

CANADA / JUDGMENT

R. v. Blaney

2022 BCCA 98

COURT

British Columbia Court of Appeal

DECIDED

16 March 2022

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2022 BCCA 98 R. v. Blaney

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Blaney,

2022 BCCA 98

Date: 20220316

Docket: CA45750

Between:

Regina

Respondent

And

Barry Ross Blaney

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Butler

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

October 30, 2018 (conviction) (R. v. Blaney, 2018 BCSC 2211,

Chilliwack Docket 67163).

Counsel for the Appellant:

E. Holzman

Counsel for the Respondent

(via audioconference):

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

October 19, 2021

Place and Date of Judgment:

Vancouver, British Columbia

March 16, 2022

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Fisher

Summary:

The appellant challenges his conviction for two counts of breaching a condition of a long-term supervision order. Count 1 alleged that the appellant failed to take his medication as prescribed and Count 2 alleged the appellant failed to hand some of his medication into the facility where he lived. The appellant submits the verdict on Count 1 was unreasonable because the Crown failed to prove the actus reus of the offence or, alternatively, that the evidence was incompatible with the appellant's evidence, which the trial judge never rejected and was not otherwise contradicted. Regarding Count 2, the appellant submits the trial judge erred in law by failing to consider subjective mens rea. Held: The appeal of Count 1 is allowed; the appeal of Count 2 is dismissed. On Count 1, the judge assumed the actus reus for both counts was the same and failed to distinguish the factual elements needed to be proved for Count 1. The appellant gave direct evidence as to the directions provided by his doctor that was not contradicted or rejected. There is no basis for the conclusion the appellant failed to take the medication as prescribed. On Count 2, the judge properly applied a subjective mens rea standard and considered whether the Crown had shown the appellant did not have a reasonable excuse for failing to turn in the medication.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] Barry Blaney appeals his conviction for two counts of breaching a condition of a long-term supervision order ("LTSO") pursuant to s. 753.3(1) of the Criminal Code, R.S.C. 1985, c. C-46. The condition required him to take medication as prescribed and, when living in a Community Residential Facility ("CRF"), to hand in prescription medications to staff at the facility (the "Medication Condition"). The breaches stemmed from a routine search of the facility where Mr. Blaney resided that resulted in the discovery of a bottle containing capsules of Gabapentin, a prescription medication. The bottle was found in a backpack located in his room.
- [2] When the Gabapentin was discovered in his room, he was charged with a two-count indictment:

Count 1

[Mr. Blaney], on or about the 27th day of September, 2017, did, without reasonable excuse, fail or refuse to comply with a long-term supervision order, by failing to take medication as prescribed, contrary to Section 753.3(1) of the Criminal Code.

Count 2

[Mr. Blaney], on or about the 27th day of September, 2017, did, without reasonable excuse, fail or refuse to comply with a long-term supervision order, by not handing some of his medication into the community residential facility or community correctional centre at which he was living, contrary to Section 753.3(1) of the Criminal Code.

- [3] Mr. Blaney submits that the verdict on Count 1 was unreasonable as the Crown failed to prove the actus reus of the offence because there was no evidence as to directions given by a health care practitioner or, alternatively, that it was incompatible with Mr. Blaney's evidence that the trial judge never rejected and was not otherwise contradicted. Regarding Count 2, he submits that the trial judge erred in law in failing to apply subjective fault in his analysis of the required mens rea for the offence.
- [4] For the reasons that follow, I would allow the appeal of the conviction on Count 1, but dismiss the appeal on the Count 2.

Background

- [5] Pursuant to the terms of the sentence imposed for the predicate offence committed by Mr. Blaney, he became subject to an LTSO imposed by the Parole Board of Canada on November 22, 2011, following his release from a custodial sentence. The conditions imposed were varied on a number of occasions. The Medication Condition is contained in a Long Term Supervision Certificate issued on July 4, 2017. At the time, Mr. Blaney resided at the Chilliwack Community Correctional Centre ("CCC"). The condition provided that he was required to:

Take prescribed medication as directed by a health care practitioner and while required to live at a CRF, all medications must be handed to the CRF and dispensed in accordance with the prescribed dosage as outlined on the medication package.

- [6] By way of admissions of fact filed as an exhibit at trial, Mr. Blaney agreed that he was bound by the Medication Condition. He also admitted that the Chilliwack CCC is a CRF, as described by the Parole Board of Canada.
- [7] At trial, the Crown called the evidence of two psychiatric nurses, a corrections officer and a parole officer. Mr. Blaney also testified. Trevor Nicholl, one of the psychiatric nurses, testified that residents who filled their own prescriptions were required to hand in their medications for safekeeping, and that they would be dispensed by the CCC staff. He stated that he reminded Mr. Blaney about the requirement to hand in his medications every time he went to see his doctor. Jim Jones, a parole officer, testified that he had discussed the Medication Condition with Mr. Blaney many times and that the facility dispensed Tylenol 3 to him on a daily basis. While he was aware of Mr. Blaney's neurological issues, he did not consider him to be forgetful.
- [8] Mr. Blaney testified that he had a brain injury and pain stemming from a number of injuries including those he had sustained as a professional fighter and in several motor vehicle collisions. He was prescribed Tylenol 3 in April 2017. He was aware of the Medication Condition and that it required him to turn in any prescription medication and indicated that he had provided the Tylenol 3 medication to the CCC in accordance with that condition. He also testified that he did not like using narcotics and did not want to continue taking Tylenol 3 that had been prescribed for pain management. Some time in the summer, he raised that concern with his doctor. Mr. Blaney maintained that the doctor prescribed Gabapentin in place of Tylenol 3, but directed him to finish the Tylenol 3 tablets before starting the Gabapentin prescription.
- [9] Mr. Blaney went to Vancouver to have the prescription filled. While he did not remember the date, the prescription was ordered and filled on September 8, 2017. Afterwards, he and a friend took the Skytrain to Waterfront Station. His friend noticed that the bag holding the pills had ripped and that one of the bottles was missing. Mr. Blaney said that he considered returning to the Skytrain to look for it, but that it was too busy and this made him uncomfortable. Instead, they visited friends who gave him a paper bag for the pills and a backpack in which he placed the pills.
- [10] Mr. Blaney testified that after he returned to the CCC in Chilliwack, he placed the backpack on the floor at the end of his bed and forgot about it. He said that he never opened the bottle and did not take any of the Gabapentin, as his intention was to begin using it once he had finished the Tylenol 3, as directed by his doctor.

- [11] On September 27, 2017, staff carried out a routine search of the facility and its residents. The trial judge heard from a number of witnesses regarding the search. The corrections officer searched the backpack found at the foot of the bed in Mr. Blaney's room and located the bottle of Gabapentin. Mr. Blaney admitted that the backpack was his.
- [12] Mr. Nicholl testified that he examined the prescription bottle after the search and that it contained 111 pills. The prescription was for 240 pills, which would have been dispensed in two bottles. He observed that if they were divided equally, there would have been 120 pills in each bottle. However, he did not know how many were dispensed in each bottle. On the assumption that Mr. Blaney had been taking the prescribed four pills per day, Mr. Nicholl testified that he should still have had 163 pills, meaning that 52 were unaccounted for.
- [13] At trial, the appellant argued on Count 1 that there was no evidence to prove beyond a reasonable doubt that he had failed to take his medication as prescribed. On Count 2, he argued that the mens rea of the offence was not made out, and that there was no evidence that his failure to turn his medication in to the facility was intentional. Further, he submitted that he had a reasonable excuse for failing to do so: he simply forgot to turn the Gabapentin medication in to the staff at the CCC. He highlighted his traumatic brain injury and his assertions that he was still taking the Tylenol 3 medication and did not know that Gabapentin had a street value.
- [14] The Crown took the position that the case was straightforward. The evidence established that Mr. Blaney had failed to take his medication as directed by the terms of the label affixed to the Gabapentin bottle, contrary to the Medication Condition of the LTSO, and had failed to turn the medication in as required. The Crown argued that what the doctor may have said to Mr. Blaney about finishing the Tylenol 3 tablets before beginning the Gabapentin prescription was irrelevant to the LTSO condition, because the prescription label set out the prescribed dosage and gave no indication that he was to refrain from taking the medication until he had finished the Tylenol 3 prescription. Additionally, even if he had lost some of the pills, he was required to hand in what remained and to take what remained as prescribed. It was clear that he failed to do that. The Crown argued that the defence evidence about reasonable excuse was undermined by the length of time the backpack sat at the end of Mr. Blaney's bed, and that it made little sense for Mr. Blaney's doctor to instruct him to continue to take Tylenol 3 after being told that Mr. Blaney did not want to continue taking narcotics.
- [15] The judge's reasons set out the evidence presented at trial and the submissions of counsel in great detail. However, the analysis leading to the convictions is brief, the substance of which is contained in two paragraphs:
- [221] In the case at bar, even were I to accept Mr. Blaney's testimony that the missing pills were inadvertently lost and that he had no intention of using Gabapentin until he had used up his Tylenol 3 prescription, the fact remains he knew he was required to turn in the prescription and pills he had in his possession in his backpack and did not do so; this is sufficient to provide a path to conviction. In my opinion, the fact that most undercuts the defence

position on reasonable excuse and mens rea is the days Mr. Blaney's large, zippered backpack remained at the foot of his bed, 21 days, where it remained until the September 27 search.

[222] Mr. Blaney's testimony that he had forgotten about the Gabapentin is not reasonable, considering the circumstances as a whole. Put another way, while it may be possible Mr. Blaney inadvertently lost some of the prescribed medication, he still had pills in his possession that he was obliged to turn in to the CCC, and to Mr. Nicholl specifically. As discussed in these reasons, a significant number of pills went missing.

[16] Considering the evidence as a whole, the judge found Mr. Blaney guilty of both counts.

On appeal

Issues

[17] The appellant is charged with breaching the Medication Condition of his LTSO. Section 753.3(1) of the Criminal Code provides:

753.3 (1) An offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years

[18] In *R. v. Zora*, 2020 SCC 14, the Court affirmed the presumption that the Crown is required to prove subjective mens rea for most criminal offences:

[33] As described by this Court in [*R. v. A.D.H.*, 2013 SCC 28], this presumption of subjective fault reflects the underlying value in criminal law that the "morally innocent should not be punished" (*A.D.H.*, at para. 27). This starting point is not an absolute rule, but rather captures what was assumed to be present in the mind of Parliament when enacting the provision (para. 26). The presumption of subjective fault will only be overridden by "clear expressions of a different legislative intent" (paras. 27-29).

Zora involved a conviction for failure to comply with a condition of recognizance, an offence that is similar to the breach offence in question. Here, the parties agree that the Crown was required to prove subjective intent to satisfy the mens rea for an offence under s. 753.3(1).

[19] The appellant raises a single ground of appeal with respect to each conviction. With respect to Count 1, he argues that the verdict was unreasonable. For Count 2, he says that the judge failed to consider subjective mens rea as required for breaches of s. 753.3(1).

Count 1 - Was the verdict unreasonable?

Parties' positions

- [20] Mr. Blaney argues that the verdict on Count 1 was unreasonable because there was no evidence capable of supporting the actus reus: that he failed to take medication as prescribed. He argues "prescribed" must be read with regard to the Medication Condition, which required him to take "prescribed medication as directed by a health care practitioner". He says the only evidence on what was directed by a health care practitioner was that given by Mr. Blaney: that he was not to take the Gabapentin until he had finished taking all of the previously prescribed Tylenol 3. Referring to s. 686 (1)(a) of the Criminal Code, he says that there was no evidentiary basis on which a properly instructed jury could have rendered a guilty verdict: *R. v. Biniaris*, 2000 SCC 15.
- [21] Alternatively, Mr. Blaney argues that the verdict was unreasonable because of a "Beaudry/Sinclair" reasoning error (*R. v. Beaudry*, 2007 SCC 5 and *R. v. Sinclair*, 2011 SCC 40). He says that if this Court determines there was sufficient evidence to support a guilty verdict, it should conclude that the judge nevertheless erred by failing to make factual findings on critical matters that could have supported a verdict of not guilty. The two unresolved evidentiary issues were: whether Mr. Blaney had lost some of the Gabapentin pills; and whether he had not consumed any of that medication because he was following the doctor's directions. He acknowledges that if the verdict is set aside on this basis, it would mean that a new trial should be ordered rather than an acquittal.
- [22] The Crown argues that LTSO conditions must be interpreted in view of their protective purpose. Here, the purpose of the Medication Condition was to ensure that the staff at the CCC could monitor and implement the proper use of prescription drugs, for the benefit of the appellant and the safety of the community. The Crown says that the actus reus for Count 1--failing to take medication as prescribed--incorporates both parts of the Medication Condition. It required that the appellant take the medication: 1) as prescribed; and 2) that he do so "in accordance with the prescribed dosage as outlined on the medication package." The Crown says the appellant wrongly focuses only on the first part of the condition, but that the judge correctly viewed the medication label on the Gabapentin bottle as a concrete and specific reflection of the directions provided by the health care practitioner. On the basis of this approach, the Crown says there was evidence on which the judge properly concluded that it had proved the actus reus of Count 1.
- [23] With regard to the appellant's alternate position, that the judge made a Beaudry/Sinclair reasoning error, the Crown says the judge did not have to resolve evidentiary issues in order to conclude that the actus reus of Count 1 was proved. The Crown says the appellant's assertion that he was directed by his doctor not to take the Gabapentin until he had taken all of the remaining Tylenol 3s, was a non-essential issue. Similarly, whether he lost some of the Gabapentin and if so, how much, did not have to be resolved because the judge did not have to decide the precise manner in which the appellant had failed to take his prescription as required. All he had to do was reach the conclusion that he had not done so. There were two paths by which he could arrive at that conclusion. The judge could take note of the large

number of pills missing to conclude Mr. Blaney had disposed of them or used them in a manner contrary to the prescription. Or, the judge could accept the appellant's evidence that he had not been taking any of the Gabapentin. Either was sufficient to arrive at the conclusion that Mr. Blaney had not taken the medication as prescribed, which is the *actus reus* of Count 1. As a result, the judge did not need to resolve whether Mr. Blaney's doctor directed him to finish taking the Tylenol 3 before starting to take the Gabapentin, or whether he had been following that direction and had lost some of the pills.

Analysis

- [24] On the hearing of an appeal against conviction, this Court may allow an appeal if it is of the opinion that the verdict "is unreasonable or cannot be supported by the evidence": Criminal Code, s. 686(1)(a)(i).
- [25] The test for determining whether the verdict is unreasonable is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered: *Biniaris* at para. 36; *R. v. Yebes*, [1987] 2 S.C.R. 168 at 185. In applying the test, an appellate court is required "to review, analyse and, within the limits of appellate disadvantage, weigh the evidence": *Biniaris* at para. 36. The weighing of evidence is considered a subjective exercise, the goal of which is to examine the weight of the evidence "rather than its bare sufficiency": *Biniaris* at para. 36. An appellate court is justified in intervening where the trial judge was not alive to an applicable legal principle, their reasons indicate a flaw in the evaluation of the evidence, or they entered a conviction that was inconsistent with the factual conclusions: *Biniaris* at para. 37.
- [26] The judge described the considerable body of evidence in detail. However, as both parties observe, the judge did not resolve some of the key evidentiary issues, including whether Mr. Blaney's evidence about the directions provided by his doctor was credible and should be accepted. I would agree with the appellant that the weight of the evidence is insufficient to support a guilty verdict. There was no evidence from which a safe inference could be drawn as to when Mr. Blaney was directed by his doctor to start taking the replacement medication. The judge failed to evaluate Mr. Blaney's evidence of the directions he received from his doctor and did not draw a conclusion as to whether that evidence was true or raised a reasonable doubt. In my view, the judge's reasons clearly demonstrate the flaw in his analysis and evaluation of the evidence.
- [27] The starting point is to note, as the Crown emphasizes in its factum, that the Medication Condition has two parts. The first part of that condition required the appellant to take "prescribed medication as directed by a health care practitioner". Count 1 is directed at a breach of that part of the condition. The breach alleged is the failure to "take medication as prescribed". The second part of the Medication Condition stated that "all medications must be handed to the CRF and dispensed in accordance with the prescribed dosage as outlined on the medication package" while Mr. Blaney was living "at a CRF". Count 2 is directed at that term of the Medication Condition. The breach alleged is the failure to hand "his medication

into the community residential facility or community correctional centre at which he was living".

- [28] The judge describes the inferences he drew from the evidence, as well as the factual matters that he chose not to resolve. The flaw in the judge's reasoning or analysis is that he failed to apply his findings, including with regard to the unresolved factual matters, to the two counts in the indictment. He appears to have assumed that the actus reus for both counts was the same and did not attempt to distinguish the factual elements that needed to be proved for each offence.
- [29] The reasons clearly articulate the judge's conclusion that the elements of the breach alleged in Count 2 had been established beyond a reasonable doubt. The judge began his analysis by observing that the evidence of the Crown witnesses and Mr. Blaney was "not arraigned totally against one another" and that "the evidence on the critical issues is not in opposition": at para. 216. He further noted that Mr. Blaney acknowledged that he was bound to turn in prescription medications to Mr. Nicholl who would oversee their proper dispensation.
- [30] In response to the defence argument that there was no evidence to prove that he had not complied with the Medication Condition, the judge found that the argument was "not supportable, because Mr. Blaney had unreported Gabapentin in his possession and some pills were missing from the prescribed amount": at para. 218. The reference to "unreported" medication is directed at the failure to report and hand in the prescription medication to the CRF, a finding which the judge explains in more detail. However, this observation does not consider, let alone make a finding about, the directions provided to Mr. Blaney by his doctor for taking the medication.
- [31] The judge then turned to the circumstantial evidence, "including the missing pills": at para. 119. After citing passages from *R. v. Villaroman*, 2016 SCC 33, he performed the analysis at paras. 221-222 which I have set out above. For ease of reference I will repeat those conclusions which demonstrate that his findings only support the actus reus for Count 2. The judge found, "the fact remains he knew he was required to turn in the prescription and pills he had in his possession in his backpack and did not do so": at para. 221; emphasis added. The judge concluded that this was "sufficient to provide a path to conviction": at para. 221. While that is correct, it is only so with regard to Count 2. The same can be said of the conclusion that, "while it may be possible Mr. Blaney inadvertently lost some of the prescribed medication, he still had pills in his possession that he was obliged to turn in to the CCC, and to Mr. Nicholl specifically": at para. 222; emphasis added. These findings support the conclusion that the Crown proved the actus reus for Count 2 beyond a reasonable doubt, but provide no support for a similar conclusion about the actus reus for Count 1.
- [32] The testimony of the appellant was described in detail by the judge, including his statement that his doctor "told him to finish Tylenol 3 first, then start using Gabapentin" (at para. 120), and his assertion that he lost some of the Gabapentin and never took any of them: at paras.

106, 108. The judge specifically refrained from deciding whether to accept those averments. The judge simply stated, "even were I to accept Mr. Blaney's testimony that the missing pills were inadvertently lost and that he had no intention of using Gabapentin until he had used up his Tylenol 3 prescription", Mr. Blaney knew of the requirement to turn in the medication and failed to do so: at para. 221. As I have indicated, this does not resolve the question of what directions were given by the doctor to Mr. Blaney. Further, in spite of the controversial evidence, the judge did not carry out a credibility analysis. He found that "Mr. Blaney presented fairly well as a witness", was "straightforward and courteous", and "exhibited some signs of a keen intelligence": at para. 217. The judge never decided if he should accept or reject Mr. Blaney's evidence about the directions given by his doctor. It appears that the judge was of the view he did not need to resolve that issue since he could reach a guilty verdict on both counts because Mr. Blaney acknowledged that he knew of the requirement to hand in prescription medication and he had failed to do so. As I have indicated, that reflects a misunderstanding of the distinction between the elements of the two offences.

- [33] I would also reject the Crown's submission that the prescription label is evidence that the judge could properly rely on to find that the appellant "failed to take medication as prescribed". To establish the *actus reus* for Count 1, the Crown had to prove that Mr. Blaney failed to "take prescribed medication as directed by a health care practitioner", contrary to the first term in the Medication Condition. Mr. Blaney gave direct evidence as to the directions provided by his doctor: he was to finish the Tylenol 3 prescription before starting the Gabapentin. He did not state or agree that he was told to start the course of medication right away and the prescription label does not specify when Mr. Blaney was to commence taking the Gabapentin. There was no contrary evidence. Mr. Nicholl's evidence did not challenge any of Mr. Blaney's assertions about the directions he received or that the Gabapentin was a replacement for Tylenol 3. Accordingly, the only evidence before the judge was that Mr. Blaney was not to start taking the Gabapentin until he was finished taking the Tylenol 3 medication. The judge neither rejected Mr. Blaney's evidence nor found that he was not credible. Accordingly, there was no basis for the conclusion that Mr. Blaney failed to take the medication as prescribed.
- [34] I would also reject the Crown's position that the reference to the "prescribed dosage as outlined on the medication package" in the second part of the Medication Condition somehow informs the breach alleged in Count 1. The second part of the condition, which forms the basis for Count 2, is directed at how medications are to be handled and dispensed while Mr. Blaney is living at a CRF. He was required to hand in all prescription medications to the CRF, and the medications were required to be "dispensed in accordance with the prescribed dosage as outlined on the medication package." For the purpose of the Medication Condition, the prescribed dosage on the label established the manner in which the medication was to be dispensed. However, in the face of Mr. Blaney's evidence as to his doctor's directions, it is not evidence that could be relied on to establish when he was to start the course of medication.

- [35] Having arrived at the conclusion that the verdict was unreasonable on the weight of the evidence and that the judge's reasons clearly indicate a flaw in the evaluation of that evidence, I need not consider the appellant's alternate argument based on a so-called Beaudry reasoning flaw.
- [36] In summary, I would conclude that the verdict cannot be supported by the evidence and was thus unreasonable. I would allow the appeal from the guilty verdict on Count 1 and would enter an acquittal on that count.

Count 2 - Did the judge fail to apply subjective fault principles?

- [37] The appellant argues that the judge failed to properly apply the subjective fault standard in determining that the mens rea for the Count 2 offence had been made out. He says this led the judge into error in his assessment of Mr. Blaney's exculpatory evidence of his reasonable excuse: that he forgot that he had the prescribed Gabapentin medication in his possession.
- [38] The appellant starts with the uncontroversial proposition that s. 753.3(1) does not create a "duty-based offence" that would displace the presumption of subjective fault, and that there is no indication of legislative intent to displace that standard: Zora at paras. 41-45. He says that the provision allowing an offender to establish a "reasonable excuse" for failing or refusing to comply with an LTSO should play no role in the interpretation of the mens rea. Rather, it creates a defence that is available to an accused that should only be considered by a court after the Crown has established all elements of the offence, including mens rea. I note that the respondent does not take any issue with this statement of the legal principles.
- [39] The appellant argues that the judge essentially conflated the proof of mens rea and the defence of a "reasonable excuse". The judge incorrectly assumed that genuine forgetfulness was not relevant because Mr. Blaney had knowledge of the Medication Condition. The appellant says the judge did not consider whether Mr. Blaney, notwithstanding his knowledge of the condition, intended to breach it--which he needed to do to resolve the mens rea question. The judge compounded this error when he failed to consider Mr. Blaney's evidence about his brain injury and forgetfulness in order to determine if it supported his reasonable excuse: that he simply forgot to turn the medication in to the CRF. The appellant says this was a failure to consider Mr. Blaney's personal characteristics as the judge was required to do.
- [40] Finally, the appellant argues that the judge proceeded on the assumption that any risk of non-compliance with the Medication Condition was sufficient to establish recklessness in breaching that condition. This is contrary to Zora which establishes that mens rea is only satisfied where it is shown that an accused knew or perceived a substantial and unjustified risk that their conduct would likely fail to comply with a condition and yet persisted in that conduct: at paras. 109, 118.

- [41] The respondent submits that if the reasons are read in context, taking into account the detailed evidence reviewed by the judge and the way in which the parties framed the issues at trial, it is clear that the judge properly considered all of the evidence about whether the appellant intended to breach the Medication Condition on a subjective fault standard. Further, the judge considered and rejected the defence argument on reasonable excuse.
- [42] In my view, when the reasons are considered in context, there is little merit to the appellant's position.
- [43] In *Zora*, the Court set out the requirements for the proof of subjective mens rea for a failure to comply offence:
- [109] Subjective mens rea generally must be proven with respect to all circumstances and consequences that form part of the actus reus of the offence (*Sault Ste. Marie*, at pp. 1309-10; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 139, per Dickson J., dissenting, but not on this point). Therefore, subjective mens rea under s. 145(3) can be satisfied where the following elements are proven by the Crown:
1. The accused had knowledge of the conditions of their bail order, or they were wilfully blind to those conditions; and
 2. The accused knowingly failed to act according to their bail conditions, meaning that they knew of the circumstances requiring them to comply with the conditions of their order, or they were wilfully blind to those circumstances, and failed to comply with their conditions despite that knowledge; or
- The accused recklessly failed to act according to their bail conditions, meaning that the accused perceived a substantial and unjustified risk that their conduct would likely fail to comply with their bail conditions and persisted in this conduct.
- [44] Although there is no appellate authority dealing with the mens rea requirement for s. 753.3(1), and *Zora* concerned s. 145(3) of the Criminal Code which has a slightly different statutory construction, I agree with the parties that the requirements set out in *Zora* are applicable to this failure to comply offence. In that regard, I note that in *R. v. Docherty*, [1989] 2 S.C.R. 941, the Court held that proof of subjective mens rea was required for a breach of probation offence (now s. 733.1). The statutory construction for the two offences (s. 753.3(1) and s. 733.1) is similar; both state that an offender "who, without reasonable excuse, fails or refuses to comply" with an LTSO or probation order is guilty of the offence.
- [45] Adapting the requirements from *Zora* to the circumstances here, in order to satisfy the mens rea requirement for the Medication Condition, the Crown had to establish that Mr. Blaney:
- knew of the Medication Condition and that it required him to turn in his prescription medications to the CCC staff; and

· knowingly failed to act (or recklessly failed to act) according to that condition knowing that he had the Gabapentin, a prescription medication, in his possession after he returned to the CCC on September 8, 2017.

[46] As I understand the appellant's position, he accepts that the judge correctly concluded that Mr. Blaney had knowledge of the Medication Condition and its requirements. However, the judge failed to properly consider whether Mr. Blaney knowingly failed to act in accordance with that condition. The appellant suggests that the judge somehow conflated proof of subjective mens rea and consideration of whether Mr. Blaney had a reasonable excuse, and that the judge did not consider Mr. Blaney's personal characteristics.

[47] I would reject each of these arguments. This Court must take a functional approach when considering reasons for judgment. A judge's reasons must be considered as a whole in the context of the evidence adduced, the submissions of counsel, and the history of the trial: *R. v. R.E.M.*, 2008 SCC 51 at para. 35. When the reasons are considered in context here, it is clear that the judge properly applied a subjective mens rea standard and that he considered whether the Crown had shown that Mr. Blaney did not have a reasonable excuse for failing to turn in the medication.

[48] First, as the Crown argues, the submissions of counsel focused on what was actually in the appellant's mind in view of his particular circumstances and challenges, not on what a reasonable person would have done or thought. In other words, the submissions were focused on a subjective standard. Further, at para. 176 of the reasons, the judge referred to his own decision in *R. v. Elder*, 2017 BCSC 1164:

[176] In *Elder*, Crown and defence counsel agreed the Crown must prove the actus reus and mens rea of the alleged offence, and that the mens rea is not one of general intent. Further, in this vein, I noted at para. 58 that breach of a long-term sentence offender condition is not a strict liability offence and that the accused is innocent until proven guilty, that the terms of the indictment, its essential elements, have to be proven beyond a reasonable doubt. In that case, I was left with a reasonable doubt that Mr. Elder had intentionally refused to participate in a counselling program and did not breach the conditions stated in Count 2

[Emphasis added.]

The reference to *Elder* confirms that the judge was aware of the requirement for, and applied, a subjective mens rea standard when he considered whether the appellant's refusal or failure to turn in the prescription medication to the CRF was intentional.

[49] Second, there is no merit to the suggestion that the judge failed to consider Mr. Blaney's personal characteristics and frailties, including his brain injury and reported forgetfulness. The judge set out the evidence adduced about Mr. Blaney's personal characteristics, including about his head injuries. The judge noted that Mr. Blaney had been a boxer and had "been engaged in too many fights": at para. 97. The judge summarized Mr. Blaney's testimony that he had been in more than one motor vehicle accident and had been

diagnosed with a brain injury for which he had received treatment at the UBC Brain Clinic. The judge observed that Mr. Blaney's doctor described his neurological condition as "very complex": at para. 103. The judge also referred to the evidence of the CCC staff about Mr. Blaney's behaviour in the facility.

- [50] Having stated the law correctly and considered the relevant evidence about Mr. Blaney's personal characteristics and frailties, I see no basis to conclude that the judge did not apply the law correctly when he considered whether Mr. Blaney knowingly, or recklessly, failed to act in accordance with the Medication Condition when he did not turn the Gabapentin into the staff at the CCC as he was required to do.
- [51] Third, I would reject the suggestion that the judge somehow conflated the reasonable excuse defence and the Crown's requirement to prove subjective intent.
- [52] The judge accepted Crown counsel's submission that a key piece of evidence was the length of time that had passed since the prescription was filled. There was conflicting evidence about how often Mr. Blaney used the backpack--he said only rarely while Crown witnesses said he used it almost daily. But Mr. Blaney admitted that he had kept the backpack at the foot of his bed in his room. Crown counsel argued that Mr. Blaney's evidence that he had forgotten about the Gabapentin was undermined by the fact that the backpack was in plain view for almost three weeks. Counsel urged the judge to conclude that it was extremely unlikely that the appellant could have completely forgotten about the Gabapentin for that length of time.
- [53] The judge accepted that argument, and in doing so, arrived at conclusions on both mens rea and reasonable excuse. He stated:
- [221] In my opinion, the fact that most undercuts the defence position on reasonable excuse and mens rea is the days Mr. Blaney's large, zippered backpack remained at the foot of his bed, 21 days, where it remained until the September 27 search.

[Emphasis added.]

I note that the period of time in question was 19 days, not 21 days as stated in the paragraph above, but this miscalculation did not ultimately affect the outcome of the decision.

- [54] While the analysis is brief, it is clear the judge considered the evidence and the submissions, both of which are set out in detail, and that he rejected the defence arguments both on mens rea and reasonable excuse. The fact that the judge referred to those findings together does not demonstrate any conflation of the two issues. Rather, it is a consequence of the fact that the evidence relied on by each party in support of their submissions on mens rea and on the defence of reasonable excuse was the same for both issues. Mr. Blaney argued that he had genuinely forgotten about the Gabapentin prescription and had no intent to breach the Medication Condition. That same evidence was the basis on which he argued that he had a reasonable excuse. The Crown argued that his evidence could not be believed in large part because he had the bottle in his backpack either at the foot of his bed or in use for almost

three weeks. The Crown argued that intent could be inferred from these circumstances and that also had the effect of establishing that Mr. Blaney did not have a reasonable excuse for not turning in the medication. The judge could and did reject the defence position on both mens rea and reasonable excuse based on his assessment of the same evidence.

[55] In summary, I would dismiss this ground of appeal.

Disposition

[56] I would allow the appeal from the conviction on Count 1 and substitute an acquittal. I would dismiss the appeal on Count 2.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Fisher"

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Prepared on 26 October 2026 · Esheria