

CANADA / JUDGMENT

R. v. Frederickson

2022 BCSC 1598

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Supreme Court of British Columbia

DECIDED

17 August 2022

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2022 BCSC 1598 R. v. Frederickson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Frederickson,

2022 BCSC 1598

Date: 20220817

Docket: 33458W

Registry: Vancouver

Regina

v.

Lawrence Peter Frederickson

Before: The Honourable Mr. Justice Riley

On judicial review from: Provincial Court of British Columbia, April 27, 2022

(R. v. Frederickson, Surrey Docket 245436-5KB & 248671-1)

Oral Reasons for Judgment

Detention Review Hearing

Counsel for the Crown:

N.M.D. Reithmeier

Counsel for the Accused:

J.A. Percival

Place and Date of Hearing:

New Westminster, B.C.

August 17, 2022

Place and Date of Judgment:

New Westminster, B.C.

August 17, 2022

- [1] THE COURT: This is a ruling on a bail review under s. 525 of the Criminal Code. The accused was ordered detained by the Honourable Judge Wingham of the Provincial Court of British Columbia, in Surrey, on 27 April 2022. At that time Mr. Frederickson was facing two sets of charges. One set of charges relates to what I will call the dangerous driving incident. The Crown now advises that those charges are being prosecuted summarily. The other set of charges is for breach of probation and bail orders. I understand that those charges are also proceeding summarily.
- [2] Mr. Frederickson has now been in custody on these matters for four months. No trial dates have been set. This is of significant concern to the court, both in terms of supervising Mr. Frederickson's custodial status under s. 525 and, more generally in terms of seeing that criminal proceedings are dealt with as expeditiously as possible. Of course, the central question that has to be decided by me at this stage is whether Mr. Frederickson's continued detention is justified, despite the passage of more than 90 days in custody without having had a trial.

Facts

- [3] I will first review the allegations against Mr. Frederickson, as reflected in the transcript of the proceedings in the Provincial Court. I should say that these are mere allegations at this point and Mr. Frederickson is presumed innocent of the charges until the Crown proves them at trial.
1. The Dangerous Driving Charges
- [4] In terms of the dangerous driving charges, the allegations relate to incidents that occurred on 14 April 2022. A police officer in an unmarked vehicle saw a white Chevrolet Monte Carlo, checked the plates, and determined that they did not match the vehicle. The evidence is clear that Mr. Frederickson was the driver of the Monte Carlo, as he was later stopped and was the driver and sole occupant. A marked police vehicle endeavoured to stop Mr. Frederickson in the Monte Carlo, but Mr. Frederickson sped away or drove away. The unmarked police vehicle then re-established surveillance and recruited officers in other vehicles, and a police helicopter, to aid in stopping the Monte Carlo. The police deployed a spike belt. Mr. Frederickson drove over or around it - as a result of which I believe at least one tire would have been punctured - and he then began driving erratically.

- [5] The pattern of dangerous driving over at least a five-minute duration was caught on video and recorded by the police helicopter. Basically, Mr. Frederickson drove at high speed (considering the tire damage), drove into oncoming traffic on the wrong side of the street on multiple occasions, drove on the sidewalk for at least two blocks, and ultimately ran the Monte Carlo into two other civilian vehicles before a police cruiser executed some kind of contact maneuver to stop it. There were no injuries reported by the occupants of the other vehicles, although there was damage and I believe the airbags were deployed on at least one vehicle.
- [6] As I say, Mr. Frederickson was the driver and sole occupant when the Monte Carlo was stopped. He appeared to be a bit stunned, but there is no evidence of impairment or drug use. When advised of his Charter rights and warned at the scene, Mr. Frederickson said it was a terribly stupid thing to do and also mentioned that he thought the police were not allowed to get into high-speed pursuits, or words to that effect.
- [7] That incident happened on 14 April 2022 and Mr. Frederickson has been in custody ever since then. I should repeat, as I mentioned a few minutes ago, under our law Mr. Frederickson is presumed innocent, so everything I have just said is merely allegation, as recounted by the Crown at Mr. Frederickson's bail hearing, but the case against Mr. Frederickson is quite overwhelming.
2. Breach of Probation, Breach of Release Order
- [8] By way of background in relation to the breach charges, Mr. Frederickson was sentenced on 17 December 2021 in respect of a number of offences, including obstruction of justice, flight from the police, possession of false identity documents, and breach of prior court orders. He was sentenced to time served, with credit for 165 days of time served. Mr. Frederickson was placed on a probation order for two years. One of the requirements of the probation order was to report to a probation officer upon release and thereafter as directed. There was also a driving prohibition.
- [9] The alleged breach of the probation order is that Mr. Frederickson reported to the probation office one time, but thereafter failed to report again until his next arrest. He was arrested on 18 March 2022 for failure to report to a probation officer. Mr. Frederickson was released at that time on an order requiring him to report to a bail supervisor, and he did not report subsequently, which is the basis for the alleged breach of the terms of the release order. Mr. Frederickson did phone in on the date that he was supposed to report, but he was told by the supervisor to attend in person later that day and he did not do so and did not attend at any point after that, up until the date of his arrest on the driving offences.
3. Prior Criminal Record

- [10] Mr. Frederickson, who is now 41 years old, has what I would characterize as an abysmal criminal record. It lists a total of some 74 convictions over a span of about 19 years. The record includes property offences, breach of court orders, offences of violence, convictions for multiple driving offences (some under the Criminal Code and some under the Motor Vehicle Act), and convictions for flight from police and obstruction of police in the execution of their duties.
- [11] Of greatest concern for present purposes are the driving offences, obstruction and flight offences, and the prior breaches of court orders.
- [12] The driving and flight offences are of concern because those offences put the public at risk, as is evidenced by the kind of conduct underlying the most recent set of charges. Mr. Frederickson has multiple prior convictions for driving while prohibited. The most recent convictions were in relation to offences committed in 2021, so last year. On 17 December 2021, Mr. Frederickson was found guilty of two counts of driving while prohibited, along with a separate count of flight from the police. He was subject to both a three-year driving prohibition and a probation order at the time that he was arrested on the most recent set of driving offences.
- [13] In terms of breaches or offences of failure to comply with court orders, these are of concern because they reflect very poorly on Mr. Frederickson's ability and willingness to abide by court ordered terms intended to ensure his safe release into the community. In the court below, the Crown noted that Mr. Frederickson had a total of some 25 convictions for violating court orders. That certainly does not inspire confidence in terms of his ability and, or willingness to comply with the terms of court ordered release.

4. Mr. Frederickson's Personal Circumstances

- [14] As noted Mr. Frederickson is now 41 years old. He has had a difficult life in some respects. His mother and two siblings have all passed away. Mr. Frederickson's counsel says he has had a significant drug problem in the past, although the particulars were not really fleshed out in submissions.
- [15] Mr. Frederickson has a common law partner who appeared at the bail proceedings in Provincial Court and is supportive of him. They have two children, ages two and 12, but the children are presently not in the care of their mother. I am told they are in foster care because the mother also struggles with substance abuse.
- [16] At the time of his arrest, Mr. Frederickson was living with his father. His father appeared at the bail hearing in Provincial Court and also at the bail review hearing before me today. The evidence is that during the time Mr. Frederickson was living with his father, prior to his most recent arrest, he was helping his father to deal with both his financial obligations and his physical limitations and challenges.

- [17] At the time of his arrest, Mr. Frederickson was actively involved in what is said to be a rather successful demolition business in Surrey. He has a partner in that business and I was told that there are also a number of employees at the business.
- [18] With regard to the circumstances surrounding the most recent set of charges, counsel for Mr. Frederickson explained at the original bail hearing that some or all of the instances where Mr. Frederickson failed to report to his supervisor were due to significant illnesses and hospitalization.
- [19] With respect to the driving charges, defence counsel explained that Mr. Frederickson was driving a vehicle without a proper licence because he knew he was not allowed to be driving and cannot own a car. He was said to be working steadily in the demolition business and motivated to earn money and provide support for his family. Counsel asserted, both at the original bail hearing and in the review hearing before me, that Mr. Frederickson was frustrated because of the difficulty he had in getting to work without be allowed to drive. He made a poor judgment in trying to evade the police rather than stopping when they directed him to do so.
- [20] At the review hearing before me, counsel added by way of further explanation, though admittedly not an excuse, that Mr. Frederickson had a bad history with the police and was fearful of being mistreated, so he tried to evade as opposed to stopping when the police directed him to do so.
- [21] Mr. Frederickson's original release plan, as proposed to the Provincial Court Judge, was to reside with his father under strict terms so he could continue to work and support his father and his family. Mr. Frederickson's father was prepared to make a \$500 cash deposit for his bail.

The Provincial Court Judge's Decision

- [22] In the decision refusing Mr. Frederickson's release, the learned Provincial Court Judge referred to a collection of well-known cases from the Supreme Court of Canada on bail, including *R. v. Antic*, 2017 SCC 27 and *R. v. Myers*, 2019 SCC 18. He noted the importance of the presumption of innocence, the right to reasonable bail, and the significance of the ladder principle under which an accused person should be released on the least onerous terms that are reasonably available in the circumstances.
- [23] The Provincial Court Judge also noted that Mr. Frederickson was in a reverse onus situation under the Criminal Code. The Provincial Court Judge did not cite the applicable provision, but I am told by Crown counsel that it is his understanding the reverse onus would be engaged in Mr. Frederickson's case by s. 515(6)(a) or one of the iterations under sub (6)(a) which deals with a person who has been released on an indictable charge and then finds himself arrested on another indictable charge. The Provincial Court Judge further noted that, despite the reverse onus, the principles about presumption of innocence, the right to reasonable bail, and the importance of the ladder principle continue to apply.

[24] Now, in Mr. Frederickson's case, the Provincial Court Judge agreed with the Crown that Mr. Frederickson's detention was required for the protection of the safety of the community, per s. 515(10)(b), commonly referred to as the secondary ground. In reaching that conclusion, the Judge applied the reasoning in the well-known case of *R. v. Abdel-Rahman*, 2010 BCSC 189, which considers how the existence of risk, the level of risk, and the adequacy of bail measures to effectively manage that risk are to be evaluated. The Provincial Court Judge found that in light of Mr. Frederickson's extensive criminal record, the fact that he had been sentenced and was on probation in December of 2021, and the seriousness of the allegations, there was a risk to the public. The Provincial Court Judge found a substantial likelihood that, if released, Mr. Frederickson would commit criminal offences, and further found that in view of his history of non-compliance with court orders, the risk to the public could not be managed by terms of a bail order. In the Judge's view, the release plan did not address the level of risk that Mr. Frederickson presented, particularly considering his criminal record and his poor track record, as far as non-compliance with the terms of court orders.

Procedural History

- [25] Mr. Frederickson was detained in the Provincial Court on 27 April 2022. Crown counsel has outlined that initial disclosure was made by the Crown on 2 May 2022 and disclosure was substantially completed with materials that were given to Mr. Frederickson's counsel on or about 9 June 2022. The Crown also conveyed its initial sentencing position on 6 May 2022.
- [26] I have been shown the record of proceedings from Provincial Court which reflects that, since his detention on 27 April 2022, Mr. Frederickson has had a total of 10 subsequent appearances in the Provincial Court. Since disclosure was completed in early June, there have been six subsequent adjournments and, as far as I can tell from the submissions of counsel today, they have all been either for counsel to have discussions, or at the request of the defence. No arraignment has taken place, no plea has been entered, and no trial dates have been set.
- [27] More specifically, it is noteworthy that on an appearance in Provincial Court on 22 July 2022, the matter was adjourned to the next date with the adjournment peremptory on the defence to set some kind of a date, for either a plea or a trial, on the next appearance.
- [28] Despite that, on 5 August 2022, the matter was adjourned again. Apparently the reason for that adjournment was to await the results of this bail review, although it seems to me that this approach was counterproductive. Since no trial dates have been set, this court is not in a position to know, with certainty at least, how long Mr. Frederickson would be in custody before his trial takes place. The practice of adjourning a fix date to accommodate a s. 525 bail review is, with respect, counterproductive and ought not to be encouraged.

The Bail Review Hearing

- [29] In the s. 525 review before me, the Crown maintained its position that Mr. Frederickson's detention is required on the secondary ground, to protect the safety of the community.
- [30] For his part, Mr. Frederickson, through counsel, put forward a new release plan. Counsel explained that Mr. Frederickson has now been in custody on these matters for some four months. In that time, he has reflected on his situation and counsel says Mr. Frederickson now recognizes that he has not fully dealt with his drug problem. Counsel did not delve into the details of Mr. Frederickson's particular substance abuse problem, other than to note that he has struggled with addiction and he has now arranged for a place at a residential drug recovery house, Luke 15, in Surrey.
- [31] Materials were filed to confirm that Mr. Frederickson has a spot at Luke 15, and to describe the program itself and its elements. It is proposed that Mr. Frederickson would reside there under virtual house arrest until the charges are dealt with. Counsel says Mr. Frederickson will not be working, but rather focusing entirely on his recovery.
- [32] Counsel submits that Mr. Frederickson will have no reason to drive and does not intend to drive a vehicle in the indefinite future. He intends to respect the driving prohibitions that have been imposed upon him.
- [33] I heard from Mr. Frederickson himself and from his father in the course of the bail review hearing. For his part, Mr. Frederickson says his actions were foolish. He says he was fearful of the police, but he acknowledges that he should not have reacted the way he did. Mr. Frederickson says he wants to focus on his recovery and do his best to help his common law partner to get their children out of care. He does not intend to work while he is dealing with his recovery, and he assures the court that he will no longer be driving a vehicle.

Analysis

- [34] That brings me to the analysis. I am not going to engage in a lengthy review of the applicable legal principles. The leading case is Myers, which sets out the test and the relevant considerations in a bail review under s. 525 of the Criminal Code. The question is whether the continued detention of the accused is justified, taking into account the passage of time since the initial order refusing release.
- [35] The case law also acknowledges that the onus of persuasion or onus of proof at the detention review falls on the party that had the onus at the original bail hearing: R. v. Khan, 2021 BCSC 2668 at para. 12, citing R. v. Tunnillie, 2020 NUCJ 26 at para. 53 to 56.
- [36] Now, in this case, I am going to pause here to note that at this point in time, there is some uncertainty as to whether Mr. Frederickson continues to be in a reverse onus situation. I say that because the provision cited and relied upon by the Crown, s. 515(6)(a)(i), speaks of a person who has been charged with an indictable offence, that is alleged to have been committed while at large or after being released in respect of another indictable offence.

The wrinkle in this case is that Mr. Frederickson was charged with offences that are hybrid in nature. Under the Interpretation Act, R.S.C. 1985, c. I-21, those are deemed to be indictable offences until an election has been made. Often, that would mean such offences would be treated as indictable offences for the purposes of s. 515(6)(a). That would have been the case when Mr. Frederickson was before the Provincial Court Judge at the original bail hearing. However, at this point in time, based upon the submissions of counsel before me, it appears that the Crown will be proceeding summarily on all of the charges against Mr. Frederickson. So, I have some uncertainty about whether this continues to be a reverse onus situation under 515(6)(a)(i), and I am not satisfied that is the case. In these circumstances, I will conduct my analysis on the basis that the onus rests with the Crown to show that Mr. Frederickson's continued detention is required within the meaning of s. 525 and s. 515 of the Criminal Code.

- [37] I also acknowledge the animating principles of the presumption of innocence, the right to reasonable bail, and the importance of considering release on the least onerous terms that are sufficient to address the relevant bail risks as discussed in the case law.
- [38] In Myers at para. 63, the Court directs judges under s. 525 to consider a number of factors, namely (a) any new evidence or change in circumstance since the original hearing, (b) the impact of the passage of time and any unreasonable delay on the proportionality of detention, and (c) the rationale offered for the initial detention.
- [39] In this case, I am going to address the factors in reverse order.
- [40] With regard to the rationale for the initial detention, Ms. Percival for Mr. Frederickson acknowledges that there is no error in the Provincial Court Judge's initial decision ordering Mr. Frederickson's detention. It was well-reasoned. Counsel says it was a reasonable conclusion to reach at the time it was made. Counsel's real focus is on the passage of time and the change of circumstance with respect to Mr. Frederickson's new release plan.
- [41] Now, I should say as an update, with regard to the rationale for the original detention order, Justice Wingham was proceeding on the basis that Mr. Frederickson was in a reverse onus. As I have said a few minutes ago, I am not certain that this continues to be the case in light of the Crown's indication of an intent to proceed summarily on all of the charges against Mr. Frederickson. In those circumstances, I will not be applying a reverse onus in this analysis, and that is a difference between the original decision ordering Mr. Frederickson's detention and the situation as it is now. I will explain how that plays out later in these reasons.
- [42] In terms of the impact of the passage of time, delay, and proportionality of detention, four months have now passed since Mr. Frederickson's arrest. No arraignment has taken place and no dates have been set. That is far too long a period of time when dealing with an accused in custody on relatively straightforward charges, proceeding summarily. I cannot blame the Crown or even the court system for the apparent delay in setting the trial dates in these matters, although of course the ultimate obligation to get the case to trial is on the Crown as the moving party in criminal proceedings. Disclosure has been complete for

months. I have been shown no good reason why hearing dates of some sort have yet to be set. I note that on 22 July 2022, the next date was to be peremptory on the defence setting hearing dates, yet for some reason that did not occur. I also consider that it was counterproductive to delay the setting of dates pending this s. 525 bail review hearing. That should not be encouraged.

- [43] Turning to proportionality of detention, Mr. Frederickson has already spent four months in custody, which would be the equivalent of an effective six-month jail sentence. The maximum penalty for the driving offences, I am told, if prosecuted summarily is two years less one day. I agree with the Crown that, given the seriousness of the allegations against Mr. Frederickson and given his prior criminal history, if he is convicted after a trial, he is likely to receive a substantial jail sentence, perhaps not the maximum but certainly a substantial sentence. I would not be surprised if the sentence on the driving offences were in excess of one year in jail, that is, if Mr. Frederickson is convicted. I appreciate the presumption of innocence, but here I am being asked to engage in a theoretical proportionality exercise. Also, even with the presumption of innocence, the case against Mr. Frederickson on the driving charges could only be considered overwhelming in its strength.
- [44] To return to proportionality, counsel for Mr. Frederickson advises that in Provincial Court, the time between a fix date and trial dates for in-custody accused persons is in the range of two to three months. If Mr. Frederickson had a trial in three months time, at that point he will have spent a total of seven months in custody, which would be the equivalent of 10.5 to 11 month jail sentence after trial. So at this point, this is not a situation where Mr. Frederickson is, in my view, likely to spend more time in custody awaiting trial than if he were convicted and sentenced on the most serious offence that he is facing.
- [45] In terms of new evidence and changes in circumstances, it is relevant that Mr. Frederickson has now spent four months in custody. That in itself is relevant because it could have at least some effect of bringing it home to Mr. Frederickson that if he does not comply with the terms of release, there are significant consequences. Of course, given Mr. Frederickson's criminal record and the fact that he has spent time in custody and been sentenced many times before, these consequences should have been foreseeable to Mr. Frederickson, even before he spent the last four months in pretrial detention.
- [46] Ms. Percival's principal submission is that the new release plan is a significant enough development to warrant a different outcome than the result at the original bail hearing. Counsel emphasizes that Mr. Frederickson has a longstanding drug problem, that over the past four months he has come to recognize he has not yet fully dealt with it, and that the release plan will address that. It will also ensure some supervision over Mr. Frederickson's release. While he will not be in jail, he could be released on terms that would effectively amount to house arrest. He would not have any reason to drive and he assures the court that he will not do so.

- [47] I have given careful consideration to Mr. Frederickson's new release plan. I also take into account what is said by the Supreme Court of Canada in one of the final passages in Myers about the importance and value of a release plan designed to address an accused person's risk factors, that is, the root causes that have led the accused to become involved in alleged criminal activity.
- [48] I accept that releasing Mr. Frederickson to a drug recovery program could have a potential salutary effect for him and for the public at large, in terms of ensuring that he is able to manage his substance abuse problem without further conflict with the law. As Ms. Percival points out, substance abuse can be a longstanding problem and it often takes a long period of determined effort to break the cycle of addiction.
- [49] I also accept that requiring Mr. Frederickson to reside at a drug recovery house would offer at least some form of ongoing supervision that could assist in keeping him out of trouble.
- [50] Having said all of that, it is pretty obvious to me from the circumstances of Mr. Frederickson's arrest, what he said to the police at the time of the arrest, and what both Mr. Frederickson and his counsel said at the initial bail hearing, that substance abuse did not play a significant role in the driving incident that led to Mr. Frederickson's most recent arrest.
- [51] His counsel told the court at the original bail hearing and at the hearing before me that at the time of the incident, Mr. Frederickson was in a period where he had dealt with his substance abuse issues. He was not in the throes of ongoing drug use or a binge of drug use when he got into the car and drove it and then engaged in a very dangerous pattern of driving that put the public at risk. Mr. Frederickson's counsel told the court that Mr. Frederickson was in the car because he was frustrated about being unable to get to work. Mr. Frederickson, knowing that he was prohibited from driving, got in a car and then, when he was identified by the police, made the reckless decision to evade and drive dangerously. There is no evidence from the circumstances of the arrest suggesting ongoing use of drugs, impairment, or an effort to evade the police in order to conceal drugs in his possession. It was really all about Mr. Frederickson making a choice to drive and to evade the police when he was caught driving.
- [52] Mr. Frederickson's conduct on this occasion does not appear to have been an isolated act of bad judgment. He has multiple prior convictions for driving offences. He also has convictions for evading the police. The most recent set of convictions is from last year. Given his history of non-compliance with the terms of probation and bail orders, I do not have any confidence that, if released, he would abide by his bail restrictions.
- [53] In the result, the concerns underlying Judge Wingham's decision denying Mr. Frederickson's release continue to apply now.

- [54] I will say that Mr. Frederickson was dealt with on the basis that he was subject to a reverse onus during that hearing, and I am not convinced that the reverse onus continues to apply. In the result, the onus is on the Crown to show that continued detention is required under s. 525 and s. 515, in view of the purposes of bail discussed in s. 515(10)(a), (b), and (c). I find that this is not a case that is a close call, and it does not turn on onus.
- [55] I am satisfied that continued detention is required. I conclude that detention is necessary on the secondary ground because there is a substantial risk to the safety of the community. The new release plan is not enough to address or overcome the substantial risk to the safety of the community, considering the seriousness of the outstanding charges, and Mr. Frederickson's prior criminal history. In the result, the order that Mr. Frederickson be held in custody pending trial is confirmed.
- [56] Now, as far as the court's supervisory jurisdiction is concerned, I do consider this to be a case where a direction for an expedited trial under s. 525(4)(a) is required. I note Justice Tammen's concern in the Fancello case where the court made a direction for an expedited trial based on an apparent delay of some two months for intake in the Provincial Court. The delay in this case is twice as long, in the context of an accused who is before the court on charges that are proceeding summarily. So, I find it is necessary to make a direction for an expedited trial.
- [57] I have considered whether I should simply make a direction that "the trial be expedited" per the language of s. 525(4)(a), or alternatively whether I should make a more specific direction regarding the timeframe for certain steps in the proceedings. I am reluctant to make a more specific direction out of a concern that it might unduly intrude upon the functions of the Provincial Court. I also take into account that there is another court appearance in the Provincial Court several days from now, and Ms. Percival says it is the general practice for in-custody trials in the Provincial Court to be set two or three months down the road from the fix date. If that happens, and a trial date is set two or three months down the road, there will be no serious risk that continued detention will become disproportionate, for the reasons given above.
- [58] I will, however, make one additional direction, and it is also under s. 525(4)(a). The additional direction is that if a date for trial or disposition of some kind has not been set in the Provincial Court by the 16 September 2022, then arrangements are to be made to have this matter brought back before me at 9:15 a.m. on a date when I am available to hear it for possible further directions or more specific directions under s. 525(4)(a). When I say a date must be set in the Provincial Court by 16 September 2022, I mean a trial or disposition date must be scheduled or put in place by that deadline. I do not mean the trial or disposition hearing must actually take place before that deadline.

[59] To be clear, I am not ordering a further detention review hearing under s. 525(4)(b). I cannot do both, make directions under s. 525(4)(a), and order a further review hearing under s. 525(4)(b). I am simply making directions, and if a date is not set within the next month for Mr. Frederickson's trial or for disposition of the charges before the Provincial Court, then the matter has to come back before me and I will consider making further or more specific directions under s. 525(4)(a) to expedite the trial.

"Riley J."

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