, to the clerk of the court.

MS. MILLER: Thank you, sir.
THE COURT: I don't believe that the names of any witnesses or victims have been provided with the exception of Ms. Bardak. So to be on the safe side he is to have no contact whatsover directly or indirectly with Lydia Bardak.
He is not to possess any cellular communication device, any firearm, ammunition, explosive device, or any other weapon. The only exception will be that he will be allowed to possess a knife while eating a meal for the purpose of eating a meal.
He is not to possess or consume alcohol or any other intoxicants except in accordance with a prescription from a licensed medical practitioner.
He is to surrender himself into the

custody of the Royal Canadian Mounted Police in Yellowknife at least 48 hours prior to his attendance in court where his attendance is required. Upon his arrival in Yellowknife, for the purpose of attending court, he is to immediately proceed to the local RCMP detachment for the purpose of surrendering himself into custody.

There will be a Form 8 and a Form 19 for

the return date. What are you suggesting, counsel?

MS. WAWZONEK: Perhaps two weeks, Your Honour.

THE COURT: Two weeks. When would that be - May the 7th?

MS. WAWZONEK: Yes, it is. Actually, Your Honour, I apologize, I'm in the Supreme Court that week. May 13th, please.

THE COURT: May 13th, 9:30. Of course you can appear on his behalf should you file the necessary designation of counsel.

MS. WAWZONEK: Your Honour, the only way that I will be able to do that is if he enters

an election.

MS. MILLER: I can elect.

THE COURT: Although I think that --

MS. MILLER: -- I am in a position to elect, Your Honour. We are proceeding by indictment.

THE COURT: And of course Section 5(2) of the Controlled Drugs and Substances Act is indictable by law. Fair enough.

MS. WAWZONEK: Yes, Your Honour.

THE COURT: You don't know if you are counsel of record at this point?

MS. WAWZONEK: I won't, and the problem

with Legal Aid is he can't make the application until he has made his election.

THE COURT: I am just saying that you could.

MS. WAWZONEK: Yes, sir. If the Court and the Crown will allow, I certainly would intend to continue to appear and I would expect that I would in due course be counsel of record.

THE COURT: Fine. I am not going to

make any order under the circumstances.

MS. WAWZONEK: Thank you, sir.

THE COURT: So then to that date, and 9:30 is fine with you?

MS. WAWZONEK: Yes please, sir.

THE COURT: Anything further on this? I can't think of anything but I may have missed something.

MS. WAWZONEK: I don't think so, Your Honour.

THE COURT: Ms. Miller?

MS. MILLER: No, Your Honour, I believe you covered all of the conditions which were discussed before, thank you.

THE COURT: Thank you both for your assistance, you have both been helpful.

(ADJOURNED)

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the

Supreme Court Rules,

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Lois Hewitt,
Court Reporter