

CANADA / JUDGMENT

R. v. Zeleniski

2021 BCSC 2718

COURT

Supreme Court of British Columbia

DECIDED

16 December 2021

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2021 BCSC 2718 R. v. Zeleniski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zeleniski,

2021 BCSC 2718

Date: 20211216

Docket: 31783-1-W

32508-1-W

Registry: Vancouver

Regina

v.

Clayton Wade Zeleniski

Before: The Honourable Mr. Justice Brongers

Oral Reasons for Judgment

(Detention Review Hearing)

Counsel for the Crown:

A-K. Saettler

Counsel for the Accused

appearing by teleconference:

N. Selamaj

Place and Date of Trial/Hearing:

Kelowna, B.C.

December 15, 2021

Place and Date of Judgment:

Kelowna, B.C.

December 16, 2021

- [1] THE COURT: The accused, Clayton Wade Zeleniski, is before the court for a detention review hearing pursuant to s. 525 of the Criminal Code, R.S.C. 1985, c. C-46, because he has been in custody in excess of 90 days and the trial of the indictable offences with which he has been charged has not yet begun.

Background

- [2] Mr. Zeleniski is facing charges in relation to three incidents.
- [3] The first incident dates from January 28, 2020. Further to Information 93045 received in Kelowna, Mr. Zeleniski is charged with 10 counts. While out on bail, Mr. Zeleniski had been directed by his bail supervisor to reside at a certain address in Kelowna. The police executed a search warrant at that address as part of a drug investigation, and found Mr. Zeleniski present along with others. The police also found drugs, various weapons including a rifle, a shotgun, a machete, and crossbows, as well as ammunition. Mr. Zeleniski's bail conditions at the time prohibited him from possessing weapons and he was also subject to a lifetime firearm possession ban. Mr. Zeleniski was arrested and charged with five counts of possessing weapons for a dangerous purpose, three counts in relation to possession of firearms without a licence and contrary to a previous order, one count of possession of a controlled substance, and one count in relation to his breach of a release order. A trial of the matter is scheduled for April 25, 2022.
- [4] The second incident dates from December 2, 2020. Further to Information 95233 received in Kelowna, Mr. Zeleniski is charged with driving while prohibited. On that day, the police saw him driving a Ford F-150 pickup truck and, knowing that he was not permitted to drive, effected his arrest after Mr. Zeleniski stopped and exited from the vehicle. This matter is scheduled for trial on February 9, 2022.
- [5] The third and arguably most serious incident dates from January 9, 2021. Further to Information 95192-C-4 received in Kelowna, Mr. Zeleniski is charged with three counts: (1) breaking and entering; (2) assault with a weapon; and (3) failure to comply with a release order. These counts arise from allegations that Mr. Zeleniski broke down the door to a residence in which an acquaintance of Mr. Zeleniski, Ms. Bayleigh Elliott was present with another friend. Ms. Elliott says that she was assaulted by Mr. Zeleniski and that he used bear spray on her during the attack. A preliminary inquiry in respect of this matter is scheduled

for May 24, 2022.

- [6] Mr. Zeleniski has been in custody since he was arrested in relation to the events of January 9, 2021. A judicial interim release hearing took place before the Provincial Court on August 10, 2021. At that hearing, the Crown took the position that Mr. Zeleniski should be detained on public safety grounds. Mr. Zeleniski submitted that he should be released on certain conditions, namely, that he reside under house arrest with a friend of the family, Irene Colcord, in her basement suite in Kelowna, but that his surety be his sister-in-law, Adrianna Zeleniski, who lives in Lumby. He also proposed a \$500 deposit for the release order and a no-contact order in respect of Ms. Elliott.
- [7] On August 11, 2021, Judge Burdett ordered that Mr. Zeleniski be detained pursuant to s. 515 of the Criminal Code. After considering the circumstances surrounding the alleged offences, Mr. Zeleniski's proposed bail plan, the apparent strength of the Crown's case, and other factors, the Provincial Court judge ultimately concluded as follows in her reasons for judgment and I quote:

I have considered the release plan proposed by defence. The cash deposit suggested is half of what Mr. Zeleniski posted in a previous bail. Despite his sister-in-law's well-placed intentions, I cannot see how a surety located in Lumby, more than 70 kilometres and an hour away, will in any way operate to ensure that Mr. Zeleniski does not commit further offences if he is released. He has a history of breaching past bail orders apart from those before the court, and the breaches of his past bail orders were not insignificant breaches such as failing to report or breaching a curfew. Instead, those breaches consisted of accumulating new substantive and serious charges.

I find that there is a risk of such a magnitude that it amounts to a substantial risk that Mr. Zeleniski will commit further offences if he is released. I find that the risk would constitute a danger to public safety given the number and nature of the weapons and firearms found in his residence, and a specific risk to the complainant, Ms. Elliott, who he appears to know and has some sort of relationship with. I find that Mr. Zeleniski has not shown cause on the balance of probabilities that his detention is not justified on the secondary ground and I order him detained on all three informations.

Her Honour Judge Burdett's reference to the "secondary ground" is to the notion that the detention of an accused in custody is justified where the detention is necessary for the protection or safety of the public pursuant to s. 515(10)(b) of the Criminal Code.

- [8] Mr. Zeleniski has now been detained for over 11 months at the Okanagan Correctional Centre ("OCC") without a trial. He seeks an order releasing him from detention subject to conditions. The Crown continues to oppose his release.

Legal Framework

[9] R. v. Myers, 2019 SCC 18, is the leading case that sets out the principles to be applied when adjudicating a s. 525 Criminal Code detention review hearing. At paragraph 46, the Supreme Court of Canada stated:

The question that the judge must answer at a s. 525 hearing is therefore as follows: Is the continued detention of the accused in custody justified within the meaning of s. 515(10)? Section 515(10) sets out three possible grounds on which the detention of an accused in custody may be justified: where it is necessary in order to ensure the attendance of the accused in court; where it is necessary for the protection or safety of the public; and where it is necessary in order to maintain public confidence in the administration of justice.

[10] The Supreme Court of Canada in Myers also explained the nature of a detention review hearing and the scope of material that can be considered by a judge conducting such a review. Paragraphs 48, 49, and 63 of the judgment are particularly instructive:

[48] The judge at the s. 525 hearing is therefore free to make inquiries about the case, as well as to rely upon the transcript, exhibits and reasons from any initial judicial interim release hearing and from any subsequent review.

[49] Furthermore, both parties are entitled to make submissions on the basis of any additional "credible or trustworthy" information which is relevant or material to the judge's analysis. The admissibility of any material that existed at the time of the initial bail hearing but was not presented at that point should also be governed by the criteria of due diligence and relevance discussed in St-Cloud, at paras. 130-35. In the context of a s. 525 review, the judge must be particularly attentive to any new evidence or material change in the circumstances of the accused and to its impact on the question whether his or her continued detention in custody is justified. For example, the period of pre-trial detention may have afforded the accused person time to make arrangements for a suitable surety, develop a comprehensive release plan or take other steps that would negate the initial basis for his or her detention under s. 515(10).

[63] In determining whether the detention of the accused is still justified, the reviewing judge may consider any new evidence or change in the circumstances of the accused, the impact of the passage of time and any unreasonable delay on the proportionality of the detention, and the rationale offered for the original detention order, if one was made.

[11] In addition, it should be noted that as Mr. Zeleniski has been charged with breaches of release orders, and because he is charged with possession of certain weapons while being prohibited from doing so, the onus is upon him to demonstrate why his continued detention in custody is not justified as per s. 515(6) of the Criminal Code.

The Position of the Accused

- [12] In his submissions, counsel for Mr. Zeleniski provided further background information regarding his client. He noted that Mr. Zeleniski is 51 years old and is Indigenous. His now deceased mother is a residential school survivor. He was born in New Westminster, grew up in Squamish, and has lived his adult life in the Okanagan. He has a grade 10 education and has been a labourer in the construction industry and had a gutter business for a time. However, his ability to work is now limited by a hand injury and his mental health issues. He has also dealt with substance abuse, having been previously addicted to crack cocaine.
- [13] It is acknowledged that Mr. Zeleniski has an extensive criminal record, but his counsel submits that it must be understood within the context of his challenging background. In particular, his counsel correctly submits that, pursuant to s. 493.2 of the Criminal Code, the Court must have regard to his circumstances as an Aboriginal accused and one who belongs to a vulnerable population that is overrepresented in the criminal justice system.
- [14] Mr. Zeleniski proposes a release plan which he says is more robust than the one that was presented to the Provincial Court and rejected as being insufficient by Judge Burdett. In particular, his proposed surety this time is Irene Colcord herself, and not his sister-in-law in Lumby. Ms. Colcord is prepared to put up a deposit of \$1,000, to which Mr. Zeleniski would add \$6,000 for a total financial obligation of \$7,000. He says that he has been able to raise these funds through the support of his family and community. Mr. Zeleniski would reside with Ms. Colcord in the basement of her residence in Kelowna under 24-hour house arrest. Mr. Zeleniski would also be prohibited from contacting, communicating, or being within 500 metres of Bayleigh Elliott. Most significantly, these conditions would be subject to electronic monitoring. In support of this proposal, counsel for Mr. Zeleniski submitted a Technical Suitability Report dated December 8, 2021 confirming that electronic monitoring is possible at Ms. Colcord's residence.
- [15] Counsel for Mr. Zeleniski submits further that the Court ought to consider the potential weaknesses of the Crown's case in relation to whether Mr. Zeleniski was actually in possession of the weapons found in his residence, as well as the alleged unreliability of Ms. Elliott. Finally, counsel notes that Mr. Zeleniski has already been in pre-trial detention for a lengthy period and that a trial in relation to the home invasion and assault charges will not take place until many months from now.

The Position of the Crown

- [16] Counsel for the Crown's submissions focused on the circumstances that have given rise to the charges against Mr. Zeleniski, as well as his lengthy criminal record which shows a pattern of non-compliance with release orders and conditions. In the Crown's view, the case against Mr. Zeleniski in respect of these serious charges is a strong one, and he faces a lengthy sentence if convicted. Given Mr. Zeleniski's past conduct and the risk to public safety that he poses, the Crown says that his continued detention until trial is therefore still

warranted.

- [17] The Crown also does not believe that Mr. Zeleniski's proposed release plan is adequate. Counsel for the Crown suggested that, even if he is under house arrest, Mr. Zeleniski may still be able to commit offences, such as possessing restricted weapons or controlled substances.

Analysis

- [18] Having heard counsel's submissions and having reviewed the transcript and reasons at the original detention hearing, it is apparent that the primary issue is whether the continued detention of Mr. Zeleniski is still justified in order to ensure the protection of the public. In light of the serious nature of the alleged conduct that has given rise to the numerous charges that Mr. Zeleniski faces, it is understandable that Judge Burdett found that the risk Mr. Zeleniski posed to the community required that he not be released pending trial at that time. What is different now, however, is that Mr. Zeleniski has presented a revised release plan that is considerably different from the one that he proposed at the original detention hearing.
- [19] In *R. v. Myers*, the Supreme Court of Canada directed judges who hear detention reviews to pay careful attention to release plans, particularly those that have the potential to address the root causes of offending, and to remember that pretrial detention is a measure of last resort. Paragraph 67 of that judgment reads as follows:

Third, Mr. Myers was detained exclusively on the basis of the second ground under s. 515(10), despite the fact that he had a release plan involving a closely supervised treatment facility to address his substance abuse problems and multiple proposals to address the concern that he posed a risk to the public. It was within the bail judge's discretion to determine whether the release strategies presented by counsel addressed the risk that if released from custody, Mr. Myers would commit a criminal offence or interfere with the administration of justice within the meaning of s. 515(10)(b). That being said, judges and justices presiding over bail hearings should always give very careful consideration to release plans that involve supervised treatment for individuals with substance abuse and mental health issues. Release into treatment with appropriate conditions will often adequately address any risk raised under s. 515(10), and such a strategy is a less onerous alternative than provincial remand. It may also substantially address the root causes of the accused person's alleged criminal behaviour and reduce the likelihood of future criminal conduct. In accordance with the principles articulated in *Antic*, we must not lose sight of the fact that pre-trial detention is a measure of last resort.

- [20] With respect to Mr. Zeleniski's new proposed release plan, three aspects are particularly noteworthy. First, his surety, Irene Colcord, is a trusted family friend who has known Mr. Zeleniski for many years and who shares his Indigenous heritage. She will actually be living with him and monitoring his house arrest, as opposed to the previous proposal that Mr. Zeleniski's surety be a relative who would reside at a considerable distance from him.

Second, Mr. Zeleniski's surety is willing to deposit \$1,000 of her own money which, along with the \$6,000 Mr. Zeleniski will deposit, is considerably more than the \$500 deposit that formed part of the original release plan. Most significantly, Mr. Zeleniski now submits that his house arrest should be electronically monitored. In my view, Mr. Zeleniski's willingness to subject himself to such an intrusive measure is indicative of his commitment to respect the terms of his release, an element which he admittedly has not demonstrated in the past.

- [21] In sum, I find that this plan is sufficient to reasonably manage the public safety risks that Mr. Zeleniski's release might otherwise pose. In reaching this conclusion, I am cognizant of the fact that the Technical Suitability Report indicated some concern with the fact that Ms. Colcord is "known to the RCMP," although the report does not provide further details in this regard. Counsel for Mr. Zeleniski explained that, in 2019, Ms. Colcord was convicted of theft and wilfully resisting a police officer. In my view, however, this should not disqualify Ms. Colcord from being a surety. Indeed, it would seem that Ms. Colcord's past experience with the criminal justice system is likely to provide her with a heightened appreciation of the importance of ensuring that Mr. Zeleniski complies with the terms of his release given her responsibility as his surety.

Conclusion

- [22] In conclusion, I find that Mr. Zeleniski has met his onus to show that his continued detention is not justified within the meaning of s. 515(10) of the Criminal Code, particularly considering his circumstances as an Aboriginal accused and a person who belongs to a vulnerable population that is overrepresented in the criminal justice system pursuant to s. 493.2 of the Criminal Code.
- [23] I therefore order Mr. Zeleniski's release pursuant to s. 525(5) of the Criminal Code on the following conditions:
1. Pursuant to s. 515(2), Mr. Zeleniski shall be released from custody at the Okanagan Correctional Centre with a total financial obligation of \$7,000 consisting of a deposit by him of \$6,000, and a deposit of \$1,000 by his surety, Irene Evelyn Colcord, who is named a surety pursuant to s. 515(2.1).
 2. This order will be electronically supervised and Mr. Zeleniski will not be released from custody at the Okanagan Correctional Centre until he has been fitted with electronic supervision equipment and has entered into an electronic supervision agreement which includes the wearing of and care for the electronic supervision equipment.
 3. Within two business days after his release from custody, Mr. Zeleniski must report by telephone to the bail supervisor at Kelowna Community Corrections, 1355 Water Street, Kelowna, 250-470-6866, unless he obtains before his release written permission from his bail supervisor to report elsewhere or within a different timeframe. After that, he must report as directed to the bail supervisor.

4. Mr. Zeleniski must live at 405 Mugford Court, Kelowna, British Columbia, with his surety, Irene Evelyn Colcord, and provide his bail supervisor with his phone number.
5. Mr. Zeleniski must obey house arrest by being inside the residence at 405 Mugford Court, Kelowna, British Columbia, or on its lot, 24 hours a day, every day. This condition is to be electronically supervised.
6. Mr. Zeleniski must present himself immediately at the door to his residence or answer the phone when any peace officer or bail supervisor attends or calls to check on him during his house arrest.
7. Mr. Zeleniski may not leave the residence at 405 Mugford Court, Kelowna, British Columbia, unless he has written permission from his bail supervisor, such permission to be kept in his possession at all times while absent from the residence. Mr. Zeleniski may also be away from the residence during the house arrest hours while at, or going directly to, or returning directly from, a healthcare facility because of a medical emergency. If asked, he must provide his bail supervisor with proof of attendance at the facility.
8. If Mr. Zeleniski is expelled or evicted from 405 Mugford Court, he must tell his bail supervisor immediately. If the office is closed, he must contact his bail supervisor immediately when the office opens on the next business day.
9. Mr. Zeleniski must have no contact or communication, directly or indirectly, with Bayleigh Elliott.
10. Mr. Zeleniski must not go to or be within 500 metres of any place where Bayleigh Elliott lives, works, attends school, worships, or happens to be. If Mr. Zeleniski sees Bayleigh Elliott, he must leave her presence immediately without words or gestures.
11. Mr. Zeleniski must not possess directly or indirectly any weapon as defined by the Criminal Code including: (a) firearms and ammunition; (b) crossbows, prohibited or restricted weapons or devices or explosive substances; (c) anything used, designed to be used, or intended for use in causing death or injury to any person, or to threaten or intimidate any person; (d) any imitation firearms or weapons including any compressed airguns or BB/pellet guns; or (e) any related authorizations, licences, and registration certificates, and he must not apply for any of these.
12. Mr. Zeleniski must not be in any residence where any other person keeps or stores any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, or explosive substance.
13. Mr. Zeleniski must appear before the Court as and when required to do so by the court.

"Brongers J."

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Prepared on 27 October 2026 · Esheria