COURT OF APPEAL

Citation: *R.* v. *Silver*, 2006 YKCA 04

Date: 20060419
Docket No.:05-YU559
Registry: Whitehorse

Between:

REGINA

Respondent

And

DANIEL SILVER

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

Sue Bogle — Counsel for Her Majesty the Queen
David St. Pierre — Counsel for Daniel Silver

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Silver has applied to be released from custody pending the hearing of his appeals from his convictions and sentence on charges of possessing a controlled substance for the purposes of trafficking and two related firearms charges. The main focus of the application was to seek bail pending his conviction appeals and therefore s. 679(3) of the *Criminal Code* governs. That subsection requires the appellant to establish that (a) his appeal is not frivolous; (b) he will surrender himself into custody in accordance with the terms of any release order; and (c) his detention is not necessary in the public interest. All three of these criteria are at issue here.

ANALYSIS

Is the appeal frivolous?

[2] The Crown acknowledges that the appellant need only meet a low threshold in establishing that his appeal is not frivolous. As was stated by Finch C.J.B.C. in *R.* v. *Mapara*, 2004 BCCA 310, at para. 10, a "frivolous appeal is one which is brought for improper purposes or which has no reasonable prospect of success". It is only necessary for the appellant to show that the appeal might succeed: *R.* v. *Collinson,* 2005 YKCA 001, at para. 4.

[3] Although the Crown concedes that it would be difficult for it to contend that the appellant does not have an "arguable" case, it nevertheless submits that his grounds of appeal are weak and that this is relevant to the third "public interest" criteria.

[4] The facts found by the trial judge are that the appellant was stopped by the RCMP while driving a motor vehicle in Whitehorse on October 22, 2004. The police were acting on a tip from a confidential informant that Mr. Silver was on his way to a known drug house in downtown Whitehorse to sell cocaine. Upon being stopped at the road side, Mr. Silver was subjected to a "pat down" search which revealed a loaded handgun with an obliterated serial number in his pants. He was also in possession of a cell phone and $105 in cash. A woman and a child were passengers in the vehicle. He was then brought to the detachment and subjected to a strip search which revealed approximately 41 grams of powder and crack cocaine in a special pocket within Mr. Silver's underwear. The cocaine was packaged separately in nine packets.

[5] Mr. Silver challenged the legality of the road side stop and the subsequent searches and sought to exclude the items seized. The trial judge ruled against him on

these issues and on March 27, 2006, he was found guilty of possession of cocaine for the purposes of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, possession of a loaded restricted firearm without a licence, contrary to s. 95(a) of the *Criminal Code* and possessing a firearm knowing that the serial number had been removed, contrary to s. 108(b) of the *Criminal Code*. On the same day he was sentenced to a total 27 months imprisonment, after being credited with having spent approximately 2 months in custody awaiting bail following his original arrest on October 22, 2004. He also received a ten-year firearms prohibition.

[6] Mr. Silver's counsel indicates that he intends to argue the following points at the appeal hearing:

1. That the initial road side stop was not based on reasonable and probable grounds and therefore the following searches were illegal;
2. The above constitutes an "extremely egregious breach" of Mr. Silver's *Charter* rights, which should result in exclusion of the evidence seized;
3. That there was insufficient evidence to conclude that Mr. Silver possessed cocaine for the purposes of trafficking; and
4. If the conviction appeal fails, that Mr. Silver should have been considered for a conditional sentence.

[7] It is difficult for me sitting as a Chambers Judge on such applications to engage in a meaningful evaluation of the strength of the grounds of appeal based upon the brief submissions of counsel. While I share the Crown's concerns about the relative strength of the grounds of appeal, that does not allow me to conclude that the appeal totally lacks

merit. I find myself in the same position as Smith J.A. in *R.* v. *Burd*, 2005 BCCA 620 at para. 18, where he said:

> "It is difficult to attempt to assess the strength of the appeal on an application such as this and I can do no more than say that, on the basis of the materials before me, it appears that the appeal is arguable and that it is more than "frivolous"."

[8] Earlier, Wood J.A., similarly remarked in *R.* v. *Barling*, [1993] B.C.J. No. 3138 (B.C.C.A.), at para. 3,

> "... I accept [the Crown]'s arguments as amounting to her opinion, which may prove to be well founded, that the appeal will not succeed. But that is a vastly different thing from a determination that the appeal is frivolous. Frivolous is a term of art in the law. It is used in the Criminal Code in connection with the liberty of the subject and in my view must be strictly confined to its appropriate meaning. Were it otherwise, a determination against an appellant on this ground would be tantamount to dismissal of an appeal on its merits by a single judge of this Court."

[9] I find that the appellant has established his first criterion.

Will the appellant comply with the terms of his release order?

[10] The issue here, from the Crown's perspective, is that Mr. Silver was convicted and sentenced for two breaches of his recognizance while awaiting his trial. I am informed by counsel that on February 7, 2005, Mr. Silver was driving a vehicle registered to his common-law spouse. He was pulled over for speeding and, due to some problems with insurance or registration, the police were about to tow the vehicle. Mr. Silver then informed the police about a "Blackberry" electronic device in the vehicle, which belonged to a friend of his common-law spouse. Mr. Silver also informed his bail supervisor about this incident. His recognizance prohibited him from possessing cell phones or any other

mobile communication devices. A few days later, the bail supervisor initiated a charge for this incident.

[11] The second breach occurred on February 25, 2006. On this occasion, Mr. Silver had driven his common-law spouse to her work place, dropped her off and was subsequently stopped by the police. A cell phone was located in the glove box of the vehicle. A significant amount of cash was also found in Mr. Silver's jacket pocket, which I understand totalled about $5,250 in bills of various denominations. This cash was seized by the police as suspected proceeds of crime. Mr. Silver was arrested and detained in custody on that breach charge.

[12] On March 27, 2006, he was sentenced to 30 days concurrent on a single "rolled-up" information (from February 7 to 25, 2006) for these two breaches. The Crown argues that these were significant breaches and that they should raise concerns for me about whether the appellant will surrender himself into custody in accordance with the terms of any release order.

[13] Mr. Silver intends to argue that the cash found on his person on February 27th was money he intended to pay to his counsel for the upcoming court appearance on March 27, 2006. In response, the Crown submitted that it is not so much concerned about what this money was for, but where it came from. However, even here, the Crown concedes that the presumption of innocence applies to Mr. Silver in relation to the seizure of those funds. Further, it is noteworthy that no drugs were seized during either of the two stops in February. Indeed, on the first occasion it was Mr. Silver himself who alerted the police and his bail supervisor to the existence of the Blackberry, which did not belong to him. In addition, Mr. Silver's counsel makes the point that his client has

since been sentenced for these breaches, after spending about 30 days in pre-sentence custody, and that this has had a significant deterrent effect upon Mr. Silver. Finally, Mr. Silver's counsel stressed that his client intends to vigorously pursue the return of the seized cash.

[14] It is also relevant to this second criterion that Mr. Silver, at 30 years of age, has no prior record of criminal convictions. In his affidavit, he admitted to receiving a conditional discharge in 2000 for a charge of obstruction of justice. However, under s. 730(3) of the *Criminal Code*, that disposition is deemed not to be a conviction.

[15] I further take into account Mr. Silver's other circumstances. He says that he has resided in Whitehorse since October 2003 and that he and his common-law wife have had one child together. He has provided confirmation of employment available to him upon his release. Mr. Scott Lewis is the proprietor of a small Whitehorse company called "Year Round Renovations", and he has indicated that he employed Mr. Silver last year and would like to hire him again this year as soon as possible. As this communication was made to Mr. Silver's counsel, I assume that Mr. Scott is aware of Mr. Silver's current legal circumstances. Also, Mr. Silver says that he was enrolled at the Yukon College in Whitehorse in a "hospitality program" prior to his arrest in February.

[16] In addition, Mr. Silver has obtained the assistance of one Barbara Waugh, who is a 40-year-old life-long resident of the Whitehorse area, residing in the Golden Horn subdivision. She is currently on disability from her job as a nurse's aid. She describes Mr. Silver as "a good friend" and has known him for some time. She often babysits Mr. Silver's young child. She does not have a criminal record and is aware of Mr. Silver's current custodial status and the nature of his charges. Mr. Silver's counsel has explained

to her the basic principles of acting as a surety for an appellant on bail. She advised Mr. Silver's counsel that she would be willing to act as a surety and could provide proof of valuable security up to an amount of $10,000.

[17] Finally, Mr. Silver himself has deposed under oath in his affidavit that if he is released by this Court, he will comply with all terms imposed and will surrender himself into custody when directed to do so.

[18] Taking all these circumstances into account, I am satisfied that Mr. Silver has met his onus of establishing that he will surrender himself into custody in accordance with the terms of any release order which may be granted.

Public interest?

[19] The third criterion in s. 679(3)(c) is whether the detention of the appellant "is necessary in the public interest". This involves two considerations: first, the protection and safety of the public; and, second, the maintenance of public confidence in the administration of justice.

[20] The public interest seemed to be the main focus of the Crown's opposition to Mr. Silver's application. Here the Crown submits that Mr. Silver has been convicted of serious drug and firearms charges; that he has admitted further breaches of his recognizance while awaiting trial on these charges; that he has been found in possession of a significant amount of cash of suspicious origin; and that he has no significant ties to the community. Further, she says that his grounds of appeal are not sufficiently strong to tip the balance in favour of the reviewability of his convictions and sentence. Rather, the Crown submits that the enforceability of the sentence is paramount here, that is, in order for the public to have confidence that Mr. Silver will

actually serve the sentence imposed, the immediate execution of sentence should not be disturbed: see also *R.* v. *Crockett,* 2001 BCCA 707, at para. 22, and *R.* v. *Collinson*, cited above, at para. 23. On the other hand, as was noted by Smith J.A. in *R.* v. *Burd,* cited above, at para. 4, the strength of the grounds of appeal is "not necessarily determinative" under s. 679(3)(c). Rather, I must look at all the relevant factors in addition to the strength of the case and the nature and the circumstances of the offences. Those circumstances include:

1. the likelihood of further offences occurring;
2. the appellant's prospects of rehabilitation;
3. the appellant's criminal record and personal circumstances; and
4. the appellant's performance during pre-trial bail.

[21] As well, I recognize the principles set out in *R.* v. *K.K.* (1997), 113 C.C.C. (3d) 52 (B.C.C.A.) and *R.* v. *Nguyen* (1997), 119 C.C.C. (3d) 269 (B.C.C.A.), where the then Chief Justice of the British Columbia Court of Appeal confirmed that bail is not to be denied because an offence fails within a particular class of case, such as one involving drugs and firearms. Rather, as McEachern C.J.B.C. noted at para. 8 of *Nguyen* it is the "constitutional right of every person charged with an offence, guaranteed in s. 11(e) of the *Canadian Charter of Rights and Freedoms,* not to be denied bail without just cause". In addition, McEachern C.J.B.C. reviewed a number of authorities and concluded at paras. 18 and 19 as follows:

> "The principle that seems to emerge is that the law favours release unless there is some factor or factors that would cause "ordinary reasonable, fair-minded members of society" … or persons informed about the philosophy of the legislative provisions, Charter values and the actual circumstances of

> the case … to believe that detention is necessary to maintain public confidence in the administration of justice.
>
> In most cases there will be special circumstances indicating that an appellant should or should not be released. As Parliament has not excluded any class of crime, these circumstances should follow from the events surrounding the crime and the circumstances of the offender, as opposed to the species of the crime as a conclusive factor in and or itself."

[22] And finally, at para. 25:

> "Some members of society, of course, will think everyone convicted and sentenced to prison should be detained until their appeal is allowed. The clear language of s. 679(3) demonstrates that such is not the law in Canada. Parliament has imposed a positive duty upon the court which judges cannot avoid. Experience tells us, as reasonable members of society already know, that most persons on bail do not commit further crimes or fail to appear, although even one breach is too many. When decisions about bail are made with the public in mind, it must be a public which has accurate knowledge of the law, the nature of the risk Parliament anticipated, the actual circumstances of the accused, and the facts of the case."

[23] In *R.* v. *K.K.*, cited above, McEachern C.J.B.C. similarly remarked, at para 11, that if the risk to public safety can be adequately addressed:

> "… the real public interest is to ensure, as best can be done, that those who commit these kinds of offences, now or in the past, will ultimately be appropriately punished for what they have done. Viewed this way, with the certainty of punishment assured, it makes little difference to the public interest if a person who is not a present risk, is made to account for his conduct immediately upon conviction or after the final determination of the appeal process. As is often said, justice grinds slowly, but it grinds on to the end." (emphasis added)

[24] As for the risk to public safety, I repeat that it is very significant that Mr. Silver has virtually no criminal record, with the exception of a conditional discharge six years ago

and his most recent breach of recognizance conviction. He has also resided in Whitehorse for approximately two and a half years and has formed a relationship and started a family. He has found work and his previous employer is prepared to hire him again upon his release. He has the support of Ms. Waugh who is a person of means and apparent good character and is prepared to support him by acting as his surety.

[25] It is also significant to me that Mr. Silver was able to maintain compliance with the conditions of his recognizance, from his original release from custody on these charges in early December 2004, until his arrest on the breach charges in late February 2006. Those conditions were substantial, both in number and in content. For example, Mr. Silver was required to report to the RCMP three times each week. He was also required to abstain absolutely from the possession or consumption of non-prescription controlled drugs and substances and he was prohibited from possessing any firearms or cell phones. Therefore, while the breach charges were foolish and avoidable, they were not, in the relative scheme of things, of the most serious nature. In addition, Mr. Silver has apparently admitted responsibility for them and has served his sentence. I think I can therefore logically conclude that he has learned his lesson about what is likely to happen to him if he breaches any release conditions which I might impose. As for the Crown's suspicions about the source of the funds which were found on Mr. Silver's person, at this stage it is important to remember that suspicion does not displace the presumption of innocence.

[26] Taking all of these circumstances into account, it is my view that a fair-minded and fully informed member of the public, knowledgeable about the law of bail pending appeal and an offender's continuing constitutional rights, as well as the circumstances of

this particular offender, would not have their confidence in the administration of justice shaken by the release of Mr. Silver on appropriately strict conditions to address the relative level of risk. In other words, I am satisfied that Mr. Silver has established that his detention is not necessary in the public interest.

CONCLUSION

[27] I release the appellant upon a recognizance in the amount of $2,000, without cash deposit. In addition, I direct that Ms. Barbara Waugh be named as a surety in the amount of $5,000, again without the necessity of a cash deposit. The other conditions will be as follows:

1. Keep the peace and be of good behaviour.
2. Report immediately upon your release to a Bail Supervisor and thereafter as and in the manner directed by your Bail Supervisor.
3. Report to the Royal Canadian Mounted Police in Whitehorse each Monday, Wednesday, and Friday as and when directed by your Bail Supervisor.
4. Remain within the Yukon Territory unless you have the prior written approval of the Bail Supervisor.
5. Abstain absolutely from the possession or consumption of controlled drugs and substances except in accordance with a prescription provided by a qualified medical practitioner.
6. Advise your Bail Supervisor of your place of residence, and do not change that residence without prior approval of your Bail Supervisor.
7. Do not have in your possession any firearms, ammunition or explosive substance.
8. Do not posses any cell phone, pager or other device intended for the purpose of providing mobile communication.
9. Commence employment with Scott Lewis at “Year Round Renovations” immediately upon your release and do not change that employment without the prior written permission of the Bail Supervisor. In the event that this employment is terminated, you must make every reasonable effort to find alternative employment or enrol in an education program.
10. Remain within your residence and abide by a curfew between the hours of 10 p.m. and 6 a.m., unless you have the prior written permission of your Bail Supervisor.

11. Answer anyone attending at your residence or telephoning you for the purpose of checking on your curfew.
12. Permit anyone attending at your residence for the purpose of checking on your curfew to enter your residence in order to ensure that you are in compliance with this recognizance.
13. Surrender yourself into the custody of the Royal Canadian Mounted Police at least 24 hours prior to the hearing of your appeal in Docket No. 05-YU559.

GOWER J.