

CANADA / JUDGMENT

## R. v. Aiken

2021 BCSC 2364

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DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Aiken,

2021 BCSC 2364

Date: 20211202

Docket: 32385W

Registry: Vancouver

Regina

v.

Carey Robert Aiken

Before: The Honourable Justice MacNaughton

Oral Reasons for Judgment

(Section 525 Detention Review Hearing)

Counsel for the Crown (Respondent):

K. Gagnon

Counsel for the Accused (Applicant):

C. Paquette

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 18, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 2, 2021

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## Introduction

- [1] Carey Robert Aiken is before the Court for a detention review hearing pursuant to s. 525 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. He was detained, pursuant to the order of Judge E. Burgess of the Provincial Court in Surrey, on June 24, 2021.
- [2] Mr. Aiken is charged:
- a) on Vancouver Information 262766, sworn June 21, 2021, with one count of mischief under s. 430(4) and one count of theft under s. 334(b) of the Code;
  - b) on Vancouver Information 262699, sworn June 11, 2021, with one count of break and enter under s. 348(1)(d) of the Code;
  - c) on Vancouver Information 262624, sworn June 3, 2021, with one count of mischief under s. 430(4) and one count of attempt to break and enter under ss. 348(1)(a) and 463 of the Code; and
  - d) on Surrey Information 245111, sworn June 11, 2021, with one count of break and enter under s. 348(1)(b) of the Code.
- [3] All of Mr. Aiken's Vancouver charges are set for fix date on November 19, 2021, and his Surrey matter is set to "Confirm Trial Date" on November 24, 2021.

## The Alleged Offences

- [4] All of Mr. Aiken's current charges relate to events that occurred after Mr. Aiken was released from custody with respect to a prior offence. On Information 255662, Mr. Aiken was convicted of break and enter. He was sentenced to 90 days of "new time". He had already served credited time of 576 days, amounting to an effective sentence of 666 days.
- [5] I will refer to the outstanding offences in the order of the dates on which they are alleged to have occurred as, in some cases, Mr. Aiken was not identified or charged until later.
- [6] The first offence is Surrey Information 245111. It is alleged to have occurred on November 22, 2020. Because of that date, it appears that Mr. Aiken was released prior to serving his full sentence for his break and enter conviction on Information 255662. The date on which he was released is not clear on the materials before me.
- [7] Information 245111 alleges that, late on November 21, or early in the morning of November 22, 2020, Mr. Aiken shattered a glass door to a home and stole a computer and a key fob. The complainant saw a man in the backyard who left without incident. The complainant discovered the damage to the door and the theft. The break-in appears to have occurred when the complainant and other occupants of the home were out of the house.
- [8] Mr. Aiken was not identified for some time. He was arrested after Csts. Faresin and Cutler identified him, on the home's CCTV video. The officers knew Mr. Aiken from their prior dealings with him.
- [9] Mr. Aiken says that he has a strong defence to the charge, as he has a valid reason for being at the home and the items he is seen carrying in the video were not reported missing. They belonged to Mr. Aiken. Mr. Aiken also says that the home is in a bad area in Whalley and there are two shelters about a two-minute walk away.
- [10] Information 262624 alleges that, on December 8, 2020, Mr. Aiken attempted to break into the Sanatan Cultural Society building, also known as the Shiv Mandir or Shiva Temple, on Dorset St. in Burnaby. No one was in the building at the time. Mr. Aiken was identified by Cst. Cutler from CCTV images of the offence.
- [11] Mr. Aiken denies that he is responsible for the break-in. The CCTV footage is very grainy and the still photo taken from it is of poor quality and shows no identifying features. The photo is of a white male who appears to have thick, dark brown hair. Mr. Aiken has light hair and visible tattoos on his neck. Mr. Aiken also says that there is no DNA or fingerprint evidence linking him to the Shiva Temple.
- [12] In the period between December 8, 2020, and the date of the incident charged in Information 262766, Mr. Aiken was charged and held on New Westminster charges. He was in custody from January 30 to May 6, 2021, when he was acquitted and released.

- [13] Information 262766 alleges that, two days after his release, on May 8, 2021, Mr. Aiken was observed by the Vancouver Police Department trying car door handles. The police followed him and observed him damage a vehicle parked at the Dollarama on Kingsway. He was arrested, and stolen property was found on his person. He was charged with wilfully damaging a vehicle and theft. He was released on an undertaking, but a warrant was issued later that day.
- [14] Mr. Aiken says that he paid for the car window to be replaced.
- [15] Finally, Information 262699 alleges that on June 10, 2021, while a resident was at home, Mr. Aiken was observed trying to break into a home by prying open a window on a back deck. Police were notified, the residence was surrounded, and Mr. Aiken was taken into custody.
- [16] Mr. Aiken denies that he committed the break-in and says that he has a valid defence, as he was not wearing the clothing that was described by the complainant and the complainant lost sight of the suspect.
- [17] Further, Mr. Aiken says that, on a search incident to arrest, the police did not find a screwdriver or any tool that could be used to pry open windows, nor did the police find a screwdriver or tool during a search of the bushes he was standing next to at the time of his arrest.
- [18] Finally, Mr. Aiken says that he was identified by the complainant after his arrest and when he was in handcuffs. There is no DNA or fingerprint evidence connecting Mr. Aiken to the offence.
- [19] I accept Mr. Aiken's overall submission that none of the break and enter offences approach the seriousness of a home invasion and, thus, would not attract the longer sentences applicable to home invasions. The only break-in during which a resident was at home was the one charged in Information 262699, but Crown disclosure indicates that, prior to the break-in, someone rang the doorbell and knocked on the door and the resident did not answer.

### Events after Mr. Aiken's Arrest and Detention

- [20] Following his arrest for the incident on June 10, 2021, Mr. Aiken was remanded. He attended a bail hearing on June 18, 2021, and was released to Launching Pad Rehabilitation Society ("Launching Pad") subject to a number of other conditions, including a condition that he was to report to his bail supervisor if he was not going to remain at Launching Pad.
- [21] After arriving at Launching Pad, Mr. Aiken never went in to take up residence. He ran away almost immediately and failed to report to his bail supervisor. He submits that he had every intention of attending Launching Pad for treatment, but on his arrival, he says that he was assaulted by someone whom he was afraid of. At the time, he had broken ribs, and did not believe he could defend himself. He ran out of fear.

- [22] Mr. Aiken's counsel submits that Mr. Aiken does not have problem-solving skills and, therefore, his instinct was to flee. He did not have a cell phone, and he did not think to call his counsel for advice.
- [23] Mr. Aiken did not commit any new offences while he was on bail and away from Launching Pad. He was taken back into custody on June 21, 2021, sought his release again, and was detained on June 24, 2021, by Judge Burgess. He has remained in custody since June 24.

### **The Parties' Positions on the s. 525 Hearing**

- [24] The Crown opposes Mr. Aiken's release and submits that Mr. Aiken's detention continues to be necessary on the secondary ground under s. 515(10)(b) of the Code. The Crown submits that there is a substantial risk that Mr. Aiken will reoffend if he is released, and he poses a serious risk to public safety.
- [25] The Crown relies on his extensive criminal record, including his repeated failures to comply with court orders. In addition, the Crown submits that Mr. Aiken's continued detention is justified on the tertiary ground. The Crown says his release would bring the administration of justice into disrepute.
- [26] Finally, in light of Mr. Aiken's extensive criminal record and his increasingly lengthy periods of incarceration, the Crown submits that a sentence imposed on Mr. Aiken for any one of the offences he is currently charged with will result in a longer sentence than the time he has already spent in pretrial custody.
- [27] Mr. Aiken submits that his risk of reoffending has been reduced since he went into custody in June and that he should be released into a treatment program at the Hope for Freedom Society (the "Society"), a faith-based recovery society found by Mr. Aiken, with which he has been communicating for some time.
- [28] The Society is certified by the Ministry of Health's Assisted Living Registry and is designated a supportive recovery facility. It is staffed 24/7. Residents follow a strict schedule and spend four hours each day in group sessions, in addition to doing individual step work based on the Alcoholics Anonymous or Narcotics Anonymous programs. Residents wake up early and attend programming for most of the day. The Society has a 10:00 p.m. curfew. The Society reports any breach of a resident's conditions. Mr. Aiken is aware of the Society's program requirements and is prepared to abide by its rules.
- [29] Mr. Aiken has satisfied himself that there are currently no negative peers staying at the Society's residence. He says that the religious-based programming is a good fit for his beliefs. He believes that he can succeed in the program.
- [30] Mr. Aiken submits that his risk has been reduced for the following reasons:

- a) he has been able to access programs while he has been in custody and has begun addressing his PTSD and the complications of his addiction. The Society will provide treatment and counselling for his addiction and mental health issues;
- b) for the first time, he has motivation and support in the community;
- c) the release plan he currently proposes is different, as the Society is a place to which he has a connection, and he proposes that he will be bound by strict conditions not to leave the Society's facility unless he is in the company of a representative; and
- d) the release plan will now have a financial amount attached to it in the form of a promise to pay the amount of \$1,000.

#### Mr. Aiken's Circumstances

#### Mr. Aiken's Early Life

- [31] Mr. Aiken's early life can only be described as grim. It was recounted by his counsel.
- [32] He is currently 48 years old. He was born in New Westminster and had a twin brother. His mother was 14 years old at the time of his birth. She had endured significant abuse as a child and suffered from substance abuse. She moved with her children to Surrey. They were often homeless. Mr. Aiken never knew his father.
- [33] When Mr. Aiken was nine years old, he and his brother were found alone in a house where their mother had abandoned them. Upstairs neighbours found them, without food, and living in squalor. The boys were taken into the care of the Ministry, now known as the Ministry of Child and Family Development (the "Ministry").
- [34] Mr. Aiken and his brother lived in between 20 and 25 foster homes all over the lower mainland. They were adopted twice, but as a result of challenges in the adoptive families, they were returned to the Ministry's care.
- [35] Mr. Aiken suffered significant psychological and physical abuse in the foster care system, and he learned to run away. He was frequently homeless because he was too afraid to go back to foster homes. Mr. Aiken recognizes that he grew up with very little structure and no meaningful supervision.
- [36] Mr. Aiken did have a relationship with his grandmother, and she cared for him and his brother when she was able to, but the extent of the abuse and psychological trauma proved to be too much for her.
- [37] Mr. Aiken's mother died when he was 19 years old. She was found in a basement and had overdosed from heroin. He was profoundly impacted because, despite his mother's mistreatment of her boys, he still believed that she did the best she could, given the circumstances. Following his mother's death, he lost his aunt, and his uncle committed suicide. He then lost his grandfather. His grandmother died about eight years ago.

- [38] Mr. Aiken began using drugs when he was 12 years old and was forcibly injected with cocaine or heroin by a family member. Most recently, he is addicted to methamphetamine and heroin, which he uses to deal with the trauma he has gone through. His crimes, which will be discussed later in these reasons, were committed to support his addiction.
- [39] Mr. Aiken was diagnosed with hepatitis C almost 20 years ago and was aggressively treated. He was diagnosed with bi-polar, ADHD, and severe depression through the Regional Treatment Centre. After suffering some traumatic losses, he twice attempted suicide.
- [40] In 2016, Mr. Aiken's twin brother, whom he describes as his best friend, was diagnosed with oral cancer, a tumour grew on his tongue. After a difficult battle, his cancer was fatal. Mr. Aiken gave the direction to remove his brother's life support. He died on June 22, 2016. Mr. Aiken was incarcerated at the time. He was temporarily released, in shackles, to be with his brother when he died. He harbours significant guilt about his decision to remove his brother's life support.
- [41] Mr. Aiken has a daughter whom he fathered when he was 17 years old. He had not seen her since, but found her on Facebook and reconnected with her shortly after his brother died. His daughter lives in Edmonton and has two children of her own. They have started to talk to each other in the last few years. She does not use drugs or alcohol.
- [42] Mr. Aiken expresses a desire to meet his grandchildren in person once he is out of custody and is stable in the community.
- [43] Mr. Aiken also has a niece, Tori DaSilva Melvin, his twin brother's daughter. She was put up for adoption and contacted Mr. Aiken when she was trying to locate her birth father. They started having contact in late August 2021, and she has written a letter in support of Mr. Aiken.
- [44] Mr. Aiken says that his contact with Ms. Melvin and his daughter has motivated him to attend a facility where he can get the support he needs to navigate his complex issues. While in custody, he has completed a certificate program in Complex PTSD and program booklets on:
- a) Relapse Prevention
  - b) Alcohol and Other Drug Education -Treatment for Criminal and Addictive Behaviours
  - c) Preparing for Release Program (aimed at relapse prevention)
  - d) Building Resilience
  - e) Essential Skills to Success
  - f) Substance Abuse - Chemicals and the Body
  - g) Employability Skills and Expectations

- h) Healthy Relationships - the Impact of Family Violence.

### Mr. Aiken's Criminal Record

- [45] Mr. Aiken has an extensive criminal record which dates back to 1996. It reflects 19 convictions for break and enter, one for attempt to break and enter, five convictions under s. 145 of the Code, one breach of probation and four breaches of conditional sentence orders resulting in revocation. There are also convictions for weapons offences, drug offences, threats, resisting arrest, obstruction of police officers, thefts and assaults. In addition, he has an active youth court record which remains open because there have been no gaps in his offending. His youth record includes further offences of break and enter. There are no youth offences involving violence.
- [46] Mr. Aiken's previous convictions for break and enter have resulted in sentences of up to 40 months in jail.

### Analysis

- [47] In the circumstances of this case, I must decide whether the continued detention of Mr. Aiken is justified under the secondary and tertiary grounds in s. 515(10)(b)-(c) of the Code.
- [48] I need to consider whether there is any substantial likelihood that Mr. Aiken will commit a criminal offence on his release and whether his continued detention is necessary to maintain confidence in the administration of justice.
- [49] To the extent that the past is a predictor of the future, absent a significant change in Mr. Aiken's life, there is a substantial likelihood that he will reoffend if he is released.
- [50] A review of Mr. Aiken's extensive, almost uninterrupted criminal record, that includes a demonstrated lack of compliance with court orders, suggests that, unless something dramatically changes, Mr. Aiken will spend most of his life in and out of jail.
- [51] The issue is whether his current proposed release plan, and the other recent changes in his life, are significant enough to mitigate that likelihood.
- [52] In considering Mr. Aiken's release plan, I must consider the Supreme Court of Canada's comments in *R. v. Myers*, 2019 SCC 18 at para. 67:
- [67] Third, Mr. Myers was detained exclusively on the basis of the second ground under s. 515(10), despite the fact that he had a release plan involving a closely supervised treatment facility to address his substance abuse problems and multiple proposals to address the concern that he posed a risk to the public. It was within the bail judge's discretion to determine whether the release strategies presented by counsel addressed the risk that if released from custody, Mr. Myers would commit a criminal offence or interfere with the administration of justice within the meaning of s. 515(10)(b). 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.

- [53] I accept that Mr. Aiken has long-standing substance abuse and mental health issues as a result of his very challenging childhood, which has continued into his adulthood. I also accept that his challenges are, in large measure, responsible for his criminal behaviour which, for the most part, reflects property offences.
- [54] A review of his history indicates that he has never participated in a residential treatment program to address his substance abuse, PTSD, and other mental health issues. As Myers cautions, judges presiding over bail hearings should consider whether a proposed release plan will provide an accused with adequate supervised treatment that is a "less onerous alternative" than remand. Without treatment, I have little doubt that Mr. Aiken will reoffend.
- [55] After giving this matter careful consideration, I have decided that Mr. Aiken should be released to participate in the Society's program. While it is true that Mr. Aiken's criminal history gives rise to concerns about his ability or willingness to comply with court-ordered conditions and that there are concerns about the significant likelihood of Mr. Aiken reoffending if he were released, there is evidence that a number of things have changed since Mr. Aiken's last release to enable him to attend at a recovery house. I am satisfied that on the conditions I will set out, Mr. Aiken's risk of reoffending will be reduced.
- [56] First, he has spent some of his current period of incarceration involved in a number of programs that are targeted at his complex challenges.
- [57] Second, for the last three months he has been in contact with his niece who lives in Richmond, B.C. According to her letter to the Court, Ms. Melvin writes about how through Mr. Aiken's connection with her, she has learned about her father and the challenges they faced. She describes that her involvement with Mr. Aiken has been life-altering for both of them and that he has taken steps to mend his relationship with his own daughter. Mr. Aiken has made an effort to foster both relationships.
- [58] Third, the Society's program seems ideally suited to Mr. Aiken's complex needs and, as proposed, his attendance there would be subject to a condition that he not to leave the Society's residence unless accompanied by one of the Society's staff. It is a structured program that is recognized by the Ministry of Health.
- [59] Fourth, on the evidence, Mr. Aiken sought out the Society because he believed its program would suit him. He did so after completing the Complex PTSD Workbook which, as described by "Amanda", a Concurrent Disorders Counsellor at North Fraser Pre-Trial Centre, as a valuable resource for those affected by complex PTSD, allowing them to be informed and active partners in the therapeutic healing process. In particular, it:

provide[s] comprehensive coverage of a range of issues related to the treatment of complex PTSD: the importance of attachment patterns (as a sometimes hidden element of an adult's emotional problem); an overview of different models of treatment, with enough information so the reader can make an informed choice regarding which approach might be the best fit; and potential obstacles to successful treatment - obstacles that can be identified in advance so that an appropriate treatment plan can be constructed

[60] Presumably, Mr. Aiken considered that information when selecting the Society's program.

[61] Taking these factors into account, I order Mr. Aiken's release on the following conditions:

- Condition 1: You will be released only to a representative of Hope for Freedom Society when they have a bed available for you.
- Condition 2: You are to report by telephone (604-660-3777) to a bail supervisor at 275 East Cordova Street, Vancouver, B.C., within the first business day of your release, and thereafter you are to report as directed by the bail supervisor.
- Condition 3: You must live at the Hope for Freedom Society facility located at 3237 Liverpool Street, Port Coquitlam, B.C., or at any other location associated with that facility unless you are given written permission by your bail supervisor to live elsewhere.
- Condition 4: You must follow the rules of the Hope for Freedom Society facility as long as they do not conflict with the terms of this order and if there is a conflict you must tell your bail supervisor about the conflict immediately.
- Condition 5: You must not possess or consume alcohol, drugs or any other intoxicating substance, except with a medical prescription.
- Condition 6: You must attend, participate in and complete any programs to which you are directed by the Hope for Freedom Society.
- Condition 7: If you are expelled or remove yourself from the program you must tell your bail supervisor immediately, if the office is closed you must contact your bail supervisor immediately when the office opens on the next business day.
- Condition 8: You are not to go to the 5600 block Dorset St., Burnaby, B.C., the 3300 block of Church St., Vancouver, B.C., or the 10400 block of 140th St., Surrey, B.C.
- Condition 9: You must not possess any tools or instruments capable of use for criminal activity, including pry bars, screwdrivers, bump keys, bolt cutters, pliers, blow torches, grinders, night vision goggles, slim jims, or lock picks.
- Condition 10: You must not leave the Hope for Freedom Society facility unless you are in the immediate presence of a staff member of the facility or you have the written permission of your bail supervisor. Such permission is to be given only for compelling reasons.

[62] In addition to these conditions, you will be released on your promise to pay \$1,000 if you fail to comply with a condition of this order.

"MacNaughton J."

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