
CANADA / JUDGMENT

R. v. Berlinguette

2020 BCSC 477

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 477 R. v. Berlinguette

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Berlinguette,

2020 BCSC 477

Date: 20200325

Docket: 30540W

Registry: Vancouver

Regina

v.

Rene Eric Berlinguette

Before: The Honourable Mr. Justice Riley

(In Chambers)

Oral Reasons for Judgment

Counsel for the Crown:

R. Flannigan

Counsel for the Accused:

D. Melville

Place and Date of Hearing:

New Westminster, B.C.

March 24, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 25, 2020

Introduction

- [1] Mr. Berlinguette is before the court for a 90 day bail review. On 3 December 2019, he was detained on a number of outstanding charges, on three separate Informations, by the Weatherly P.C.J. in Surrey. He has been in custody now for more than 90 days, the 90 day mark having passed on 2 March 2020, and is therefore entitled to a review of his detention under s. 525 of the Criminal Code, R.S.C. 1985, c. C-46 [Code].

The Allegations

- [2] The allegations as recounted by the Crown at Mr. Berlinguette's original bail hearing can be summarized as follows. There were three separate sets of charges, which I will deal with in chronological order.

Information 231901

- [3] First, there are the charges on Surrey Information 231901. At the time of the initial bail hearing there were 13 counts on this Information. The charges have since been amended and there are now 15 counts.
- [4] Counts 1 and 5 involve allegations of fraudulent use of a credit card and fraud between 17 September 2018 and 1 October 2018. It is alleged that the credit card of an Ontario-based business was used fraudulently to purchase a total of \$2398 in merchandise, firearms and firearms-related items from an internet vendor of firearms and firearms components. Those items were purchased over the internet and delivered to an address in Langley, British Columbia, an address previously known by the police to be that of Mr. Berlinguette. The police later obtained other evidence linking Mr. Berlinguette to the credit card transactions, during the search of the Langley residence as described below.
- [5] The remaining counts on Information 231901 (counts 2-4, and now 6-15) are allegations that on 16 October 2018, Mr. Berlinguette unlawfully possessed a number of items of contraband, stolen credit cards, identity documents, credit card forgery equipment, stolen mail, illegal firearms, ammunition, and firearms accessories. All of these counts arise from the search of a residence in Langley pursuant to a warrant on 16 October 2018. Mr. Berlinguette was present in the residence and was arrested when the police attended. The residence was occupied by Mr. Berlinguette and two other people, but at the bail hearing Crown counsel recounted a body of circumstantial evidence linking Mr. Berlinguette to (a) a room where some of the contraband was found, and (b) circumstantially, to the contraband items found

in other locations in the house. Among other things there was DNA from Mr. Berlinguette on at least one of the items of contraband, which was in fact one of the items allegedly purchased from the internet firearms vendor referred to above. Mr. Berlinguette's fingerprints were also located on a notebook containing names and other personal information from credit cards. Again, this is just some of the circumstantial evidence linking Mr. Berlinguette to the credit card fraud offences and other contraband which is the subject of the charges.

- [6] Mr. Berlinguette was arrested on these charges on 16 October 2018 and at the time of his arrest he was on a conditional sentence order for a prior offence, one of fraud. He was held in custody until I believe November of 2018.
- [7] Mr. Berlinguette was next before the court in January 2019, when he was charged with and found guilty of a breach of probation offence for failing to report to a bail supervisor in December 2018.

Information 236307

- [8] The next substantive set of charges is on Information 236307. There are three counts on that Information, all from 8 May 2019. It is alleged that on that date Mr. Berlinguette used a stolen credit card, and was in possession of stolen property that had been taken from a residence in Langley.
- [9] A family member went to check that the home of her parents in Langley was secure while they were away. She found that the house had been broken into, with the front door kicked in and thousands of dollars of property stolen. The matter was reported to the police. Mr. Berlinguette was identified in surveillance video using credit cards stolen from that residence at a coffee shop and a liquor store.
- [10] On the basis of that the police obtained a warrant for Mr. Berlinguette's residence, and searched it on 15 June 2019. They located the clothing Mr. Berlinguette was seen to be wearing in the surveillance video. They also located various items in the house which may or may not be contraband and no charges have been laid against Mr. Berlinguette in relation to those things.

Mr. Berlinguette's Arrest

- [11] On 15 October 2019, Mr. Berlinguette was arrested on a warrant of first instance on all of these matters, that is, on Information 231901 alleging the offences in September to October 2018, and on Information 236307 alleging the fraud offences in May 2019.

Information 84603

- [12] At the time of the original bail hearing on 3 December 2019, Mr. Berlinguette was also facing charges in relation to Information 84603. In particular, Mr. Berlinguette was charged with three separate breaches of probation. Subsequent to the bail hearing before the Honourable Judge Weatherly, Mr. Berlinguette entered guilty pleas was been sentenced in respect of those breach of probation offences. In particular, on 27 February 2020 Mr. Berlinguette pled guilty in the Provincial Court of British Columbia to three counts of breach of probation and was sentenced to time served with credit given for 25 days in custody, plus probation for two years.

Criminal Record

- [13] At the bail hearing the Crown also tendered a copy of Mr. Berlinguette's criminal record showing that he had multiple convictions for offences including property and fraud offences, resisting arrest, and failure to comply with court orders. Subsequent to the 3 December 2019 bail hearing, there are now three more entries on Mr. Berlinguette's criminal record, for breach of probation, as noted above.
- [14] Mr. Berlinguette is 43 years old. By my count at the time of the bail hearing in the Provincial Court he had 14 prior convictions, from 2002 through to 2019, along with some additional findings on his record for breach of bail and breach of conditional sentence orders.

Crown Submissions at the Bail Hearing

- [15] Crown counsel sought Mr. Berlinguette's detention on the secondary ground as provided for under s. 515(10)(b) of the Criminal Code. That particular subsection says, and this is paraphrasing, that detention is justified where there is a likelihood that if released the accused would endanger the safety of the community by committing further offences.

Submissions of Counsel for Mr. Berlinguette at the Bail Hearing

- [16] Mr. Berlinguette was represented at the bail hearing by counsel, who explained that Mr. Berlinguette was an individual with substance abuse problems. With respect to his background, counsel related that Mr. Berlinguette was then 42 years and had worked in the past as a drywaller.
- [17] Counsel proposed Mr. Berlinguette's release on a recognizance with no deposit and no surety, on conditions requiring him to reside at a particular drug recovery house, called "It's Up to You Recovery Society". That is a non-profit, registered drug recovery facility in Surrey with a program that includes drug testing of residents at regular intervals. Counsel also proposed conditions barring Mr. Berlinguette from possession of computers or electronic devices, a condition intended to address the risk associated with further offences of fraud offences over the computer.

- [18] Counsel pointed out that there were gaps in Mr. Berlinguette's criminal record, indicating that Mr. Berlinguette had some periods of success in the community. Counsel also pointed out that if detained, Mr. Berlinguette would likely remain in custody for some time awaiting trial, perhaps eight months to one year (which I note, parenthetically, would have meant trial dates in December of 2020).
- [19] Counsel asserted that there were arguable issues as to the strength of the Crown's case. With respect to the first set of charges, from October of 2018, counsel asserted that (i) there were arguments about the validity of the search warrant, and (ii) there were triable issues on the merits in terms of the circumstantial evidence linking Mr. Berlinguette to some of the counts. With respect to the second set of charges, from May 2019, counsel simply pointed out that the charges were limited to use and possession of stolen credit cards.
- [20] Counsel for Mr. Berlinguette also made submissions on the applicable legal principles. Counsel cited the ladder principle discussed in *R. v. Antic*, 2017 SCC 27 [Antic] under which the ladder of various bail options must be considered and detention in custody can only be found to be justified where the court concludes that no other less onerous form of release could address the risk the accused might pose if released into the community pending trial. Counsel also relied on *R. v. Myers*, 2019 SCC 18 [Myers] for its discussion of proportionality, that is, the concern that if detained, Mr. Berlinguette could end up spending more time in custody than he would get if convicted and sentenced to serve a jail sentence.

The Learned Provincial Court Judge's Reasons

- [21] The learned Provincial Court Judge gave brief reasons, reviewing the allegations against Mr. Berlinguette and his prior criminal record. The Judge noted that Mr. Berlinguette's criminal record included numerous recent convictions for substantive criminal offences and breaches of court orders. Mr. Berlinguette was on the Provincial Court Judge's view, "uninclined or unwilling" to comply with court orders. The Judge considered Mr. Berlinguette's plan for release, but did not consider it viable in the sense that Mr. Berlinguette would be likely to comply with the terms of any bail order. Moving to his consideration of secondary ground in s. 515(10)(b) of the Criminal Code, the Provincial Court Judge undertook the analysis discussed in *R. v. Abdel-Rahman*, 2010 BCSC 189 at para. 23, identifying a risk that Mr. Berlinguette would commit further offences, determining that it was a substantial risk, concluding that there was a consequential danger to public safety, and finally concluding that the danger could not be prevented or reduced to an acceptable level by bail terms.

Subsequent Developments

- [22] There have been a number of developments since Mr. Berlinguette's initial bail hearing on 3 December 2019. I would put those developments into five categories, those being: (1) Mr. Berlinguette's guilty pleas and sentencing on three counts of breach of probation, (2) developments with respect to scheduling of trial dates, (3) developments with respect to Mr.

Berlinguette's release plan, (4) Mr. Berlinguette's conduct and progress while in custody, and (5) recent developments with respect to the COVID 19 pandemic. I will discuss each of these points in further detail in my analysis below.

Analysis

- [23] The leading case dealing with s. 525 of the Criminal Code is *Myers*, in which the Court explained that the purpose of the 90 day bail review is to prevent accused persons from languishing in custody pending trial and to ensure matters are tried promptly. The court went on to set out a number of principles to be applied by a judge presiding over a s. 525 bail review hearing, which I would summarize as follows.
- [24] First, the reviewing judge may consider the transcript of bail proceedings, reasons given by the first instance decision maker, and additional credible and trustworthy evidence that is made available since the initial bail hearing. In this case I was furnished with the transcript from the 3 December 2019 bail hearing, the reasons for judgment of the Provincial Court Judge, copies of the Informations, and an updated copy of Mr. Berlinguette's criminal record. I was also advised of various developments in the case through submissions of counsel, which I consider to be an entirely appropriate manner of proceeding in this particular case. I note that there were no factual disputes between the parties regarding any of the new information provided to me by either counsel, although Crown counsel did express concern about not having enough time to properly enquire into and vet the party with whom Mr. Berlinguette now proposes to reside if released, an issue which I will return to later.
- [25] Second, the reviewing judge should show respect for any findings of fact made by the first level decision maker unless some cause has been shown to interfere with them.
- [26] Third, the overarching question is whether the continued detention of the accused in custody is justified as contemplated in s. 515(10) of the Criminal Code, which sets out three bases for detention. Those are: (1) to ensure attendance at trial per s. 515(10)(a), (2) to protect safety of the public as contemplated in s. 515(10)(b), and (3) to maintain confidence in the justice system per s. 515(10)(c).
- [27] I will pause here to make the following observations about s. 515(10) of the Criminal Code and the bail system in the Criminal Code in general. The case law dealing with judicial interim release recognizes the importance of the presumption of innocence, which continues to operate unless and until an accused person is proven guilty at trial or admits guilt by pleading guilty: *Antic* at para. 66; *Myers* at para. 1, 22. The case law also makes it clear that the system favours release at earliest possible opportunity, with detention only being justified where the bail risks set out in s. 515(10) cannot be met or properly managed on conditions that are less onerous than detention. There is in effect a bail ladder, where the court must consider what level of supervision is necessary to address all the relevant bail risks, and the accused must be released on the least onerous terms that will achieve that

result. It is only where those risks cannot be properly managed by some bail arrangement short of detention that the accused's detention in custody is justified: Antic at para. 44; Myers at para. 56.

[28] Finally, I will return to my summary of the principles in Myers and conclude with the following direction from that case. In deciding the overarching question of whether continued detention is justified under the grounds set out in s. 515(10), reviewing judge should consider (i) any new evidence or change in circumstance, (ii) impact of the passage of time and any unreasonable delay on the proportionality of detention, and (iii) the rationale offered for the initial detention: Myers at para. 63. I will address each of these points in turn.

(i) New Evidence, Changes in Circumstances

[29] As noted above, there have been a number of developments since the initial bail hearing in this matter on 3 December 2019.

[30] First, there is Mr. Berlinguette's guilty plea and sentencing for three counts of breach of probation. Mr. Berlinguette received a sentence of time served with credit for 25 days in custody, to be followed by probation upon release. This development does not enure to Mr. Berlinguette's benefit. It only adds to his history of failure to comply with court orders.

[31] Second, with regard to scheduling, Mr. Berlinguette's outstanding substantive charges have been scheduled for trial. In respect of Information 231901, the allegations from September and October 2018, these matters are now set for trial commencing 9 February 2021, for 12 days, in the Provincial Court of British Columbia. In respect of Information 236307, offences alleged to have been committed in May 2019, those charges are set for trial on 9 March 2021, again for 10 to 12 days, in the Provincial Court of British Columbia. In respect of both sets of dates, Crown counsel advises that when the dates were set, counsel for Mr. Berlinguette indicated he was not available for trial until January of 2021 at the earliest. In one of the matters, it is clear that dates were offered in September of 2020 but those dates were declined by defence counsel. I note that at the time of the initial bail hearing, the Provincial Court Judge was told that if detained Mr. Berlinguette would most likely remain in custody for nine to 12 months awaiting trial. That would have meant Mr. Berlinguette would have been in custody until December of 2020. As things have unfolded, trial dates have been arranged for February and March of 2021. This is some two to five months longer than the Provincial Court Judge was led to believe would be the case, but it appears that the principal reason for the added delay was the availability of counsel for the accused. That situation is not really under the control of anyone other than Mr. Berlinguette and his counsel. So, this is a development, but it is not a development that can be laid at the feet of the Crown or the court system. Still, it is a reality, and the duration of Mr. Berlinguette's anticipated detention is something that must be considered in assessing the issue of proportionality of detention, which I will address in more detail under a separate heading below.

- [32] Third, with respect to Mr. Berlinguette's release plan, counsel advises that things have changed. Mr. Berlinguette now proposes that he be released on a recognizance with a \$2,000 cash deposit. With regard to where he will reside if released, Mr. Berlinguette now proposes to reside with his brother Albert Berlinguette, at an address in Aldergrove. Counsel for Mr. Berlinguette says that release to a drug recovery facility is no longer an option because the drug recovery facilities are not presently inclined to accept new residents in light of the emerging COVID 19 public health crisis. Be that as it may, the fact is that that whereas Mr. Berlinguette originally proposed release to an arm's length, accredited facility with a formal drug screening program, he now proposes release to the private residence of a family member. Counsel says the release plan involves a significant step up because of the \$2,000 cash deposit. That is debatable. Cash bail is, in my view, most useful in addressing primary ground concerns about risk of flight. Cash bail is much less useful in addressing concerns about the secondary ground, that is, risk to public safety. In this case the Provincial Court Judge was told that Mr. Berlinguette had a substance abuse problem and that the associated risk could be addressed by way of release to a residential recovery facility. The Provincial Court Judge was not satisfied that the risk could be appropriately managed given the seriousness of the recently accumulated allegations against Mr. Berlinguette and his history of non-compliance with court orders. The new release plan does not, in my view, represent a material step forward in terms of addressing that risk.
- [33] The fourth development relates to Mr. Berlinguette's status and conduct while in custody. I am told that while in custody he has participated in an NA or AA program and that he has recently acted as a co-facilitator at meetings. This is indeed a very positive step and something that weighs in Mr. Berlinguette's favour. As to whether it tips the balance in favour of release, I will return to that point later.
- [34] The fifth and final development that has been addressed by counsel is the emerging crisis with respect to the global pandemic, COVID 19. The COVID 19 pandemic has required swift and drastic action in the curtailment of normal operations by many different sectors of society, including public institutions like the court system. Both the Provincial Court and the Supreme Court of British Columbia have issued notices suspending normal court operations for a period of time. These scheduling developments have no immediate implication for Mr. Berlinguette's cases, because his matters were set for trial in February and March of 2021 and those dates remain. But these developments are an indication of the significant impact that the COVID 19 crisis has had on all segments of society and all institutions.
- [35] Insofar as COVID 19 is concerned, I have also been provided with the decision in *R. v. J.S.*, 2020 ONSC 1710, in which J.M. Copeland J. at para. 18-19 expressed concern about the elevated risk to detained persons being held in a confined space. The Court noted that one of the main strategies advocated by public health officials to combat the spread of COVID 19 is social distancing and self-isolation, a strategy which is problematic in institutions where inmates do not normally have single cells. I acknowledge the logic behind that concern, but on the other hand I have been provided with some information to indicate that those

responsible for the administration of pre-trial detention facilities in this province have specific measures in place to monitor and address COVID 19 risks.

- [36] The J.S. decision addressed the implications of the coronavirus specifically in the context of the tertiary ground in s. 515(10)(c) of the Criminal Code. That particular provision is concerned with situations in which bail can justifiably be denied based on the need to maintain public confidence in the administration of justice. The Court in J.S. was satisfied that there was an independent basis for revisiting the finding that the accused's detention was required to maintain public confidence, namely a material change in circumstance based on the availability of new sureties, and then also took into account concerns about COVID 19 in the custodial setting in Ontario.
- [37] I consider myself obliged to take Mr. Berlinguette's submissions on the COVID 19 situation into account in considering how it may impact on the health concerns of a detained accused as explained by the Court in Myers at para. 27. However, on the record placed before me in this particular case I do not find that the COVID 19 concerns tip the scale so as to affect the result, one way or the other, so I will not say any more about it.

(ii) Passage of Time, Delay, Proportionality of Detention

- [38] As things presently stand, Mr. Berlinguette will remain in custody on one set of charges until his trial in February of 2021 and on the other set of charges until his trial in March of 2021. This is, as noted, some two to five months longer than the learned Provincial Court Judge was given to believe, based principally on the availability of counsel for Mr. Berlinguette. If this qualifies as delay, it is not delay that is attributable to the Crown or to the court system. It is a delay that would appear to be primarily under the control of Mr. Berlinguette or his counsel. It seems to me that Mr. Berlinguette and his counsel might have had options to secure earlier dates. Counsel might have tried to adjourn out of custody matters to free himself up. Or Mr. Berlinguette might have gotten other counsel to act for him. As I say, none of this was really in the control of anyone other than Mr. Berlinguette or his counsel.
- [39] Leaving aside the reason for the delay, it is still necessary to consider the effect of the detention and how it impacts on the question of proportionality. The concern is whether Mr. Berlinguette, who is presumed innocent, will end up spending time in custody that approximates the amount of time he would spend in custody if ultimately convicted and sentenced to jail terms.
- [40] On the one hand, Crown counsel says that if Mr. Berlinguette were convicted after trial, it is anticipated the Crown would seek a federal penitentiary sentence for the most serious charges on Information 231901, and a consecutive sentence for the charges on the other Information, 236087, because those are separate offences with an intervening arrest. On the other hand, counsel for Mr. Berlinguette cites R. v. Robertson, 2020 BCCA 65 as a case where an offender received an 18 month jail sentence for firearms and property offences that, counsel says, were roughly comparable to the most serious charges facing Mr. Berlinguette.

Counsel stresses that Mr. Berlinguette is presumed innocent, and his submissions here are made solely for the purposes of demonstrating that Mr. Berlinguette's pre-trial detention would be, in his submission, disproportionate to the seriousness of the charges. It is submitted that with credit for time spent in custody, Mr. Berlinguette may end up spending more time in custody than he would if convicted of the most serious charges.

- [41] It is no simple task to assess what sentence Mr. Berlinguette, who is presumed innocent of all the charges against him, would receive if convicted. The most I can say is that there is an argument that on the most serious set of charges, he could receive sentences ranging from 18 months to more than two years. Looking at the Robertson decision, in my view the allegations in Information 231901 against Mr. Berlinguette are on their face more serious, and Mr. Berlinguette's criminal record is arguably more significant, than was the case in that matter. In any event, there is, of course, another set of charges which are not inconsequential, in respect of which Mr. Berlinguette may well be liable to receive consecutive jail sentences, on top of or in addition to the sentence he would likely receive if convicted on the first set of charges. At the end of the day, my conclusion is that in this particular case, given the seriousness of the charges, the fact that Mr. Berlinguette was actually serving a conditional sentence at the time of the first set of charges, and his criminal record, I cannot conclude that the amount of time Mr. Berlinguette will spend in pre-trial custody approximates or exceeds that which he would serve if convicted and sentenced to jail terms on the most serious charges he is facing. Proportionality is a consideration but it does not tip the balance in favour of release.

(iii) Rationale Offered for the Initial Detention

- [42] The learned Provincial Court Judge determined that Mr. Berlinguette's detention was necessary for the protection or safety of the public as contemplated in s. 515(10)(b) of the Criminal Code. Although concise, it is clear that the Provincial Court Judge's analysis was conducted under the framework articulated by Halfyard J. in *R. v. Abdel-Rahman*, 2010 BCSC 189 at para. 23. The Provincial Court Judge concluded that there was a risk to public safety associated with Mr. Berlinguette's release, the risk was of such a magnitude to constitute a "substantial likelihood", the risk posed a danger to public safety, and detention was necessary because the risk could not be managed or reduced to an acceptable level by the imposition of bail conditions. There has been no suggestion that the Provincial Court Judge committed any error or law or principle in reaching that conclusion, a conclusion to which deference is owed.
- [43] Indeed, in my respectful view the Provincial Court Judge's conclusion was entirely reasonable in light of the seriousness of the allegations against Mr. Berlinguette and his prior criminal record. While serving a conditional sentence in the community, Mr. Berlinguette was arrested and later charged with a collection of serious fraud and firearms-related offences. After spending a number of months in custody in connection with the breach of his conditional sentence, Mr. Berlinguette was released again and was then charged with another set of fraud offences. Mr. Berlinguette also has a criminal record with

multiple convictions for failure to comply with court orders. There is indeed a notable gap in Mr. Berlinguette's criminal record from 2006 to 2015, but the Provincial Court Judge was correct in observing that from 2015 through to 2019 Mr. Berlinguette has repeatedly and consistently been in trouble with the law. In these circumstances, the Provincial Court Judge was justified in concluding that Mr. Berlinguette's release posed an unacceptable risk to the safety of the community, and that the risk could not be appropriately managed given Mr. Berlinguette's demonstrated history of being uninclined or unwilling to abide by court orders.

[44] In terms of whether continued detention is justified, in my view the situation has not changed significantly since Mr. Berlinguette was initially detained on 3 December 2019. There continues to be a substantial risk that if released Mr. Berlinguette will commit further offences that would pose a risk to the safety of the community, which risk is not manageable by any conditions that could be imposed as part of a bail order. Mr. Berlinguette is not in a materially better situation now, as far as the bail risks he poses, than when he was when initially detained. He has been attending and co-facilitating a drug counselling program, which is a positive. However, Mr. Berlinguette's release plan, though different, actually offers less assurance than the plan found by the learned Provincial Court Judge found to be insufficient in addressing the risk to public safety associated with release.

[45] For all of those reasons, I conclude that Mr. Berlinguette's continued detention is required under the aforementioned provisions of the Criminal Code.

"Riley J."

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