

CANADA / JUDGMENT

R. v. Van Dyke

2012 BCCA 513

COURT

British Columbia Court of Appeal

DECIDED

20 December 2012

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2012 BCCA 513 R. v. Van Dyke COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Van Dyke, 2012 BCCA 513 Date: 20121220 Docket: CA040305 Between: Regina Respondent And Bradley Jay Van Dyke Applicant Direction of the Chief Justice on an Application for Review Pursuant to Section 680 of the Criminal Code Counsel for the Applicant: R.C.C. Peck, Q.C. Counsel for the Respondent: F. Tischler Written Submissions of the Applicant filed: December 7th, 2012 Written Submissions of the Respondent filed: December 14th, 2012 Place and Date of Judgment: Vancouver, British Columbia December 20th, 2012 Reasons for Judgment of the Honourable Chief Justice Finch:

- [1] Mr. Van Dyke applies for a direction under s. 680 of the Criminal Code for review of the Order pronounced by a justice of this Court in chambers on 2 November 2012, dismissing his application for judicial interim release pending his appeal from conviction by a jury in the Supreme Court of British Columbia of four offences: break and enter to commit an indictable offence, aggravated assault, use of a firearm while committing an indictable offence, and discharging a firearm with intent to wound, maim or disfigure.
- [2] Before the chambers judge, the Crown acknowledged that the appeal was not frivolous, and also agreed that Mr. Van Dyke had shown that he would likely surrender himself into custody if bail were granted. The issue before the judge was therefore whether the applicant had established that his detention was not necessary in the public interest: s. 679(3)(c).
- [3] On this application for a direction that the refusal of bail be reviewed by a division of the Court, the applicant submits that the chambers judge erred in principle by overemphasizing the seriousness of the offences, and in failing to balance that consideration against the strength of the intended appeal.
- [4] The chambers judge's decision was, as mentioned, pronounced on 2 November 2012, shortly before the decision of a five judge division of this Court in R. v. Gingras; R. v. Porisky: 2012 BCCA 467, which reconsidered in some detail how the seriousness of offences, and the merits of the appeal should be treated in assessing the public interest criteria in s. 679(3)(c) on an application for bail.
- [5] For the Court, Mr. Justice Donald said:

- [31] In any event, the controversy, such as it is, can now be laid to rest. The strength of the grounds of appeal can work both ways. The merits are in opposition to the seriousness of the offence; the greater the seriousness of the offence, the stronger the grounds required to shift the balance from enforceability to reviewability. Since the strength of the grounds and seriousness of the offence are two sides of the same coin, it does not make sense to say that weak grounds cannot negatively affect a bail application.
- [6] In this case, in her reasons for refusing bail, the judge said:
- [17] I am satisfied that there is real substance to the grounds of appeal, and that they go beyond the modest description of 'not frivolous', a consideration that makes the issue of reviewability somewhat more urgent. I also have in mind the circumstances of Mr. Van Dyke's father.
- [18] On the other side, this is a case involving firearms and personal injury. I am troubled in this case that the offences were violent, that they involved the carrying of a gun to the cabin and the discharge, twice, of the gun, that the surrounding circumstances were involved with the drug trade, and that the appellant has another conviction in relation to production of marihuana. Given these considerations, I cannot say that Mr. Van Dyke's detention is not necessary in the public interest. Considering the standard of the ordinary, reasonable, fair-minded citizen informed of the circumstances of this case, it seems to me that Mr. Van Dyke's release would tend to undermine public confidence in the administration of justice.
- [7] The reference in para. 17 to the applicant's father is an acknowledgement that the father is terminally ill, lives in Ontario, and that the applicant would like to visit him one last time, if permitted.
- [8] The threshold for a direction under s. 680 is low: *R. v. Gill*, 2001 BCCA 569, para 4; *R. v. Porisky*, 2012 BCCA 371 at para. 7. The test is "whether the court, properly applying the law, could possibly conclude that the application for release should have been allowed."
- [9] In a case such as this where the public interest criteria requires a balancing of enforceability and reviewability, I am not able to say that a division of the Court would necessarily reach the same conclusion as that reached by the chambers judge.
- [10] I am of the view that the low threshold for a direction under s. 680 has been met, and accordingly direct that the order of 2 November 2012, be reviewed by a division of the Court.
"The Honourable Chief Justice Finch"

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