
CANADA / JUDGMENT

Butler v. Matsqui Institution (Warden),

2012 BCSC 672

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Supreme Court of British Columbia

DECIDED

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2012 BCSC 672 Butler v. Matsqui Institution (Warden)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Butler v. Matsqui Institution (Warden),

2012 BCSC 672

Date: 20120510

Docket: 26033

Registry: Vancouver

Between:

Dillan Butler

Applicant

And

Warden of Matsqui Institution

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Applicant:

D.M. Turko

Counsel for Respondent:

B.Sokhansanj

D.M.Hill

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 3, 2012

Place and Date of Judgment:

Vancouver, B.C.

May 10, 2012

- [1] The applicant Dilan Butler is a federal penitentiary inmate who seeks to set aside a decision by prison officials transferring him from a medium to a maximum security institution.
- [2] The applicant is serving a three year sentence for manslaughter and aggravated assault. He was serving his sentence at the medium security Matsqui Institution, but on March 15, 2012 the warden at Matsqui ordered a transfer to the Kent maximum security institution. The transfer followed a stabbing incident in which prison officials said the applicant had been identified as the aggressor. Although a number of earlier incidents were also referred to as reasons for the transfer, the stabbing is clearly the matter that triggered a review of the applicant's security classification.
- [3] On this application, the applicant contends that he was not given an opportunity to defend himself against the allegation because he was denied access to pertinent information, including a surveillance camera videotape taken at the time of the incident.
- [4] The decision of prison authorities to transfer an inmate to a more restrictive setting constitutes a deprivation of residual liberty and must be made in accordance with the governing statutes and the Charter of Rights and Freedoms. An unlawful deprivation of residual liberty will be set aside on an application in the nature of habeas corpus: *May v. Ferndale Institution*, 2005 SCC 82.
- [5] The authority to transfer a prisoner from one institution to another is contained in s. 29 of the Corrections and Conditional Release Act, S.C. 1992, c.20. However, s. 12 of the regulations made under the Act require that the prisoner be given notice of a proposed transfer and an opportunity to make representations in response to it. Section 27 of the Act gives the prisoner the right to receive "all the information to be considered in the taking of the decision, or a summary of that information." However, s. 27(3) gives the corrections service the right to withhold some of that information in certain circumstances:
- (3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize

- (a) the safety of any person,
- (b) the security of a penitentiary, or
- (c) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (a), (b) or (c).

- [6] The stabbing incident that gave rise to the applicant's transfer occurred on January 25, 2012. On February 14, 2012, the applicant was served with a "Notice of Involuntary Transfer Recommendation" stating that the prison's security and intelligence office (SIO) had identified him "as the aggressor in this serious assault." It also said that he had refused to co-operate in the investigation of the stabbing and added that he had been implicated in a total of six incidents over a five month period. At the same time, the applicant received an "Assessment for Decision" that particularized the other incidents, all of which pre-dated the stabbing.
- [7] On February 24, 2012, the applicant received an "Addendum to Assessment for Decision," which purports to describe what is shown on a surveillance video. As described, the video apparently does not show the stabbing, but shows both the victim and the applicant entering the area where the stabbing occurred and shows the applicant leaving that area. It also describes the movement of a number of other inmates, who are not identified by name.
- [8] Both the applicant and his counsel requested disclosure of the video and other information. In a letter to the warden dated March 2, 2012 counsel said that the video, as described, was exculpatory in that it showed there were a number of other inmates in the area who had as much opportunity as the applicant to commit the offence. Counsel also sought summaries of the information obtained by SIO as a result of interviews with other inmates.
- [9] On March 13, 2012, a Warden's Board met to consider the transfer recommendation. According to an affidavit filed on behalf of the corrections service, the video was not considered. The applicant was given an opportunity to address the Warden's Board, but said he would not discuss the matter without his lawyer.
- [10] Following the Warden's Board, the acting warden issued a decision approving the transfer to Kent. Included in that document is a statement that "there is significant information to suggest" that the applicant was involved in the assault.
- [11] The affidavit filed by the corrections service is sworn by a parole officer at the institution, who states that she had been advised of security concerns as the reason for not releasing the video:

In particular, the review of the actions of other inmates might put them at risk and the security of institution and investigations may be compromised by supplying inmates with information about the placement of video cameras. Moreover, the video footage could not be edited to address such concerns. I have been informed by the Acting Warden that he agreed with the SIO's concerns and

concluded that, because there are reasonable grounds to believe disclosure of the video would jeopardize the safety of other inmates, the security of the institution and the conduct of lawful investigations, the video should not be released.

- [12] In *Khela v. Mission Institution (Warden)*, 2011 BCCA 450, the Court of Appeal said that s. 27(3) of the Act requires the warden to establish reasonable grounds for withholding information. Such grounds may obviously arise out of concern for the security of other inmates or the institution, but in my view reasonable grounds must include a reasonable connection between those concerns and the stated reasons for withholding the specific information. In this case, the warden has referred to security concerns but, in my view, has failed to explain how disclosure of the video will compromise those security concerns in the context of the disclosure that has already been made.
- [13] The affidavit refers to concern about disclosing the identities of other inmates who were present. It does not explain why the applicant would not be expected to know which inmates were present, given that he was present at the same time. Similarly, the information already given to the applicant identifies where various inmates are seen in the video. While that does not disclose the precise location of the surveillance camera or cameras, it certainly identifies areas visible to them.
- [14] I have also been provided with a confidential affidavit, attaching security and intelligence reports that were withheld from the applicant pursuant to s. 27(3) of the Act. I have reviewed those reports and can find nothing that amplifies or explains the stated concern about releasing the video. One of those reports details an investigation of the stabbing incident. To the extent it describes what is shown on the video, it contains no information that has not been disclosed to the applicant, other than the names of the other inmates. The second report has nothing to do with the video in question.
- [15] The Supreme Court of Canada in *May* said s. 27 imposes an "onerous" disclosure obligation on the corrections service. However, counsel for the warden argues that the obligation relates only to information "considered in the making of the decision." It is therefore argued that because the video evidence was not considered at the Warden's Board, there is no obligation to disclose it.
- [16] In my view, that is too narrow a reading of s. 27 and the applicable case law. In *May*, the Court said at para. 92:

In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction. As *Arbour J.* held in *Ruby*, at para. 40:

As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position ...

[emphasis added.]

[17] In *Foster v. Mission Institution (Warden)*, 2011 BCCA 451, the Court said:

The Warden was obliged to provide Mr. Foster with information sufficient to allow him to meet the case against him and with the information she considered in making her decision. [emphasis added]

[18] Clearly, the duty of disclosure may include not only information on which the authorities relied, but other information in the possession of those authorities that may assist the inmate in responding to the charge. As the court in *May* makes clear at paras. 89-93, that does not mean the full criminal law/*Stinchcombe* standard of disclosure applies. But the court said at para. 93 that "in the administrative law context, statutory obligations and procedural fairness may impose an informational burden on the respondents."

[19] Although the video may not have been played at the warden's board, the description of it was clearly considered. The final decision states:

Mr. Butler there is significant information to suggest that you were involved in an assault upon another inmate. This information and analysis of such is reflected in documentation by your case management team.

[20] The description provided to the applicant does not indicate the length of the video, but indicates that it begins at least half an hour before the stabbing victim sought medical attention. It does not indicate when, within that period, the applicant entered or left the area where the stabbing occurred. Neither the applicant nor the court has any way of knowing whether that description includes everything of substance shown on the video or whether it omits aspects the applicant might have relied upon in his defence.

[21] In order to be in a position to answer the allegations, the applicant was entitled to know if the description of the video relied upon by the warden was complete and accurate, whether any portion of it could be described as exculpatory or whether the entire video provided a basis for arguing that it did not logically support the inferences that authorities sought to draw from it.

[22] In the absence of reasonable grounds being shown for withholding it, the failure to provide the complete video to the applicant rendered the process unfair. In *Foster*, at para. 18, the Court of Appeal referred to the following statement in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at para. 23:

... [T]he denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[23] I therefore order that habeas corpus is granted and declare that the applicant should be released from custody at Kent Institution and returned to custody in a medium security institution, to be dealt with there as prison authorities consider appropriate.

"N. Smith J."

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