

CANADA / JUDGMENT

R. v. D.D.

2020 BCCA 169

COURT

British Columbia Court of Appeal

DECIDED

4 June 2020

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2020 BCCA 169 R. v. D.D.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. D.D.,

2020 BCCA 169

Date: 20200604

Docket: CA46607

Between:

Regina

Respondent

And

D.D.

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. This publication ban applies indefinitely unless otherwise ordered.

Pursuant to s. 16(4) of the Sex Offender Information Registration Act [SOIRA], no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

The text of this judgment was corrected at paragraph 6 on June 16, 2020.

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

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

December 2, 2019 (R. v. [D.D.], 2019 BCSC 2278,

New Westminster Docket X057869).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

F.M. Rowan

Counsel for the Respondent

(via videoconference):

L.A. Ruzicka

Place and Date of Hearing:

Vancouver, British Columbia

June 4, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 11, 2020

Summary:

The appellant's application under s. 490.027 of the Criminal Code to terminate his registration under the Sex Offender Information Registration Act was dismissed by a judge of the Supreme Court of British Columbia, who held that the impact of continued registration on the applicant was not grossly disproportionate to the appellant. The appellant appeals on the basis the judge erred in law by failing to properly consider and weigh all of the factors pertinent to the analysis of gross disproportionality. The appellant also asks this court to consider the passage of time without further offences and the fact the registration period is nearing its end as moderating the weight of the public interest in having him registered. Held: Appeal dismissed. The judge did not err in failing to give weight to the offence-free period and the length of time remaining in the

registration period as the public interest in registration is fixed by the legislation; the impact of registration on the appellant is the relevant factor in the analysis of gross disproportionality. The judge did not err in his consideration of the impact.

- [1] SAUNDERS J.A.: The appellant appeals from the dismissal of his application to terminate his registration under the legislation generally referred to as SOIRA, the Sex Offender Information Registration Act, S.C. 2004, c. 10. The application is under s. 490.027 of the Criminal Code, R.S.C. 1985, c. C-46. That section provides:

490.027 (1) The court shall make an order terminating the obligation if it is satisfied that the person has established that the impact on them of continuing the obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the Sex Offender Information Registration Act.

- [2] The appellant was convicted in 2003 of sexual assault on a female family member between 1993 and 2000. Subsequent to his conviction, SOIRA came into effect, and the appellant became subject to its terms. He was registered under SOIRA for a period of 20 years. The SOIRA order expires in 2023. I will note that the fact of the timing of SOIRA's application to the appellant brings the case under s. 490.027 of the Criminal Code rather than s. 490.016 referred to in the reported oral ruling indexed as 2019 BCSC 2278. Nothing turns on the misidentification of the applicable section as the two sections are subject to the same criteria for termination of a registration order, and I refer throughout my reasons to the sections that apply to the appellant's registration.

- [3] The appellant is now 64 years of age. He had no criminal record before the offence and he has not been convicted of any offences since. He has completed a number of programs including a Low Intensity Sex Offender Program at a correctional facility and has completed the National Maintenance Sex Offender Program. He is now assessed as low risk of recidivism. The appellant has completed a substance abuse counselling program. He has been evaluated by a general and forensic psychiatrist who, in 2019, concluded that the appellant is at a low risk of sexually re-offending. The psychiatrist concluded that the continuing legal monitoring of the appellant would not make an "appreciable difference in diminishing or controlling his risk of sexual recidivism".

- [4] The appellant is the operator of a flooring company which he has owned for many years. At the time of the application, the company employed a full-time staff of 10 people and had between 25 and 30 independent contractors who worked for it on an intermittent basis.

- [5] As a result of his conviction, the appellant is currently precluded from entering the United States of America. His business receives product supplies from several European countries and from the United States, Mexico and China. The appellant deposes that he has turned down invitations from suppliers to visit manufacturing plants and as a consequence has not been able to establish relationships with suppliers in the same manner as his competitors.

He deposes, further, that he believes that his inability to visit suppliers may affect his ability to negotiate better prices, and prevents the opportunity to inspect the manufacturing plants to confirm that they have the necessary quality controls to ensure the products that he receives are consistent with his customers' standards.

[6] As evidence in his application, the appellant presented a legal opinion from Andrew Hayes, a United States immigration lawyer, concerning the impact of his SOIRA status on his admissibility to the United States. In the opinion letter, Mr. Hayes explains that the appellant is ineligible to enter the United States because of his conviction, but is able to apply for a waiver of inadmissibility, in which case three criteria will be considered in determining the application:

1. the seriousness of the applicant's prior violation of immigration or criminal law;
2. the risk of harm to society if the applicant is admitted; and
3. the nature of the applicant's reason for seeking entry.

[7] In the letter, Mr. Hayes opines:

I believe that [D.'s] removal from SOIRA would reflect very positively on a waiver application because it would constitute quantifiable evidence that directly supports the second Hranka factor: the risk of harm to society if the applicant is admitted.

I believe that [D.'s] many strong equities, including removal from SOIRA, can lead to a successful waiver application. The generous Hranka balancing test allows even individuals convicted of very serious offences, including sexual assault, to demonstrate they pose no threat to U.S. society and have strong reasons to travel.

[8] The judge referred to *R. v. S.S.C.*, 2008 BCCA 262 and *R. v. Redhead*, 2006 ABCA 84. He observed correctly that the burden is on the appellant to demonstrate that the negative impact of complying with SOIRA is "grossly disproportionate to the public interest".

[9] The judge stated that the circumstances of the offence were serious, that the appellant had no criminal record before or since the predicate offence, that he pleaded guilty at trial and accepted responsibility, that he underwent treatment, and that the offence took place over a prolonged period of time and was not easily exposed. He then focussed upon the impact of the SOIRA registration in the context of admissibility to the United States and asked himself whether it "is sufficiently disproportionate to the public interest that registration can be cancelled". The judge recognized that a decision by American authorities to permit the appellant to enter the United States "may have a positive impact" on his business operation and said:

- [47] I am satisfied that, although the offence charged was serious, the applicant is at a very low risk to reoffend. His criminal record favours the granting of the order. There are no convictions except for his sexual assault which was the subject of the offence that leads to this application.
- [48] In this case, I accept the applicant's sworn evidence concerning his business, the importance of his relationship with suppliers, and the need to assure his customers of good quality products used in the manufacturing process. However, I am required to assess whether continued registration has a grossly disproportionate effect on him that overwhelms the interest in the continued registration. This includes the impact on his relationships and ability to access the United States for the purpose of vetting suppliers and establishing business relationships.
- [49] I am troubled by two aspects of the evidence. First, the applicant cannot rely on speculation to support a conclusion that the effects of registration are grossly disproportionate. In this case, the principal basis of his application originally was that his entry to the United States was prohibited because of his registration. On review of his lawyer's opinion, the applicant's position was modified because he concedes it is not the registration that prohibits his entry to the United States, but the conviction itself. Thus, the impact of registration is much more speculative. The lawyer said simply that his removal from SOIRA would "increase likelihood of a favourable agency discretion".
- [10] The judge dismissed the application, saying:
- [53] I am not satisfied that the applicant's need for deregistration is in any way essential to his application for admission to the United States. The risk of harm to society in the United States is addressed in the letter from Dr. Tomita, who opines that the applicant is in a category that is known to have the "lowest rates of offending". It is clear he has taken several tests and programs to address any concerns about his propensity to this type of criminal behaviour.
- [54] The applicant does not contend that continued registration is a barrier to his obtaining admission to the United States. Rather, he seems to want deregistration as proof of quantifiable evidence that he is no longer a risk to society. It seems to me he seeks the imprimatur of the court on the psychiatrist's report concerning his risk to offend.
- [55] The applicant's lawyer does not suggest that, absent registration, the applicant will likely fail in his application for admission to the U.S. Thus, it seems to me, at best, that granting the order will only improve his chances of obtaining a waiver because this Court has in some way endorsed the proposition that he is at a low level of risk to offend.
- [57] In this case, I am not satisfied that the impact of the registration on the applicant is so grossly disproportionate to warrant withdrawal at this time. The applicant is not precluded from travelling out of Canada due to the registration. Limitations on his travel to the USA are due to his conviction. Removal of his SOIRA registration might improve his chances of

obtaining waiver of admissibility permitting him to travel to the United States to contact his suppliers and monitor the quality of goods imported; I cannot conclude that this feature of his personal circumstances, in spite of his diminished risk of reoffending, constitutes a grossly disproportionate impact.

The evidence on this application demonstrates only a modest impact on the applicant's business affairs that might be ameliorated if registration was cancelled, and in the result I have concluded he has not met the burden of establishing that the impact of continuing obligations under SOIRA is not grossly disproportionate to the public interest.

- [11] The appellant contends that the judge erred in law in failing to properly consider and weigh all of the factors when determining whether the impact of SOIRA registration is "grossly disproportionate" to the appellant. At the hearing of the appeal the appellant pressed the submission that the standard of gross disproportionality established by s. 490.027 contemplates successful applications for termination of registration, and urged us to consider the passage of time without further offences as a factor moderating the weight of the public interest in having him registered. In other words, rather than changed circumstances modifying only the impact of registration on the offender, he says that under s. 490.027 the passage of time can affect both ends of the comparison - the public interest in registration and the adverse impact registration has on him - and thereby affect the assessment of gross disproportionality.
- [12] The Crown resists the appeal on the basis that the appellant has not demonstrated reversible error on the part of the judge.

Discussion

- [13] As we are not the court of first instance, our role is not to decide the application afresh. Rather we must ask whether the judge made a reversible error. The appellant says that the errors he advances are errors that engage the standard of correctness. The Crown submits that the errors identified concern the balancing of relevant factors and says that the judge's reasons are entitled to deference.
- [14] Section 490.029(1) provides for an appeal from a decision under s. 490.027(1) in these terms:
- 490.029 (1) The Attorney General or the person who applied for a termination order may appeal from a decision of the court made under subsection 490.027(1) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may dismiss the appeal, or allow it and order a new hearing, quash the termination order or make an order that may be made under that subsection.
- [Emphasis added.]

- [15] There appear to be no reported cases on the approach we should bring to an appeal provided by s. 490.029(1). We are referred, however, to two cases of appeals under s. 490.014 of decisions under s. 490.012, a section that variously requires a sentencing judge to impose a registration order or allows a sentencing judge to impose a registration order on application of the Crown. Section 490.014 allows for an appeal of such a decision on the same basis as s. 490.029.
- [16] In *Redhead*, the Alberta Court of Appeal, addressing a Crown appeal of a s. 490.012 decision refusing registration, said the court can alter a SOIRA order only "where there is an error of principle, failure to consider a relevant factor, an over emphasis of appropriate factors, or a clearly unreasonable decision". That test was adopted without comment in *R. v. Debidin*, 2008 ONCA 868 at para. 71. On the other hand, the Saskatchewan Court of Appeal observed in *R. v. T.C.*, 2009 SKCA 124, that *Redhead* applied the standard applicable to DNA orders which have a different appeal provision and, the appellant only raising issues of law in *T.C.*, applied the correctness standard of review.
- [17] In this case the appellant characterizes his challenges to the reasons for the decision as a question of law. To the extent they are questions of law, the standard of review is correctness: *R. v. Shepherd*, 2009 SCC 35. As said recently in *R. v. Le*, 2019 SCC 34 at para. 23, "whether a legal standard is met, amounts to a question of law and attracts a correctness standard (citations omitted)".
- [18] I approach the issues raised from that perspective.
- [19] S.S.C., *Redhead*, and *Debidin* address sections other than termination under s. 490.027(1) of a registration already in place. Nonetheless, they provide guidance on the scheme of securing sex offender information and we may draw the following principles from them:
1. the question is whether the impact of the registration requirements on the offender's current and prospective circumstances is grossly disproportionate;
 2. the burden is on the applicant to establish that the test of gross disproportionality, provided in s. 490.027, is met;
 3. the standard of grossly disproportionate is a high standard which requires the offender to establish more than merely disproportionate impact and more than a "simple imbalance of individual impact over public interest";
 4. the risk of recidivism is not determinative of a termination application;
 5. there is no presumption of impact arising from the length of the reporting obligation alone; and
 6. in determining whether termination is appropriate, the nature of the offence, the risk to offend, the offender's criminal record, and other matters personal to the circumstances should be taken into account.

- [20] To this list we may add the judge's observation at para. 38 made after his review of the jurisprudence that "[n]ormal inconvenience to an offender's privacy or liberty interests are not sufficient to warrant making an order".
- [21] It is convenient to discuss the appellant's contentions in four pieces: the effect of the effluxion of time on the balance required by s. 490.027(1), the judge's comment that "the impact of registration is much more speculative", the judge's consideration of the appellant's personal circumstances, and the judge's approach to gross disproportionality.
- [22] I turn to the issue of time. The appellant contends that the judge failed to give full effect to the effluxion of time, offence-free, relative to the stump end of the registration order, in particular as it relates to the public interest. The public interest served by SOIRA registration was addressed in S.S.C. There Justice Chiasson referred to the purpose of the legislation, and adopted the view that a gross disproportionality analysis on a SOIRA application is not about the content or degree of the public interest, that having been determined by Parliament, but rather the impact on the offender of registration. He said:
- [78] The stated purpose of the legislation and its overall scheme providing for the collection and use of information establishes Parliament's intention that all sex offenders register, while providing protection for their privacy and liberty interests (Charter s.7) through processes of exemption, termination and appeal.
- [79] The Alberta Court of Appeal stated in para. 42 of Redhead:
- [] had Parliament intended that courts should determine whether there exists a public interest in registering an offender on a case-by-case basis, factoring in all of the individual circumstances surrounding each offender and his or her offence, it could have made that intention clear []. Instead, Parliament has pronounced that there is a public interest in having those who commit the prescribed offences registered. The language of s.490.012(4) [in the case at bar s. 490.023(2)] presumes a 'public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders', but questions whether the impact on the offender would be grossly disproportionate to that public interest. [] the focus of the inquiry is not on whether there is a public interest in having the offender registered, but [] on whether the impact on the offender would be grossly disproportionate to the public interest.
- And:
- [86] Parliament intended that all sex offenders must register. Registration has the potential to affect the liberty and privacy interests of all offenders. The inquiry is whether the effect of registration on the offender seeking exemption is grossly disproportionate to the public interest.
- [87] I summarize the following points from this analysis:

1. the public interest requires all sex offenders to register, not just those with the profile of predatory strangers or those with a heightened risk to re-offend;
2. the public interest is fixed; Parliament has declared that registration is in the public interest;
3. an offender seeking exemption is obliged to establish that his or her registration would be grossly disproportionate to the public interest; that is, it is a given that registration has a potential minimum or threshold effect on all offenders;
4. relevant to the consideration of the offender's circumstances is the nature of the offence, the risk to re-offend, the offender's criminal record, and other similar matters personal to the circumstances of the offender.

[Emphasis added.]

- [23] To like effect are *Debidin* and, in the context of a DNA order, *R. v. R.C.*, 2005 SCC 61. In my view the public interest in registration is fixed by the legislation and it is the impact on the applicant that is the pertinent factor that must be examined. Here the appellant does not say the effluxion of time, by itself, is aggravating the impact of the order upon him. I do not consider the judge erred in failing to give weight to the fact the registration period is nearing its end.
- [24] Nor do I agree that the judge erred in law in saying, with reference to Mr. Hayes' legal opinion, that "the impact of registration is much more speculative". The statement was made in the context of the judge's consideration of the effect of his SOIRA registration on his admissibility to the United States as compared to the fact of his conviction, and recognizes that there was no evidence that removal of the SOIRA registration was certain to persuade the American authorities to waive his inadmissibility. I see no basis here to interfere with the order appealed.
- [25] I reach the same conclusion on the judge's review of the appellant's personal circumstances. It appears to me that the judge fully recognized the appellant's role as an employer and the limiting effect the registration has or could have on the appellant's business. Knowing about his role as an employer and the business effect of the inability to travel to the United States, the judge found that the order had a "modest impact" on the appellant's business. There was nothing in the evidence that compelled the judge to project the impact to a higher level.
- [26] The ultimate question is whether the judge made a reversible error in not finding that the impact of the appellant's SOIRA registration was grossly disproportionate to "the public interest in protecting society through the effective prevention or investigation of crimes of a public nature".
- [27] The standard of gross disproportionality is a high one and requires a marked and serious imbalance between the objective of the legislation and the impact of the registration on the registrant. In the context of s. 7 of the Canadian Charter of Rights and Freedoms, gross disproportionality has been described as "totally out of sync with the objective of the

measure": Canada (Attorney General) v. Bedford, 2013 SCC 72. In Debidin, Justice Watt observed at para. 63 that "grossly disproportionate" is a very stringent and demanding standard, one not easily satisfied, something rare and unique.

[28] Here, the impact of which the appellant complains flows from the conviction and the impact of the registration on the business is fairly characterized as modest. The SOIRA scheme itself contemplates that the registration will have some effect on all offenders (S.S.C.). With these features in mind, and applying any of the descriptions of gross disproportionality, I cannot say the judge erred in concluding the impact on the appellant was not grossly disproportionate to the public interest in registration.

[29] I would dismiss the appeal with thanks to counsel for their submissions.

[30] WILLCOCK J.A.: I agree.

[31] BUTLER J.A.: I agree.

[32] SAUNDERS J.A.: The appeal is dismissed.

"The Honourable Madam Justice Saunders"

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