

CANADA / JUDGMENT

R. v. Myles

2020 BCCA 105

COURT

British Columbia Court of Appeal

DECIDED

31 March 2020

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2020 BCCA 105 R. v. Myles

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Myles,

2020 BCCA 105

Date: 20200331

Docket: CA46639

Between:

Regina

Respondent

And

Nathan Clifford Kenneth Myles

Appellant

Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated October 11, 2019 (R. v. Myles, 2019 BCSC 2333, Duncan Docket 41763-2) and January 15, 2020 (R. v. Myles, Duncan Docket 41763-2).

Oral Reasons for Judgment

The Appellant, appearing in person

(via videoconference):

N.C.K. Myles

Counsel for the Respondent

(via teleconference):

J. Dyck

Place and Date of Hearing:

Vancouver, British Columbia

March 27, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 31, 2020

Summary:

Following a Supreme Court trial, the appellant was convicted of firearms and property offences. He was sentenced to 21 months' imprisonment. He has appealed the convictions and sentence and applies for release pending the hearing. Held: Application for release pending appeal is dismissed. The appellant has not met his burden under s. 679(3) of the Criminal Code. There are serious concerns that if released, the appellant will not surrender himself into custody in accordance with the terms of any bail order. Moreover, release on the form of bail proposed by the appellant would raise issues of public safety and adversely impact public confidence in the administration of justice. Although release pending appeal is denied, it is appropriate to direct that the appeals from conviction and sentence be expedited.

- [1] DEWITT-VAN OOSTEN J.A.: The appellant seeks release pending his appeals from conviction and sentence. The Crown opposes the application.
- [2] The appellant applied to the Legal Services Society ("LSS") for funding to assist with his appeals; however, the application was denied. He subsequently filed an application for the appointment of counsel under s. 684 of the Criminal Code, R.S.C. 1985, c. C-46. That application has not proceeded because since then LSS has indicated that it will reconsider the funding request. I understand LSS will likely complete its reconsideration this week.
- [3] In light of the circumstances, Mr. Myles was asked if he wanted to adjourn the application for release to await the possibility of legal representation. He declined. As he received the Crown's response to his bail application only one day prior to the hearing on March 27, 2020, he was granted permission to provide additional submissions in writing. Those submissions have been received and reviewed.

Trial Background

- [4] The appellant was tried before a judge of the British Columbia Supreme Court for multiple firearms and property offences. He was in custody pending his trial. The offences occurred at the beginning of January 2019. The trial took place in October 2019. Convictions were entered on 16 counts. Three of the counts were then judicially stayed, applying *R. v. Kienapple*, [1975] 1 S.C.R. 729. A global sentence of 21 months' imprisonment was imposed on January 15, 2020. The appellant received 255 days' credit for time spent in pre-sentence custody, leaving approximately one year to serve.
- [5] A summary of the circumstances surrounding the offences appears at the start of the reasons for conviction:
- [2] The offences in question arose as a result of observations by Constable Laing, a member of the Duncan-Cowichan RCMP, and the primary investigating officer on the matter. He observed Mr. Myles driving a red Chevrolet Cavalier vehicle on January 2, 2019. He conducted a traffic stop to serve Mr. Myles with a notice of driving prohibition. As a result of his investigation and a subsequent search of that vehicle, three firearms and a crossbow were located in the trunk of the vehicle, along with other items, primarily identification belonging to other persons that the Crown alleges are stolen.
- [3] Mr. Myles has testified in his own defence on the trial, and denied that he was driving the vehicle at the date and time in question. He admitted purchasing the vehicle a few weeks prior to the alleged offences, but testified that he was not driving the vehicle on the date of the alleged offence, or on any of the other dates when he was allegedly seen by officers.
- [4] Therefore, the central issue raised by the defence is whether Mr. Myles was the owner of the red Chevrolet Cavalier, and as outlined in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, whether I believe Mr. Myles' evidence, whether his evidence raises a reasonable doubt, or whether the evidence as a whole raises a reasonable doubt.
- [5] I have concluded that I do not believe Mr. Myles, and neither his evidence nor the evidence as a whole raises a reasonable doubt. I have determined on the totality of the evidence that I do accept, that I am satisfied beyond a reasonable doubt that Mr. Myles should be convicted of the offences he is charged with, subject to hearing submissions with respect to the counts that are Kienapplled.

R. v. Myles, 2019 BCSC 2333

Grounds for Appeal

- [6] The appellant's notice of appeal alleges an "unreasonable" verdict and "excessive" sentence. In his affidavit filed in support of the application for release, as well as in the additional written submissions, the appellant offers greater particularization. He says:

- the trial judge erred in accepting the evidence of the primary investigator (Cst. Laing) and rejecting the appellant's testimony, as Cst. Laing's evidence has "serious credibility and reliability issues" and involves police corruption;
- the trial judge misapprehended evidence and/or rejected exculpatory evidence without explanation or good reason; and,
- the evidence, as a whole, was not sufficient to prove that the appellant was the driver and owner of the vehicle on the day police took the vehicle into custody and located firearms and stolen property.

- [7] In support of these grounds, the appellant provided the Court with excerpts from the closing submissions at trial, setting out the challenges that defence counsel made to Cst. Laing's evidence. Defence counsel drew the judge's attention to internal inconsistencies in the officer's evidence; inconsistencies between his testimony and other statements made during the related police investigation; and other aspects of the officer's testimonial narrative that were said to be less than forthright.
- [8] It is the appellant's position that in light of those inconsistencies, some of which were acknowledged by Cst. Laing, there was no reasonable basis for the judge to accept the officer's version of events, including his identification of the appellant as the driver of the vehicle carrying the firearms. The appellant says that, instead, the judge should have accepted the appellant's evidence and concluded that his denial of involvement in the offences provided an "overwhelming" basis from which to acquit.

Appellant's Antecedents

- [9] Mr. Myles is 40 years old. He has an 18-year-old daughter and an elderly father. I do not understand Mr. Myles to ordinarily reside with either of those family members.
- [10] Mr. Myles has a lengthy criminal record, dating back to 1997. The record contains more than 50 convictions that predate the offences at issue on this appeal. These include convictions for property offences; failing to comply with an undertaking, recognizance or probation order (x 12); obstructing or resisting a peace officer (x 7); drug offences; unlawful possession of explosives and firearms, and possession contrary to a prohibition order (x 5); fleeing from police (x 2); and offences involving violence (assault, uttering threats, forcible confinement and assault causing bodily harm). His record also contains an entry as "parole violator" from 2000.
- [11] I understand that Mr. Myles is currently awaiting trial for two counts of possession of drugs for the purposes of trafficking (heroin, fentanyl and methamphetamine), and one count of possession of cocaine. Those offences are said to have occurred in June 2018 and are set for trial in October 2020. According to the related record of proceedings, Mr. Myles was initially on bail for the drug offences. Then, in January 2019, the bail was revoked and Mr. Myles was rendered subject to a detention order.

- [12] The Public Prosecution Service of Canada has conduct of the drug prosecution and has told Mr. Myles that it will consent to his release on the federal charges. The appellant says this arrangement was made in exchange for a later trial date and the federal Crown agreed to his release without conditions, even though they were aware of the convictions on the firearms offences. However, the matter has not been addressed in court; as such, the detention order currently remains in place. The provincial appellate Crown has been in touch with the federal prosecutor, who confirmed the agreement to release, but contrary to Mr. Myles' understanding of the situation, said that the prosecutor and Mr. Myles' lawyer on the drug charges are "negotiating" possible release conditions.
- [13] The Crown advises that Mr. Myles' anticipated release date on the firearms and property offences is September 27, 2020. His warrant expiry date is February 1, 2021.

Parties' Positions on Bail

- [14] The appellant contends he should be released because he has strong grounds of appeal with "obvious" merit; he is prepared to abide by court-ordered conditions; and, consistent with the federal Crown's decision to consent to release on the outstanding drug charges, he does not present a risk to the public. He says it is unfair for the federal Crown to agree to his release, but not the provincial Crown with conduct of his appeal.
- [15] Mr. Myles says that if released, he plans to work for Juggernaut Resources (a mineral exploration company) and live at a residence on Shawnigan Lake Road on Vancouver Island. This property belongs to a friend of Mr. Myles and there is a trailer on the property in which the appellant can reside.
- [16] For the three years prior to his current incarceration, when not in custody, Mr. Myles stayed at a residence on Chemainus Road on Vancouver Island. The residence was described at trial as a "dope house", with more than one dealer residing there and customer traffic. Mr. Myles was self-employed, although the details of what his employment consisted of are unclear to me. I believe, but am not certain, that it involved mechanics.
- [17] The Crown is opposed to release, submitting that the appellant is unlikely to surrender himself into custody and presents significant public safety concerns.
- [18] In putting their positions forward, both sides have focused their arguments on the appeal from conviction and the grounds raised in support of that appeal.

Discussion

- [19] Release pending an appeal from conviction is governed by s. 679(3)(a)-(c) of the Code. As explained in *R. v. Oland*, 2017 SCC 17, the applicant for release bears the burden of establishing the Code criteria on a balance of probabilities (at para. 19). The presumption of innocence is no longer an informing principle because one or more convictions has been entered.

[20] A three-pronged analysis is required:

[20] The first criterion [for release] requires the appeal judge to examine the grounds of appeal with a view to ensuring that they are not "not frivolous" (s. 679(3)(a)). Courts have used different language to describe this standard. While not in issue on this appeal, the "not frivolous" test is widely recognized as being a very low bar .

[21] The second criterion requires the applicant to show that "he will surrender himself into custody in accordance with the terms of the [release] order" (s. 679(3)(b)). The appeal judge must be satisfied that the applicant will not flee the jurisdiction and will surrender into custody as required.

[22] The third criterion requires the applicant to establish that "his detention is not necessary in the public interest" (s. 679(3)(c)).

Oland. [Internal references omitted].

[21] With reference to this framework, the Crown concedes that Mr. Myles has met his burden under s. 679(3)(a) to show that the appeal from conviction is not frivolous, although it says the grounds for challenging the verdict do not rise much above that. I agree with that assessment, based on the material before me.

[22] Mr. Myles' predominant complaint on the appeal from conviction is that the judge was wrong to accept the evidence of the main police investigator and reject his. He repeatedly emphasized that point before me, as well as in his written submissions. In his view, Cst. Laing's evidence was untruthful, unreliable, and the problems with the officer's evidence--as detailed in the closing submissions by defence counsel--should have been obvious to the trial judge. He argues that the judge's assessment of Cst. Laing's credibility is materially flawed. The appellant contends that the judge ignored (or failed to give adequate consideration to) inconsistencies in Cst. Laing's evidence, inconsistencies between his testimony and descriptions provided by other witnesses, mid-stream testimonial changes when the officer was confronted in cross-examination, and the fact that Cst. Laing misrepresented the circumstances relevant to this case in an investigative affidavit.

[23] It is apparent from the reasons below that the judge was aware of the legal principles governing the assessment of evidence where an accused testifies (R. v. W.(D.), [1991] 1 S.C.R. 742) and instructed herself accordingly. She did not believe Mr. Myles; nor did his evidence leave her with a reasonable doubt. She provided specific reasons for finding that the appellant's evidence was "entirely unbelievable." She then found, on the whole of the Crown's case, that Mr. Myles had "both knowledge and control of the firearms, crossbow, ammunition and stolen property found in the vehicle". The Crown's case included the evidence of Cst. Laing. The judge acknowledged the credibility and reliability concerns raised by the defence in respect of Cst. Laing's evidence, but, ultimately, she found the officer to be a credible witness, describing him as "an honest officer [who] was prepared on many occasions to make concessions during his evidence."

[24] Relying on her credibility findings, the judge found as a fact that:

- Mr. Myles purchased the vehicle in which the firearms were located in December 2018 (he acknowledged this fact in his testimony and it was independently confirmed);
- Mr. Myles was seen by police driving that vehicle on December 18;
- the vehicle was towed on December 23 and Mr. Myles was the person who retrieved it;
- on the date of the offences, January 2, 2019, he was again seen driving the vehicle;
- when the vehicle was stopped and being dealt with by police on January 2, Mr. Myles was in the vicinity, standing on the other side of the road;
- Mr. Myles' personal property was located in the vehicle when it was searched by police;
- a .22 calibre semi-automatic rifle was in plain view in the trunk of the vehicle. A Harrington and Richardson shotgun and bolt-action rifle, along with a crossbow and ammunition, were found in a hockey bag in the vehicle; and,
- the appellant's personal belongings were "strewn throughout the car".

[25] Appeals from conviction that challenge a judge's credibility findings are assessed through a deferential lens. In *R. v. Gagnon*, [2006] 1 S.C.R. 621, the majority affirmed that in these cases, the appeal court must:

10 defer to the conclusions of the trial judge unless a palpable or overriding error can be shown. It is not enough that there is a difference of opinion with the trial judge (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 32-33; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 74). A succinct description of the overall approach appears in *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 4, where this Court stated that "it is only where the Court has considered all of the evidence before the trier of fact and determined that a conviction cannot be reasonably supported by that evidence that the court can . . . overturn the trial court's verdict". With respect to the credibility of witnesses, the same standard applies. In *Lavoie v. R.*, [2003] Q.J. No. 1474 (QL), at para. 37, Nuss J.A. of the Quebec Court of Appeal stated that a trial judge's assessment of the credibility of witnesses "will not be disturbed unless it can be demonstrated that he committed a palpable and overriding error" (citing *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33).

[Emphasis added.]

[26] It will be for a division of this Court to determine the merits of the appeal from conviction and whether the convictions should be upheld or set aside. However, based on my review of the reasons below and the transcript excerpts provided by the appellant, I do not consider the appeal from conviction to be strong. If there is overriding and palpable error here, it is not obvious from the face of the material before me. (I do not have access to the evidence called at trial.) A trial judge has considerable latitude in making her credibility findings. And she is not obliged, in her reasons, to detail every piece of evidence she has considered or evidentiary frailty she has reconciled: *R. v. M. E-H.*, 2015 BCCA 54 at para. 68.

- [27] The second criterion for release requires that Mr. Myles establish he will not flee the jurisdiction and will surrender himself into custody when required, in accordance with the terms of the bail order (s. 679(3)(b)). Mr. Myles has an extensive criminal record, including multiple convictions for failure to comply with bail, breach of other court orders, obstructing a peace officer, flight from police and a conviction for failing to appear in court (from 1999). I have significant concerns that in the absence of a robust release plan mandating close and frequent supervision and, importantly, one or more sureties to provide a compelling incentive for Mr. Myles to comply, there is a likelihood that Mr. Myles will not adhere to the terms of his bail, including attending court when required.
- [28] Mr. Myles has no surety to offer. He told the Court that he is able to make a \$1,500 cash deposit, or a promise to pay in that amount (he prefers the latter). He says he received money for his birthday in February that he can use for this purpose. (I note that in his application for the appointment of counsel, dated and signed on March 4, 2020, after his birthday, Mr. Myles stated that he had no cash available to him and owes \$10,000 in debts. He put his income at \$3,960 per year and stated that he owns nothing of value.)
- [29] In a previous appearance before this Court, the appellant was asked about the possibility of a surety. He said he does not wish to pursue that avenue. He does not have a "close connection" with family members situated in British Columbia, who might be in a position to play that role. In my view, the release plan proposed by Mr. Myles, in light of his substantiated criminal history for not respecting court orders, is insufficient to meet his burden under s. 679(3)(b).
- [30] That brings me to the third prong of the release analysis, namely, whether Mr. Myles has shown that "his detention is not necessary in the public interest" (s. 679(3)(c)).
- [31] In deciding whether this burden is met, I must consider two issues: (1) public safety; and (2) public confidence in the administration of justice. On the second of these issues, I am obliged to weigh the interest in enforceability of the verdict against the interest in reviewability: Oland at paras. 22-24. It is generally understood that judgments should be immediately enforced. At the same time, society recognizes that the justice system is not infallible. Accordingly, when assessing bail, the appeal court must be mindful of the fact that persons who seek to challenge the legality of their convictions should be entitled to a meaningful review process that does not require them to serve a substantial part or the whole of their sentence, only to find that the conviction on which that sentence was based was unlawful: Oland at para. 25.
- [32] Factors for consideration in weighing enforceability against reviewability include the apparent strength of the grounds of appeal, the seriousness of the offences for which the appellant has been convicted, the circumstances surrounding those offences, and the length of sentence imposed.

- [33] I do not have access to the reasons for sentence where the trial judge likely would have addressed the gravity of Mr. Myles' offending conduct and made findings about his level of moral blameworthiness. However, Mr. Myles was found guilty of multiple offences involving the unlawful possession of firearms. One of the firearms contained an altered, defaced or removed serial number. The guns were stored in a careless manner. For example, one of them had a magazine with 59 bullets inserted into it and no trigger lock. There was a round in the chamber. The appellant was prohibited from possessing firearms and ammunition at the time of his offences.
- [34] As noted by Dickson J.A. in *R. v. Kachuol*, 2017 BCCA 292:
- [25] In recent years, Canadian courts have become increasingly concerned by the proliferation of handguns, gun violence and the dire consequences for our society. Guns are inherently, often lethally, dangerous, all the more so when they are possessed for an illicit purpose. As a result, their possession and use is highly regulated and, if unlawful, criminalized to ensure public safety, express society's condemnation and punish offenders.
- [35] These were serious offences. Mr. Myles was subject to court orders at the time. He has a substantial record of offending, including crimes of violence and prior convictions for firearms offences. In 2016, he received a global 28.5 months' imprisonment for forcible confinement and three counts of assault. There have been periods in which the offending appears to have stopped; however, since 2015, Mr. Myles has exhibited steady recidivism. Based on the record, including breaches of court orders, I find there is a substantial likelihood that if released, Mr. Myles will re-offend. Moreover, it is my view that, realistically, his offending will put the safety of the public at risk.
- [36] The appellant says he has not used drugs while incarcerated, nor has he engaged in violence, and that this weighs in favour of his release. At trial, Mr. Myles acknowledged a history of using illicit substances, including heroin. In December 2018, he was hospitalized for heroin withdrawal. He also says he is prepared to abide by bail conditions, including conditions relating to employment and/or maintaining a particular residence. Although this concern was not pressed in oral submissions, the appellant has also raised the issue of being incarcerated during the public health circumstances surrounding COVID-19.
- [37] I have no confirmation of Mr. Myles' intended employment with Juggernaut Resources or details of what it might consist of, when it would start, or the expected duration. He says he last spoke to a representative of that company in January. Nor has Mr. Myles provided independent confirmation of his intended residence, including the property owner's willingness to have him reside there. The Crown has gathered information indicating that, over time, there have been multiple incidents of police interaction with the Shawnigan Lake Road address. These have included attendance for allegations of break and enter, mischief, "unwanted persons", assault, theft, uttering threats and "suspicious" persons or vehicles. The Crown's information raises serious questions about whether the Shawnigan Lake Road property is an appropriate place for Mr. Myles' to be while on bail.

- [38] A police officer who is familiar with Mr. Myles, and his past offending, indicates that responding to him has previously required "multi-members". The proposed place of residence is a long distance from a larger police detachment, a heavily treed property, and said to pose a "greatly increased risk" to police officers if they need to attend and deal with Mr. Myles without sufficient backup availability. There are multiple trailers on the property and it would be difficult for police to know, at any given time, where the appellant is situated. Mr. Myles confirms the existence of multiple trailers and says some of them are likely rented out to others. However, he says this residence is his only option. He contests the reliability of the police information about the property and says that if they are concerned about going there, he can meet them on the road for the purpose of a check-in.
- [39] I do not consider the grounds of appeal put forward by Mr. Myles' on his convictions to be strong. There is, in my view, a significant interest in immediate enforceability of the verdict below, given the nature of the offences and Mr. Myles' history of offending. Regrettably, I have little confidence that he will comply with the terms of his bail in the absence of a robust, tightly structured form of community supervision that carries a compelling incentive for adherence. In my view, a promise to pay \$1,500 or even a cash deposit in that amount, is not sufficient. I appreciate that the federal Crown has agreed to judicial interim release on Mr. Myles' outstanding drug charges. However, I do not know the rationale underlying that position; the terms of the contemplated release; and/or when the release might actually take effect.
- [40] I am alive to the concerns surrounding COVID-19; however, I have received no information about the specific level of risk faced by Mr. Myles in his current circumstances, health vulnerabilities he may have, or steps taken by the custodial institution to mitigate the risk. As a result, I have no evidentiary foundation, particular to Mr. Myles, from which to make an informed assessment of the impact that this factor should appropriately, and realistically, have on the bail analysis in this case.
- [41] In any event, it is my view that in the circumstances of this case, as a whole, the principle of enforceability outweighs reviewability and a reasonably informed member of the public would lose confidence in the administration of justice were Mr. Myles to be released pending appeal on the basis of the plan put forward.
- [42] I recognize that if not released, Mr. Myles may serve a substantial portion of his sentence before his appeal from conviction is heard, possibly the majority of it. There has been no suggestion that the sentence imposed falls outside the generally accepted range of sentences for persons with the background of Mr. Myles and/or the nature of the offences for which he stands convicted. However, delay is something I must take into account in the balancing required under s. 679(3)(c): Oland at para. 48. It is not determinative. See, for example, R. v. Ferwerda, 2018 NLCA 14 (Chambers) at para. 109.

[43] I am satisfied that this is one of the situations contemplated in Oland, where the appellant simply cannot be released on the basis of the proposed order, even though a decision to this effect materially impacts the principle of reviewability. As a result, the appropriate step for me to take, in the alternative, is to direct that the appeal be expedited pursuant to s. 679(10) of the Code.

Disposition

[44] For the reasons provided, the appellant has failed to meet his onus for release under s. 679(3) of the Code. Accordingly, the application for bail pending appeal is dismissed.

[45] This appeal is already subject to case management. Subject to the discretion of the assigned case management judge to set timelines, I direct that the appeals from conviction and sentence be expedited. A case management conference should be held within 10 days for consideration of a schedule that will enable an expedited appeal. Accordingly, I ask Crown counsel to contact the Court registry at their earliest convenience and arrange for a conference by telephone.

"The Honourable Madam Justice DeWitt-Van Oosten"

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Prepared on 28 October 2026 · Esheria