NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. West***, 2006 NSCA 103

Date: 20060821
Docket: CAC 264962
Registry: Halifax

Between:

William Fenwick West

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice M. Jill Hamilton
Application Heard:	August 10, 2006, in Halifax, Nova Scotia, In Chambers
Held:	Application for judicial release is dismissed. Appeal to be heard Monday, March 26, 2007 at 10:00 a.m.
Counsel:	James J. White & Matthew Joudrey, Articled Clerk, for the appellant Kenneth W.F. Fiske, Q.C., for the respondent

Decision:

[1] Mr. West applied for judicial release pending appeal of his convictions and sentences for bank robbery while armed with an imitation offensive weapon, forcible confinement, and stealing a car. These were the appellant's second convictions relating to the robbery of the Bank of Montreal in Mahone Bay in December, 1998. He appealed his first convictions, was released pending appeal, was successful on appeal, represented himself on his retrial and has appealed his convictions and sentences arising from his retrial.

[2] Two affidavits were filed in connection with Mr. West's application, Mr. West's and his counsel's. In his affidavit, Mr. West deposed as to his court involvement arising from the Mahone Bay robbery, including his release pending appeal following his first convictions and his appearance in court as required thereafter.

[3] His counsel's affidavit repeated this history and added Mr. West's age, residence and employment and stated he believes the grounds of appeal Mr. West set out in the notice of appeal he filed as a self represented person from prison, are serious and substantive and that the appeal is not frivolous or vexatious. He indicated that if Mr. West is not released Mr. West will not be able to assist in the preparation of his appeal. I note counsel did not represent Mr. West on retrial and the transcript of the retrial was not available at the time the application was heard.

[4] Mr. West was cross-examined on his affidavit and on the Informations, Indictment and Recognizance filed by the Crown with respect to outstanding charges against Mr. West. He is presently facing charges relating to robbery and unlawful confinement at a credit union in Bass River in May, 1998. At the preliminary inquiry relating to these charges he consented to being committed to stand trial. He represents himself. The trial is set to begin September 5, 2006. He indicated he has applied to adjourn the trial seeking further disclosure. The Crown provided the court with a copy of a DNA report it intends to introduce as evidence at that trial, which concludes blood samples taken from the Bass River Credit Union match known blood samples of Mr. West. Mr. West indicated he intends to challenge the validity of the report and the DNA testing procedure used in Canada.

[5] Mr. West is also currently facing charges arising from his retrial on the offences related to the Mahone Bay robbery. The charges include threatening to cause bodily harm to and attempting to intimidate one of the trial Crown attorneys. At his preliminary inquiry with respect to these charges, the judge committed Mr. West to stand trial. Mr. West is represented by counsel with respect to these charges. He was unable to confirm that the trial of these charges has been set for the end of October, 2006 as the Crown suggested.

[6] While Mr. West's counsel has indicated Mr. West's parents are prepared to act as sureties, with a cash deposit of $5,000 and justification in the amount of $5,000, no evidence was presented as to the amount of control his parents or the people with whom Mr. West would live if released, his wife and mother-in-law, could exercise over him if he was released. There was no evidence from any proposed surety.

[7] There are numerous grounds of appeal set out in Mr. West's lengthy notice of appeal including: inadequate disclosure; improper introduction of his statement to the police; inadequate help by the judge to him as a self represented person; bias; inadequate consideration of the evidence entered; denial of adequate legal representation; serious issues as to the manner in which the police investigation was conducted and **Charter** infringements. Mr. West argued that he has strong grounds of appeal. He also argued that he is not a flight risk because his record shows he appeared when required following his previous release. He argued that the fact this was his second conviction relating to the robbery at Mahone Bay should not militate against his release because his grounds of appeal have substance.

[8] The Crown agreed that Mr. West's appeal is not frivolous.

[9] While the Crown's main argument was that Mr. West's detention is necessary in the public interest, it also argued that there is a concern that he may be a flight risk. It argued there is an increased risk of flight given the length of sentence that Coughlan. J. ordered, almost ten years, the fact this is his second conviction arising out of the robbery at Mahone Bay and that if Mr. West is found guilty of the charges he is scheduled to be tried for in the Fall of this year, before his appeal is scheduled to be heard, he could be facing substantial additional sentences.

[10] With respect to the public interest, the Crown argued this concept involves an assessment of the public safety and the confidence of the public in the judicial system. It argued that several facts indicate bail should not be granted on this ground: Mr. West's prior criminal record (which included conviction for a robbery in Kentville in 1981 which resulted in a 7 year sentence and conviction for possession of property obtained by crime in 1990 which resulted in a 30 month sentence); the fact this is his second conviction with respect to the bank robbery in Mahone Bay; the substantial sentence he is presently facing and the additional sentences he may be facing if found guilty of the outstanding charges against him.

[11] Mr. West sent a letter to the court dated August 10, 2006, following the hearing of his application. As agreed by his counsel and the Crown, I have not taken his letter into account in reaching my decision.

[12] Pursuant to s.679 (3) of the **Criminal Code** R.S., c. C-34, s.1, a judge of the court of appeal may release an appellant from custody pending determination of his appeal if the appellant satisfies the judge on a balance of probability that (a) the appeal is not frivolous; (b) that he will surrender himself into custody in accordance with the terms of the order; and (c) that his detention is not necessary in the public interest.

[13] At this stage of the proceeding there is little information before me on which I can assess the strength of Mr. West's grounds of appeal. I have read the decisions from the court of first instance, the notice of appeal and the affidavits. No obvious error is apparent to me from these documents. The reasons given by the judge for convicting Mr. West are largely based on credibility. The transcript of the trial has not yet been prepared. With respect to the first criterion, for the purpose of this application I accept the position of Mr. West and the Crown that his appeal is not frivolous.

[14] With respect to the second criterion, Mr. West has not satisfied me that he will surrender himself into custody if I release him. Mr. West appeared when required when he was released pending his appeal of his first convictions relating to the Mahone Bay robbery. However, the circumstances now are different. This is his second conviction with respect to the same robbery. He is imminently facing a trial with respect to another robbery where he is aware that the Crown is intending

to introduce DNA evidence that it will argue places him at the scene. He is also facing another trial on the threat and intimidation charges relating to his retrial.

[15] The fact Mr. West has been convicted twice of the same offence does not mean that his present appeal has any less chance of success than his first appeal; see **R. v. O'Grady** (1997), 117 C.C.C. (3d) 136 (B.C.C.A., in Chambers), ¶ 14. Nor does the fact he is facing two trials on serious criminal charges, that appear to be presently scheduled to be heard this Fall, mean he will be convicted of those charges. Until tried, Mr. West is presumed to be innocent of those charges. What may have changed however is Mr. West's view of his situation, which may affect his risk of flight.

[16] The effect of the upcoming trials on flight risk was commented on in **R. v. Patterson,** [2000]135 O.J. No. 3189 (Ont. C.A.):

> ¶ 10 There are, however, several factors that cause me concern about whether Patterson would surrender into custody before the hearing of his appeal.
>
> . . .
>
> ¶ 12 Second, Patterson must know that there is a substantial chance that his period of incarceration will increase dramatically in the near future. Within months, he faces a trial on a second set of pimping charges in Ontario. Also, there is a bench warrant for his arrest in Nevada on similar charges. If Patterson is convicted of either or both of these charges, he could well be in prison for something in the order 20 years. No matter how strong the ties of family, friends and Toronto, the legitimate possibility of prison time of this duration might weaken those ties.

[17] Nor has Mr. West satisfied me that his detention is not necessary in the public interest.

[18] The question of what meaning ought to be attached to the phrase "necessary in the public interest" was addressed in **R v. M.W.C.** (2002), 210 N.S.R. (2d) 29:

> [16] In arriving at my conclusion I have paid particular attention to a number of cases, including the decision of the British Columbia Court of Appeal in **R. v. Toor (S.S.)**, [2001] B.C.J. No. 305, 148 B.C.A.C. 299; 243 W.A.C. 299 (C.A.), a decision of Justice Prowse, sitting in chambers. In the course of her remarks, she referred to the comments of Chief Justice McEachern in an earlier case, **R. v.**

Nguyen (T.T.) (1997), 113 B.C.A.C. 56; 184 W.A.C. 56; 10 C.R. (5th) 325 (C.A.), wherein McEachern, C.J.B.C., described the meaning that ought to attach to the phrase "necessary in the public interest":

> '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' (per O'Grady at 4 [p. 139 C.C.C.]), or persons informed about the philosophy of the legislative provisions, **Charter** values and the actual circumstances of the case (per **R. v. K.(K.)**, [1997] at 54), to believe that detention is necessary to maintain public confidence in the administration of justice.'

[17] Further, I have considered the comments of Justice Flinn of this court sitting in chambers in December, 2001, in **R. v. Desmond (R.H.)**, [2001] N.S.J. No. 520; 199 N.S.R. (2d) 296; 623 A.P.R. 296 (C.A.), where Flinn, J.A., referred with approval to the remarks of Pugsley, J.A., in **R. v. E.R.H.** (1999), 174 N.S.R. (2d) 298, 532 A.P.R. 298 (C.A.), where in the latter case Justice Pugsley said:

> '¶ 24 Public interest includes both the safety of the public and the confidence of the public in the judicial system.
>
> ¶ 25 Any action that may detrimentally affect public confidence and respect is contrary to the public interest (**R. v. Demyen** (1975), 26 C.C.C. (2d) 324).'

[19] In assessing whether Mr. West's release is necessary in the public interest, I must weigh the values of reviewability, the need to review the convictions leading to imprisonment (which may require a temporary suspension of the sentence), and the need to respect the general rule of immediate enforceability of judgments; see **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 at 47-48 (Ont. C.A.).

[20] The offences that Mr. West has been convicted of are serious and Mr. West has received a lengthy prison sentence, almost ten years. His criminal record, though dated, relates to similar offences. The charges he is facing relate to charges for a similar offence and charges relating to his retrial for the Mahone Bay robbery. On both outstanding charges Mr. West has been committed to stand trial following a preliminary inquiry. On the robbery charge he knows the Crown intends to introduce DNA evidence putting him at the scene of the crime. The trials are presently set to begin prior to the appeal hearing.

[21] Mr. West was sentenced to almost ten years in prison four months ago. His appeal will be heard in 7 months. A denial of bail will not render his appeal nugatory.

[22] Considering these factors I am satisfied Mr. West's detention is necessary in the public interest.

[23] For the foregoing reasons Mr. West's application for judicial release is dismissed and his appeal will be heard on Monday, March 26, 2007 commencing at 10 a.m. for the full day.

Hamilton, J.A.