
CANADA / JUDGMENT

R. v. Berg

2013 BCSC 344

COURT

Supreme Court of British Columbia

DECIDED

31 January 2013

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2013 BCSC 344 R. v. Berg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Berg,

2013 BCSC 344

Date: 20130131

Docket: X074851-2

Registry: New Westminster

Regina

v.

Timothy Ralph Norman Berg

Before: The Honourable Mr. Justice Bernard

Oral Reasons for Sentence

Counsel for the Crown:

B.A. Lane

Counsel for the Accused:

D.J. Gable

Place and Date of Hearing:

New Westminster, B.C.

January 28 and 31, 2013

Place and Date of Judgment:

New Westminster, B.C.

January 31, 2013

- [1] THE COURT: Mr. Berg has entered a guilty plea to one count of "impaired driving". The offence occurred on June 22, 2009 in Surrey, British Columbia.
- [2] In brief, Mr. Berg was observed to be driving a cube van erratically within the grounds of a large residential complex. The police were called and in the course of their investigation a demand for breath samples was made.
- [3] Mr. Berg provided two samples showing a blood alcohol content of 190 milligrams of alcohol in 100 millilitres of blood. As this reading is in excess of 160 milligrams it is deemed, pursuant to s. 255.1 of the Criminal Code, to be an aggravating circumstance for sentencing purposes.
- [4] Mr. Berg is a 52-year-old man whose lengthy criminal history includes eight prior convictions for impaired driving or related offences, spanning from 1977 to 2004.
- [5] For the instant offence, the Crown elected to proceed by Indictment; however, at the sentencing the Crown opted not to rely upon the "greater punishment for subsequent convictions" provisions of the Criminal Code, which require the Crown to satisfy the Court that the offender, before making his plea, was notified that a "greater punishment" would be sought (see s. 727 of the Code).
- [6] The import of the foregoing is that the minimum punishment and the minimum prohibition provisions which would otherwise apply are not triggered; thus, the Court retains a discretion unfettered by statutory minimums.
- [7] The Crown seeks a 12-to-15-month jail sentence, a two-year probation order, a three-year Criminal Code driving prohibition, and a five-year Motor Vehicle Act driving prohibition.
- [8] The defence position is that given the offender's criminal history, a jail sentence is warranted; however, it is one that ought to be served in the community under a conditional sentence order, principally due to Mr. Berg's compelling personal circumstances and the substantial gap between his last "drinking and driving" conviction and the instant one. In this case, it is the absence of a mandatory minimum period of incarceration which raises the conditional sentence as a sentencing option.

- [9] The pre-sentence report prepared for this sentencing hearing has disclosed the following personal circumstances of Mr. Berg. He had an unhappy and unstable childhood. He only completed Grade Six in school. He has a history of working in construction and general labour. He has lived on the street and in emergency shelters from time to time. Since 2006, he has been in receipt of disability income assistance due to a degenerative disc disease. In 2002, he sustained a head injury from which he suffers significant memory deficits.
- [10] Mr. Berg is a relatively frail looking man who struggles with multiple issues relating to his physical and mental health. He is single, has no family support, and has a few friends. He takes anti-depressant medication and has a lengthy history of taking such. He has a history of severe depression and attempted suicide. He has been diagnosed with a personality disorder. He has been addicted to alcohol since his early teens.
- [11] Mr. Berg presently lives with a friend who has kindly and generously offered him temporary shelter at his residence in New Westminster pending the resolution of this matter. If Mr. Berg does not receive a custodial sentence for the instant offence, then he has been welcomed into The House of the Good Shepherd Ministries located in Squamish, British Columbia. This is a group residence at a Christian counselling/training centre registered with the Canadian government to provide offenders with accommodation, counselling and rehabilitation. The pastor, Tim McGrath, has known Mr. Berg for 15 years and says that his facility would offer a stable residence with an atmosphere of family life support and one-on-one interaction. Significantly, Pastor McGrath is familiar with Mr. Berg's mental health and substance abuse issues, and describes Mr. Berg as a hard worker with the potential to succeed.
- [12] It is common ground that the related criminal history of Mr. Berg mandates that he receive a jail sentence for the instant offence; however, it is agreed that a fit term would be less than two years. In such a circumstance and in the absence of a mandatory minimum jail sentence, the Court is obliged to consider whether the sentence should be served in the community under a conditional sentence order. In *R. v. Proulx*, 2000 SCC 5, Lamer C.J.C. said:
- [20] Parliament has mandated that expanded use be made of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society.
- ...
- [90] ... it would be an error in principle not to consider the possibility of a conditional sentence seriously when the statutory prerequisites are met.
- [13] The statutory prerequisites for a conditional sentence are as follows:
- (a) that the offence is not punishable by a minimum term of imprisonment;
 - (b) that the term of the jail sentence which would be imposed is less than two years; and

- (c) that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing as set out in ss. 718 to 718.2 of the Criminal Code.
- [14] It is only the third of these prerequisites which is in question. It obliges the Court to consider the risk of re-offending and the potential gravity of the damage should re-offending occur (see Proulx, *supra*, at para. 69).
- [15] In *R. v. Takhar*, 2007 BCCA 505, the Court considered these factors in the context of a sentence appeal brought by a 53-year-old impaired driver with six prior "drinking/driving" offences and a long history of "alcohol related problems", who had been sentenced to ten months in jail. The Court concluded that the punitive and restorative objectives of sentencing could be achieved by the imposition of a conditional sentence; accordingly, the Court allowed the appeal and imposed an 18-month conditional sentence order. In so doing, the Court recognized that while impaired driving presents a real risk of danger to the public, the goal of protecting society from such a risk may be best served by a sentence which has, as a reasonable prospect, the rehabilitation of the offender. The Court also recognized that a conditional sentence may be sufficient to denounce the criminal conduct, to deter, and to punish the offender.
- [16] In *Takhar*, *supra*, the Court noted the relatively short period of time the offender would likely spend in custody if a ten-month custodial sentence were imposed and contrasted it with an 18-month conditional sentence with stringent conditions for which there would be: (a) no early release for earned remission, and (b) the threat of jail if any condition were breached. Ultimately, the Court favoured the latter.
- [17] There are, of course, differences between *Takhar*, *supra*, and the instant case; but, it can be said that every case is unique. The focus must be on whether the differences are material, and I am satisfied that in many instances they are not. On the other hand, there are important similarities. The two offenders are similarly aged alcoholics with histories of similar conduct which raise legitimate similar concerns about re-offending.
- [18] In relation to mitigating personal circumstances, I would venture to say that those of Mr. Berg are much more compelling than those of Mr. Takhar and, thus, raise a legitimate question about whether incarceration is the answer for Mr. Berg or for society, in this instance. Mr. Berg is significantly compromised by physical and mental health issues. It is clear that he needs the sort of long-term help, support, and community that is offered by The House of the Good Shepherd. He is fortunate, indeed, that such a facility is available to him.

- [19] Taking all the foregoing into account, I am satisfied that a relatively lengthy conditional sentence of imprisonment would be consistent with the fundamental purpose and principles of sentence and, in particular, that it would offer the best prospect of long-term protection of the public while meeting the objectives of denunciation, deterrence and punishment.
- [20] I am mindful that for most offenders with the criminal record of Mr. Berg, a custodial sentence would not merely be the only fit sentence to meet the objectives of deterrence and denunciation, but it would also be mandatory. Mr. Berg is, one would hope, not like most offenders. It is, perhaps, for this reason that the Court has been afforded the sentencing discretion it would not otherwise have if the aforementioned "greater punishment" provisions were triggered.
- [21] Mr. Berg, I sentence you to a "jail" term of 18 months to be served under a conditional sentence order on the following conditions additional to those which are compulsory under the Criminal Code:
1. Within 72 hours, assume daily residence at The House of the Good Shepherd in Squamish, British Columbia; abide by the House rules, and do not change your residence without the prior written approval of your conditional sentence supervisor.
 2. Attend, participate in, and complete any counselling and assessment programs as directed by your conditional sentence supervisor.
 3. Complete 60 hours of community work service within the first six months of this order.
 4. Do not possess or consume alcohol or non-prescription drugs.
 5. If you have not already done so, immediately surrender your driver's licence to your conditional sentence supervisor and do not operate a motor vehicle.
- [22] Mr. Berg does not own a motor vehicle and the evidence discloses no pressing need to drive one. His drinking/driving history is abysmal. In my view, Mr. Berg has forfeited the right to drive for a period lengthier than that sought by either the Crown or defence; accordingly, under the Criminal Code, Mr. Berg is prohibited from driving a motor vehicle for three years (the maximum period in the absence of a notice of greater punishment) and for 12 years under the Motor Vehicle Act. These prohibitions are to run concurrently with one another.
- [23] Counsel, is there anything further?
- [24] MS. LANE: I had suggested a period of probation to follow with conditions that are more minimal than what was imposed on the conditional sentence order and I would ask that the Court consider that for a period of two years.
- [25] THE COURT: Yes, I have considered that, thank you, and have decided against it.

- [26] MR. GABLE: And if there is a victim fine surcharge with respect to this, I am inviting the Court to waive it in light of the fact that he will be resident at The House of the Good Shepherd.
- [27] THE COURT: Do you take any issue with that, Ms. Lane?
- [28] MS. LANE: No.
- [29] THE COURT: I gather what you are saying Mr. Gable is that he does not have the means to pay such a fine?
- [30] MR. GABLE: He is essentially impecunious, so -
- [31] THE COURT: It would be a financial hardship application. Yes, I will grant it on that basis.
- [32] MS. LANE: A stay of proceedings on Count 2, My Lord.
- [33] THE COURT: Yes. Thank you. Anything further?
- [34] MR. GABLE: No, thank you, My Lord.
- [35] THE COURT: Thank you, counsel.
- "The Honourable Mr. Justice Bernard"

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Prepared on 29 October 2026 · Esheria