

CANADA / JUDGMENT

R. v. Brown

2020 BCSC 1363

COURT

Supreme Court of British Columbia

DECIDED

24 August 2020

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2020 BCSC 1363 R. v. Brown IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Brown, 2020 BCSC 1363 Date: 20200824 Docket: 180172-1 Registry: Victoria Regina v. Malcolm Michael Brown Before: The Honourable Madam Justice Murray Oral Reasons for Judgment Counsel for the Crown: C. Jennings via telephone Counsel for the Accused: C. Johnson via telephone Place and Date of Hearing: Victoria, B.C. August 17, 2020 Place and Date of Judgment: Victoria, B.C. August 24, 2020

- [1] THE COURT: This is my decision on the bail review.
- [2] On July 9, 2020, Mr. Brown was arrested for assault and released by the Saanich police on an undertaking with conditions, including that he report to a bail supervisor, not have contact with the complainant, and a red zone around the complainant's residence.
- [3] Very briefly, the allegations against Mr. Brown are that he was in Brydon Park in Saanich, with his dogs. Mr. Penston, 78, whose house abuts the park, observed Mr. Brown physically handling one of his dogs in a way that Mr. Penston believed to be abusive. Mr. Penston approached Mr. Brown and told him not to do that to his dog. Mr. Brown swung at Mr. Penston, but missed. In an effort to avoid the blow Mr. Penston stepped back and fell. Mr. Brown allegedly kicked Mr. Penston twice while he was on the ground. Mr. Brown then got his dogs and left the park. Mr. Penston contacted the police.
- [4] Attempts were made to identify Mr. Brown. Efforts included a media release in which details, including the allegations of cruelty against a dog, were made public.
- [5] Some time following the media release, Mr. Brown's mother went to Mr. Penston's house and confronted him about the allegations he had made against her son. While there is no indication that this was done at the behest of or even with the knowledge of Mr. Brown, it is proof that Mr. Penston's residence is easy to find.
- [6] Mr. Brown wrote several emails to Saanich police and news outlets admonishing them for how they dealt with Mr. Penston's complaint. Mr. Brown's anger towards Mr. Penston is evident in his correspondence.

- [7] Mr. Brown turned himself in when contacted by police, and was released, as I said earlier, by the police on conditions.
- [8] On July 17, 2020, Mr. Brown applied to the Provincial Court to vary the conditions of the police undertaking. He argued that the conditions were unreasonable and excessive. He relied on the comments of the Supreme Court of Canada in the recent case of *R. v. Zora*, 2020 SCC 14.
- [9] In addition to deleting the condition that he report as directed to a bail supervisor as per the concession of the Crown, Her Honour Judge Chaperon deleted the no weapons condition as she found that there was no justification for it.
- [10] In imposing the bail order, the judge, on her own initiative, added a term that Mr. Brown keep the peace and be of good behaviour.
- [11] Mr. Brown appeals the learned Provincial Court judge's order on the basis that she erred in law by failing to follow the Supreme Court of Canada's decisions in *Zora*, *Antic* and *Myers*.
- [12] The Crown concedes that Her Honour Judge Chaperon erred in law by failing to provide sufficient reasons for upholding the conditions. The Crown further concedes that the condition that Mr. Brown keep the peace is unnecessary. The Crown takes no position regarding the condition that he provide a bail supervisor with his home address and phone, and not change them without notifying the bail supervisor.
- [13] The conditions that are in dispute are as follows:
1. report to a bail supervisor as directed;
 2. no contact with Mr. Penston; and
 3. no go to Brydon Park or to the street on which Mr. Penston lives. Mr. Brown argues that these conditions are not necessary, and are contrary to the principles of restraint enunciated in *Zora*.
- [14] In *Zora*, the Supreme Court of Canada held that courts must avoid the imposition of any more stringent bail conditions than are clearly necessary to address the specific risks posed by the individual accused. The imposition of unnecessary bail terms is contrary to the presumption of innocence and has a disproportionate impact on the vulnerable and the marginalized.
- [15] The court provides the following guidance regarding how to determine what conditions are necessary:
- [84] Only conditions which target those specific s. 515(10) risk(s) are necessary. If an accused is a flight risk, but poses no other risks, only those conditions that minimize their risk of absconding should be imposed. Similarly, if an accused poses a risk to public safety and protection, only the least onerous conditions to address that specific threat should be imposed. ... Further, such conditions will not be necessary for public protection and safety

merely because an accused poses a risk of committing another offence while on bail, unless they pose a "substantial likelihood" of committing an offence that endangers public protection and safety. ... Any condition imposed to maintain confidence in the administration of justice must be based on a consideration of the combined effect of all the relevant circumstances from the perspective of a reasonable member of the public, especially the four factors set out in s. 515(10)(c): the apparent strength of the prosecution's case, the gravity of the offence, the circumstances surrounding the commission of the offence, and whether the accused is liable for a potential lengthy term of imprisonment.

[16] At paragraph 89, the Supreme Court of Canada instructs courts to consider each proposed condition to decide whether it is necessary and reasonable in the circumstances of the particular offence and the particular offender in order to satisfy the concerns for release.

[17] With that law in mind, I now turn to consider in turn the conditions in issue.

(1) Report to a bail supervisor

[18] The Crown argues that there must be a condition that Mr. Brown report to allow a bail supervisor to review the bail conditions with Mr. Brown and have him sign them to indicate his understanding. This is particularly important, says the Crown, as Mr. Brown is not present for this bail review.

[19] I am not persuaded that this is necessary. The court registry staff can review the conditions with Mr. Brown and he can sign the order in their presence.

(2) No contact with Mr. Penston

[20] There is no question that a no contact order is necessary and appropriate in this case.

[21] The allegations involve the serious assault of an elderly man. Charges have been approved. The Crown's case on its face appears to be strong. According to the Crown, four witnesses describe Mr. Brown kicking Mr. Penston while he was lying on the ground.

[22] A no contact condition is necessary for the safety and security of Mr. Penston. There is no suggestion that this term would be onerous on Mr. Brown or infringe his freedom as he does not know Mr. Penston other than through this incident. There is no reason that he would have to have contact Mr. Penston.

[23] Further, I agree with the Crown that reasonable well-informed members of the public would lose confidence in the justice system if such a condition is not imposed.

(3) No go Brydon Park and the street that Mr. Penston lives on

[24] I am satisfied for all of the reasons above that these no go conditions are necessary. Brydon Park is a small park in the middle of a residential area in Saanich. There are several other parks in the immediate vicinity, and many other parks in Saanich. As stated above, Mr. Penston's house abuts Brydon Park.

- [25] The street that Mr. Penston lives on is a one block, dead end road that leads to the park. There is no suggestion that Mr. Brown needs to be on Vanguard Place or in Brydon Park for any reason.
- [26] Accordingly, in my view, these conditions are reasonable as they are proportionate to the risk and are at most minimally intrusive. They protect the complainant without unduly restricting Mr. Brown's freedom.
- [27] I have no doubt that right minded, reasonable members of the public would lose their confidence in the administration of justice if Mr. Brown was permitted to return to this park and to be on Mr. Penston's street while at large awaiting trial on this serious charge.
- [28] In conclusion, Mr. Brown's release order is varied. He is released without financial obligation on the following terms: (1) report to court as directed; (2) he shall have no contact, directly or indirectly, with Ted Penston; and (3) he shall not go to Brydon Park in Saanich, British Columbia, or to Vanguard Place in Saanich, British Columbia.
- [29] Anything further, Ms. Jennings?
- [30] MS. JENNINGS: No, thank you, My Lady.
- [31] THE COURT: Mr. Johnson?
- [32] MR. JOHNSON: No, thank you, My Lady.
- [33] THE COURT: Thank you. So Mr. Brown will have to attend the court registry to sign the new bail document. "The Honourable Madam Justice Murray"

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Prepared on 25 October 2026 · Esheria