

# SUPREME COURT OF YUKON

Citation: *R. v. Wejr*, 2016 YKSC 64

Date: 20161125  
S.C. No. 14-00142A  
15-00685  
15-00685A/B/C/D  
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Applicant

And

DAMON WEJR

Respondent

Before Mr. Justice R.S. Veale

Appearances:  
Joanna Phillips  
Mandy Cheema

Counsel for the Crown  
Counsel for the Defence

## REASONS FOR JUDGMENT (Section 521 Bail Review)

### INTRODUCTION

[1] VEALE J. (ORAL): The Crown applies for a review of bail under s. 521 of the *Criminal Code* on the grounds that the judge who made the recognizance erred by not permitting the Crown to cross-examine a surety and by ordering that a surety pay a \$2,000 cash deposit.

### BACKGROUND

[2] Mr. Wejr was charged with trafficking cocaine to undercover officers on May 31, 2014. He was released on a recognizance on August 1, 2014, with a number of conditions. The two conditions that have been consistently ordered are:

6. Not attend any premises whose primary purpose is the sale of alcohol, including any liquor store, off sales, bar, pub, tavern, lounge or nightclub.
8. Not possess or use any cellphone, smartphone, or other mobile electronic communications device.

[3] These conditions were ordered as the Crown alleged that these are the tools and places for a “dial-a-dope” operation.

[4] On June 16, 2016, Mr. Wejr pled guilty to trafficking and was sentenced to 12 months in jail less a credit of 11 months for time served.

[5] However, prior to his conviction, Mr. Wejr was charged with a breach of his recognizance by being in a bar on April 10, 2015, i.e. over a year before his June 16, 2016 conviction.

[6] He also failed to appear at his trial date on December 17, 2015. A warrant of arrest was issued.

[7] On January 14, 2016, Mr. Wejr was charged with possession of cocaine for the purpose of trafficking (as amended on November 15, 2016), as well as two charges for breaching his recognizance.

[8] As a result of the January 2016 charge, on June 16, 2016, after his conviction on the May 2014 trafficking charge, a Justice of the Peace granted Mr. Wejr bail without sureties but including the same two conditions set out above, among others.

[9] Between October 1, 2016, and October 7, 2016, Mr. Wejr was charged with four additional counts of alleged breaches of one of the above conditions.

### **Judicial Interim Release Decision**

[10] On October 17, 2016, the judge held a hearing and ordered that Mr. Wejr be released on similar conditions to his previous recognizance including the two conditions

mentioned above, plus a \$2,000 cash deposit from Mr. Wejr, a \$1,000 no-cash deposit from his surety, also his common-law spouse, Erin Borgford, and \$2,000 cash deposit from James Thompson, his friend and surety.

[11] The judge gave the following reasons:

Is there a substantial likelihood that he would commit further offences? I'm certainly concerned about his ability to abide by the terms of the recognizance. As I mentioned, there was one substantive charge and 10 breach charges. But, again, in my view, those breaches need to be put into context. They all relate to either possessing a phone or being in a bar.

I consider the substantive offence, possession of cocaine for the purpose of trafficking, to be a serious one; the breaches less so, unless the Crown is able to tie them specifically to a pattern of trafficking.

In the end result, as I indicated, it's not been an easy decision for me. I've come to the conclusion that he could be released on a recognizance with significant conditions.

[12] There are a number of factors raised by Crown and defence at the judicial interim release hearing but I will focus on those raised by the Crown in this bail review.

[13] At the bail hearing, the Crown objected to Erin Borgford as a surety based on the fact that she was Mr. Wejr's girlfriend and requested that she be put on the stand for cross-examination. The judge did not respond to this application and after a short break, proceeded to release Mr. Wejr on conditions and with sureties.

[14] The Crown also objected to James Thompson as a surety on the grounds that he is a friend of Mr. Wejr and does not live with him and so has no way of watching him.

The Crown also said the offer of employment by Mr. Thompson to fix up Mr. Thompson's shop was really about doing odd jobs, as it was the last time Mr. Wejr worked for Mr. Thompson a month previously. Defence counsel indicated that

Mr. Thompson, although not a licensed plumber, has a sufficient amount of work to keep Mr. Wejr employed. I note that Mr. Wejr also works cutting and hauling firewood.

### **This Bail Review Hearing**

[15] In *R. v. St-Cloud*, 2015 SCC 27, at para. 121, the Supreme Court of Canada has ruled that there are only three circumstances in which a reviewing judge can intervene in an interim judicial release order:

1. where the judge has erred in law;
2. if the decision was clearly inappropriate and the judge gave excessive weight to one relevant factor or insufficient weight to another; and
3. where there is admissible new evidence.

[16] The reviewing judge does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently. The reviewing judge may consider evidence that is truly new or evidence that existed at the time of the initial release hearing but was not tendered for some reason that is legitimate and reasonable.

[17] I conclude that the judge has erred by not permitting the Crown to cross-examine Ms. Borgford. It was no doubt a slip of attention but nevertheless, given the seriousness of the Crown's allegations, should have been pursued. Furthermore, that error resulted in the judge not hearing evidence that I find shows a material and relevant change in the circumstances of the case.

[18] I also conclude that the trial judge erred in law by releasing Mr. Wejr, requiring both Mr. Wejr and Mr. Thompson, the surety, to deposit cash. This offends ss. 515(2)(d) and (e) of the *Criminal Code* which I set out below:

**Release on undertaking with conditions, etc.**

(2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released

...

(d) with the consent of the prosecutor, on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; or

(e) if the accused is not ordinarily resident in the province in which the accused is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, on his entering into a recognizance before the justice with or without sureties in such amount and with such conditions, if any, as the justice directs, and on his depositing with the justice such sum of money or other valuable security as the justice directs.

[19] In my view, requiring a surety to deposit cash in a manner which is not set out in the *Criminal Code* is not an appropriate way to ensure the proposed surety has the financial capacity to be a surety.

**DECISION**

[20] Firstly, I will address the suitability of Erin Borgford as a surety for Mr. Wejr. Ms. Borgford has lived common-law with Damon Wejr for approximately two years. She was born and raised in Whitehorse and her parents reside here. She has a criminal record for an impaired driving conviction in February 2015. She completed high school and has taken three years of university which were interrupted by her mother's illness. She intends to return to university when Mr. Wejr's matters are concluded. She is working as a waitress at a bar, which limits her ability to observe Mr. Wejr but gives her

the ability to pay a no cash deposit of \$1,000. Ms. Michelle Wolsky, who has known Erin Borgford and her family for years, testified as to her good character.

[21] However, on January 28, 2016, Ms. Borgford signed a notice of Appointment of Lawyer stating that she was retained to act as the lawyer for Damon Wejr. She filed it in the Territorial Court of Yukon on February 1, 2016, for the purpose of entering the court cell premises, which is only accessible by lawyers, to give Mr. Wejr certain unspecified information. This action by her is prohibited under the *Legal Profession Act*, R.S.Y.

2002, c. 134, and is a serious misrepresentation to the court. In my view, it overshadows the positive aspects of her character and I find her to be unsuitable as a surety.

[22] While a close relationship does not necessarily make someone unsuitable as a surety, it certainly raises question about whether that person can discharge the duties of a surety. That duty is to ensure the good behaviour of the accused while on bail and to render him (i.e. hand him over or advise the authorities) if he does not appear to be keeping the peace and being of good behaviour.

[23] Secondly, James Thompson was cross-examined by the Crown. Mr. Thompson is a congenial 41-year-old man, on social assistance of \$400 per month. He is a friend of Damon Wejr. Mr. Thompson has a child support obligation that is paid by his mother who is reimbursed by Mr. Thompson when he is able. At present, while on social assistance, he is permitted to work occasionally, so long as he reports his earnings to social assistance. He has no assets, except an old car which he could not put a value on. It does not appear that he gave Mr. Wejr continual employment as represented at the initial bail hearing. He testified that Mr. Wejr was a friend for a year and a half and

that Mr. Wejr would occasionally assist him in lifting heavy appliances. He did not pay the \$2,000 cash deposit as ordered but Erin Borgford did for Mr. Thompson.

[24] I conclude that Mr. Thompson has neither the financial suitability nor the general suitability to be a surety.

### **CONCLUSION**

[25] I revoke the judicial interim release order and order that Mr. Wejr be detained in custody. The Crown submits, and I agree, that the matter should be returned to Territorial Court for a new bail hearing.

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VEALE J.