

CANADA / JUDGMENT

R. v. Adams

2023 BCCA 369

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 369 R. v. Adams

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Adams,

2023 BCCA 369

Date: 20230921

Docket: CA48982

Between:

Rex

Respondent

And

Trenton Clifford Jonathan Adams

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Hunter

The Honourable Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated

December 12, 2022 (sentence) (R. v. Adams, 2022 BCSC 2289,

Penticton Docket 47242).

Oral Reasons for Judgment

Counsel for the Appellant:

S.J. Runyon

Counsel for the Respondent:

C.L. Morgan

Place and Date of Hearing:

Vancouver, British Columbia

September 18, 2023

Place and Date of Judgment:

Vancouver, British Columbia

September 21, 2023

Summary:

In this sentence appeal, the appellant contends the judge erred in balancing the offender's potential for societal reintegration and the risk posed to children. In doing so, he submits that the prohibition of ancillary contact, except for when it is permitted by his probation officer for "compelling reasons," unduly impacts this reintegration. He presents the same complaint in relation to the prohibition of attending certain public spaces. Held: Extension of time to seek leave to appeal granted; leave to appeal allowed; appeal allowed to the extent set out in the reasons. The sentence's no-contact order was demonstrably unfit. The appellant's no-contact order is modified to permit incidental communication, contact, or presence in a public place where other adults are present. The sentence's no-go order was not demonstrably unfit.

- [1] HARRIS J.A.: This is a sentence appeal that requires both an extension of time to seek leave to appeal, as well as leave to appeal. Mr. Adams has satisfied the test for both applications and I would make the orders sought.
- [2] The subject matter of the appeal focuses on certain conditions imposed in the two-year probation order and the five-year s. 161 order. Those conditions relate to so-called no-contact and no-go orders. No issue is taken with any other terms of his sentence. In brief, Mr. Adams says that these conditions are demonstrably unfit in light of the purposes to be served by such orders.
- [3] For context, Mr. Adams was sentenced after his guilty plea to a single count of possession of child pornography, contrary to s. 163.1(4) of the Criminal Code, R.S.C. 1985, c. C-46. Mr. Adams admitted to possessing 357 images and five videos depicting child pornography. He was sentenced to 16 months' incarceration less 90 days' credit for pre-trial custody, a two-year probation order, DNA sampling, a five-year s. 161(1) prohibition, a 20-year SOIRA

order, and a s. 164.2(1) forfeiture of seized electronic devices. In her reasons, Justice MacDonald analysed the facts relating to the offence and the offender in considerable detail, including Mr. Adams' high risk of reoffending, lack of insight into his offence, and refusal to participate in sex offender programming.

[4] The terms of the probation order under appeal are referred to as conditions 6 and 7. They provide:

6. You must not have any contact, communication, directly or indirectly, or be in the presence of any person under the age of 16. The exception is as follows:

With the prior written permission of your probation officer. Such permission is to be given only for compelling reasons. You must carry the permission, which can be in electronic format, with you at all times.

7. You must not engage in volunteer work or employment that would bring you in contact with persons under the age of 16 years without the prior written permission of your probation officer. You must carry this permission, which can be in electronic format, when you are engaged in the activity.

[5] Mr. Adams says a fit condition 6 would delete "or be in the presence of" and add an exception permitting incidental contact in a public place where other adults are present. Condition 7 should, he says, delete the "bring you into contact" language and add in another exception permitting incidental contact in public places where other adults are present.

[6] The s. 161 orders in issue, as set out in ancillary order 4 of the judge's reasons, are the prohibitions from:

- a. attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground, or community centre;
- c. having contact or communication with a person who is under the age of 16 years; [and]

The exceptions are as follows:

- i. in the presence of (under the supervision of) a person approved in writing by the court, your probation officer, your parole officer, a member of the Royal Canadian Mounted Police, or the person to whom you are reporting under the Sex Offender Information Registration Act. You must carry a copy of the written permission with you.
- ii. lawful employment, with the circumstances of employment being approved in advance in writing by the court, your probation officer, your parole officer, a member of the Royal Canadian Mounted Police, or the person to whom you are reporting under the Sex Offender Information Registration Act. You must carry a copy of the written permission with you.

iii. as approved in advance in writing by the court, your probation officer, your parole officer, a member of the Royal Canadian Mounted Police, or the person to whom you are reporting under the Sex Offender Information Registration Act. You must carry a copy of the written permission with you.

- [7] Mr. Adams seeks to delete the prohibitions from attending any public park, community centre, and public swimming area, leaving in place only the prohibitions against attending a daycare centre, playground, or school ground. He seeks to modify the no-contact order to allow for incidental contact in a public place when other adults are present.
- [8] There is no issue about the deference owed to the sentencing judge and the circumstances in which appellate intervention is permitted. We may interfere only where the judge has made an error in principle that has affected the sentence or where the sentence is demonstrably unfit (*R. v. Friesen*, 2020 SCC 9 at para. 26; *R. v. Lacasse*, 2015 SCC 64 at paras. 41, 44). These principles apply to conditions in a probation order and s. 161 prohibitions, the imposition of both of which engage an exercise of discretion.
- [9] On this appeal, Mr. Adams submits that the no-contact and no-go conditions are demonstrably unfit. The gist of Mr. Adams' objections to the challenged terms is that they are more restrictive than reasonably necessary to achieve legitimate public purposes, most particularly protecting potential victims in the future in light of his risk of reoffending. He says inadequate consideration was given to the risk he posed to potential victims, given that his offence did not involve actual contact with young persons, and the risk of reoffending related to the probability that he would commit a similar (that is a no-contact) offence in the future. He says the no-contact, no-go terms profoundly limit his liberty and make it impossible for him to function at all in society because it is impossible to avoid incidental contact with young persons in public places. The conditions force him to become isolated from society. The fact that he was already isolated was recognized, he argues, to have contributed to his offending in the first place. The isolation imposed on him by the conditions will, if anything, reinforce the risk of reoffending and undermine any possibility of his reintegration in society and his rehabilitation without materially succeeding in protecting children or society. The conditions restrict his opportunities to secure stable employment which is a powerful protective factor, it is argued, against criminal behaviour. Similarly, the orders limit his housing opportunities and engender isolation, all of which further enhance the risk of reoffending.
- [10] There are, I think, two aspects to Mr. Adams' appeal. The first relates to the failure to include any exception for incidental contact in the conditions. The second relates to the places he cannot go. I will address each in turn, after addressing some general principles.
- [11] Judges are required to consider making a s. 161(1) prohibition when an offender is convicted or is discharged of an enumerated sexual offence. In doing so, they must give effect to the overarching protective function of s. 161(1) to shield children from sexual violence: *R. v. K.R.J.*, 2016 SCC 31 at paras. 45-6. As stated in the Supreme Court of Canada judgment:

- [48] Further, I agree with the line of cases holding that s. 161 orders can be imposed only when there is an evidentiary basis upon which to conclude that the particular offender poses a risk to children and the judge is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk: see *A. (R.K.)*, at para. 32; see also *R. v. R.R.B.*, 2013 BCCA 224, 338 B.C.A.C. 106, at paras. 32-34. These orders are not available as a matter of course. In addition, the content of the order must carefully respond to an offender's specific circumstances.
- [12] These principles were helpfully elaborated on in *R. v. R.J.H.*, 2021 BCCA 54, wherein Justice Fisher explained:
- [19] The evidentiary basis will naturally include everything that is considered for the overall sentence. However, given the protective function of s. 161 prohibitions, the focus should be on the offender's specific risk and what is reasonably required to minimize that risk in the offender's particular circumstances. As the court in *A.(R.K.)* held, it is not necessary for the offender to have a record of related convictions or to have committed the offence in one of the proscribed circumstances set out in s. 161(1). In my view, the scope and duration of the prohibition is informed primarily by the nature and extent of the risk, with emphasis on the risk factors particular to the offender and the pool of potential victims. The duration should also take into account the length of the sentence, the age of the offender upon release into the community, and the prospects for rehabilitation.
- [20] Finally, it is important to take into account the principles expressed in *Friesen* when considering s. 161 orders. While *Friesen* did not address these orders, the court's message that sentences "fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children" is important. Although the guidance provided in *Friesen* was focused on sentencing principles for the offence of sexual interference, the court made it clear that the principles are relevant to sentencing for other sexual offences against children, including child pornography offences: see *Friesen* at para. 44 and footnote 2.
- [21] Moreover, as this court held in *Williams*, the analytic approach in *Friesen* that focuses on the protection of children from sexual exploitation should inform the s. 161 analysis established in *K.R.J.*, and reliance on precedents that pre-date *Friesen* may be of limited assistance to sentencing judges and appellate courts. I note as well that an emphasis on the protection of children from wrongful exploitation and harm takes on increased importance the higher the risk of re-offence and the younger the victim: see *Friesen* at paras. 123, 134-135.
- [13] Here, I am persuaded that the necessary evidentiary foundation existed to conclude that some kinds of restrictions on contact with children, and presence in places where children were likely to be, were justified. Although the risk of reoffending most likely involves possessing child pornography, the risk of offending through some kind of direct or indirect contact was not eliminated. Mr. Adams had no insight into the harm occasioned by his conduct and refused to participate in sex offender programmes. And, the writer of the

pre-sentence psychological report, who assessed the risk to children posed by Mr. Adams, recommended that his access to minors be modified. Indeed, Mr. Adams did not take issue on appeal with the imposition of conditions or prohibitions on his contact with minors. Rather, his objection was to the breadth and sweeping nature of them.

- [14] One final point of principle. Terms in probation orders need to be clear, unambiguous, and enforceable (R. v. Goddard, 2019 BCCA 164 at paras. 20-23).
- [15] I have already described the gist of Mr. Adams' argument. In short, he contends that the absence of an "incidental contact" exception within condition 6 and s. 161(1)(c) makes it impossible for him to function in society. It is, he reasonably points out, impossible to move around, to use public transit, to walk down the street, to do virtually any everyday activity without risking breaching the condition or prohibition. If the matter stood there, I would have little difficulty in accepting that the condition and prohibition are unreasonable and demonstrably unfit. They would not reflect a reasonable attempt to minimize the risk to children posed by Mr. Adams.
- [16] But matters do not stand there. The judge built in exceptions to the no-contact orders. For example, she provided that condition 6 was subject to an exception by the prior written permission of his probation officer: such permission to be given only for "compelling reasons". In my view, the condition and the exception must be read together to determine whether, jointly, they rest on any error in principle or are otherwise demonstrably unfit.
- [17] It is evident that the judge, by providing for an exemption to condition 6, was attempting, within the exercise of her discretion, to mitigate what might otherwise be the draconian implications of the prohibition standing alone. In principle, there is nothing untoward in providing for an exception delegated to, for example, a probation officer who may be best placed to administer the order in light of the particular circumstances or needs of the offender and the community in which they live. It is difficult for a judge to anticipate all of the potential issues that may arise in any given case and a probation officer is likely better placed to craft appropriate responses as they arise.
- [18] The difficulty here, in my respectful view, is that the exception as it is framed offers the probation officer unclear guidance as to the scope of the exception they may provide. The exception is stated only to be available in compelling circumstances. What are compelling circumstances? Do they capture incidental contact in public places where there are other adults? It may be that a probation officer would conclude that incidental contact of that kind was not intended to be captured because it was not explicitly provided for as an exception within the condition itself.

- [19] In my opinion, a probation order that does not make clear, unambiguous, and effective provision permitting incidental contact in a public place in the presence of adults is demonstrably unfit in this case. Without such a provision, the probation order would be impossible to comply with, impossible to enforce, and would not reflect a reasonable attempt to protect a class of potential victims. There may be various ways in which that result can be achieved, but it should be clearly framed.
- [20] I take it that the judge was making a considered effort to mitigate any excessively draconian implications of the blanket no-contact condition. Unfortunately, I am not persuaded that the means chosen were clear enough to achieve that goal. Because the term of the exception is, I think, too vague, it rests on an error in principle and risks resulting in a demonstrably unfit term on punishment.
- [21] In the result, we are entitled to interfere with condition 6. I would substitute the following language drawn from the Provincial Court Probation Picklist:
- You must not have any contact or communication directly or indirectly with, or be in the presence of, any person under the age of 16 years of age.
- The exception is
- Incidental communication, contact or presence in a public place where other adults are present.
- [22] I would, however, retain the exception provided for by the judge to ensure that other circumstances not captured by incidental contact can be dealt with. In order to ensure consistency, I would add the exception, as phrased above in para. 21, as an additional exception to the s. 161 "no-contact" order set out as ancillary order 4(c) in the judge's reasons.
- [23] I turn now to the challenge to condition 7 and the other terms of the s. 161 order. These terms involve places and employment. Again, they delegate to a probation officer, or others, the authority to make exceptions to the blanket prohibitions. Here, I can discern neither error in principle nor conditions that are demonstrably unfit. As I have said above, there is nothing in principle wrong in delegating the authority to make exceptions to others. This includes a probation officer, who may be better placed than a judge to deal with circumstances as they arise and who can craft appropriate responses that are sensitive to the particular facts. In my view, the restrictions on attending certain places or engaging in certain activities requires a proper exercise of discretion. To the extent that relieving Mr. Adams from those restrictions is justified at a particular time and place, it is demonstrably fit to delegate that decision to a probation officer or others, who may be more familiar with employment opportunities and public places in the community where the offender is living. I would not interfere with the judge's exercise of discretion.
- [24] In the result, I would allow the appeal only to the extent set out in these reasons, having already extended the time to apply for leave and granted leave to appeal.

[25] HUNTER J.A.: I agree.

[26] GRIFFIN J.A.: I agree.

[27] HARRIS J.A.: The appeal is allowed to the extent set out in the reasons.

"The Honourable Mr. Justice Harris"

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