
CANADA / JUDGMENT

United States v. Wakeling

2013 BCCA 166

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 166 United States v. Wakeling

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

United States v. Wakeling,

2013 BCCA 166

Date: 20130118

Docket: CA039032

Between:

The Attorney General of Canada

on behalf of the United States of America

Respondent

And

Andrew Gordon Wakeling

Applicant

Before:

The Honourable Mr. Justice Frankel

(In Chambers)

On appeal from: Supreme Court of British Columbia, May 13, 2011

(U.S.A. v. Wakeling, Vancouver Registry No. 25260)

Oral Reasons for Judgment

Counsel for the Applicant:

G.P. DelBigio, Q.C.

Counsel for the Respondent:

K.L. Swift

Place and Date of Hearing:

Vancouver, British Columbia

January 11, 2013

Place and Date of Judgment:

Vancouver, British Columbia

January 18, 2013

[1] FRANKEL J.A.: This is an application by Andrew Gordon Wakeling for release pending the determination of his application for leave to appeal to the Supreme Court of Canada. That application is from the judgment of this Court dismissing an appeal from his committal for extradition by a judge of the Supreme Court of British Columbia. The United States of America seeks to have Mr. Wakeling extradited to stand trial on drug-related charges arising out of the importation into that country of a large quantity of MDMA, more commonly called ecstasy, in 2006. The Minister of Justice has ordered Mr. Wakeling surrendered on those charges.

Background

- [2] The extradition proceedings in Canada have been on-going for several years. Mr. Wakeling was initially arrested in Ontario in 2007, where he was released on a recognizance in the amount of \$35,000.00, with a cash deposit in that amount. In 2009, the extradition proceedings were transferred to British Columbia, where Mr. Wakeling resides.
- [3] Mr. Wakeling's cash bail was confirmed by a judge of the Supreme Court of British Columbia on January 11, 2010. That bail contained a number of conditions including ones requiring Mr. Wakeling to remain in British Columbia and to abide by a night-time curfew. However, Mr. Wakeling immediately breached his bail conditions as he was stopped for speeding in New Brunswick on January 14, 2010. At that time he produced a Saskatchewan driver's licence with an address in Regina. When the Attorney General of Canada became aware of that breach he sought and obtained a warrant for Mr. Wakeling's arrest. That warrant was executed and Mr. Wakeling was again taken into custody.
- [4] On February 11, 2010, a judge of the Supreme Court of British Columbia dismissed Mr. Wakeling's application for release. At that time, the extradition hearing was set for May 2010.

- [5] Shortly before the extradition hearing was to start, Mr. Wakeling indicated that he intended to bring a constitutional challenge to s. 193(2)(e) of the Criminal Code, R.S.C. 1985, c. C-46. That provision permits Canadian peace officers to disclose private communications that have been lawfully intercepted in Canada to foreign authorities. The reason for this challenge was that the evidence submitted by the United States in support of its extradition request consisted mainly of telephone calls to which Mr. Wakeling was a party. Those calls had been lawfully intercepted in Canada and disclosed to American investigators. Mr. Wakeling sought to have those calls ruled inadmissible on the basis that his rights were violated by reason of the fact that they were disclosed without a judicial authorization specifically permitting disclosure. It was common ground that Mr. Wakeling could not be committed without those calls.
- [6] As time was needed for the parties to prepare for and argue the constitutional challenge, the extradition hearing did not proceed in May 2010.
- [7] On July 28, 2010, Mr. Wakeling renewed his application for release. He relied on the fact that the adjournment of the extradition hearing constituted a change in circumstances. That application was granted and Mr. Wakeling was released on a recognizance in the amount of \$150,000.00 with one surety and on strict conditions. That bail remained in place throughout the course of the extradition proceedings in the Supreme Court. Mr. Wakeling's mother, Jean Wakeling, was the surety.
- [8] The constitutional challenge was heard over several days in late 2010 and early 2011. On February 10, 2011, the extradition judge dismissed that challenge. Her reasons are indexed as 2011 BCSC 165. The extradition hearing continued and on May 13, 2011, the judge committed Mr. Wakeling into custody to await a decision by the Minister of Justice with respect to his surrender. That same day Mr. Wakeling filed an appeal from committal and, pending the hearing of that appeal, a judge of this Court released him on a recognizance in the amount of \$150,000.00 with one surety and on strict conditions. His mother continued to be the surety.
- [9] On October 20, 2011, the Minister ordered Mr. Wakeling surrendered. On November 1, 2011, Mr. Wakeling filed an application for judicial review of the Minister's decision. On November 24, 2011, his bail was renewed pending the hearing of his appeal and the judicial review application. The hearing of those matters commenced on May 31, 2012. As required by a condition of his release, Mr. Wakeling surrendered himself into custody that morning.
- [10] The hearing in this Court continued on June 1, 2012, at which time judgment was reserved on both the appeal and the judicial review application. The presiding judge then ordered Mr. Wakeling released on a recognizance on the same terms and conditions as before, with the surrender date now being the morning set for release of this Court's judgment. Mr. Wakeling complied with that condition on October 9, 2012 and has been in custody since then.

- [11] This Court dismissed both the appeal from committal and the judicial review application. In doing so, it rejected Mr. Wakeling's constitutional challenge. The Court's reasons are indexed as 2012 BCCA 397.
- [12] On November 9, 2012, Mr. Wakeling filed an application with the Supreme Court of Canada seeking leave to appeal this Court's judgment affirming his committal: File No. 35072. That application focuses principally on the constitutional challenge rejected by both the extradition judge and this Court.
- [13] Mr. Wakeling is 46 years old. He lives in Lillooet, British Columbia, with his wife. Their residence is within 200 meters of the local Royal Canadian Mounted Police Detachment. His mother, two brothers, two sisters, and three adult children all reside in this province. He has one grandchild. He is self-employed, and before going back into custody last October, he was involved in renovating suites in the apartment building in which he lives; a building owned by his mother.
- [14] Mr. Wakeling has a criminal record comprised of 16 convictions for a variety of offences, mostly property-related crimes. In light of the sentences imposed, the offences appear to be at the less serious end of the spectrum. His most recent conviction was in 2000, when he received a one month sentence for obstructing a peace officer.

Applicable Test

- [15] By virtue of s. 20 of the Extradition Act, S.C. 1999, c. 18, this application is governed by s. 679(3) of the Criminal Code. To obtain release, Mr. Wakeling must establish that: (a) his appeal is not frivolous; (b) he will surrender himself into custody when required to do so; and (c) that his detention is not in the public interest.

Positions of the Parties

- [16] Mr. Wakeling submits that he has satisfied all three conditions. The first is not directly in issue as the Attorney General accepts that the grounds Mr. Wakeling seeks to advance in the Supreme Court of Canada are arguable. However, the Attorney General's position is that they are exceedingly weak. I will return to this argument later in these reasons.
- [17] Mr. Wakeling says that the following factors militate in favour of his release:
- (a) he has roots in British Columbia;
 - (b) he lives "under the nose" of the Royal Canadian Mounted Police which makes it difficult for him to abscond;
 - (c) except for the New Brunswick incident - which he describes as a "bump" - he has complied with the conditions of his release and has surrendered when required to do so; and
 - (d) his criminal record is "dated".

He acknowledges that weighing against him is the fact that his fight to avoid extradition is coming to the end of the line.

- [18] In opposing the granting of bail, the Attorney General submits that although Mr. Wakeling's grounds cannot be said to be frivolous, they lack obvious merit and, therefore, it is highly unlikely that the Supreme Court of Canada will grant leave to appeal. In this connection, the Attorney General says this Court's decision upholding the constitutionality of s. 193(2)(e) of the Criminal Code is entirely reasonable and notes that there are no conflicting decisions on this issue.
- [19] The Attorney General describes the New Brunswick incident as a "flagrant and serious breach"; one that raises concerns with respect to whether Mr. Wakeling will abide by any conditions imposed on him now that the extradition proceedings have reached their final stage. He further submits that the risk of flight is now greater than it was previously and must be assessed having regard to Canada's international obligations and the fact that extradition proceedings are near conclusion: see *Thailand v. Saxena*, 2006 BCCA 145 at para. 13 (Chambers), 224 B.C.A.C. 68; *United States v. Ibrahim*, 2012 BCCA 278 at para. 41 (Chambers), 323 B.C.A.C. 234.
- [20] With respect to the public interest criterion, the Attorney General submits, again on the basis of the New Brunswick incident and the fact that the extradition proceedings are in their late stages, that Mr. Wakeling poses a threat to public safety. In addition, the Attorney General submits that public confidence in the administration of justice would be adversely affected if a person who has been committed for extradition for serious offences is released in connection with an application for leave to appeal which is unlikely to succeed. Put otherwise, the Attorney General says that Mr. Wakeling has not established that the public interest in the "reviewability" of his committal outweighs the public interest in the "enforceability" of that order: see *R. v. Mapara*, 2001 BCCA 508 at paras. 32 - 36, 158 C.C.C. (3d) 312; *R. v. Gingras*; *R. v. Porisky*, 2012 BCCA 467 at para. 45.

Analysis

- [21] I will begin by considering the second criterion in s. 679(3), and the question of whether I am satisfied that Mr. Wakeling will surrender himself into custody in accordance with any order I might make. While I appreciate that Mr. Wakeling's efforts to avoid being surrendered have so far failed and that the extradition process is nearing its conclusion, the fact remains that he has been on bail for some years and, except for the New Brunswick incident early on in the process, has abided by very strict conditions and has surrendered when required to do so. Those conditions include reporting in person five days per week to the Lillooet Detachment, abiding by a night-time curfew, and presenting himself at the door of his residence when the police attend there during the curfew hours. When I consider his previous compliance together with his roots in this province and the fact that his mother is prepared to stand as his surety for a significant amount, I am satisfied that the degree to which he is a risk to flee can be adequately addressed through strict conditions.

- [22] This brings me to the third criterion in s. 679(3), namely whether Mr. Wakeling has satisfied me that his detention is not necessary in the public interest. This, again, requires a consideration of his grounds of appeal and prospects of success.
- [23] The Attorney General is correct when he says that leave to appeal is difficult to obtain from the Supreme Court of Canada. As Mr. Justice Doherty observed in *France v. Ouzghar*, 2009 ONCA 137, 242 C.C.C. (3d) 26 (Chambers), such applications are granted "sparingly". However, Mr. Justice Doherty also noted that it is difficult for a judge of an intermediate appellate court to realistically assess an applicant's chances of obtaining leave. This is because it is not possible to predict what the Supreme Court will find to be what is commonly referred to as "an issue of national importance". The fact that, as in the case at bar, there are no conflicting decisions will not inevitably result in leave being refused. Indeed, there have been cases in which leave was granted notwithstanding that several courts of appeal had come to the same conclusion on the point of law in issue. In this case, the issue sought to be raised is a novel one and I cannot say that it is so devoid of merit that its limited prospects of success weigh against granting bail.
- [24] What remains is a consideration of whether Mr. Wakeling's interest in seeking a review of this Court's decision on the constitutionality of s. 193(2)(e) of the Criminal Code outweighs the public's interest in the enforceability of the order for his committal. In this regard, it is important to keep in mind the distinction that exists between an extradition and a domestic prosecution. As Mr. Wakeling points out, his situation is different from that of an offender who applies for bail pending an appeal from conviction. Mr. Wakeling has not been convicted and, therefore, the presumption of innocence has not been displaced: see *United States of America v. Le*, [2012] O.J. No. 2802 at paras. 15, 16 (C.A., Chambers).
- [25] In assessing the public interest, the judgment in *Ouzghar* is again apposite. In that case, France sought to extradite Mr. Ouzghar for trial. After noting, in paragraph 11, that a person who has yet to be tried is not someone whom a court has found should be incarcerated, Mr. Justice Doherty stated:
- [12] In addressing the public interest, it is important to understand the purpose for which the applicant is in custody in Canada. The only reason Canada has any cause to place him in custody is to facilitate his surrender to France. The applicant will not be surrendered while his application for leave to appeal to the Supreme Court of Canada is outstanding. It cannot be said to be in the public interest to hold the applicant in custody to facilitate his surrender when his surrender will not take place before the application for leave is decided. Absent some substantive cause specific to the applicant to justify detention, the public interest considered in the context of an extradition proceeding is not served by incarceration that does not facilitate the applicant's surrender to the requesting country.

[26] Returning to Mr. Wakeling, having considered all of the factors, I am of the view that he is entitled to bail. Accordingly, I order that he be released upon his entering into a recognizance in the amount of \$150,000.00 without deposit but with one surety, that surety to be his mother (subject to her being found acceptable by a justice of the peace). The conditions of the recognizance will be the same as those set out in the last bail order, being the one granted by Mr. Justice Low on June 1, 2012, with the following changes:

Condition (b) will now read:

The Applicant shall report, in person, daily to the RCMP Detachment in Lillooet, British Columbia.

Condition (n) will now read:

In the event that an oral hearing of the Applicant's application for leave to appeal is ordered by the Supreme Court of Canada, the Applicant shall surrender himself into custody at the Sheriff's Office, The Law Courts, 800 Smithe Street, Vancouver, British Columbia, at 9:30 a.m. on the day prior to the date fixed for that hearing. If the hearing is scheduled for a Monday, then surrender shall be the previous Friday. If the hearing is scheduled for the day following a statutory holiday, then surrender shall be on the immediately previous non-weekend work day.

[27] The recognizance will also contain the following conditions:

Condition (o):

In the event that an oral hearing of the Applicant's application for leave to appeal is ordered and judgment is reserved by the Supreme Court of Canada, the Applicant shall be released from custody, and shall continue to be bound by Conditions (a) to (m) above and Conditions (q) and (r) below. In addition, the Applicant shall surrender himself into custody at the Sheriff's Office, The Law Courts, 800 Smithe Street, Vancouver, British Columbia, at 9:30 a.m. on the day prior to the date fixed by the Supreme Court of Canada for the delivery of judgment on his application for leave to appeal. If that day is a Monday, then surrender shall be on the previous Friday. If that day follows a statutory holiday, then surrender shall be on the immediately previous non-weekend work day.

Condition (p):

In the event that an oral hearing of Applicant's application for leave to appeal is not ordered, the Applicant shall surrender himself into custody at the Sheriff's Office, The Law Courts, 800 Smithe Street, Vancouver, British Columbia, at 9:30 a.m. on the day prior to the date fixed by the Supreme Court of Canada for the delivery of judgment on his application for leave to appeal. If that day is a Monday, then surrender shall be on the previous Friday. If that day follows a statutory holiday, then surrender shall be on the immediately previous non-weekend work day.

Condition (q):

In the event that the Applicant abandons his application for leave to appeal, he shall forthwith surrender himself into custody at the Sheriff's Office, The Law Courts, 800 Smithe Street, Vancouver, British Columbia.

Condition (r):

The Applicant shall, in any event, surrender himself into custody at the Sheriff's Office, The Law Courts, 800 Smith Street, Vancouver, British Columbia, at 9:30 a.m. on June 28, 2013.

"The Honourable Mr. Justice Frankel"

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