

CANADA / JUDGMENT

R. v. Chappell

2020 BCCA 38

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 38 R. v. Chappell COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Chappell, 2020 BCCA 38 Date: 20200124 Docket: CA46104 Between: Regina Respondent And David Lee Chappell Appellant Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Fitch The Honourable Mr. Justice Butler On appeal from: An order of the Supreme Court of British Columbia, dated March 15, 2019 (R. v. Chappell, 2019 BCSC 644, Kamloops Dockets 104963-2; 105153-1-T; 105153-2-T; 105154-1-T; 105154-2-T; 105155-1-T; and 105155-2-T). Oral Reasons for Judgment Counsel for the Appellant: C.E. Johnson Counsel for the Respondent: M.G. Scott Place and Date of Hearing: Vancouver, British Columbia January 24, 2020 Place and Date of Judgment: Vancouver, British Columbia January 24, 2020 Summary: Held: Appeal allowed. A restitution order requiring the appellant to pay in excess of \$200,000 to redress damage caused to a tractor-trailer and cargo in the course of a drug-fueled crime spree is set aside. The order was made without enquiry into his ability to pay the amount, and appears to be based on the remote possibility of a windfall. R. v. Dunn, 2010 BCCA 22 applied. A restitution order in the amount of \$6,500 in favour of the owner of the unit is issued in place of the one set aside.

- [1] SAUNDERS J.A.: David Lee Chappell seeks leave to appeal sentence and if leave be granted, appeals from a restitution order in the amount of \$201,613.37 made on March 15, 2019, as part of the sentence for a number of offences that took place over six months. The spree culminated in an incident on November 6, 2017, when, attempting to evade arrest, he seized a tractor-trailer, kidnapped the driver at the point of an imitation firearm, and when the driver escaped, attempted to drive the vehicle himself, rolling it down an embankment on the side of a highway. Mr. Chappell had been using crystal methamphetamine at the time of this offence and the sentencing judge described all of the offences as "drug fuelled". Mr. Chappell pleaded guilty.
- [2] At the sentencing hearing, some information was provided to the judge as to Mr. Chappell's past earning history, which was significant, in the oil and gas industry in Alberta. He had left that industry by the time of the offences. Most of the sentencing hearing concerned the length of the custodial sentence that should be imposed. The Crown sought a global sentence of seven years and seven months for all of his offences. Mr. Chappell sought a sentence of two years less a day after taking into account time served.

- [3] Also at the sentencing hearing, the Crown sought restitution orders in favour of his former intimate partner whose windshield he had broken, and the insurer of the tractor-trailer, in the amounts of \$449.01 and \$201,613.37 respectively. In asking for them the Crown explained that they would be stand-alone and not form part of the sentences, but "would be out there in the event that Mr. Chappell ever wins the lottery". I understand that by saying they would not form part of the sentence Crown counsel was saying in a colloquial way that the restitution orders would not have penal consequences. The restitution orders, of course, are part of the sentence imposed and give rise to a sentence appeal: *R. v. Nanos*, 2013 BCCA 339.
- [4] There was some discussion between counsel for Mr. Chappell and the judge concerning the restitution order in relation to the windshield (\$449.01) but through some mistake, no discussion at all with counsel about the restitution order in favour of the insurer. Apart from the assumption, implicit in the Crown's suggestion that the restitution orders were there in the event Mr. Chappell had a windfall so that it was unlikely Mr. Chappell could satisfy the restitution orders, there was no discussion of the ability of Mr. Chappell to satisfy the orders.
- [5] The judge imposed a global sentence of five years and six months for the offences, reflecting a reduction in consideration of the totality principle. She then made both restitution orders sought by the Crown pursuant to s. 738 of the Criminal Code, R.S.C. 1985, c. C-46, and did so without referring to Mr. Chappell's capacity to pay.
- [6] Mr. Chappell does not contest the order he pay restitution to his former partner in the amount of \$449.01. He appeals only the restitution order aimed at the damage he caused to the tractor-trailer, equipment and cargo. He contends that the court erred in failing to consider his ability to pay the restitution order, both present and future, in accordance with the decision in *R. v. Yates*, 2002 BCCA 583 para. 17. He acknowledges, as he must, that his counsel did not protest the order at the sentencing hearing, but says that the Crown failed to lay the groundwork for the order by establishing in some fashion that payment was more than a pipe-dream. Mr. Chappell refers us to *R. v. Heathcliff*, 2015 YKCA 15 at paras. 7-13, wherein the Yukon Court of Appeal reduced the amount of a restitution order when the sentencing judge ignored the offender's ability to pay.
- [7] We can approach the question before us by asking whether the judge made an error in principle, or whether the sentence is demonstrably unfit. I prefer to address the appeal on the latter question, as it is clear to me that the restitution order imposed is excessive in the context of the information before the judge, so as to render it unfit in the circumstances. I conclude that on the record before us, it is most unlikely that Mr. Chappell will be able to make any meaningful dent in the amount owed,
- [8] In *R. v. Dunn*, 2010 BCCA 22, the judge had referred to the capacity of the offender to pay the restitution order by saying as to the likelihood of recovering the money: "Well, if he wins the lottery, I guess so." Mr. Justice Donald observed that there had been no real inquiry into the capacity to pay the order and, in setting it aside, said:

- [12] I am unable to say that any useful purpose would be served by a restitution order where the likelihood of compliance is as remote as the judge said. The order was an afterthought made without the benefit of full argument and is unlikely to provide any tangible benefit to the victim.
- [9] There is no evidence, or even information, before us of prejudice from reliance on the restitution order. On the other hand, we do know that by s. 178(1) of the Bankruptcy and Insolvency Act, R.S.C. 1983, c. B-3, a discharge from bankruptcy would not discharge Mr. Chappell from the restitution order. In other words, this order is likely to burden him indefinitely, and will make more difficult his rehabilitation as a fully participating member of the community, upon release from custody.
- [10] I consider that the restitution order in its current amount should be set aside. The question then is whether any order directed to the damage he did to the truck and cargo should be substituted.
- [11] Mr. Chappell proposes as an alternative to the order appealed, an order in the amount of \$6,500 in favour of the owner of the vehicle, being the amount it paid as the deductible. That is not an insignificant sum, but is an amount that Mr. Chappell should be able to satisfy within some reasonable time after release from custody, given his employment history in the past. Accordingly, I would grant leave to appeal sentence, allow the appeal, set aside the restitution order in the amount of \$201,613.37, and order that Mr. Chappell make restitution to 1434179 Alberta Ltd. of Grande Cache, Alberta in the amount of \$6,500.
- [12] FITCH J.A.: I agree.
- [13] BUTLER J.A.: I agree.
- [14] SAUNDERS J.A.: Leave to appeal sentence is granted, the appeal is allowed, the restitution order in the amount of \$201,613.37 is set aside, and an is order made that Mr. Chappell make restitution to 1434179 Alberta Ltd. of Grande Cache, Alberta in the amount of \$6,500. "The Honourable Madam Justice Saunders"

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