COURT OF APPEAL

Citation: *R. v. Flahr*, 2009 YKCA 16 Date: 20090703
Docket 09-YU637
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

SLADE CURTIS FLAHR

Before: Mr. Justice R.S. Veale

Appearances:
Jennifer Grandy — Appearing for the Crown
James Van Wart — Appearing for Defence

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): This is an application by Mr. Flahr for release on bail pending the hearing of his sentence appeal. It requires a granting of leave to appeal under s. 679(1)(b). It also requires that the three tests set out in s. 679(4) are met or established; the first being that the appeal has sufficient merit in the circumstances that it would cause unnecessary hardship if he were detained in custody; secondly, that he will surrender himself into custody in accordance with the terms of the order; and thirdly, detention is not necessary in the public interest.

[2] The Crown concedes that the threshold has been met for purposes of s. 679(4),

but I will deal with the merits, to some extent, for the record in this oral decision.

[3] The history of the matter is that Mr. Flahr pled guilty and the guilty plea was accepted on September 30, 2008, in the Territorial Court in Watson Lake, where he resides. He pled guilty to a grow operation, I will call it, contrary to s. 7 of the *Controlled Drugs and Substances Act*, and also a failure to comply with an undertaking. Interestingly, the date of the offence is April 21, 2008, on the substantive issue of the grow operation; the breach of the undertaking was February 11, 2008, on an entirely different matter.

[4] In any event, on September 30, 2008, the trial judge heard the sentencing submissions in Watson Lake and was advised that Mr. Flahr had some medical issues with respect to the amputation of his leg. As I understand it, it was the amputation that took place prior to this but there were medical issues that arose as a result of a re-injury, and the trial judge, on his own motion, granted an adjournment to June 2, 2009, when the matter was addressed again in Watson Lake.

[5] On the date of sentencing in Watson Lake, in very brief reasons comprising of three pages, the trial judge imposed a custodial sentence of six months on the cultivation charge and 30 days concurrent on the failing to report charge. I am going to read out the operative paragraph, and there is only one:

> [2] At the time the matter was originally before the Court, a custodial sentence was clearly warranted based [on] the prior record of the accused and the nature of the offences, particularly the cultivation offence. It also appeared that an actual custodial sentence was, to use the vernacular, “in the cards”, given the decision of the British Columbia Court of Appeal in *R.* v. *Van Santvoord,* [2007] B.C.J. No. 404.

[6] The *Santvoord* decision is a decision of the British Columbia Court of Appeal in 2007. It dealt with a Crown appeal on a cultivation issue and the facts were fairly clear, as I understand it, that there was a serious commercial operation that was taking place. At paragraph 36 of that decision Justice Ryan indicated that the grow operation was:

> … an on-going, highly productive, highly profitable commercial double-site grow operation that, by his own documentation, was intended to provide him with a comfortable life style.

[7] The Court also relied on a decision called *R.* v. *Su*, 2000 BCCA 480, which indicated that, although the sentencing goals of denunciation and deterrence are extremely important, a conditional sentence may be appropriate in other circumstances.

[8] What is raised in this sentence appeal is whether or not the other circumstances exist in this case. Those facts are in the sentencing hearing, which was one that was done on an informal basis, which is usually the case when on circuit, or even in Whitehorse.

[9] Defence counsel made a submission that it was a personal-use issue based on medical requirements, or at least a medical concern that Mr. Flahr had, and he did not want to take painkillers but preferred to use marihuana, as opposed to a commercial operation. The Crown did not specifically prove, as might be required in a formal hearing, that it was a commercial operation, but suggested that it may have indeed been a commercial operation. That issue was never properly resolved before the trial judge and the issue was certainly not resolved in the reasons for sentencing of the trial judge. So, on that basis alone, there is, in my view, sufficient merit to proceed in the

sentencing appeal and also to permit the release of Mr. Flahr on appropriate bail conditions.

[10] I indicate, in addition, that the sparse reasons for judgment made no reference at all to any consideration of a conditional sentence or an alternative to a custodial sentence, and it strikes me that in the circumstances of this particular case that it would have been appropriate and of great assistance to the Court of Appeal had some reference been made because it leaves one in doubt as to whether or not adequate consideration was given to a conditional sentence at the time of sentencing.

[11] I am not going to go on at length on the issues that will undoubtedly be raised because I think it is conceded by all parties that the threshold has been met under s. 679(4) and I am going to order his release on these conditions, which I understand have been discussed by the Crown and defence:

1. That he keep the peace and be of good behaviour;
2. That he appear before this Court when required to do so by the Court;
3. That he report immediately to the bail supervisor after his release and in the manner directed by the bail supervisor;
4. That he abstain absolutely from the possession, consumption and purchase of non-prescription drugs and submit to a breath or bodily fluids test upon demand by a peace officer or bail supervisor who has reason to suspect that he has failed to comply with this condition;
5. That he remain within the jurisdiction of the Court unless with the prior written permission of his bail supervisor;

6. That he notify his bail supervisor in advance of any change in name or address or any change in employment or occupation;

7. That he surrender himself into the custody of the RCMP in Whitehorse, Yukon, in a sober condition, not less than 24 hours before the hearing of this appeal;

I say, parenthetically, that that date, as I understand it, is October 16. Should the date change it would be the obligation of counsel to advise so that it would be clear that he is not to appear on October 16, but otherwise, he should; and if you have any doubt, appear on October 16. Finally:

8. That he provide his bail supervisor access to all medical information and records.

[12] Mr. Flahr, I see you have these conditions in front of you in writing?

[13] THE ACCUSED: Yes.

[14] THE COURT: And I am assuming that you can read?

[15] THE ACCUSED: Yes.

[16] THE COURT: Okay. Tell me what the fourth condition is.

[17] THE ACCUSED: The condition is to remain in the jurisdiction of the Court --

[18] THE COURT: No, that is -- no, that is --

[19] THE ACCUSED: Oh, abstain absolutely from the possession, consumption and purchase of non-prescription drugs and to submit to a breath or bodily fluids test on demand by a police officer or bail supervisor who has reason to suspect that you have failed to comply with this condition.

[20] THE COURT: Okay, what does that mean in the context of this case?

[21] THE ACCUSED: If they ask me for a blood test or a breath test I have to submit to it.

[22] THE COURT: Okay, but what about the first part of it, absolutely abstain from the possession, consumption or purchase of non-prescription drugs?

[23] THE ACCUSED: That means the only thing I would be permitted to use would be stuff prescribed by the doctor.

[24] THE COURT: Right, and that means that if you get involved in any way, even in a minor way, in consumption, possession or purchase of marihuana, you are in trouble.

[25] THE ACCUSED: Yep.

[26] THE COURT: Anything further?

[27] THE CLERK: Is that an undertaking or recognizance?

[28] THE COURT: It is a recog, is it not? It is a recognizance.

[29] MR. VAN WART: Sure, perhaps it -- I think the recognizance Mr. Flahr was on before was without surety and $1,000, no deposit. I would suggest that perhaps the same could apply.

[30] THE COURT: What were those conditions again?

[31] MR. VAN WART: Without surety and with $1,000 without deposit.

[32] THE COURT: So ordered. Those are additional, Madam Clerk.

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VEALE J.