

CANADA / JUDGMENT

United States v. Barba-Ruiz

2020 BCSC 214

COURT

Supreme Court of British Columbia

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2020 BCSC 214 United States v. Barba-Ruiz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Barba-Ruiz,

2020 BCSC 214

Date: 20200214

Docket: 27860

Registry: Vancouver

In the Matter of the Extradition Act, S.C. 1999, c. 18, as Amended

Between:

The Attorney General of Canada

on behalf of the United States of America

Requesting State

And

Jose Barba-Ruiz, also known as "Picoso"

Person Sought

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Judgment

Counsel for the Requesting State:

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J. Gibb-Carsley

Counsel for the Person Sought:

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(C. Garel-Jones appearing as agent for reasons)

Place and Date of Hearing:

Vancouver, B.C.

January 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 14, 2020

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Introduction

- [1] Under s. 29(1)(a) of the Extradition Act, S.C. 1999, c. 18 [Act], the United States applies for the committal into custody of Mr. Barba-Ruiz to await surrender to it for prosecution.

The Extradition Process

- [2] In *M.M. v. United States of America*, 2015 SCC 62 at paras. 19-26, Justice Cromwell describes the three-stage extradition process. The process begins when the Minister of Justice receives an extradition request from a foreign state. If the Minister decides to authorize the request for extradition, he or she issues an Authority to Proceed ("ATP"). The ATP identifies the Canadian offence or offences that most closely correspond to the alleged conduct set out in the extradition request.
- [3] Pursuant to s. 24(1) of the Act, the receipt of an ATP enables a superior court judge to hold a committal hearing, commencing the second stage of the process. The extradition judge's role in such a hearing is mainly to decide whether there is admissible evidence that would justify committal for trial in Canada for the Canadian offences specified in the ATP.
- [4] If an extradition judge issues an order of committal, the process moves to the third and final stage, which involves a determination by the Minister of Justice of whether to surrender the individual to the foreign state.

The Facts in this Case

- [5] On July 4, 2019, the Minister of Justice, through his authorized representative, issued an ATP under s. 15 of the Act. It was marked as Ex. 1 in this proceeding.
- [6] As set out in the ATP, Mr. Barba-Ruiz is sought for prosecution in the United States for conduct that the Attorney General of Canada ("AGC") submits, had it occurred in Canada, would justify committal of Mr. Barba-Ruiz for trial for the offence of conspiracy to traffic in a substance included in Schedule I of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA], contrary to s. 465(1)(c) of the Criminal Code, R.S.C., 1985, c. C-46 [Code] and s. 5(1) of the CDSA.
- [7] The AGC relies on the following evidence in support of the application for the committal of Mr. Barba-Ruiz:
 - (a) the Record of the Case for Prosecution ("ROC") certified on June 7, 2019, and marked as Ex. 2 in this hearing;
 - (b) the Revised Record of the Case for Prosecution ("RROC") certified on July 17, 2019, and marked as Ex. 3 in this hearing; and
 - (c) the evidence of Cpl. Bryan Huang with respect to the arrest and identification of the detainee before the court.
- [8] There is very little difference between the ROC and the RROC. The RROC contains some additions and slight revisions to the expected evidence at trial.

The Test for Committal

[9] Where an individual is sought by a requesting state for prosecution, the test for committal is set out in s. 29(1)(a) of the Act:

29(1) A judge shall order the committal of the person into custody to await surrender if

(a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner

[10] In this case, Mr. Barba-Ruiz's counsel concedes that the evidence in the ROC and the RROC is sufficient to establish that the conduct Mr. Barba-Ruiz is alleged to have engaged in, had it been committed in Canada, would justify committal for trial for the offences set out in the ATP. Thus, it is not necessary for me to consider the first part of the test.

[11] In addition, pursuant to an Admission of Fact, filed as Ex. 4 in this proceeding, Mr. Barba-Ruiz admits that: "the person before the Court is the same Jose Barba-Ruiz who, on April 17, 2019, in Vancouver, British Columbia, was arrested by Cpl. Bryan Huang and Cst. Jason Ing of the Royal Canadian Mounted Police upon identifying himself to both as Jose Barba-Ruiz."

[12] Mr. Barba-Ruiz's counsel, therefore, says that the sole issue to be determined is whether the person before the court, Mr. Barba-Ruiz, is the person who is accused of committing the offences giving rise to the ATP and described in the ROC and the RROC.

[13] As a result of Mr. Barba-Ruiz's concession, in this decision, I will only summarize the committal evidence briefly as it relates to the offences. I will set it out in more detail as it relates to the issue of identity.

Summary of the Committal Evidence

The Evidence Set Out in the ROC and the RROC

[14] The ROC and the RROC set out the expected evidence of Corey Forgetta, a Special Agent with the United States Department of Homeland Security ("DHS"), and Nick Moreno, a Special Agent with the United States Drug Enforcement Administration ("DEA"). They will testify with respect to a joint investigation that led to two maritime seizures of large shipments of cocaine in October and November of 2016.

[15] The investigation involved authorized wiretap intercepts of BlackBerry Messenger ("BBM") messages and a cooperating witness ("CW") who worked closely with Mr. Barba-Ruiz and Roberto Castellanos-Meza. Mr. Castellanos-Meza is said to be a significant cocaine broker operating in Mexico.

[16] The CW has pleaded guilty to offences against the United States.

- [17] Special Agents Forgetta and Moreno are expected to testify that between October 16 and 18, 2016, agents intercepted a number of BBM messages relating to a maritime shipment of cocaine. They are expected to say, in particular, that on October 18, the messages show that crew members were aware that they were being followed by aircraft and sought permission to jettison the cargo of cocaine. Mr. Castellanos-Meza gave the necessary permission, and the cocaine was jettisoned.
- [18] Daniel F. Kenney, a Special Agent with DHS Investigations, and a number of Coast Guard Officers are expected to testify about the recovery and seizure of the two jettisoned maritime shipments. Samples taken from the shipments tested positive as cocaine. The first shipment was on October 18, 2016, and the second on November 3, 2016.
- [19] Special Agents Forgetta and Moreno are expected to testify that BBM intercepts of a phone associated with Mr. Castellanos-Meza disclosed conversations about the seizures, including photographs of Mexican Newspaper articles about them.
- [20] Later in November 2016, and in January and February 2017, the Honourable Cynthia Bashant, a United States District Judge in and for the Southern District of California, issued and renewed wiretap authorizations for BBM accounts used by the CW and Mr. Castellanos-Meza.
- [21] The CW is expected to identify Mr. Barba-Ruiz as the user of multiple Blackberry Personal Identification Numbers, which were intercepted during the course of the investigation. The CW is also expected to authenticate the BBM interceptions involving him/her as being his/her communications with Mr. Barba-Ruiz.
- [22] Special Agents Forgetta and Moreno are expected to testify about specific communications that were intercepted in which the parties used coded language regarding brokering of cocaine sales.
- [23] On November 30, 2016, communications were intercepted between the CW and Mr. Barba-Ruiz during which Mr. Barba-Ruiz discussed brokering sales authorized by Mr. Castellanos-Meza of specific "brands" of cocaine. Special Agents Forgetta and Moreno are expected to testify that Mr. Barba-Ruiz and the CW negotiated sales of samples of cocaine, following which they would provide for bulk purchase of cocaine, typically intended for importation to the United States. Special Agents Forgetta and Moreno are also expected to testify about discussions between the CW and Mr. Barba-Ruiz about potential cocaine buyers.
- [24] On January 18, 2017, communications were intercepted in which Mr. Castellanos-Meza instructs Mr. Barba-Ruiz to bring drug ledgers and collected cash to him at his home. Later intercepted communications between Mr. Castellanos-Meza and Mr. Barba-Ruiz involved discussions of cash payments, unit prices for cocaine, and drug deliveries.
- [25] The CW is expected to testify that Mr. Barba-Ruiz is Mr. Castellanos-Meza's secretary and that Mr. Barba-Ruiz and Mr. Castellanos-Meza travelled to Canada together on December 25, 2016. Because the CW personally attended meetings with Mr. Barba-Ruiz and Mr.

Castellanos-Meza during 2016 and 2017, he/she can explain their working relationship, their processes, Mr. Barba-Ruiz's responsibility for maintaining ledgers and financial accounting for Mr. Castellanos-Meza's drug trade, and Mr. Barba-Ruiz's communication with important drug traffickers on Mr. Castellanos-Meza's behalf.

- [26] The CW is also expected to testify that, because of his/her attendance at an accounting meeting with Mr. Castellanos-Meza, Mr. Barba-Ruiz, and others, he learned of the maritime seizures of thousands of pounds of cocaine associated with Mr. Castellanos-Meza's operation. The CW also learned that Mr. Castellanos-Meza and Mr. Barba-Ruiz were investors in the seized shipments, and Mr. Barba-Ruiz confirmed to the CW that the seizures had caused him losses.
- [27] The CW is also expected to testify that, because of his/her attendance at these various meetings with Mr. Barba-Ruiz, he/she is able to identify Mr. Barba-Ruiz and that the photograph that is attached as Ex. A to the RROC, a colour copy of which was marked as Ex. 6 in this proceeding, is a photograph of Mr. Barba-Ruiz, Mr. Castellanos-Meza's secretary.

Corporal Huang's Evidence

- [28] Cpl. Huang and Cst. Ing of the Royal Canadian Mounted Police were involved in the arrest of Mr. Barba-Ruiz.
- [29] Cpl. Huang testified that on April 16, 2019, his office was advised that the Department of Justice ("DOJ") had received information from the DEA and the DHS that an individual who had arrived into Vancouver International Airport (YVR) on a flight from Mexico was being detained by the Canadian Border Services Agency on an immigration issue. The United States sought the extradition of this individual to face charges there. The DOJ forwarded the request from the United States for a provisional arrest of Mr. Barba-Ruiz and a photograph of the individual sought to be arrested, which is the same photograph the CW identified as depicting Mr. Barba-Ruiz in the ROC and the RROC.
- [30] On April 16, 2019, Cst. Ing swore an affidavit in support of a warrant for the provisional arrest of Mr. Barba-Ruiz pursuant to the Act. In it, he set out Mr. Barba-Ruiz's name and nickname, date and place of birth, country of citizenship, and passport number. He attached as Ex. B the photograph of Mr. Barba-Ruiz provided by the United States as part of its request material. He attached as Ex. C copies of Mr. Barba-Ruiz's fingerprints, which also formed part of the request material, and, as Ex. D, a copy of an arrest warrant from the United States District Court of the Southern District of California dated December 14, 2018.
- [31] A copy of Cst. Ing's affidavit was marked as Ex. 5 in this proceeding.
- [32] In his evidence, Cpl. Huang testified that although the photograph attached as an exhibit to Cst. Ing's affidavit is in black and white, he had a colour version of the photo, which was attached to the original of the affidavit. The colour version was marked as Ex. 6 in this proceeding.

- [33] On April 17, 2019, Associate Chief Justice Holmes issued a Warrant of Provisional Arrest (the "Warrant") for Mr. Barba-Ruiz. The Warrant was marked as Ex. 7 in this proceeding.
- [34] After the Warrant was issued, Cpl. Huang testified that he and Cst. Ing arranged to meet with Canada Border Services Agents at YVR. The detainee was brought into an interview room, where they spoke to him. Because Mr. Barba-Ruiz was not proficient in English, Cpl. Huang said they brought in a Spanish-speaking co-worker to interpret for them. The detainee was asked to identify himself. He said that he was Jose Barba-Ruiz and spelled his name for them. He told them his date of birth was March 21, 1989--the same date of birth identified in the ROC and RROC. He wrote out his address for Cpl. Huang and Cst. Ing.
- [35] The Warrant was explained to Mr. Barba-Ruiz, and he was Charter warned. Mr. Barba-Ruiz said he understood, and that he wished to speak to his lawyer, who they understood to be an immigration lawyer, and to the Mexican Consul General. Cpl. Huang and Cst. Ing arranged for Mr. Barba-Ruiz to speak to his lawyer and faxed her a copy of the Warrant. Mr. Barba-Ruiz also spoke to the Consul General.
- [36] Mr. Barba-Ruiz indicated that his family was staying with a cousin, and they intended to travel back to Mexico in a few days. Mr. Barba-Ruiz wrote a letter to his spouse, whom he names, authorizing her to return to Mexico with his two children, whom he also names and for whom he provides dates of birth. Cpl. Huang and Cst. Ing arranged to have the letter faxed to Mr. Barba-Ruiz's immigration lawyer, who was asked to give it to Mr. Barba-Ruiz's wife. A copy of the letter was marked as Ex. 8 in this proceeding.
- [37] Cpl. Huang testified that after Mr. Barba-Ruiz spoke to his lawyer and to the Mexican Consul, he was transported to the Vancouver jail where he was booked. Cpl. Huang and Cst. Ing then went to the Vancouver International Airport and met with the Border Services officer who was responsible for the immigration detention of Mr. Barba-Ruiz. They retrieved Mr. Barba-Ruiz's personal effects, which included US and Mexican currency, a Mexican passport, a Mexican driver's license, and a Mexican voter's card. Cpl. Huang testified that all documents bore a photo and a date of birth of March 21, 1989.
- [38] Copies of Mr. Barba-Ruiz's driver's license and voter's card were marked as Ex. 9 in this proceeding. Cpl. Huang also made a copy of Mr. Barba-Ruiz's passport, as Canadian Border Services wished to maintain continuity of the original. The copy of the passport was marked as Ex. 10. It, too, bore a photograph and a date of birth of March 21, 1989.

Has the AGC Proven Mr. Barba-Ruiz's Identity to the Relevant Standards of Proof?

- [39] In *Danielson v. United States of America*, 2008 BCCA 519 at paras. 24-25, Justice Chiasson wrote:

[24] The two identification issues that arise under s. 29 concern whether a person ("the fugitive") will be committed into custody. The person identified in the RoC must be linked to the alleged criminal conduct and that person must be shown to be the person before the court. I would recast the identification issues as follows:

1. on a balance of probabilities is the person before the court the person named in the RoC;
2. is there a prima facie case that the person before the court is the person who engaged in the alleged conduct that underlies the request for extradition?

[25] Expressed in this way, it is seen that in many cases the inquiry under both identification issues will involve the same information although the onus of proof differs. For example: the evidence in the RoC contains a photograph which is used by witnesses to identify the person linked to the alleged illegal conduct and the same photograph is used by the extradition judge to identify the person in the courtroom. On other occasions the information will not be the same.

[40] Section 37 of the Act specifically deals with the evidence of identification; that is, whether the person before this Court is the Mr. Barba-Ruiz named in the ROC and the RROC:

The following are evidence that the person before the court is the person referred to in the order of arrest, the document that records the conviction or any other document that is presented to support the request:

- (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and
- (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.

[41] In Danielson at para. 27, Justice Chiasson considered whether the word "and" between subparagraphs (a) and (b) of s. 37 requires both similarity of name and physical characteristics and concluded that the use of the verb "are" clearly showed that, individually, both (a) and (b) can be evidence of identification. At para. 28, Justice Chiasson held that s. 37 sets a low threshold for evidence of identification. He referred to *United States of America v. Gunn*, 2007 MBCA 21, leave to appeal ref'd [2007] S.C.C.A. No. 108, and said that mere similarity of name, alone, can be sufficient.

The First Part of the Identification Test from Danielson

[42] Here, I consider whether, on a balance of probabilities, the person before this Court is the person named in the ROC and the RROC.

[43] Paragraph (a) of s. 37 provides that the similarity of Mr. Barba-Ruiz's name to the name of the person set out in the ROC and the RROC is evidence that he is the person who is sought by the United States.

- [44] In this case, the name of the person named in the ROC and the RROC is identical to that of Mr. Barba-Ruiz, who identified himself to Cpl. Huang and Cst. Ing on April 17, 2019, and was arrested pursuant to the Warrant. As the case law describes, it may not be necessary for me to go any further. However, there is additional evidence in this case to support that the person before this Court is the same person named in the ROC and the RROC.
- [45] The passport, Mexican voter's card, and driver's licence Mr. Barba-Ruiz carried all bore the identical name to, and date of birth of, the person sought by the United States. Further, in the presence of Cpl. Huang and Cst. Ing, Mr. Barba-Ruiz wrote a letter to his spouse identifying himself and authorizing her to travel back to Mexico with his children.
- [46] I have also examined the photograph that was attached to Cst. Ing's affidavit, and Ex. 6, the colour version that was available to Cst. Ing and Cpl. Huang, and compared them to the physical characteristics of the individual before me.
- [47] There are three observable differences between the man in the photograph and the man before this Court. The man in the photograph is younger, he does not have a beard, and he is not wearing glasses. However, the facial characteristics of the person before this Court are similar to the facial characteristics of the individual in the photograph. In particular, the face is similarly shaped, the space between the eyes across the bridge of the nose is similar, the nose and eyes are similarly shaped, and the jawline is similar.
- [48] On all the evidence, I conclude that the AGC has met the first part of the identification test.

The Second Part of the Identification Test from Danielson

- [49] Here, I address whether there is a prima facie case that the person before this Court is the person who engaged in the alleged conduct that underlies the request for extradition.
- [50] Counsel for Mr. Barba-Ruiz argues that there is insufficient evidence in the ROC and the RROC to identify Mr. Barba-Ruiz as the person who made the communications to the CW. Although he concedes that the CW would have had sufficient familiarity with the sought person to recognize him, he submits that the photograph used by the CW to identify this person is insufficient to establish a prima facie case that this person was Mr. Barba-Ruiz.
- [51] I agree with counsel that the information provided by the CW in the ROC and RROC, which I summarized above, indicates that he/she has sufficient familiarity with the person who engaged in the alleged conduct to identify him. As summarized above, they had multiple encounters and meetings together with Mr. Castellanos-Meza regarding the drug transactions, to which Mr. Barba-Ruiz would bring the drug ledgers. They also communicated over BBM regarding the drug transactions in conversations that were intercepted by the investigative team.

- [52] Mr. Barba-Ruiz's counsel submits that the photograph used by the CW to identify Mr. Barba-Ruiz is the only information from the CW identifying Mr. Barba-Ruiz as the person who sent the messages and participated in the meetings. He argues that this photograph alone is insufficient to establish a prima facie case that the person is Mr. Barba-Ruiz, given that the photograph was taken in 2007 and the meetings at which the CW and Mr. Barba-Ruiz were both present were in 2016 and 2017.
- [53] Counsel for Mr. Barba-Ruiz compares this case to that of Danielson, in which the extradition judge held that he could not rely on the photograph submitted for identification purposes. In Danielson, other information was relied upon to support the finding that there was a prima facie case linking the conduct to the sought person. Counsel submits that the same cannot be said in this case.
- [54] Unlike the extradition judge in Danielson, I am satisfied that the photograph submitted in this extradition hearing can be relied upon to establish a prima facie case through the evidence of the CW to link the alleged criminal conduct to Mr. Barba-Ruiz. The photograph, although a bit blurry, is sufficiently clear to show the individual's face shape and facial features in a way that would permit a person who is familiar with the individual to identify him. These features do not tend to change with the passage of time. The presence of facial hair and the wearing of glasses can change.
- [55] The court in Danielson at para. 25 expressly recognized that the same photograph could be used to satisfy both aspects of the identification question, and I am satisfied that it does so in this case.
- [56] Based on the content of the ROC and the RROC, I am satisfied that there is a prima facie case that the person before this Court is the person who engaged in the alleged conduct that underlies the request for extradition of Mr. Barba-Ruiz on the charge set out in the ATP.

Conclusion

- [57] Given the defence concession that the admissible evidence would justify committal for trial in Canada on the offence set out in the ATP, and having determined that the AGC has proven Mr. Barba-Ruiz's identity to the relevant standards of proof, I commit Mr. Barba-Ruiz for the corresponding offence of conspiracy to traffic a substance included in Schedule 1 of the CDSA, contrary to s. 465 of the Code and s. 5(1) of the CDSA.
- [58] Under s. 29(1)(a) of the Act, Mr. Barba-Ruiz is committed into custody to await a determination by the Minister of Justice of whether to surrender him to the United States.
- [59] Pursuant to s. 38(2) of the Act, I am required to inform you, Mr. Barba-Ruiz, that you will not be surrendered until after the expiry of 30 days and that you have a right to appeal this committal order and to apply for judicial interim release.

[60] Pursuant to s. 38(1) of the Act, I direct that the following documents be transmitted to the Minister of Justice:

- a) a copy of the committal order;
- b) a transcript of the evidence adduced at this hearing;
- c) copies of all exhibits introduced at this hearing; and
- d) a copy of these reasons.

"MacNaughton J."

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