

CANADA / JUDGMENT

R. v. Kuntz-Angel

2017 BCSC 1703

COURT

Supreme Court of British Columbia

DECIDED

14 September 2017

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2017 BCSC 1703 R. v. Kuntz-Angel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kuntz-Angel,

2017 BCSC 1703

Date: 20170914

Docket: 66611-1

Registry: Chilliwack

Regina

v.

David Paul Kuntz-Angel

Before: The Honourable Mr. Justice Branch

On appeal from: Provincial Court of British Columbia, July 19, 2017

(R. v. Kuntz-Angel, Chilliwack File No. 66611-1, 66611-2-A, 66611-4-1)

Oral Reasons for Judgment

In Chambers

Counsel for the Crown:

S. Di Curzio

Counsel for the Accused:

S.J. Rauch

Place and Date of Hearing:

Chilliwack, B.C.

September 11, 12 & 14, 2017

Place and Date of Judgment:

Chilliwack, B.C.

September 14, 2017

- [1] THE COURT: This is an application for review of a bail decision by the accused. The accused is charged with inappropriate touching or otherwise sexually inappropriate behaviour with persons under certain relevant ages. There is also an allegation of assault causing bodily harm on one of these individuals, as well as an assault on, and threat to, one of the individuals. There are also charges relating to violation of two earlier bail conditions. Specifically, contact through Facebook in violation of a no-contact order, and failing to comply with a condition of residing where directed.
- [2] Section 520 of the Criminal Code gives the accused the right to apply for a review of a bail decision. Section 520 does not "confer an open-ended discretion on the reviewing judge to vary the initial decision concerning the detention or release of the accused": R. v. St-Cloud, 2015 SCC 27, at para. 92. That said, these sections establish a hybrid remedy, and therefore provide greater scope than an appeal for variation of the initial order: St-Cloud, at para. 92.
- [3] The review is conducted "on the basis of the transcript and exhibits from the initial proceedings, although some new evidence is admissible"; St-Cloud, at para. 94. Sections 520(7) and 521(8) permit the accused to adduce new evidence and exhibits in support of the review application.
- [4] In St-Cloud, the court held at para. 121 that it is appropriate for the reviewing judge to intervene if the judge who made the order:
- (a) erred in law,
 - (b) made a decision that was "clearly inappropriate." For example, if the judge "gave excessive weight to one relevant factor or insufficient weight to another." But the reviewing judge is not entitled to vary the order because he or she "would have weighed the relevant factors differently", or
 - (c) where new evidence "shows a material and relevant change in the circumstances of the case".

- [5] In the more recent decision *R. v. Antic*, 2017 SCC 27, the Supreme Court set out principles and guidelines that should be adhered to when applying the bail provisions in a contested hearing at para. 67 of that decision. In the circumstances of this case, the concern of greatest moment arises in relation to the proper application of the principle established in para. 67(i) of this decision, where the SCC confirmed that if:

cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should not be beyond the readily available means of the accused and his or her sureties. As a corollary to this, the justice or judge is under an obligation, when setting the amount, to inquire into the ability of the accused to pay. The amount of cash bail must be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case.

- [6] In this case, an order was issued by Judge Wolf on July 19, 2017, which included a condition that the accused pay \$2,500 cash deposit. The transcript of this hearing and the reasons were provided to me.
- [7] Based on my review of the transcript and reasons, I conclude that the accused has met their burden on their s. 520 application. Specifically, they have shown that the court below failed to properly inquire into the ability of the accused to pay the amount established, as required by the Supreme Court of Canada.
- [8] As to the other conditions, I see no failure on the part of the judge to properly consider and apply the test in s. 515. Beyond the failure to inquire, I saw no errors of law or wholly inappropriate conditions. The bail conditions here were set relatively high up the so-called ladder of available conditions in s. 515, but this was appropriate, given the seriousness of the alleged offences, the concern with public safety, and the concerns that were before the court in terms of noncompliance with earlier bail orders.
- [9] But in terms of the inquiry into resources, the only specific evidence in the hearing as to the accused's financial situation was a reference by duty counsel for the accused to the effect that the accused was presently unemployed. If anything, that evidence, such as it was, should have heightened the need for an inquiry into the accused's resources in establishing the amount to be deposited, but little more was said about this issue. There was a suggestion that the wife had an education, but that unfortunately does not guarantee an income, nor does it establish resources in the hands of the accused. There was a reference to a vehicle, but not the value of that vehicle or whether it was laden with any loans. There was a reference to living in a hotel, but again that often raises more concerns about resources, than giving comfort about resources. Furthermore, the accused put forward some evidence that he was living in his car, which again would raise concern about resources.
- [10] The lack of inquiry may have been a result of the fact that neither party was initially seeking a cash deposit bail condition. The Crown was arguing for a detention, and the accused was not arguing for any such condition. However, this does not reduce or negate the fact that once the court determined that such a cash deposit condition was appropriate, there should

have been a more fulsome inquiry into the accused's ability to pay. In his reasons, the judge simply referred to the fact that the accused was unemployed currently, but had been employed in the past. There was no reflection of an appropriate inquiry into the accused's ability to raise the sum based on the current state of affairs. This was of particular concern, as the accused was in detention at the time, and was unemployed.

- [11] The concern about his resources has not changed. He is presently in detention, which obviously does not improve his available resources.
- [12] After the presentation of initial arguments on the first day of this matter, I advised counsel of my initial concerns about the lack of inquiry into available resources. To that end, and pursuant to the powers granted to the court under s. 520(9) and 518(1), a second day was reserved, at which either side could present evidence on this issue.
- [13] After hearing all the submissions and evidence on this issue over the two days, I conclude that there was a limited error of law in failing to make the necessary inquiry into the accused's financial position, and that this led to bail conditions being set at a clearly inappropriate level such that they effectively became a detention order. This was clearly not the court's intention, based on my assessment of the reasons below, but the failure to make inquiry had that unfortunate effect.
- [14] Based on the court's more fulsome inquiry today as to financial capacity, I conclude that the bail conditions established by Judge Wolf were appropriate, save and except that the figure for the cash deposit of \$2,500 should be reduced to \$350.
- [15] There was evidence presented today that the accused had been sent approximately \$600 from his family. There was evidence that a damage deposit was being held by his former landlord in the amount of \$550. There was evidence that the accused, although on disability benefits, which is obviously a concern in and of itself, is entitled to, and has in the past made certain income through various artistic endeavours. Most recently, he earned approximately \$300 after being retained to conduct a performance. There is also evidence that the accused will be receiving his disability cheque shortly upon any release in the amount of \$1,380.56. There was also evidence that his rent in the past has been in the range of \$1,000.
- [16] Based on all this evidence, I conclude that there is available resources to support a \$350 cash deposit, and that this amount will still accomplish the objectives sought by Judge Wolf in the original hearing. This limited finding retains the essence of the finding below, that being that the accused had met any burden weighing on him to support a finding that detention was not justified. I see no reason to vary that conclusion. The key concern was properly identified in the court below: the accused needs to reside where he is directed, and he needs to take that condition seriously. As the court below noted, the real problem to this point has not been the primary ground of the need to ensure that the accused shows up to court, but rather the secondary grounds, particularly the need to adequately protect the complainants and society generally, always balanced against the presumption of innocence. But I find that these concerns were adequately reflected and balanced by the terms established in the court

below, subject to the adjustment made by this Court. As such, I vacate the order below, but reimpose identical terms, subject to the change from \$2,500 to \$350.

"Branch J."

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