
CANADA / JUDGMENT

R. v. Gallo

2012 BCSC 1364

COURT

Supreme Court of British Columbia

DECIDED

24 July 2012

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2012 BCSC 1364 R. v. Gallo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gallo,

2012 BCSC 1364

Date: 20120724

Docket: 26140

Registry: Vancouver

Regina

v.

Dean Andrew Gallo

Before: The Honourable Madam Justice Fenlon

Oral Reasons for Judgment

Counsel for the Crown (Respondent):

P.J. Stabler

Counsel for the Accused (Applicant):

J.F.C. Bridal

Place and Date of Hearing:

Vancouver, B.C.

July 23, 2012

Place and Date of Judgment:

Vancouver, B.C.

July 24, 2012

- [1] THE COURT: Mr. Gallo is charged with five counts involving fraud and possession of stolen credit cards and personal banking identification information and documents between February 2011 and May 2012.
- [2] One count, the third, is rather different from the rest; it relates to a truck loan Mr. Gallo took out in his own name and subsequently defaulted on.
- [3] A forensic audit conducted by an expert in identity theft and social engineering suggests that the perpetrator of the offences, other than the alleged truck fraud, was a sophisticated computer hacker running a highly sophisticated computer-assisted fraud scheme, including social engineering. Social engineering involves gathering enough personal information about a bank's clients or a person to get past security screening and to manipulate accounts, credit cards, and cheques. In this case it is alleged that occurred in relation to about 50 people, resulting in a loss to the bank and its customers of \$70,000.
- [4] Mr. Gallo was arrested on May 15, 2012, when he was caught using a stolen credit card to reserve a hotel room. On May 29, 2012, he came before His Honour Judge Kitchen, who declined to release Mr. Gallo from custody on the secondary ground set out in s. 515(10) of the Criminal Code which governs judicial interim release. (I may have the date of May 15 wrong. It may be May 12, but nothing turns on that.)
- [5] The learned judge concluded that Mr. Gallo posed a significant danger to the public of reoffending if released and therefore detained him.
- [6] Mr. Gallo is before this Court seeking a review of that decision. The standard of review to be applied at this hearing, based on all of the evidence provided by counsel in the hearing before me, is to determine whether the judge below made an error or whether there has been a change in circumstances or some other reason that makes it unjust for the original order to continue.
- [7] As Barrow J. put it in *R. v. Wilcox*, 2005 BCSC 1785, the applicant has the burden of showing cause, on a balance of probabilities, why the order of the Provincial Court judge should be vacated or varied.
- [8] As the reviewing judge I am required to give due consideration to the initial order, but I am also entitled to exercise an independent discretion. Further, I am entitled to consider any additional evidence and in light of that evidence consider whether the judge who made the initial order erred in law or in principle, or whether it would be unjust not to make the order sought.

- [9] The defence submits that the judge below made two errors: first, in misapprehending that the accused had been arrested for fraud on May 1 and then proceeded to commit another act of fraud on May 12, which error formed the basis of his conclusion that Mr. Gallo was likely to reoffend if released on bail; and second, in failing to give sufficient weight to the absence of any previous history of breaches of bail terms, supervision orders, or probation terms.
- [10] The two errors alleged are related and I will therefore deal with them together. I begin by reviewing those portions of the reasons for judgment in issue, paras. 6 through 8:
- [6] Mr. Gallo was found with a bag that had his identification, stolen identification and credit card information. The police intercepted that and Mr. Gallo was released.
- [7] Two weeks later he was found with other people, but in his pocket was a key that has got the same credit card information as the hard copy information. He also had a computer that has the same information on it. This information is potentially highly dangerous to the public in the amount of loss that can be perpetrated.
- [8] In those circumstances, where he is caught two weeks later in what I have said are overwhelming circumstances, it shows that Mr. Gallo is completely committed to living illegally and perpetrating this credit card scheme. That causes real concern on the secondary ground because first of all, the potential loss to the public and the danger to the public is considerable; and secondly, it shows that if Mr. Gallo was released, once again, he would go right back and do the same thing.
- [11] I do not accept defence counsel's argument that the judge's use of the word released in para. 6 means that the judge mistakenly believed Mr. Gallo had been arrested on May 1 when the bag containing the incriminating identification theft information was seized. A release is as consistent with detention as it is with arrest.
- [12] It is, however, apparent that the learned judge concluded on the evidence before him that Mr. Gallo had, on the May 1 detention, been given notice by the police that he was suspected of fraud and identification theft. If that were so, Mr. Gallo's apparently cavalier use of a stolen credit card about 11 days later, and his continued possession of a flash drive and computer containing electronic versions of the printed information contained in the bag seized on May 1, could justify the conclusion reached by the learned judge at para. 11 of his reasons that it was inevitable that Mr. Gallo would go right back to committing the offence if released.
- [13] The evidence presented in this Court was that Mr. Gallo was one of four people in a truck pulled over by police on May 1. A search of the vehicle was conducted and the bag earlier alluded to seized. Mr. Gallo's truck ownership papers were found in that bag, according to police, but Mr. Gallo denies that he put them there. In any event, on the day of that seizure all four occupants were simply sent on their way. There was nothing in the exchange that occurred that would put Mr. Gallo on notice that he was under investigation for fraud.

[14] The most that can be drawn from that May 1 pullover and release, and Mr. Gallo's continued criminal conduct, is that he did not learn from a somewhat close call. He was certainly not charged, arrested or aware that he was under investigation.

[15] In light of this more fulsome description of what occurred on May 1, did the Crown meet the burden upon it in this case to justify continued detention of the accused?

[16] As set out by Chief Justice Lamer in *R. v. Morales*, [1992] 3 S.C.R. 711:

Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous.

[17] In *R. v. Abdel-Rahman*, 2010 BCSC 189, Halfyard J. went on to say (at para. 23), after quoting Barrow J. in *R. v. Wilcox*:

In my opinion, the decisions that a judge must necessarily make in order to reach the conclusion that detention is justified on the secondary ground, are the following:

- a) First, that there is a risk that the accused will either commit an offence, or will interfere with the administration of justice, if he is released;
- b) Second, that this risk is of such magnitude that it amounts to a "substantial likelihood;"
- c) Third, that the said risk would constitute a danger to public safety (in general, or to a specific victim or witness) if the accused is released; and
- d) Fourth, that the detention of the accused is "necessary," because the identified danger to public safety cannot be prevented or reduced to an acceptable level by bail conditions (such as reporting to authorities, curfew, no-contact, mobility restrictions, sureties or cash bail).

[18] Halfyard J., also quoted Barrow J. in *Wilcox*, wherein he observed that "necessity of detention" meant that even significant risks could not be addressed by strict bail conditions.

[19] Mr. Gallo has been in trouble with the law for similar offences in the past in 2004 and 2005. There is nothing to indicate that he has breached the terms of judicial interim release, supervision or parole in the past. The Crown submitted that, based on the expert opinion, the sophistication of Mr. Gallo's computer skills means that he can easily reassemble the previously stolen and seized identity information and continue to perpetrate fraud.

- [20] The Crown further submits that it would be difficult to impose a prohibition on computer use, given the almost universal presence of computers in homes, public spaces, and business, although Crown conceded that such prohibition orders are commonly used in similar cases. Crown also submitted that the strength of the Crown's case supported on-going detention.
- [21] In my respectful view, the sophistication and magnitude of the alleged fraud and the strength of the Crown's case do not of themselves make detention on the secondary ground more compelling. The test is whether there is a substantial likelihood the accused will reoffend and whether that risk cannot be reduced to an acceptable level by bail conditions.
- [22] I have concluded, in light of the absence of any history of the breaching of bail or parole provisions, and in light of what transpired when the accused's truck was pulled over on May 1, that the Crown has not met the burden of proving there is a substantial risk that Mr. Gallo will reoffend if released on strict conditions.
- [23] It is inherent in this conclusion that I am of the view that the trial judge below either did not have the same information that this Court has about what transpired on the May 1 arrest, or misapprehended the extent of the information provided to the accused on that arrest.
- [24] I would, therefore, vacate the existing order and provide for release on terms. I would like to have some input from Crown on those terms, but I would expect them to include the usual orders about keeping the peace and so on, and reporting. I want in particular to get some guidance on the appropriate amount that should be at risk for a surety. There should be a surety in my view.

[DISCUSSION RE TERMS AND CONDITIONS]

- [25] THE COURT: I am going to provide for the release of Mr. Gallo on the following terms.
1. He is to keep the peace and be of good behaviour.
 2. He is to appear before this Court when required to do so by the Court.
 3. He is to report to a supervisor within 72 hours of release to 275 East Cordova Street, and thereafter to report to the supervisor as and when directed.
 4. He is to provide his address to the bail supervisor and is not to change that address of his residence without prior written notice to the supervisor of the change of address.
 5. He is to remain within British Columbia unless written permission to go outside the jurisdiction is given by the Court or by the supervisor.
 6. He is not to possess identification, including credit cards, debit cards, financial documents and mail except those lawfully in his name, Dean Andrew Gallo.
 7. He is not to possess or use any computer or any digital storage devices or instruments capable of reading or reading and writing credit card data.

8. He is to provide a cash deposit of \$10,000.

"The Honourable Madam Justice L.A. Fenlon"

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Prepared on 29 October 2026 · Esheria