

CANADA / JUDGMENT

R. v. Burgoyne

2021 BCCA 51

COURT

British Columbia Court of Appeal

DECIDED

20 January 2021

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2021 BCCA 51 R. v. Burgoyne

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Burgoyne,

2021 BCCA 51

Date: 20210120

Docket: CA46884

Between:

Regina

Respondent

And

Henry Harold Burgoyne

Appellant

Before:

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

The Honourable Mr. Justice Voith

On appeal from: An order of the Provincial Court of British Columbia, dated
May 21, 2020 (R. v. Burgoyne, Cranbrook Dockets 33877-1; 34378-2-C).

Oral Reasons for Judgment

Counsel for the Appellant (via videoconference):

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Counsel for the Respondent (via videoconference):

C. Lusk

Place and Date of Hearing:

Vancouver, British Columbia

January 20, 2021

Place and Date of Judgment:

Vancouver, British Columbia

January 20, 2021

Summary:

The appellant pleaded guilty to assault and breaking and entering a dwelling house and committing an indictable offence therein. He appeals a "No Go" condition of his probation order restraining him from being within 100 kilometres of any place one of the victims lives, works, attends school, worships, or happens to be. Held: Leave to appeal granted; appeal allowed in part. The Crown concedes that the condition as worded amounts to a banishment condition and is unreasonable. The circumstances identified by the sentencing judge justify the imposition of a reasonable "No Go" condition. The condition is varied by replacing the words "100 kilometres" with "100 metres".

- [1] VOITH J.A.: The appellant, Mr. Burgoyne, applies for leave to appeal from sentence and, if leave is granted, appeals a condition of the probation order that was imposed when he was sentenced. He entered guilty pleas to breaking and entering a dwelling house in Invermere, British Columbia, and committing assault therein, and to assaulting Ms. Arlene Hunter, the sister of his wife, Ms. Betty Burgoyne. He was sentenced for these two offences to 700 days' jail and 90 days' jail, respectively, to be served concurrently, less 315 days' credit for 210 days actual time served, to be followed by three years' probation.
- [2] On this appeal Mr. Burgoyne takes issue with a single term of the probation order. That condition requires Mr. Burgoyne to "not go to or be within 100 kilometres of any place where Betty Burgoyne lives, works, attends school, worships, or happens to be" and, in the event he sees her, to "leave her presence immediately without any words or gestures."
- [3] The Crown concedes that the impugned condition, as worded, is unreasonable given the length and extent of the geographic restriction but submits that this Court ought to vary, rather than remove, the condition "by substituting metres for kilometres."

Circumstances of the Offences

- [4] The circumstances of Mr. Burgoyne's offences were captured in an Agreed Statement of Facts. On October 24, 2019, Mr. Burgoyne entered the residence of Ms. Hunter (defined as the "Residence" in the Agreed Statement of Facts). The Residence is located in Invermere, British Columbia.
- [5] Mr. Burgoyne was intoxicated when he entered the Residence. He then assaulted Ms. Hunter in the Residence by kneeing her in the stomach. He wanted his wife, Ms. Burgoyne, to go home with him, but she refused, saying that he was drunk. Mr. Burgoyne was told to leave the Residence, which he did after some delay. Mr. Burgoyne left the Residence driving a green pickup truck. He was prohibited from driving at the time under the Motor Vehicle Act, R.S.B.C. 1996, c. 318.
- [6] Mr. Burgoyne then returned and entered the Residence just after midnight. He was carrying a loaded .22 calibre rifle with the safety on. In the hallway, Mr. Michel, another person at the Residence, wrestled the rifle away from Mr. Burgoyne and pushed him out the door.
- [7] Mr. Burgoyne was arrested a short time later, while driving the green pickup truck. He later stated to the police that Mr. Michel should have let him walk past so that he could shoot Ms. Hunter.

The Reasons of the Sentencing Judge

- [8] Before the sentencing judge, the Crown sought a custodial sentence of six years. The defence sought a sentence of time served. The sentencing judge, in unreported reasons dated May 21, 2020, read the Agreed Statement of Facts into the record. He addressed Mr. Burgoyne's circumstances, noting that he was 54 years old, that he was of Indigenous descent, that aspects of his life had been difficult, and that a "thorough" Gladue report had been prepared for the sentencing.
- [9] He addressed Mr. Burgoyne's criminal record, which consisted of seven convictions over 37 years. Four of those convictions related to driving while impaired. He had two prior convictions for assault and one for assault causing bodily harm, though each of these latter convictions was dated.
- [10] The sentencing judge addressed the three victim impact statements that had been filed and dealt with two of them, from Ms. Hunter and Ms. Burgoyne, at some length.
- [11] The sentencing judge noted that Mr. Burgoyne recognized that "alcohol and anger were factors" in the offences and that he was an alcoholic. The sentencing judge further noted that, unfortunately, Mr. Burgoyne did not see the need to receive any treatment and that he blamed Ms. Hunter for the offences. The sentencing judge then dealt with the mitigating and aggravating circumstances before the court, several of which are relevant to this appeal.

- [12] The sentencing judge accepted that Mr. Burgoyne "believe[d]" that he had made a stupid mistake and that this would not happen again. It seems clear, however, that the sentencing judge was skeptical about this assurance. He again noted that, unfortunately, Mr. Burgoyne saw "no need to address his alcoholism" and that it appeared he had "no empathy for the harm he has caused to Arlene Hunter and the other victims." He said, "It is clear Mr. Burgoyne was not traumatized by what happened and that concerns me."
- [13] He emphasized that the offences had occurred at a dwelling house, that Mr. Burgoyne knew the house was occupied, and that there had been some violence, which are deemed to be aggravating circumstances under s. 348.1 of the Criminal Code, R.S.C. 1985, c. C-46. It was also an aggravating factor that there was a firearm involved. He considered that it was a further aggravating factor that the break and enter had occurred twice. He observed that on the first occasion, when he was confronted, Mr. Burgoyne left the Residence. He also said, "Sadly or unfortunately this did not cool off his anger, and he in fact upped the ante and he made everything more terrifying for everyone in that residence."
- [14] Still further, the sentencing judge noted that the offences were in the nature of a domestic dispute, and he quoted from portions of s. 718.2(a) of the Criminal Code, which provide that the following are deemed to be aggravating circumstances:
- (ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family
 - (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation
- [15] The trial judge also noted relevant mitigating factors, including the fact that Mr. Burgoyne had pleaded guilty, that he had generally been a productive member of society, and that he did not have a general pattern of antisocial behaviour. He recognized that Mr. Burgoyne was of Indigenous descent and the resulting importance of s. 718.2(e) of the Criminal Code. He noted that the Gladue report he had reviewed had been helpful and informative and that "without it the sentence would almost certainly have been higher."
- [16] Finally, it is relevant that in imposing various conditions of probation, the judge did not impose any rehabilitative conditions. This is notwithstanding the role that alcohol played in these offences and Mr. Burgoyne's history of difficulty with alcohol. This was, again, on account of the fact that Mr. Burgoyne was not willing to attend counselling, a fact that was confirmed in the Gladue report that was before the court. Instead, various protective conditions were imposed with reference to the conditions as worded and numbered in the General Harmonized 2019 Probation and Peace Bond Picklist (December 16, 2019) (the "Picklist").
- [17] Under condition 2002, the judge imposed a "No Contact" condition, prohibiting Mr. Burgoyne from directly or indirectly contacting or communicating with Ms. Hunter, Ms. Burgoyne, or a Mr. Jesse Paul.

- [18] The judge did not purport to rely on condition 2302-2, the "Banishment" condition. Instead, under condition 2005-1, which is described as a "No Go" condition, he imposed a condition that Mr. Burgoyne not go or be "within 100 kilometres of any place where [Ms.] Burgoyne lives, works, attends school, worships, or happens to be." However, condition 2005-1, as it appears on the Picklist, starts with the words "you must not go to (or be within ____ metres of)" where one or more named individuals "lives, works, attends school, worships, or happens to be." When the sentencing judge pronounced this condition, the defence inquired, and the judge confirmed, that he had intended to impose a 100-kilometre restriction.

The General Legal Framework

- [19] Sentencing judges have considerable latitude in crafting appropriate conditions of probation: *R. v. Shoker*, 2006 SCC 44 at para. 14; *R. v. Goddard*, 2019 BCCA 164 at para. 19. The sentencing judge's decision about which conditions to include in a probation order involves an exercise of discretion. An appellate court will intervene in that exercise of discretion only if the judge has erred in principle, imposed a condition that is clearly unreasonable, or if the order is manifestly inappropriate or renders the sentence unfit: *Goddard* at para. 19; *R. v. Manca*, 2019 BCCA 280 at para. 42.
- [20] Under the residual clause in s. 732.1(3)(h) of the Criminal Code, a judge has broad authority to impose reasonable conditions that are considered desirable to protect the public and to facilitate an offender's reintegration into the community: *Manca* at para. 39.
- [21] Conditions of probation do not have to be linked to the offence. There must, however, be a nexus between the offender, the protection of the public, and the offender's reintegration or rehabilitation into the community: *R. v. Duguay*, 2019 BCCA 53 at para. 65, citing *Shoker* at para. 13. Furthermore, conditions may serve either one or both of the purposes of protection of the public and rehabilitation: *R. v. Timmins*, 2006 BCCA 354 at para. 9; *Goddard* at para. 23; *Duguay* at para. 63. Finally, conditions must be clear, unambiguous, enforceable, and compliant with federal and provincial laws and the Charter: *Goddard* at paras. 20-23.
- [22] Mr. Burgoyne reasonably characterizes the condition at issue, which adopts the language of a "No Go" condition from the Picklist, as amounting to a banishment condition due to its geographic scope. The Crown agrees with this characterization. Banishment conditions are rare: *R. v. Forner*, 2020 BCCA 103 at para. 53. They are often viewed as "fundamentally wrong": *Forner* at para. 53. In *R. v. Rowe* (2006), 212 C.C.C. (3d) 254 at para. 7, the Ontario Court of Appeal said, "Plainly, the larger the ambit of the banishment, the more difficult the order will be to justify."
- [23] Counsel accept that, if the sentencing judge has made an error in principle, this Court can undertake its own analysis to determine a fit sentence or condition of probation: *R. v. Friesen*, 2020 SCC 9 at para. 27; *Manca* at paras. 42, 53, 56.

Analysis

- [24] Mr. Burgoyne raises various concerns in relation to the condition that the judge imposed. I have said that the Crown agrees that the condition was inappropriate in the circumstances of this case. There is, accordingly, no need to address aspects of the specific concerns that are raised and developed by Mr. Burgoyne.
- [25] The only question is whether the No Contact condition that was imposed by the sentencing judge is sufficient, without more, in the circumstances of this case. Alternatively, is a new "No Go" restriction, which limits Mr. Burgoyne's ability to go within some reasonable physical distance of where Ms. Burgoyne lives, works, attends school, worships, or happens to be, reasonable in the circumstances of this case?
- [26] Not surprisingly, such determinations are largely case specific. In *R. v. Deering*, 2019 NLCA 31, the accused appealed a condition of his probation order that barred him from being present on any part of the Burin Peninsula in Newfoundland south of a particular bridge. He had an "unenviable criminal record" of 82 convictions over 17 years. Of those convictions, 36 involved breaches of probation: at para. 6. The court observed that "the appellant's criminal history demonstrates an unwillingness or inability to abide by court orders in general and no-contact orders in particular": at para. 22. The court upheld the challenged condition of probation.
- [27] In *Forner*, the appellant appealed both her custodial sentence and a condition in her probation order that prevented her from being within a 50-kilometre radius of Osoyoos, British Columbia, other than with the written permission of her probation officer. The Court noted that at the time of the offence, the appellant had a 16-year history of alcohol abuse. She expressed what was considered to be genuine and significant remorse about the offence but said she had no memory of it: at para. 12. The Court subsequently emphasized the appellant's genuine remorse, her post-offence rehabilitation efforts, and her lack of any record of violent behaviour: at para. 50. When addressing the banishment condition, the Court noted the condition would force the appellant to live outside of her community of ordinary residence, thereby likely hindering her rehabilitation: at para. 59. There was also no reason to believe that the condition would render society safer or more secure: at para. 60.
- [28] Notably, in *Forner*, the Court considered that there were other conditions in place that would protect the victim of the appellant's attack. This included both a prohibition on the appellant having any direct or indirect contact or communication with the victim or her family and a further prohibition that prevented her from going to any residence, school, or workplace of the victim or members of her immediate family: at para. 60. Accordingly, the Court considered that "the safety of the victim and her children has been addressed": at para. 60.

- [29] In this case, Mr. Burgoyne's primary submission is that there is no basis for a "No Go" condition because there is no evidence that he poses a risk or danger to his wife. In aid of this submission his counsel identifies, for example, that it was Ms. Hunter, rather than Ms. Burgoyne, who was assaulted.
- [30] This mischaracterizes what occurred. Mr. Burgoyne broke into the Residence to get his wife to leave with him, in circumstances where she made clear that she did not wish to do so. Ms. Hunter was assaulted because she appears to have been in the way. He later returned to the Residence with a loaded weapon. Furthermore, the assertion that he did not assault Ms. Burgoyne, or poses no risk to her, ignores the significant distress and ongoing anxiety that he has caused her. She too was a victim of his actions.
- [31] Mr. Burgoyne also argued, in the alternative, that some of the language of the "No Go" condition the sentencing judge imposed should be varied to address various potential scenarios and changes of circumstance. Under s. 732.2(3) of the Criminal Code, it is open to Mr. Burgoyne, should there be such a change of circumstance, to return before the sentencing judge and to seek a variation of the conditions of his probation.
- [32] In the present circumstances, the various conditions of probation that the sentencing judge imposed were protective, rather than rehabilitative, in nature. Mr. Burgoyne showed no remorse for his offences. His offences took place in an occupied dwelling house and were violent in nature. He showed no interest in addressing his difficulties with alcohol, though he recognized that they had likely fueled his behaviour. He also had some history of violence, albeit dated. The victim impact statements the judge referred to established that Mr. Burgoyne's behaviour had caused Ms. Burgoyne considerable anxiety and concern for her safety.
- [33] There is a clear nexus between a reasonable "No Go" condition and Mr. Burgoyne's offences. Such "No Go" conditions, though restrictive, are frequently justified in the case of violent and other offences. There is often no good reason for an offender who has committed a violent offence to be within a limited but fixed distance of the victim or the places she frequents.
- [34] Further, as previously noted, Mr. Burgoyne drove his pickup truck while prohibited from driving under the Motor Vehicle Act. He was sentenced simultaneously on a separate information for a guilty plea to operating a motor vehicle while prohibited. The sentencing judge referred to a statement attributed to Mr. Burgoyne in his Gladue report that he has never had a driver's licence, and the judge noted that Mr. Burgoyne appeared to have "no intention of complying with the law". This demonstrates some unwillingness on Mr. Burgoyne's part to abide by legal prohibitions.
- [35] Accordingly, I would grant leave to appeal from sentence and allow the appeal to the extent of varying the "No Go" condition that was imposed by the sentencing judge by replacing the words "100 kilometres" with "100 metres".
- [36] ABRIOUX J.A.: I agree.

[37] GRAUER J.A.: I agree.

[38] ABRIOUX J.A.: Leave to appeal from sentence is granted and the appeal is allowed to the extent of varying the "No Go" condition that was imposed by the sentencing judge by replacing the words "100 kilometres" with "100 metres".

"The Honourable Mr. Justice Voith"

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