
CANADA / JUDGMENT

R. v. Agostino

2019 BCSC 1650

COURT

Supreme Court of British Columbia

DECIDED

3 September 2019

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2019 BCSC 1650 R. v. Agostino

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Agostino,

2019 BCSC 1650

Date: 20190903

Docket: 28400-1-W

Registry: Vancouver

Regina

v.

Christopher Michael Agostino

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Corrected Judgment: This judgment was corrected at paragraph 26 on November 30, 2021.

Before: The Honourable Mr. Justice Blok

On review from: Provincial Court of British Columbia

(R. v. Agostino, Surrey File No. 233496-1 & 233737-1)

Oral Reasons for Judgment re Detention Review Hearing

Counsel for the Crown:

R. Flannigan

Counsel for the Accused:

A. Vo

(as Agent for B. Coleman, Q.C.)

Place and Date of Hearing:

New Westminster, B.C.

August 28, 2019

Place and Date of Judgment:

New Westminster, B.C.

September 3, 2019

- [1] THE COURT: This is a detention review hearing conducted pursuant to s. 525 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] Mr. Agostino is charged with a number of offences, in two separate informations on which, in both cases, the Crown is proceeding summarily.
- [3] Mr. Agostino had bail hearings on both files and he was ordered detained on the secondary ground each time. By the terms of s. 525, Mr. Agostino is entitled to a detention review hearing because he has now been in pre-trial custody for more than 30 days and his trials have not commenced. In fact, his trials are still a fairly long way off.

I. Chronology

- [4] The relevant chronology begins with earlier matters that occurred in October and November 2017, when Mr. Agostino committed theft of merchandise from two stores, a Winners in Burnaby and a Walmart in Coquitlam. In the latter instance, he was arrested and then released on a promise to appear and an undertaking not to attend any Walmart store. Five days later, on November 9, 2017, he committed assault with a weapon. On November 18, 2017, 13 days after undertaking not to attend any Walmart, he committed robbery at another Walmart store where he slashed a loss prevention officer with a knife.
- [5] Mr. Agostino was ordered detained on the latter two charges and he remained in pre-trial detention until December 17, 2018, when he entered guilty pleas to all four offences and he was sentenced. As I read the CPIC printout, he was given an effective sentence of 24 months in jail, plus two years' probation and a weapons prohibition. After being given credit for pre-trial custody, he had four months and 12 days left to serve. He was released from jail on March 14, 2019.

- [6] On March 14, 2019 - the same day of his release - he is alleged to have committed theft-under and assault with a weapon at a Walmart store in Surrey. He was not apprehended at the scene, and charges were not laid until late April. This is one of the subject matters on which a bail hearing was conducted. For convenience, I will refer to these charges as the "Walmart Assault With a Weapon" (or "Walmart AWW") matter.
- [7] On March 26, 2019, Mr. Agostino breached the terms of his probation by attending at a Walmart store. He pleaded guilty to that charge on June 26, 2019.
- [8] On April 22, 2019, Mr. Agostino was charged with possessing a prohibited weapon (a switchblade knife) and two related charges of possessing a weapon contrary to court order and breach of probation. This is the second of the matters on which a bail hearing was conducted. Again for convenience, I will refer to this case as the "Switchblade" matter. He had a bail hearing on these charges, as well as on the March 26 breach of probation charge, on April 23, 2019. Judge La Prairie ordered him detained on the secondary ground. In doing so, Judge La Prairie noted that Mr. Agostino was in breach of several orders or undertakings and that he essentially had no plan of release.
- [9] Mr. Agostino had a second bail hearing on June 26, 2019, this one concerning the Walmart AWW charges. While these bail hearings may seem to be out of order, the timing is a function of the dates the charges were laid, and so while the Walmart AWW incident occurred prior, the charges were laid after those in the Switchblade matter.
- [10] In reasons given at that bail hearing, Judge Boblin noted Mr. Agostino had made arrangements to attend a recovery house, but the learned judge concluded, at para. 8:
- [I]n my respectful view, the substance abuse issues that Mr. Agostino has and which he is trying to deal with do not obviate the risk that he poses to the community based on the violent nature of the allegations, in combination with his record for violence.
- [11] Mr. Agostino was thus detained on the secondary ground.
- [12] There is a reference in the transcript from the second bail hearing to a s. 525 hearing that was to take place on the following day, which would have been June 27, 2019, but I was given no information about that. In reviewing the information shown in this Court's internal scheduling system, it appears that the June 27 hearing was adjourned and that no other s. 525 hearing has taken place.
- [13] Mr. Agostino had an arraignment hearing in both matters on July 23, 2019, and trial dates were subsequently set as follows: a one-day trial was set in the Switchblade matter for January 31, 2020, and another one-day trial was set in the Walmart AWW matter for February 18, 2020.

II. The Alleged Offences

- [14] Although I have referred to the circumstances of the alleged offences in brief, I will now provide some further details.
- [15] In the Walmart AWW matter, the Crown alleges that Mr. Agostino attended at a Walmart store in Surrey and stole a backpack. When a loss prevention officer ("LPO") tried to detain him, Mr. Agostino produced an extendable baton or rod of some sort and struck the LPO several times in the head and hand, injuring him. There was surveillance video. Another Walmart LPO reviewed the video and identified the assailant as Mr. Agostino.
- [16] In the Switchblade matter, the Crown alleges the police responded to a report of two males who were fighting at or near a pub. A description of both males was provided. Police were on the scene within five minutes. They located a male, Mr. Agostino, who they felt matched the description of one of those males. When they went to speak to him, he became very agitated. He was then arrested. A switchblade was found during the ensuing search of his person.

III. The Accused

- [17] Mr. Agostino is 28 years old. He was born in New York state, but his family moved to Ontario at some point. He has dual citizenship. It appears he does not have a good relationship with his family, as even defence counsel said they were not supportive. He has been in British Columbia for four years. He has a Grade 9 education and he has completed a substantial part of an apprenticeship as a welder.
- [18] Mr. Agostino has drug use problems, specifically with heroin. He went on Suboxone just prior to his second bail hearing. I was told he also has some mental health issues - depression and ADHD - and saw a psychiatrist for these issues at some point in the past. He currently has a mental health case worker.
- [19] He has a youth record starting at age 16, with four relatively minor offences. His adult record starts with the October/November 2017 thefts, assault with a weapon and robbery that were outlined earlier in these reasons for which he received an effective sentence of 24 months in jail.

IV. Positions of Crown and Defence

A. The Crown

- [20] The Crown's position is that his continued detention is justified on the secondary ground. The Crown noted the several breaches or alleged breaches of attending at a Walmart store and of other probation or release conditions, and noted in particular a prior conviction for robbery at a Walmart store and another conviction for assault with a weapon, offences similar to those currently charged. This, the Crown says, shows an inability on Mr. Agostino's part to abide by conditions intended to address concerns about weapons, theft and violence. The Crown said release to a recovery house would not provide sufficient

safeguards to address reoffending concerns.

- [21] The Crown also noted that the somewhat distant trial dates in this matter appear to be a function of defence counsel's calendar since earlier dates were available.

B. Defence

- [22] Defence counsel, who had more detail on the dates that had been offered in this matter, noted that the assigned Crown counsel had said she was not available until November 12, 2019, and this and other dates in December 2019 were not available either to the defence or from the court. Counsel noted that the dates actually secured were not substantially different from the dates offered in any event.
- [23] Defence counsel addressed matters going to the strength of the Crown's case in both cases. In the Walmart AWW case, counsel noted that the intervention of others in the scuffle with the LPO gives rise to doubt that it was Mr. Agostino who wielded the baton. In the Switchblade matter, counsel said there is a significant s. 8 Charter issue because Mr. Agostino was essentially detained randomly.
- [24] Defence counsel said a recovery facility would adequately address secondary ground concerns because Mr. Agostino's offending is related to drug use and mental health issues, and if he breaches the rules of the recovery house, the breach is reported.

V. Analysis

A. Legal Principles Relating to Section 525 Reviews

- [25] In the recent case of *R. v. Myers*, 2019 SCC 18 [Myers], the Supreme Court of Canada clarified the process and approach to be used on s. 525 detention reviews such as this one.
- [26] The court reiterated that pretrial release is the default presumption in Canadian criminal law and that detention is the exception, not the rule (at paras. 1 and 25).
- [27] As to the hearing itself, the court said:
- (a) the question the judge must answer is whether the continued detention of the accused in custody is justified within the meaning of s. 515(10) of the Criminal Code (at para. 46);
 - (b) this is a somewhat different question than the question at the initial bail hearing or in a bail review under ss. 520 or 521. A bail review focuses on the review of a prior order whereas a review under s. 525 is more properly characterized as a review of the detention itself (para. 47);
 - (c) the judge at a s. 525 hearing should show respect for any findings of fact made at the prior bail hearing if there is no cause to interfere with them;

- (d) similarly, any balancing exercise or weighing of factors made at the prior hearing must be reviewed in light of the time that has already elapsed together with any other relevant considerations (para. 47); and
- (e) the judge at the s. 525 hearing has a wide discretion to make inquiries and to receive and consider any evidence "considered credible or trustworthy" (para. 48), and should be particularly attentive to any new evidence or material change in the circumstances of the accused and to the question of whether continued detention is justified (para. 49).

[28] As to the issue of the passage of time and unreasonable delay, the court said:

- (a) in determining whether continued detention is justified under s. 515(10) of the Criminal Code, the detention review judge should also consider whether the time already elapsed has had, or the anticipated passage of time will have, an impact on the appropriateness or proportionality of the detention (para. 50);
- (b) the passage of time may or may not have an impact on the necessity of continued detention, but reviewing judges must be particularly alert to the possibility that the amount of time spent by an accused in detention has approximated or even exceeded the sentence the accused would realistically serve if convicted (para. 51);
- (c) of particular concern on the latter point is the need to reduce the risk of induced guilty pleas;
- (d) in appropriate cases, it may be possible for the reviewing judge to conclude that a hypothetical risk in relation to the primary or secondary ground is simply outweighed by the certain cost of the accused's loss of liberty or of a loss of public confidence in the administration of justice (para. 53); and
- (e) as part of this analysis, the reviewing judge may consider whether either party has been responsible for any unreasonable delay in the trial of the charge (para. 54).

[29] Finally, as to other matters that are properly considered on a s. 525 review, the court in Myers said "there may be cases in which it is necessary for the reviewing judge to scrutinize the rationale offered for the original detention order". While that order or those orders will be relevant and "will likely inform the proceedings", reviewing judges should be careful not to simply "rubber-stamp" those decisions. It may be, for example, that the "initial bail judge made an error of law" (para. 55).

[30] The court in Myers added an additional comment relating to bail hearings involving the secondary ground and proposals for release that involved treatment for substance abuse or mental health issues. The court said:

[67] That being said, judges and justices presiding over bail hearings should always give very careful consideration to release plans that involve supervised treatment for individuals with substance abuse and mental health issues. Release into treatment with appropriate conditions will often adequately address any risk raised under s. 515(10), and such a strategy

is a less onerous alternative than provincial remand. It may also substantially address the root causes of the accused person's alleged criminal behaviour and reduce the likelihood of future criminal conduct.

VI. Discussion

- [31] I will begin by saying that I have carefully reviewed the proceedings in the court below and the reasons given by the bail judges for ordering detention. I find no error in their respective approaches, nor in the decisions they made.
- [32] The passage of time to date and the further time it will take to bring the two cases to trial are of great concern here. Between the two informations, Mr. Agostino faces five counts. Three counts carry with them a maximum sentence of six months, and, for two of the counts, the maximum sentence is 18 months in jail.
- [33] The Crown conceded, very fairly, that Mr. Agostino had already served an equivalent six-month sentence and that a likely sentence for the two counts involving 18-month maximum sentences would be in the range of perhaps six to 12 months. I appreciate that there is the additional factor of likely consecutive sentences given the separate nature of the incidents, but nonetheless Mr. Agostino, who is presumed to be innocent of the charges against him, has already served a significant portion of any likely sentence, and if detained to the second trial date, he will have served an effective 15-month sentence.
- [34] I considered making directions pursuant to s. 525(9) or s. 526 to expedite the trials or the cases generally, but my inquiries of counsel (and their further inquiries of the Provincial Court judicial case manager in Surrey) revealed limited available dates; for example, just one trial date in September 2019 where two one-day trial dates are needed, with a few further dates in November 2019. In any event, the availability of the Crown's trial counsel on any of those dates was unknown. Firm information would have been available only by having assigned Crown and defence counsel attend upon the judicial case manager.
- [35] Given that: (a) counsel had, in effect, already gone through this process when the present trial dates were set; (b) the dates said to be available offered only a limited advantage over the scheduled trial dates; (c) ordering that the cases be heard on the somewhat earlier dates would likely require a change of counsel; and (d) the very process of attending upon the judicial case manager, identifying alternative dates and arranging new counsel might take a few weeks, I conclude that the limited advantage of these somewhat earlier dates does not outweigh the disadvantages of potentially losing counsel of choice and of yet more time in pre-trial custody while these matters played out.
- [36] Accordingly, although I conclude that the passage of time has not had any impact on the necessity of continued detention, in this case meaning secondary ground concerns, there is a very real concern that the amount of time Mr. Agostino will spend in detention will approximate or even exceed the sentence he would serve if convicted.

- [37] As to the secondary ground concerns, I note that Mr. Agostino's offending seems clearly linked to his illicit drug use, and his plan of release, which involves a proposal to reside at a recovery house, falls squarely within the recommendation of the Supreme Court of Canada (at para. 67 of Myers) that bail judges give careful consideration to release plans that involve supervised treatment for individuals with substance abuse issues.
- [38] Although release to a recovery house does not eliminate secondary ground concerns about Mr. Agostino reoffending, I am satisfied that substance abuse treatment will address the root causes of his offending and this mitigates secondary ground risks substantially. With the risk of reoffending mitigated in this way, I conclude that the actual risk in relation to the secondary ground is "outweighed by the certain cost of the accused's loss of liberty": Myers, at para. 53.
- [39] For all of these reasons, I conclude the continued detention of Mr. Agostino is not justified. I will order Mr. Agostino be released on certain conditions that I will now review with counsel. Those conclude my reasons.

[DISCUSSION RE BAIL RECOGNIZANCE AND CONDITIONS]

- [40] THE COURT: Mr. Agostino, I am going to pronounce the conditions of your release so please listen carefully.
- [41] THE ACCUSED: Okay.
- [42] THE COURT: The first condition is that you will keep the peace and be of good behaviour.
- [43] Secondly, you must not be within 100 metres of any Walmart store.
- [44] Thirdly, you will have no contact or communication directly or indirectly with Agamdeep Singh.
- [45] Now the recovery house conditions:
- a) You will be released only to a representative of It's Up To You Recovery House Society, 12991-100th Avenue in Surrey, B.C., which I will refer to as the "recovery house";
 - b) You must report by telephone to a bail supervisor at the bail supervisor's office at 103-10475 138th Street, Surrey, B.C., telephone, 604-586-4255, within the first business day of your admission to the recovery house, and thereafter you will report as directed by your bail supervisor;
 - c) You must reside at "It's Up To You" Recovery House Society located at 12991-100th Avenue, Surrey, B.C., unless you are given written permission by your bail supervisor to reside elsewhere;

- d) You must not leave the recovery house unless you are in the immediate presence of a staff member or approved resident, or you have the written permission of your bail supervisor. Such permission is to be given only for compelling reasons. You must also carry the written permission when you are outside the recovery house;
- e) You must abide by all rules of the "It's Up To You" Recovery House Society as long as they do not conflict with the terms of this order. If there is a conflict, you must tell your bail supervisor about the conflict immediately;
- f) You must not possess or consume any alcohol or any other intoxicating substance, except in accordance with a medical prescription; and
- g) You must attend, participate in and complete any programs to which you are directed by the recovery house. If you are expelled from the recovery house or voluntarily remove yourself from the program without permission being obtained in advance from your bail supervisor, you must advise your bail supervisor forthwith. If the office is closed, you must contact your bail supervisor immediately when the office opens on the next business day.

[46] There are further conditions relating to a bans on firearms and weapons and knives:

- a) You must not possess either personally or through another person any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, or explosive substance, anything that resembles a weapon or firearm, any weapon as defined in s. 2 of the Criminal Code or any related authorization, licences, or registration certificate; and
- b) You must not possess any knife except for the immediate preparation or eating of food, or for purposes directly and immediately related to your employment.

[47] Those conclude the conditions. Is there anything I have missed?

[48] MR. FLANNIGAN: No, My Lord, just the next return date --

[49] THE COURT: All right. Your next court hearing which you are obliged to attend, Mr. Agostino, is on January 31, 2020, at 9:00 a.m., courtroom 311, at the provincial courthouse in Surrey, B.C.

[50] THE ACCUSED: Yes.

[51] THE COURT: Do you understand all of those conditions?

[52] THE ACCUSED: Yes. Yes, sir -- or, Your Honour, thank you.

[53] THE COURT: It appears the registrar has something to draw to my attention.

[54] THE CLERK: Yes, My Lord, you have not confirmed the amount of the recognizance.

[55] THE COURT: Did I not say? My apologies.

[56] Yes, the first condition is that you will be released on your recognizance in the amount of \$1,000, with no deposit and no surety, and then with the various conditions I outlined earlier. A recognizance, Mr. Agostino, is your solemn promise to the Crown to pay that sum in the event that you do not abide by your bail conditions. All right, do you have any questions, Mr. Agostino?

[57] THE ACCUSED: No, that is okay. Thanks.

[58] THE COURT: All right, thank you very much.

[59] MR. FLANNIGAN: Thank you, My Lord.

[60] MS. VO: Thank you, My Lord.

"Blok J."

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