SUPREME COURT OF YUKON

Citation: *R v A.B.W.,* 2022 YKSC 7

Date: 20220125
S.C. Nos. 21-03500
21-03515
21-03516
21-03518
21-03518A
21-03519
20-03530
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

A.B.W.

Before Justice K. Wenckebach

Counsel for the Crown — Melissa McKay (by telephone)

Counsel and Agent for the Defence — Gregory Johannson (by telephone)

THE COURT: This decision was delivered in the form of Oral Reasons on January 25, 2022. The Reasons have since been edited for publication without changing the substance.

Publication of information identifying the young person(s) charged under the *Youth Criminal Justice Act* is prohibited by s. 110(1) of that *Act*.

Publication of information that could identify the complainant or a witness is prohibited by s. 111(1) of the *Youth Criminal Justice Act*.

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The applicant, A.B.W., has been charged with a number of *Criminal Code,* R.S.C., 1985, c. C-46 (the "*Criminal Code*") offences. He was in custody but, after a contested bail hearing, was released in order to attend treatment at a youth treatment centre (Ranch Ehrlo).

[2] He seeks review under s. 520 of the *Criminal Code* of one term of the release order, which states:

> You are to attend and actively participate in all programming including family treatment at the Ranch Ehrlo Treatment Centre and complete this programming to the satisfaction of your youth probation officer and provide consents to release progress updates to your youth probation officer regarding your participation.

[3] Specifically, A.B.W. seeks to remove the second part of the term which requires A.B.W. to complete treatment to the satisfaction of his youth probation officer and to provide consents to release progress updates to his youth probation officer. A.B.W.'s counsel says that there is new evidence that creates a material change of circumstances warranting a review of the release order and that the term should not be in the order.

[4] A.B.W. also seeks costs against the Crown.

[5] Crown counsel says that there is no new evidence, no material change of circumstances, and that the term is proper.

[6] Crown also opposes the request for costs.

[7] I will first consider whether the Court should enter into a review of the release order.

[8] In *R v St-Cloud*, 2015 SCC 27 ("*St-Cloud*"), the Supreme Court of Canada analysed the Court's role under s. 520 of the *Criminal Code*. It determined that the reviewing court can exercise its powers of review where there is new evidence that amounts to a material change in circumstances. It stated that the Court is to apply the *Palmer* criteria (*Palmer v The Queen*, [1980] 1 SCR 759 ("*Palmer*") at 775) in determining whether to admit new evidence but that the "reviewing judge must be flexible in applying these four criteria." (*St-Cloud* at para. 129)

[9] I will address each factor of the *Palmer* criteria point by point.

[10] The first factor is whether the new evidence, by due diligence, could have been admitted during the bail hearing. The Supreme Court of Canada has directed the Court to give a generous and liberal interpretation to the meaning of new evidence.

[11] The facts here are that A.B.W., who is 13 years old, was charged with uttering threats and released on an undertaking on March 17, 2021. He was subsequently charged with other offences and eventually taken into custody on September 15, 2021. A.B.W.'s bail hearing was heard on November 1. The Crown consented to A.B.W.'s release to attend Ranch Ehrlo. However, the Crown did not agree to A.B.W.'s proposal that he be released into his mother's supervision pending his admission to the treatment centre.

[12] During the bail hearing, the Crown filed a report provided by the youth probation officer that referred to information A.B.W. told him. In addition, the youth probation officer provided information to the Court which, defence counsel says, had the effect of discouraging his release prior to his attendance at Ranch Ehrlo. In the end, the Court rejected A.B.W.'s plan that he be supervised by his mother until he could attend Ranch

Ehrlo. Instead, the Court ordered that A.B.W. be released directly to Ranch Ehrlo. The impugned term was proposed by A.B.W.'s counsel.

[13] Counsel says that hearing the youth probation officer's report being talked about in court and hearing the youth probation officer's interventions had an effect on A.B.W. Nothing the youth probation officer did was improper. However, A.B.W. realized that what he said to the youth probation officer could be reported to the Court and used against him.

[14] A.B.W.'s counsel says that this realization is the new evidence demonstrating a material change in circumstances.

[15] Counsel also referred to the Supreme Court of Canada's discussion in *R v Zora*, 2020 SCC 14 (“*Zora*”), about the culture of consent that can occur in bail hearings in which the accused, facing a multitude of pressures, agrees to conditions that may be unnecessary or unreasonable. As such, the fact that the term was proposed by defence counsel should not factor into my decision.

[16] A.B.W.'s counsel also said that I should take into account that A.B.W. is 13 and that it took time for A.B.W. to truly understand the youth probation officer’s role.

[17] The Crown says that the report that was filed in court had been provided to counsel four months before the hearing. Presumably both A.B.W. and his mother, S.W., to whom he speaks and consults on his legal issues, both saw the report. A.B.W. was charged in March and had been reporting to the youth probation officer since then. S.W. had acted as a surety for A.B.W. when he had been released previously. This must lead to the inference that both understood the role of the youth probation officer, including

that he would report to the Court and he was not an advocate on A.B.W.'s behalf. The information being presented to the Court is therefore not new evidence.

[18] In my opinion, A.B.W.'s counsel is not presenting any new evidence. As Crown stated, A.B.W. has been under the youth probation officer's supervision since March. A.B.W.'s counsel was given the report in which the youth probation officer repeated what A.B.W. told him in July. A.B.W.'s bail hearing was held almost two months after he was taken into custody. His lawyer had ample opportunity to obtain fully-informed instructions with regard to the impugned term and to discuss all the implications of the term.

[19] I agree that A.B.W.'s desire to be released may have contributed to his acceptance of the impugned condition. However, the circumstances here are quite different than the culture of consent described by the Supreme Court of Canada in *Zora*.

[20] In *Zora*, the Supreme Court of Canada described the pressure an accused can feel in being presented with what appear to be “take it or leave it conditions”, prompting them to accept unreasonable conditions rather than face a contested bail hearing. In circumstances such as these, where the accused often represent themselves, the conditions are frequently unnecessary, unreasonable, and even potentially unconstitutional.

[21] Here, there is nothing to lead me to conclude that A.B.W. faced undue pressure to consent to that provision. Moreover, A.B.W.'s counsel is not arguing that the condition, per se, is unreasonable. As such, A.B.W. is facing a reality that many accused face: abiding by conditions that they do not like but which are not legally invalid.

[22] I have also taken A.B.W.'s age into account. I have considerable sympathy with the challenges A.B.W. is facing. At a young age, he is required to make complex decisions that are difficult even for adults to weigh and that have an important impact on his life. However, given the totality of the circumstances, his age is insufficient to convince me that what counsel is presenting is new evidence. Rather, what counsel is presenting is a change of position.

[23] Counsel also argued that the condition may be appropriate where the accused consents to it but is no longer appropriate where, as here, the accused withdraws their consent. At that point, it is an overreach by the state to supervise treatment.

[24] It is a violation of s. 7 of the *Canadian Charter of Human Rights and Freedoms, Part 1 of the Constitution Act,* 1982, to order an accused person to take treatment without consent. However, providing information about one's treatment is not on the same footing as taking treatment. Such a term is not rendered inappropriate by the mere fact that the accused has withdrawn their consent.

[25] The second criterion is whether the evidence is relevant.

[26] In *St-Cloud*, the Supreme Court of Canada stated that relevancy is met when the evidence is “relevant for the purposes of s. 515(10)” of the *Criminal Code* (at para. 135). The test is broad. I find that the evidence is relevant, as A.B.W.'s stated reluctance in fully participating in treatment because the youth probation officer would receive information about it would be considered a factor in the Court's determinations with regards to release conditions.

[27] The third criterion is that the evidence must be credible in the sense that it is reasonably capable of belief. In the circumstances of a bail review, this means that the

justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

[28] In this case, S.W. swore an affidavit in which she attested that, after parts of the youth probation officer's report was read into Court, she and A.B.W. became concerned that the condition that A.B.W. provide consents to the treatment centre to release information to the youth probation officer could end up hurting A.B.W.

[29] A.B.W.'s lawyer also argued that the additional information the youth probation officer provided during the hearing had the effect of discouraging A.B.W.'s release.

[30] S.W. did not, however, provide any evidence that the youth probation officer's interjections had any impact on the way she and A.B.W. perceived him or his role.

[31] I therefore do not take this part of the submission into consideration.

[32] The evidence provided in support of the application is thin. This application was filed on December 1, 2021, and heard on January 20, 2022. The evidence is contested and goes to the heart of the application. Better evidence should have been provided.

[33] Nevertheless, it is sufficient to support counsel's argument that A.B.W. ended up disagreeing with the condition after parts of the youth probation officer's report were read out in court. It is, I conclude, reasonably capable of belief.

[34] Finally, the test for the fourth criterion is that: “the new evidence must be such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice under s. 515(10)(c) of the [*Criminal Code*]. The new evidence must therefore be significant.” (*St-Cloud* at para. 137).

[35] In my opinion, this information would not have affected the judge's determination to put a term in the order requiring that the youth probation officer have information about A.B.W.'s participation in the program.

[36] The judge determined that A.B.W. would be at significant risk of committing further offences if he did not receive treatment of the kind provided at Ranch Ehrlo. Attendance at treatment was therefore key to mitigating the secondary grounds of detention.

[37] The youth probation officer's role is to oversee the accused's compliance with bail conditions. I do not see how the youth probation officer can effectively fulfil his role if he is kept ignorant of information about the most important term of the order. Some form of term that involves informing the youth probation officer of A.B.W.'s attendance and completion at treatment is required.

[38] Having said this, I can see issues with the way the treatment is phrased. Crown has also indicated that amendments to the term could be made. However, A.B.W. did not seek modifications to the term, so I will go no further than to suggest that the parties speak again to determine if and how the term may be modified.

[39] Turning to the question of costs, A.B.W. is seeking that the Crown pay a nominal sum in costs. Costs will be granted where the Crown's conduct is a marked and unacceptable departure from the reasonable standards expected of the prosecution. A.B.W.'s counsel says that the reasons costs should be awarded are that the Crown ought to have consented to the variation; Crown counsel did not respond to enquiries about availability and correspondence with the trial coordinator; applied for summary

dismissal, which was practically inconsequential; and challenged the application on all four of the *Palmer* criteria.

[40] A.B.W.'s counsel provided submissions without evidence. He referenced correspondence with the trial coordinator and the PPSC Deskbook but did not provide the relevant materials to the Court. However, the Crown's submissions included additional information which permitted me to better assess defence counsel's claims.

[41] That the Crown ought to have consented to the variation is not a factor I take into consideration, given that I have dismissed A.B.W.'s application.

[42] Defence counsel says that the Crown declined to respond to enquiries from the trial coordinator about her availability and did not provide written submissions on the issue of transcripts. From the information provided from the Crown, I conclude that the Crown did respond to the trial coordinator. Written submissions were not required, although they would have been helpful.

[43] A.B.W.'s lawyer also says that the Crown should not have brought the summary dismissal application. On this point, I agree. Given the nature of the hearing and the evidence involved, hearing the summary dismissal application would have increased the work and complexity of the application rather than simplifying it. I do not want to dissuade Crown from bringing summary dismissal applications where appropriate. Crown should, however, carefully consider whether bringing a summary dismissal application would be useful or whether it would waste counsels' and judicial resources.

[44] On the other hand, I am also of the opinion A.B.W.'s case was weak. As such, while summary dismissal was not appropriate, it was not because the Crown's application lacked merit. Ultimately, the Crown's decision to apply for summary

dismissal was a misstep and “not a marked and unacceptable departure from the reasonable standards expected of the prosecution.”

[45] Finally, the Crown's submissions on the *Palmer* test were not in any way problematic. A.B.W.'s counsel may disagree with the Crown's legal analysis. As can be seen from my decision, I disagreed with parts of the Crown's submissions. However, disagreement about the application of legal principles to the facts does not warrant a costs order.

[46] At the hearing, A.B.W.'s counsel stated that he was not pressing for costs. Nevertheless, I have addressed counsel's submissions because the application involves significant allegations against the Crown. I would note that, because of the high threshold for awarding costs against the Crown, applications for costs imply serious negligence or malfeasance. I urge counsel to carefully consider when costs should be sought. It is not an application to be made lightly.

[47] In conclusion, I deny A.B.W.'s application.

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WENCKEBACH J.