

CANADA / JUDGMENT

Vanbuskirk v. Mission Institution (Warden)

2011 BCSC 1278

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1278 Vanbuskirk v. Mission Institution (Warden)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vanbuskirk v. Mission Institution (Warden),

2011 BCSC 1278

Date: 20110928

Docket: 25833

Registry: Vancouver

Between:

Brent William Vanbuskirk

Applicant

And

Barbara Vanvugt, Warden of Mission Institution

and The Attorney General of Canada

Respondent

Before: The Honourable Madam Justice H. Holmes

Reasons for Judgment

The Applicant, Brent William Vanbuskirk:

Appearing on his own behalf

Counsel for the Respondent:

Sarah-Dawn Norris

Liliane Bantourakis

Place and Date of Hearing:

Vancouver, B.C.

September 2, 2011

Place and Date of Judgment:

Vancouver, B.C.

September 28, 2011

INTRODUCTION

- [1] Brent Vanbuskirk, who is 24 years of age, is serving sentences of imprisonment totalling 17 years and 2 months. He is currently incarcerated in Kent Institution, a maximum security prison. By way of habeas corpus, he challenges his transfer to Kent Institution from Mission Institution, a medium security facility.
- [2] Mr. Vanbuskirk says that the transfer to Kent Institution was unlawful for three main reasons, namely that:
1. the Warden's decision to authorize his transfer was made without procedural fairness, because:
 - (a) Mr. Vanbuskirk had insufficient disclosure of the bases for the proposed transfer to allow him to respond meaningfully, and
 - (b) the Warden gave inadequate reasons for her decision
 2. the Warden of Mission Institution had no real basis for her decision authorizing his transfer, and
 3. the process leading to his transfer was tainted by institutional bias.
- [3] For the reasons given below, Mr. Vanbuskirk's challenges to the process and the basis of the Warden's decision cannot succeed, and his challenge based on institutional bias has become moot. Mr. Vanbuskirk's application must therefore be dismissed.

BACKGROUND

- [4] Mr. Vanbuskirk's imprisonment in a federal institution began on December 21, 2006. He had been tried and convicted as a youth for first degree murder, and received a sentence of 8 years 2 months. Also composing the 17 years and 2 months term of imprisonment he is now serving are sentences for two charges of conspiracy to commit murder, and a charge of contempt of court.

- [5] On April 6, 2011, while he was an inmate at Mission Institution, Mr. Vanbuskirk was placed in administrative segregation pending a review of his security classification. He was suspected of involvement in the institutional drug subculture, and in the importation to and distribution of drugs and tobacco within the Mission Institution.
- [6] Mr. Vanbuskirk's Case Management Team then recommended his transfer to Mountain Institution, another medium security facility. Mr. Vanbuskirk was advised of the recommendation on April 19, 2011. He filed a written rebuttal to the recommendation with the Warden's board on May 11, 2011.
- [7] On May 20, 2011, the day scheduled for Mr. Vanbuskirk's move to Mountain Institution, he refused to leave his cell and would not cooperate. The move did not take place.
- [8] Mr. Vanbuskirk was then given notice, on June 2, 2011, of his Case Management Team's recommendation that he be transferred to Kent Institution because he was no longer manageable in a medium security institution.
- [9] At a hearing on June 10, 2011, the Warden of Mission Institution considered and approved Mr. Vanbuskirk's involuntary transfer to Kent Institution, and a change in his security classification from "medium" to "maximum". Mr. Vanbuskirk was released from segregation and transferred to Kent Institution on June 13, 2011.
- [10] Mr. Vanbuskirk is alleged to have twice stabbed an inmate at Kent Institution on June 21, 2011. The inmate was sent to hospital, and a police investigation continues. The respondents do not suggest that the incident, as alleged, renders the present application moot. However, they submit that because the Correctional Service of Canada has an ongoing duty to assess the security risks inmates pose, it seems unlikely that Mr. Vanbuskirk would be released into the general population of a medium security institution, even if the present application succeeds.

DISCUSSION

Habeas Corpus: General Principles

- [11] A successful application for habeas corpus has two elements, described in *May v. Ferndale Institution*, 2005 SCC 82 at para. 74, [2005] 3 S.C.R. 809, to which both Mr. Vanbuskirk and the respondents referred.
- [12] First, the applicant must show a deprivation of liberty. The respondents concede that Mr. Vanbuskirk's transfer from Mission Institution to Kent Institution was a deprivation of liberty because it imposed more restrictive measures on Mr. Vanbuskirk.
- [13] Second, the deprivation of liberty must be unlawful. Where the applicant has shown a deprivation of liberty, the burden falls to the detaining authority to establish that the deprivation was lawful.

- [14] Mr. Vanbuskirk agrees that the Corrections and Conditional Release Act, S.C. 1992, c. 20 ("CCRA") in ss. 29-30 gives the Warden authority to approve Mr. Vanbuskirk's security classification and his involuntary transfer. He relies instead on the common law duty of administrative decision-makers, of which the Warden was one, to act in accordance with procedural fairness.
- [15] Aspects of this duty appear in s. 12 of the Regulations to the CCRA, which entitles inmates to notice of the reasons for a proposed transfer, to make submissions with respect to those reasons, and to have submissions considered prior to any final decision regarding a transfer:
12. Before the transfer of an inmate pursuant to section 29 of the Act, other than a transfer at the request of the inmate, an institutional head or a staff member designated by the institutional head shall
- (a) give the inmate written notice of the proposed transfer, including the reasons for the proposed transfer and the proposed destination;
 - (b) after giving the inmate a reasonable opportunity to prepare representations with respect to the proposed transfer, meet with the inmate to explain the reasons for the proposed transfer and give the inmate an opportunity to make representations with respect to the proposed transfer in person or, if the inmate prefers, in writing;
 - (c) forward the inmate's representations to the Commissioner or to a staff member designated in accordance with paragraph 5(1)(b); and
 - (d) give the inmate written notice of the final decision respecting the transfer, and the reasons for the decision,
 - (i) at least two days before the transfer if the final decision is to transfer the inmate, unless the inmate consents to a shorter period; and
 - (ii) within five working days after the decision if the final decision is not to transfer the inmate.
- [16] As I will now discuss, Mr. Vanbuskirk submits that the Warden failed to provide sufficient disclosure of the reasons for the proposed transfer and to provide her reasons, after the hearing, for authorizing it.
- 1(a) Did Mr. Vanbuskirk Receive Sufficient Disclosure?
- [17] Mr. Vanbuskirk submits that the Warden's decision authorizing his transfer did not conform to the requirements of procedural fairness, because Mr. Vanbuskirk had insufficient disclosure of the allegations on the basis of which the transfer was proposed and authorized, and was therefore unable to know and meet the case against him.
- [18] I am unable to agree for the following reasons.

- [19] Procedural fairness in an administrative law context generally does not require the decision-maker to disclose all relevant information. Rather, he or she need disclose only the information he or she relied upon. The disclosure must be sufficient to enable the affected party to participate meaningfully in the decision-making process. That party must know the case he or she has to meet. (May, at paras. 91-92).
- [20] The decision to transfer Mr. Vanbuskirk to Kent Institution did not take place in isolation. Many of the incidents and concerns on which the Warden based her decision to transfer Mr. Vanbuskirk also grounded the earlier recommendations that Mr. Vanbuskirk be transferred to Mountain Institution. They included two "official security incidents" (although one consisted of fighting with another inmate which both parties said was "play fighting") and incidents and information from "believed reliable sources" advising that Mr. Vanbuskirk was involved in the drug subculture as a financier, had arranged at least two assaults, had brought cocaine into the institution, and had used a cell phone to make drug-related calls. Mr. Vanbuskirk was familiar with these incidents and concerns because he had been advised of them before that earlier proposed transfer, and he took the opportunity to respond to them in detail in the written rebuttal he submitted to the Warden's board on May 11, 2011.
- [21] Additional incidents or concerns arose between the time of the proposed transfer to Mountain Institution and the proceedings concerning Mr. Vanbuskirk's proposed transfer to Kent Institution. One of these was a third official security incident consisting of Mr. Vanbuskirk's refusal to leave his cell when ordered to do so on May 20, 2011 for the purpose of being transferred to Mountain Institution. Also new was "confirmed reliable source information" in May 2011 alleging that Mr. Vanbuskirk continued to be involved in financial transactions within Mission Institution despite his segregation.
- [22] Mr. Vanbuskirk evidently understood the general nature of the allegations and concerns. He gave an extensive and reasoned handwritten rebuttal to the Warden when she considered his transfer to Mountain Institution. He presented a well-organized type-written rebuttal when the Warden considered his transfer to Kent Institution.
- [23] The two written rebuttals demonstrate that Mr. Vanbuskirk had a clear and complete understanding of the general nature of the allegations and concerns. For example, in his rebuttal concerning the transfer to Kent Institution, after listing the documents he had received, he wrote "I deny the allegations that I am involved in the institutional drug trade and that I have played any part in any assaults". After then setting out some general principles concerning the Warden's legislated, common law, and constitutional duties, Mr. Vanbuskirk in his rebuttal responded to the alleged incidents and concerns one by one.

[24] It is true that, in relation to several of those alleged incidents and concerns, Mr. Vanbuskirk complained, as he does now, that disclosure was inadequate to allow him to make a proper response. For example, in response to the report that "two believed reliable sources claimed that Mr. Vanbuskirk is involved in the drug subculture as a financier and is responsible for arranging at least two recent assaults", he said the following:

I deny this accusation in the strongest possible terms. I do not finance, receive, give, sell, buy, import, transport or administer, drugs or contraband. I have [sic; pres. not] participated in any manner, in any assaults recently or long past. The sources are either purposely lying or repeating the fabrications of others.

I request, and I am entitled to full disclosure as section 27 of the Corrections and Conditional Release Act. The institution is obligated to provide me with all information used in reaching their decision, with the exception as noted in section 27(3).

How did the institution determine that the sources were reliable? How did they come across their information? Are they claiming first hand knowledge or are they repeating hearsay? Does two people repeating the same lie make it true? Are the two informers friends who have conspired for their own reasons? Why no dates? Why no source designators? Are both sources supplying identical information? Is their information substantially different, substantially the same? Who was I supposed to arranged to have assaulted? What was my motive?

Seeing as I really don't have money, how am I financing anything? Where did the money come from? Where did the go? Where is my connection to it? When was this supposed to have happened?

Would it not make sense for information of this sort to have some grain of truth to it? I have never been caught with drugs, I have never had a hot urine analysis, there is no physical evidence to support these allegations and it seems that the SIO department did nothing to investigate the claims or verify them in any manner. They have listened to the allegations of their informer(s) and concluded that they tell a good tale so they are to be believed.

I do not want the names of the informers, but I should have access to the substance and details of what they are saying so that I can make some defence other than "DID NOT!"

[25] As Mr. Vanbuskirk recognizes, information identifying an informer may properly be withheld according to the principles in *R. v. Leipert*, [1997] 1 S.C.R. 281 and under CCRA s. 27(3). Also, CCRA s. 27(3) allows certain information, including information the disclosure of which would endanger a person, to be withheld from the information otherwise to be given to an offender facing a potential transfer:

27. (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

...

- (3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize
- (a) the safety of any person,
 - (b) the security of a penitentiary, or
 - (c) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (a), (b) or (c).

[26] Mr. Vanbuskirk does not contend that informer sources should have been disclosed. Rather, he contends that the Warden failed even to meet the basic requirements of Correctional Service Canada policy to supply the relevant facts.

[27] Information to be given to the offender about a transfer decision may be given by way of "summary": CCRA, s. 27(1), quoted above.

[28] Correctional Service Canada policy, in Commissioner's Directive 568-6, "Creation, Control and Handling of Preventive Security Files", provides for such summaries to be given by way of a "gist":

30. Any sensitive information contained in the Preventive Security files that is shared with the case management team for the completion of any Assessment for Decision shall be formulated in the form of a gist. Information on the preparation of a gist is found in CD 701, entitled "Information Sharing", Annex B.

31. All staff required to prepare a gist of any sensitive information for any Assessment for Decision shall consult with the Security Intelligence Officer to ensure that the gist protects the sources of the information and reflects the intent of the information provided.

[29] Mr. Vanbuskirk notes that Commissioner's Directive 701, entitled "Information Sharing", Annex B, provides directions for the content of a gist, and requires it to include considerable detail (subject to the need to protect informant sources):

5. The gist must furnish the relevant facts, including:

- a. the dates and places of specific incidents;

- b. the manner in which these became known to the authorities; and
- c. any other evidence supporting the Intelligence information.
- 6. The name of an informant is not relevant information.
- 7. The disclosure of information to an offender does not necessarily mean that he or she has a right to:
 - a. know the identity of the source of the information, or details and circumstances which could reveal the identity of a source of information;
 - b. a production of the actual documents; or
 - c. all of the details of the case against him or her.
- 8. The information shared must provide the offender with sufficient details to enable the offender to respond meaningfully to the assertions being made.
- [30] He submits that the disclosure he received regarding the basis for his transfer did not meet the requirements of Commissioner's Directive 701, because it lacked dates, places, or any reference to supporting evidence except broad and conclusory statements based on information described as reliable without any indicated foundation.
- [31] However, sections 5 through 8 of Commissioner's Directive 701, Annex B, must be read in light of sections 52 and 53, which allow information to be withheld when it would jeopardize the safety of individuals:
 - 52. The CCRA subsection 27(3) identifies that information may be withheld from the offender when the information would jeopardize:
 - a. the safety of individuals;
 - b. the security of a penitentiary;
 - c. the conduct of any lawful investigation.
 - 53. The disclosure of this information to an offender does not necessarily mean that he or she has a right to:
 - a. know the identity of the source of the information, or details and circumstances which could reveal the identity of a source of information;
 - b. a production of the actual documents; or
 - c. all of the details of the case against him or her.
- [32] Thus, while information from a confidential source may be given through a gist or summary, Correctional Service Canada policy does not require disclosure of details or circumstances which could reveal the identity of the source. Nor does it require the production of actual documents, or all of the details of the case against the offender.

- [33] The common law and constitutional principles governing disclosure in the administrative law context also do not necessarily require the disclosure of this type of information. As discussed earlier, sufficient information must be disclosed to allow the offender to know the basis for the decision and therefore the case to meet, and to be in a position to respond to it.
- [34] Mr. Vanbuskirk's written and oral responses indicate that he was in that position and that, despite a lack of specific details in relation to some of the incidents and concerns, he understood and responded to the allegations and concerns that led to the decision to authorize his transfer.
- [35] As is sometimes done, where a Warden has relied in part on confidential source information, the respondents provided the Court with a sealed affidavit. I have reviewed the affidavit, but found it to be of little assistance. However, it does not detract from the conclusions I have reached on the other evidence in the application. The affidavit will be maintained in a sealed envelope in the court registry.

1(b) Did the Warden Give Sufficient Reasons for Authorizing the Transfer?

- [36] Mr. Vanbuskirk submits that the Warden's reasons rejecting his rebuttal and authorizing his transfer to Kent Institution failed to provide an intelligible basis for the decision and the reasoning underlying it, and thus breached the requirements of procedural fairness.
- [37] In this submission, Mr. Vanbuskirk notes that the brief remarks the Warden made following his oral submissions in the hearing were far shorter than his own oral submissions based on his yet more extensive written rebuttal. He submits that those remarks were insufficient to amount to intelligible reasons for decision, as required for procedural fairness.
- [38] This submission cannot succeed because it overlooks two important contextual facts.
- [39] First, the remarks were made following a hearing that reconsidered, in addition to new incidents and concerns, incidents and concerns raised and addressed in the previous hearing concerning the proposed transfer to Mountain Institution. It is clear from the evidence that all parties well understood the nature of the alleged incidents and concerns that founded the previous recommendation for transfer, and the Warden's reasons authorizing that transfer.
- [40] Second, following the hearing concerning the transfer to Kent Institution, the Warden, on June 11, 2011, gave Mr. Vanbuskirk extensive written reasons for her decision. Her brief remarks following Mr. Vanbuskirk's submissions during the hearing thus amounted essentially to the brief statement of her conclusion, the reasons for her conclusion following the next day in her written "Final Decision".
- [41] In that Final Decision, the Warden specifically noted Mr. Vanbuskirk's main concerns and responded to them:

In response to your concerns, I submit the following:

- 1) Your refusal to transfer to Mountain Institution was based on your concerns that CSC had not explored other medium security options as you were willing to integrate into Matsqui Institution. You expressed concern related to the incompatible at Matsqui Institution as you felt it could be mediated. You noted concerns related to your safety at Mountain Institution and the detrimental impact that labelling of a "Protective Custody" status would have on your future incarceration. I do not agree. I am satisfied your CMT [Case Management Team] fully explored options in which to appropriately manage your continued presence in a medium security environment through a transfer to Mountain Institution where you had no documented incompatibles. Your choice to refuse to transfer to another medium security environment has demonstrated you do not currently possess the ability to be managed within a medium security environment. You were provided this additional opportunity as a form of intervention to continue to manage you within a medium security environment that provides you more structure than Mission Institution. You have demonstrated (as outlined in the Assessment for Decision) the additional strategies attempted to maintain you at medium security are not sufficient. I concur with the CMT's recommendation.
- 2) In regards to your claims that CSC has not followed laws and policies related to information sharing, segregation and least restrictive measures related to security classification, I do not agree. I have reviewed the information presented and I am satisfied that staff were in accordance with laws and policies and all required information was shared with you in relation to the recommendation for an involuntary transfer to Kent (maximum security) Institution. In addition you were provided additional time outside of policy requirements to prepare your rebuttal to this information.

[42] The Warden's written reasons make abundantly clear that Mr. Vanbuskirk's refusal to follow staff orders to leave his cell for transfer to Mountain Institution, coupled with the previous and increasing concerns about his involvement in the drug subculture at Mission Institution, left him unsuitable for medium security classification:

Commissioner's Directive (CD) 706 gives clear instruction as to what is expected of medium-security inmates. Medium-security inmates demonstrate the "desire and ability to interact effectively with others, individually and in moderately structures groups while subject to regular and often direct supervision". It is my opinion you require a higher degree of structure and supervision, as evidenced by the behaviours referred to in the Assessment for Decision.

[43] The Warden's reasons did not fall short of the requirements of procedural fairness.

2. Did the Warden's Decision Have a Real Basis?

[44] Mr. Vanbuskirk submits that the Warden's decision to transfer him to a maximum security institution had no real basis because the only new incident, since the Warden's decision to keep him in medium security by transferring him to Mountain Institution, was his refusal to cooperate with that transfer, and, he says, that refusal could readily have been addressed by other less restrictive means. He refers in this regard to the requirement in CCRA s. 4(d) that the Warden use the least restrictive measure consistent with the protection of the public,

staff members, and offenders.

- [45] Among the suitable options for maintaining him in a medium security institution which, Mr. Vanbuskirk submits, the Warden failed to consider were transfers to Matsqui or Pacific Institutions, coupled with, in the case of Matsqui Institution, mediation and adjudication to resolve a difficulty there with an inmate deemed "incompatible" with Mr. Vanbuskirk.
- [46] Mr. Vanbuskirk explains that he refused to cooperate with the transfer to Mountain Institution because that institution is viewed, within the inmate population, as a protective custody institution, and inmates who have spent time there are viewed with suspicion and disgust.
- [47] The difficulty with these submissions -- if indeed they may in law provide a basis for review, which I do not here decide -- is that the Warden clearly determined that medium security was no longer a suitable classification for Mr. Vanbuskirk.
- [48] The proposed transfer to Mountain Institution would have provided the additional structure that the Warden had concluded was necessary, but Mr. Vanbuskirk refused to cooperate with that transfer. The Warden concluded in her Final Decision, as quoted earlier, "your choice to refuse to transfer to another medium security environment has demonstrated you do not currently possess the ability to be managed within a medium security environment", and "... the additional strategies attempted to maintain you at medium security are not sufficient". Later in her decision, she explained again that Mr. Vanbuskirk's refusal to cooperate with the transfer to Mountain Institution demonstrated a need for "more intensive management interventions":

Mr. VAN BUSKIRK, in regards to your offender security level, it is the recommendation of your CMT that your Institutional Adjustment be re-assessed as HIGH due to your refusal to integrate into a medium security institution. As noted in the Assessment for Decision dated 2011-06-01 you refused to comply with staff direction for the transfer to Mountain Institution. Given your refusal, a reassessment of your case took place. Concerns had already been noted in relation to suspected involvement in the institutional subculture. Based on the balance of probabilities at that time you were identified as an individual who was manageable within a more structured medium security environment, than could be adequately provided at Mission Institution. You were provided the opportunity to demonstrate your management within a medium security environment and were informed you would be considered for a return to Mission Institution after a period of positive behaviour at Mountain Institution. Your unwillingness to integrate demonstrates a requirement for more intensive management interventions. ...

- [49] The Warden's general conclusion that Mr. Vanbuskirk was no longer suitable for medium security classification made it unnecessary for her to specifically address his proposals for transfer to various alternative medium security institutions.
- [50] I am satisfied that the Warden's decisions to reclassify Mr. Vanbuskirk to "maximum security" and to authorize his transfer to Kent Institution had a real basis.

3. Was the Transfer Tainted by Institutional Bias?

[51] Mr. Vanbuskirk contends that his reclassification and transfer was tainted by institutional bias, because the Security Intelligence Officer (SIO) who collected the information on which the Warden relied was also a member of the Segregation Review Board.

[52] Initially, in this application, Mr. Vanbuskirk sought an order for release from his previous incarceration in the segregation unit at Mission Institution. However, he now agrees that, with his transfer to Kent, the issue is moot, and he no longer pursues that aspect of his application.

[53] Since the lawfulness of Mr. Vanbuskirk's segregation is therefore no longer in issue in this application, Mr. Vanbuskirk's submission regarding institutional bias cannot assist him. If Mr. Vanbuskirk is correct in his allegation of institutional bias -- a submission on which I do not pronounce -- his remedy would relate to decisions of the Segregation Review Board. The only remedy by way of habeas corpus is the offender's release from the deprivation of liberty found to be unlawful. Mr. Vanbuskirk is not presently in segregation, and does not in this application challenge any decision of that board.

CONCLUSION

[54] The application for habeas corpus must fail. The application is dismissed.

"H. Holmes, J."

The Honourable Madam Justice H. Holmes

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