

CANADA / JUDGMENT

R. v. Barton

2010 BCCA 292

COURT

British Columbia Court of Appeal

DECIDED

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2010 BCCA 292 R. v. Barton COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Barton, 2010 BCCA 292 Date: 20100611 Docket: CA037779 Between: Regina Respondent And Vincent Mark Barton Appellant Before: The Honourable Madam Justice Newbury The Honourable Madam Justice Neilson The Honourable Mr. Justice Groberman On appeal from Provincial Court of British Columbia, October 21, 2009 (R. v. Barton, Nos. 209553-1, 208670-1, 208671-1, 211041-1, 2991-1, and 3634-1, Vancouver Registry and Nos. 82740-1, 82741-1, and 82742-1, Port Coquitlam Registry) Vincent Mark Barton: In person (via video) Counsel for the Respondent: Elizabeth Campbell Place and Date of Hearing: Vancouver, British Columbia May 19 and 21, 2010 Place and Date of Judgment: Vancouver, British Columbia June 11, 2010 Written Reasons by: The Honourable Mr. Justice Groberman Concurring in by: The Honourable Madam Justice Newbury The Honourable Madam Justice Neilson Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] Mr. Barton appeals the suspension of a conditional sentence order on seven counts of theft as well as a consecutive sentence of 1 month imprisonment on another charge of theft. He says that the sentences are unfit, and that he should be afforded another chance to enter a recovery facility to fight his drug addictions.
- [2] On September 10, 2009, Mr. Barton was given a conditional sentence of imprisonment of 18 months following guilty pleas on seven counts of theft under \$5,000. Terms of the conditional sentence included that he reside at a residential substance treatment centre and that he not enter at any branch of the stores who had complained of him shoplifting including all British Columbia Liquor Stores. On September 21, 2009, only eleven days after the imposition of the sentence, Mr. Barton was caught stealing liquor from a liquor store. In attending at the liquor store and committing the theft, Mr. Barton breached his conditional sentence order in at least three ways - he was not supposed to leave his residence at the recovery facility during the first 6 months of the sentence, he was not supposed to enter a liquor distribution outlet for the duration of the sentence, and he was required to keep the peace and be of good behaviour.

- [3] Mr. Barton was charged with theft under \$5,000 for the September 21, 2009 incident and also brought before the Provincial Court to deal with the breaches of the conditional sentence order. He pleaded guilty to the theft, and did not contest that he had breached the conditions of the conditional sentence order. His conditional sentence order was suspended, and he was required to serve 12 months of his unexpired sentence in custody. He was also given a sentence of 1 month consecutive on the theft charge. After the expiry of this 13-month term, he was to serve what remains of his conditional sentence.
- [4] Mr. Barton appeals the suspension of his conditional sentence and the imposition of a consecutive sentence on the theft conviction. While some of the documents that he has filed suggest that he also wishes to appeal the conditional sentence imposed on September 10, 2009, he has advised the Court that that is not the case. He asks that he be released from prison immediately, so that he can be admitted to a drug rehabilitation facility, where he proposes to serve the balance of the conditional sentence. Jurisdiction to Hear the Appeal
- [5] The Crown concedes that this Court has jurisdiction to hear the appeal. The suspension of the conditional sentence order is itself a "sentence" for appeal purposes, pursuant to s. 673 of the Criminal Code, R.S.C. 1985, c. C-46. As the conditional sentence order was imposed in proceedings by indictment, an appeal lies to this Court.
- [6] The Crown takes the position that an appeal of the sentence on the theft charge may also be heard by this Court, even though the matter proceeded by summary conviction. Counsel cites s. 675(1.1) of the Criminal Code, which gives this Court jurisdiction to hear an appeal on a summary conviction matter where it was "tried with an indictable offence". In the absence of full argument on the matter, we have proceeded on the assumption that the hearing with respect to the suspension of the conditional sentence sufficed to create a situation in which the theft charge was "tried with an indictable offence." Circumstances Giving Rise to the Sentence
- [7] Mr. Barton is 41 years old, and has a very extensive criminal record. He has approximately 150 criminal convictions, almost all of which are for property offences committed to pay for his drug dependency. He has been given opportunities, in the past, to serve sentences in the community, but conditional sentences have not ultimately been effective. Some previous conditional sentence orders made regarding the appellant were terminated upon breach.
- [8] When he was sentenced in September 2009, the Crown took the position that a 12-month sentence of incarceration was appropriate. Mr. Barton sought a 3-month conditional sentence. The sentencing judge described Mr. Barton as a "difficult and challenging" and "chronic" offender. He recognized that Mr. Barton had not, in the past, been able to abide by conditional sentence orders, but noted that Mr. Barton had not yet had an opportunity to deal with his drug problem in a recovery facility. He considered Mr. Barton's proposal that he reside in a recovery facility known as "Mending Spirits" during his conditional sentence to be worthy of consideration.

- [9] The sentencing judge did not, however, consider the length of sentence proposed by Mr. Barton - 3 months - to be adequate. He decided that if he imposed a conditional sentence, it would be for 18 months. He had some concerns about Mr. Barton's ability to complete a conditional sentence without breaching conditions, and offered Mr. Barton a choice between an 18-month conditional sentence and a 12-month period of incarceration. He warned Mr. Barton of the consequences of breaching a conditional sentence: "if you breach this sentence, I can pretty well assure you, you will be going back to jail for the balance of that sentence. So it will end up being longer than what the Crown is seeking now." Mr. Barton, after an unsuccessful attempt to negotiate with the judge, chose the 18-month conditional sentence.
- [10] Unfortunately, Mr. Barton's experience at Mending Spirits was not positive. He says that, contrary to what he was led to believe, the facility was not wheelchair accessible. Further, he says, the facility had bedbugs. It appears that there were other problems as well: Mr. Barton has extensive medical needs, and the facility indicated that it had not been advised of them when he applied for admission. The facility did not feel that it could accommodate the medical needs. Among the problems, apparently, is that Mr. Barton is on a very high dose of methadone.
- [11] In any event, on September 21, 2009, he left Mending Spirits without permission, and went to a liquor store where he stole a bottle of gin and a bottle of rum.
- [12] Mr. Barton's explanation for his conduct was that he was experiencing a great deal of pain as a result of an infected foot. He says that he attended at a hospital, but was denied medication. He felt that he could only solve the problem by stealing alcohol, and then selling it in order to purchase morphine.
- [13] Mr. Barton argued that, under the circumstances, he should be given an opportunity to arrange for residence in a different recovery facility. The evidence with respect to that facility was not complete, and it was not at all clear that it was an appropriate one for Mr. Barton.
- [14] In any event, the sentencing judge considered that it was necessary to sentence Mr. Barton to a period in jail. She believed that if Mr. Barton were released on a conditional sentence order, he would commit further thefts. Further, in light of the breaches of the existing conditional sentence order, she determined that termination of the order was "the only rational result". Nonetheless, she chose not to terminate the order, and instead suspended it. She required Mr. Barton to serve 12 months of the unexpired conditional sentence in prison. She also sentenced him to a consecutive term of 1 month on the theft charge. New Evidence
- [15] At the outset of the hearing of this appeal, Mr. Barton sought to present evidence of another recovery facility that he said was willing to accept him. We allowed him to tell us about the facility, and invited him to provide documentary evidence to support his contention that it was suitable and available. He did not provide such documentary evidence. The Crown, however, provided evidence to the effect that the facility does not currently have space

available. There is also a concern as to whether Mr. Barton's methadone dose can be reduced to a level acceptable to the facility.

- [16] I am of the view that the new evidence should not be admitted, both because of its frailty and because it cannot affect an assessment of whether the sentence imposed was a fit one. I would, however, add this comment. Mr. Barton is obviously sincere in his desire to enter a recovery facility and rid himself of his drug addictions. He faces tremendous obstacles on the road to recovery, and it is impossible to say whether he will be able to follow through with his rehabilitation plans. Nonetheless, his efforts in seeking out facilities, and his determination to clean himself up are laudable.
- [17] We are advised that Mr. Barton is likely to be released from prison in July. He expresses concern that his conditional sentence supervisor will be unable to find a spot in a suitable recovery facility for him. He acknowledges that many facilities do not have the ability to accommodate his extensive needs. I would encourage Mr. Barton to actively pursue options so that he can work with the supervisor to ensure that, upon release, he has the best possible chance of recovery.

Analysis

- [18] I am unable to accept Mr. Barton's contention that the sentence imposed upon him was unfit. Mr. Barton does not accept responsibility for the breaches of his conditional sentence, contending that he had no choice but to steal liquor in order to acquire morphine. The sentencing judge did not accept that that was the case. It is noteworthy that Mr. Barton provided a similar excuse in respect of previous thefts of alcohol.
- [19] When an accused breaches a conditional sentence, there is a presumption that he or she will serve the remainder of the sentence in prison: *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 at para. 39. Mr. Barton had been advised of that presumption at the time of his September sentencing. Mr. Barton is fortunate in that the sentencing judge, even after reaching the conclusion that to do so was appropriate, decided not to terminate the conditional sentence order and mandate that his entire outstanding sentence be served in custody.
- [20] In my view, the sentences imposed on Mr. Barton were entirely fit.
- [21] The Crown does not oppose Mr. Barton's application to extend the time to seek leave to appeal his sentences. I would extend the time and grant leave to appeal. I would, however, dismiss the appeal. "The Honourable Mr. Justice Groberman" I agree: "The Honourable Madam Justice Newbury" I agree: "The Honourable Madam Justice Neilson"

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