
CANADA / JUDGMENT

R. v. Carlson

2020 BCSC 1918

COURT

Supreme Court of British Columbia

DECIDED

1 December 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Carlson,

2020 BCSC 1918

Date: 20201201

Docket: 70598

Registry: Chilliwack

Regina

v.

Paul Allan Carlson

Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

Counsel for the Crown:

B. Kozulin

The Accused, Appearing by Video:

P.A. Carlson

Place and Date of Hearing:

Chilliwack, B.C.

November 30, 2020

Place and Date of Judgment:

Chilliwack, B.C.

December 1, 2020

Introduction

[1] This is a ruling on a preliminary point in a habeas corpus matter under s. 774 of the Criminal Code. The applicant, Mr. Carlson, wishes to be personally present at his habeas corpus hearing, set for 7 December 2020. The Crown respondent submits that Mr. Carlson's personal attendance in court is not required, and that Mr. Carlson should appear by video. The Crown says this for two reasons. First, the Crown says that appearance of a prisoner by video is, in this day and age, tantamount to a personal appearance. Second, the Crown says that if Mr. Carlson is brought to court in person, this poses serious concerns about his potential exposure to COVID-19 and the risk that this could create for the rest of the inmates in the institution where Mr. Carlson is being held.

Analysis

- [2] The relevant provision of the Criminal Code is s. 774.1, which states that, "Despite any other provision of this Act, the person who is the subject of a writ of habeas corpus must appear personally in court". The question is what does the phrase "must appear personally in court" mean, and more specifically whether this phrase can be interpreted to include a prisoner's virtual appearance by video.
- [3] Before addressing that question I will briefly discuss the nature of habeas corpus proceedings and the manner in which they have traditionally been dealt with by courts under what is now s. 774 of the Criminal Code. As the Court of Appeal explained in *R. v. Gustavson*, 2005 BCCA 32 [Gustavson], historically such proceedings were dealt with in two stages. At the first stage, the Court was basically required to decide as a threshold question whether there was any merit whatsoever to the prisoner's application such as to justify the issuance of a writ of habeas corpus requiring the jailor to bring the prisoner before the court. The second stage involves the hearing on the merits of the application, in effect to decide whether the prisoner should be released.
- [4] The specific issue in *Gustavson* was whether the prisoner had a right to participate in the first stage of the hearing process. The Court held that the prisoner did have such a right, though the first stage of the hearing did not necessarily require that the prisoner be physically present before the court. The Court went on to explain that where satisfied that there is a basis for hearing the merits of the application and a writ of habeas corpus is issued by the court, s. 774.1 of the Criminal Code applies and the prisoner must be brought to court in person for the second stage of the process.

- [5] After the Court of Appeal handed down its decision in *Gustavson*, Associate Chief Justice Dohm of the Supreme Court of British Columbia issued a memorandum dated 12 February 2005 clarifying the procedure for habeas corpus proceedings in this Court. The memorandum states that in the wake of the *Gustavson* decision, "all habeas corpus applications will now be dealt with in one application at which both the Crown and the inmate will be present". What this means, as I understand it, is that as a matter of procedure in British Columbia, the two stages of the habeas corpus process have effectively been "collapsed" into a single hearing. And, because the hearing will involve a determination of the merits, the prisoner is required to be present. The memorandum goes on to state that "where video conferencing facilities are available, arrangements should be made for the Inmate to appear by that means".
- [6] I should say that after the hearing of this matter was concluded, a separate document entitled "Habeas Corpus Information Sheet", which is accessible to the public via the Court's website, was brought to my attention. This Information Sheet includes a description of the process for arranging the attendance of prisoners on habeas corpus applications. I will address the implications of this document below.
- [7] In the case before me, the Crown relies on Dohm A.C.J.'s memorandum to say that the Court has countenanced video appearances as being in compliance with the requirement in s. 774.1 of the Criminal Code that the prisoner must "appear personally in court". I cannot agree with that submission. I say that for two reasons.
- [8] The first reason why I cannot accept the Crown's interpretation is that the language in Dohm A.C.J.'s memorandum is, in my view, more open-ended than Crown counsel suggests. The memorandum states that "where videoconferencing facilities are available", arrangements "should be made" for the prisoner to appear by that means. Thus, as I interpret it, there is a preference for a process whereby the prisoner appears by video. Certainly efforts should be made to proceed in that fashion where appropriate. In practice, what this means is that where video equipment is available, and video appearance is feasible for both the court and the institution where the prisoner is being held, and where the prisoner is content or willing to appear by video, that is the preferred manner of proceeding. This is not to say that where the prisoner wishes to assert his right to be present in court in person, that wish can be overridden by the guidance offered in Dohm A.C.J.'s memorandum.
- [9] This view appears to be supported by the "Habeas Corpus Information Sheet", which is accessible on the Court's website, and includes the following under the heading "Attendance of Applicant":

An applicant who files an application for habeas corpus has a right to be present when his or her application is heard. Unless both the applicant and Crown consent or the court otherwise orders, the applicant must attend the hearing of the habeas corpus application in person in the courtroom or by videoconference.

Where an applicant is represented by counsel, counsel for the applicant must advise Supreme Court Scheduling as to the manner by which the applicant intends to appear (i.e., videoconference or in person). Once the manner of the applicant's appearance has been communicated to Supreme Court Scheduling, the registry will prepare the necessary documents to facilitate the applicant's appearance on the hearing date.

Where an applicant is self-represented, the registry will prepare the necessary documents to facilitate the applicant's physical appearance in the courtroom for the hearing unless the accused advises Supreme Court Scheduling that he or she wishes to attend the hearing by video conference. [emphasis added]

The underlined portion makes it clear that the prisoner has the right to appear in person, and indeed will be brought to court for the hearing unless the he or she requests to appear by video.

[10] The second reason I cannot accept the Crown's approach is that as a question of statutory interpretation the Criminal Code now draws a rather clear distinction between personal appearance in court and appearance by video. There are many references in the Criminal Code to appearance by video. Many of these provisions treat appearance by video as option, or alternative, or permissible exception to personal appearance in the particular circumstances where those provisions apply. Consider, for example, the requirement in s. 650 of the Criminal Code that the accused be "present in court" during the whole of his or her trial, and the exceptions to that rule as set out in s. 650(1.1) and (1.2). Where those exceptions do not apply, and none of the other relevant exceptions in the Criminal Code apply, the accused must be personally present in court for his or her trial. I appreciate that in *Gustavson* the Court of Appeal reasoned that s. 650 of the Criminal Code has no application to habeas corpus proceedings, and I obviously accept that. My point here is that as a matter of statutory interpretation the Criminal Code clearly recognizes personal appearance in court and appearance by video as two separate things. I must consider Parliament's approach to these two concepts when interpreting the phrase "must appear personally in court" in s. 774.1 of the Criminal Code.

[11] The Crown also relies on *R. v. Panton-Sawyers*, 2020 ONSC 2881 where, in the context of a habeas corpus proceeding under s. 774, Dambrodt J. held that on the facts of that case s. 774.1 created "no bar to proceeding" with the habeas corpus application with the accused appearing by video. In reaching that conclusion, Dambrodt J. also stated, "In 2020, virtual presence in a courtroom must be seen as the functional equivalent of a personal appearance". In many respects that may be true, but as I have pointed out above, in many parts of the Criminal Code Parliament has treated personal appearance in court and appearance by video as two different concepts.

[12] In any event, I think it is fair to say that the situation in *Panton-Sawyers* was materially different than the situation before me, in at least two relevant respects.

- [13] First, Dambrodt J. pointed out that the applicant in the case before him was not only pursuing a writ of habeas corpus, but also other forms of prerogative relief including certiorari. Thus, Dambrodt J. reasoned that "the relief sought would be available on certiorari, and there is no requirement that an applicant for certiorari appear personally in court for the hearing".
- [14] Second, and probably more importantly, the applicant in Panton-Sawyers (who was represented by counsel) actually consented to appearing by video, or at least conceded that appearance by video was an acceptable manner of proceeding in that case. While s. 774.1 says the person who is the subject of a writ of habeas corpus "must appear personally in court" for his or her hearing, I am not aware of any law that says the prisoner cannot waive that right, by consenting or agreeing to appearance by video.
- [15] In many if not most instances, the prisoner will prefer to participate by video, since it is often more convenient for the prisoner to appear in court by video from the institution, instead of being transported from the institution to the courthouse. These practical considerations might be of particular interest in the current environment where, due to COVID-19 procedures within jail facilities, prisoners who are taken out of the institution for the purposes of court are often required, upon their return to the institution, to be quarantined or held in semi-isolation for a period of time in order to protect other inmates from potential exposure.
- [16] That brings me back to the case at bar. Here, Mr. Carlson does not consent to appear by video. He has expressly asserted his statutory right under s. 774.1 to appear personally at the hearing of his habeas corpus matter. Indeed, at the video hearing of the preliminary argument before me, Mr. Carlson confirmed that he was prepared to accept the risk that, if returned to the institution following his habeas corpus hearing, he could be screened for COVID-19 and, if determined to be necessary, subjected to isolation procedures.
- [17] The Crown also says there is no justification for requiring Mr. Carlson's personal attendance in court, because in the Crown's submission there is no merit in his habeas corpus application. However, the Crown confirmed that this matter has been set up to be heard under the "one-stage" procedure as described in Dohm ACJ's memorandum dated 21 February 2005. Thus, I am not concerned today with any threshold assessment of the merits. That will be dealt with at the hearing of Mr. Carlson's habeas corpus application, at a one-stage hearing to take place on 7 December 2020.
- [18] The final point I will deal with is the concern about COVID-19. Crown counsel referred me to various practice directives and Court notices to the public directing changes to court procedure during the COVID-19 crisis. None of those practice directives or court notices state that personal attendances in court will not be allowed even where they are required by law.

- [19] Concerns about COVID-19 are legitimate and indeed very serious. Certainly every effort should be made by the courts to account for, accommodate, and mitigate risks associated with the pandemic. This includes limiting personal appearances to situations where they are absolutely necessary or required by law. On my interpretation of s. 774.1 of the Criminal Code, Mr. Carlson's personal attendance in court is required by law, unless he waives his right to attend in person by consenting or agreeing to appear by video.
- [20] There is always the possibility that things could change on the ground between now and the date of the habeas corpus hearing, although that is now only six days away. If a true emergency arose, such that prison officials determined that it was somehow impossible to bring Mr. Carlson to court personally for the hearing, then the presiding judge would obviously have to decide what to do. It may be that when forced to choose between adjourning his hearing to allow for a personal appearance, or proceeding by video, Mr. Carlson would choose the latter. Or it may be that Mr. Carlson will change his mind and consent to appearing by video in order to avoid a risk of quarantine upon his return to the institution. However, as things presently stand, he wishes to appear in person, and he has that right.

Conclusion

- [21] I order that Mr. Carlson be brought to court in person for the hearing of his habeas corpus application on 7 December 2020.

"Riley J."

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Prepared on 25 October 2026 · Esheria