NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Fogarty***, 2014 NSCA 89

Date: 20140918
Docket: CAC 420217
Registry: Halifax

Between:

William Lionel Edmund (Byron) Fogarty

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Motion Heard:	September 18, 2014, in Halifax, Nova Scotia, In Chambers
Written Decision:	October 1, 2014
Held:	Motion dismissed
Counsel:	Roger A. Burrill, for the appellant Timothy O'Leary, for the respondent

Decision:

[1] On September 18, 2014, this Court heard a motion brought by the appellant under s. 679 of the *Criminal Code*, seeking release pending appeal. At the conclusion of the motion, I advised the parties that the motion was dismissed with reasons to follow. These are my reasons.

Background

[2] On November 24, 2011, the appellant was the operator and sole occupant of a motor vehicle which was involved in a two-car collision in Tracadie, Nova Scotia. The two occupants of the other vehicle did not survive. As a result of the circumstances surrounding the collision, the appellant was charged with two counts under s. 255(3) of the *Code* –impaired driving causing death; and two counts under s. 249(4) of the *Code* – dangerous operation of a motor vehicle causing death.

[3] Arrested on November 24, 2011, a show-cause hearing was held in the Provincial Court, which resulted in the appellant being remanded into custody pursuant to s. 515 of the *Code*.

[4] Several months later, a bail review hearing was conducted pursuant to s. 520 of the *Code*. On April 25, 2012 Justice Duncan ordered the release of the appellant upon a recognizance with numerous terms and conditions – with two sureties. That recognizance remained in place for 14 months pending the outcome of the appellant's trial in the Supreme Court of Nova Scotia. There were no breaches of the terms of the recognizance during that time.

[5] After a trial by judge alone, the appellant was convicted of the four charges noted above on July 10, 2013, at which time bail was revoked.

[6] The appellant filed a Notice of Appeal on October 3, 2013. The appeal is scheduled to be heard on December 3, 2014.

The Law

[7] This motion is brought pursuant to s. 679 of the *Code*. The relevant provisions state:

> **679.** (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
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> *(a)* In the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
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> …
>
> (3) In the case of an appeal referred to in paragraph (1) *(a)* or *(c)*, the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
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> *(a)* the appeal or application for leave to appeal is not frivolous;
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> *(b)* he will surrender himself into custody in accordance with the terms of the order; and
>
> *(c)* his detention is not necessary in the public interest.

[8] This Court has considered the three conditions outlined in the above provision on numerous occasions. Succinctly, it is the appellant who carries the burden to establish on a balance of probabilities that the appeal is not frivolous, he will surrender himself into custody and his release is not contrary to the public interest.

[9] The parties provided a number of authorities in relation to each of the conditions to be considered by the Court. Given that the outcome of this matter is rooted in the evidence, rather than the applicable law, I do not view it necessary to review and repeat those authorities in detail. I have however, found instructive the comments of the Court in **R. v. McCormick**, 2012 NSCA 58, where the scope of the third element, the public interest, is described as follows:

> [33] The competing interests at play in assessing public interest has been the subject of considerable judicial comment. In Nova Scotia it is accepted that a judge must be concerned about a number of factors in assessing "public interest", chiefly in terms of public safety, in the sense of what is the likelihood of the appellant committing further offences or posing a danger to himself of [*sic*] others if released. But also, what would be the potential impact on the public's perception of the administration of justice if the appellant was required to remain in custody or is released.

[10] I have also carefully considered in particular the authorities submitted by the appellant which he asserts show successful motions for release in circumstances very comparable to those before the Court (see **R. v. Polley**, 2013 NSCA 156, in particular).

Issues

[11] The Crown has conceded that the first condition which must be satisfied – the appeal is not frivolous – is met. I agree. The Court is left to determine whether the appellant has on the evidence before me, established that he will surrender himself into custody, and that his release pending appeal is not contrary to the public interest.

Analysis

[12] The appellant presented the affidavit of his mother and proposed surety Donna Brushey, who was cross-examined by the Crown. The appellant did not file an affidavit in support of his motion, but with the consent of the Crown, the Court permitted him to provide *viva voce* evidence. He was also subject to cross-examination. Both testified as to their understanding of the sought terms of release. The appellant testified he would abide by any conditions deemed appropriate by this Court as he understood what his parents stood to lose as sureties.

[13] There is no dispute that the appellant, since 2006, has struggled with addiction issues. He testified that he was injured at work and prescribed OxyContin for pain relief. This spiralled into addiction, with the appellant becoming dependent on not only ill-gotten prescription medications but heroin and cocaine as well. After involvement with the criminal justice system in Ontario, the appellant became involved in rehabilitative efforts, most notably monitored methadone programs. The appellant testified that he has been prescribed methadone since 2006, both in Ontario and after his re-location to Nova Scotia in 2011. Notwithstanding his regular use of methadone, the appellant suffered a relapse in 2008. A charge of trafficking in cocaine arose during this period.

[14] The appellant testified that upon relocating to Nova Scotia in 2011 only one methadone clinic would agree to take him on as a patient. This clinic was located in Wolfville. During the 14 month period under which he was subject to the recognizance, he was able to transfer to a methadone clinic in Truro. The appellant testified that if released by this Court, he had an appointment scheduled the following day at the Truro clinic. He testified that his acceptance at the Truro clinic was "guaranteed". The appellant testified that he has been under regular methadone treatment while incarcerated.

[15] In cross-examination, the appellant acknowledged that in the past, there had been occasions when he had utilized marijuana or non-prescribed prescription drugs while undertaking methadone treatment. He candidly testified that if he did not have the benefit of regular methadone treatment, he would very likely return to the use of illicit drugs. The appellant further acknowledged that he was recently found guilty after a hearing, of a disciplinary offence – possession of contraband, namely a screwdriver and a sharpened knife, which were found following a search in his cell. While acknowledging possession of the screwdriver, the appellant asserts the knife was left by a previous occupant.

[16] Ms. Brushey also testified regarding the release plan being advanced by the appellant, and his planned attendance at the methadone clinic in Truro. She testified she understood the appointment for the following day would involve the appellant providing a urine sample. She acknowledged that based upon the assessment results, the clinic could refuse to accept the appellant for treatment.

[17] Through the able submissions of his counsel, the appellant argues he has put forward a solid release plan and that this Court should be satisfied that he will surrender himself into custody. It is submitted that the 14 month period under which the appellant successfully abided by the terms of his recognizance, is a very strong indicator that he, with the support of his sureties, will abide by any terms this Court should impose, including presenting himself upon the disposition of his appeal. There is no indication before the Court that the appellant or the sureties encountered any difficulties with adherence to the terms of release imposed from April of 2012 until July of 2013. As such, I agree with counsel, that this is a consideration deserving of weight.

[18] The Crown raises a number of concerns, including the appellant's criminal record, including an outstanding warrant arising from dated charges in Ontario, as well as the risk that the appellant will return to that province, where he lived and worked for many years. The most significant concern militating against the appellant's release from the Crown's perspective is the lack of information with respect to the nature and extent of methadone treatment available to the appellant should he be released. Without such treatment, the Crown submits there is a high risk of relapse, which puts in jeopardy not only the appellant's surrender into custody, but certainly impacts upon the public interest.

[19] I agree with the Crown that the nature of the methadone treatment the appellant will receive upon his proposed release, is a critical consideration which

intersects with both remaining conditions this Court must find are satisfied. I am satisfied that should the appellant not have available to him the benefit of a methadone program, there is a high risk of relapse. A relapse would in my view, not only decrease the probability of the appellant surrendering into custody, but also jeopardize his willingness and ability to abide by the other terms of his release. This strikes at the very heart of the public interest condition, and in particular the public's confidence in the administration of justice.

[20] In the particular facts of this case, the Court is presented with an offender who candidly acknowledges his addiction, and the importance of engaging in a methadone treatment program to maintain his sobriety. He is receiving such treatment while incarcerated. In my view, the evidence presented to the Court with respect to what treatment, if any, will be available to the appellant upon his sought release, is deficient.

[21] The appellant and his mother testified with respect to an appointment being scheduled the day following the hearing of the motion at the methadone clinic in Truro. The appellant testified his acceptance into that program was "guaranteed", whereas his mother's evidence was less definitive. The Crown argued this raised a number of important questions, none of which were satisfactorily addressed by the evidence before the Court.

[22] What was the nature of the appointment? Was there confirmation that the appellant would be accepted into the program for treatment? If accepted for treatment, would the appellant be treated immediately or placed on a waiting list? What would be the nature of the treatment? How would the methadone prescribed compare to the dosage the appellant was accustomed to receiving while incarcerated? I agree with the Crown that the above inquiries are important ones, and given the personal circumstances of this particular offender, the lack of answers is problematic, particularly as it relates to the public's confidence in the administration of justice.

[23] The appellant is a long term addict, whose ability to maintain sobriety is dependent upon his involvement in and adherence to a methadone treatment program. The appellant has a history of becoming engaged in criminal and other destructive behaviour as a consequence of relapse and addiction related challenges. He was convicted of serious offences arising from an event which took place while he was under the influence of non-prescription drugs. To release the appellant in such circumstances, without the Court having confirmation that he has available to

him the immediate benefit of a methadone treatment program, would in my view, shake the public's confidence in the administration of justice. The appellant's recent disciplinary offence while incarcerated only adds to that concern.

Conclusion

[24] The appellant and his sureties may have the best of intentions in seeking his release pending appeal. The ability of the appellant to meet the expectations associated with his release is dependent on his sobriety. The existence of a methadone treatment program is key for the appellant, and the Court is not satisfied based on the evidence presented to it, that such is in place. It is not the Crown's obligation to prove the appellant should not be released, rather, the appellant must satisfy the Court that his release is appropriate pursuant to s. 679 of the *Code*. He has failed to do so.

[25] The motion is accordingly dismissed.

Bourgeois, J.A.