
CANADA / JUDGMENT

R. v. Dreger

2014 BCCA 54

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 54 r. v. Dreger

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Dreger,

2014 BCCA 54

Date: 20140131

Docket: CA041105

Between:

Regina

Respondent

And

Corrina Dawne Dreger

Appellant

Before:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

On appeal from: An order of the Provincial Court of British Columbia,
dated May 3, 2013, (R. v. Dreger, Nanaimo Registry No. 75876-1)

Oral Reasons for Judgment

Counsel for the Appellant:

F. Arbabi

Counsel for the Respondent:

S. Hulko

Place and Date of Hearing:

Vancouver, British Columbia

January 28, 2014

Place and Date of Judgment:

Vancouver, British Columbia

January 31, 2014

Summary:

The appellant pleaded guilty to fraud and was sentenced to five years' imprisonment. She appealed her sentence. Held: The appeal was granted and the sentence was reduced to four years' imprisonment. The sentencing judge erred in treating the appellant's perceived lack of remorse as an aggravating factor. The restitution order made by the sentencing judge was upheld.

- [1] BENNETT J.A.: Corrina Dreger was employed for seven years by Collins Custom Contracting Corporation (the Company), a small family owned company located in Parksville, B.C. Ms. Dreger was the bookkeeper for the company and, in that trusted position, defrauded her employer of \$245,514.05, over a period of about seven years. She was sentenced to five years' imprisonment, and now applies for leave to appeal this sentence.

I. FACTS

- [2] The Company has been in the business of building custom, high end homes for 35 years. John Collins is the principal of the company, which has about 47 employees. Ms. Dreger was hired on April 29, 2002. She set up the accounting and bookkeeping systems, using Simply Accounting. This program allows for credits and debits to be allocated to different categories, including shareholders loans. Only Ms. Dreger and Mr. Collins had full access to the accounts. Mr. Collins trusted Ms. Dreger implicitly. When he was away he would leave signed blank cheques for her to deal with payments that needed to be made. She handled millions of dollars each year.

- [3] In December 2003, Ms. Dreger wrote herself two cheques: one for \$400 and one for \$100. She posted those cheques to shareholders loans. Over the course of the next seven years, Ms. Dreger took money from the company to pay for her Visa and other household bills, and sometimes double paying herself. She took approximately \$1900 in 2005, \$700 in 2006, \$16,000 in 2007, \$24,000 in 2008, \$47,000 in 2009, \$63,000 in 2010, \$100,000 in 2011, and \$4,000 in 2012 before she was caught.
- [4] Her Visa bill reflects that she spent money on day-to-day living expenses, trips, lottery tickets, cash advances, clothing, restaurants, and so on. Her salary began at \$14.00 per hour in 2002, and had risen to \$17.00 per hour in 2012.
- [5] During the course of her employment, Mr. Collins paid for her to attend hockey games in Vancouver, paid to finish the home she purchased with her parents, bought appliances for the home, gave her a generous leave when her father was ill and loaned her a down payment for her house.
- [6] Each year the significant losses endured by the company as a result of the fraud came to light at the financial year end (January 31), which took away from profit-sharing and bonuses for other employees and put Mr. Collins in a position where he did not know if he could continue with projects.
- [7] When he asked Ms. Dreger about the financial difficulties, she blamed the losses on Mrs. Collins' extravagant spending habits. Unfortunately, Mr. Collins believed Ms. Dreger, and not his wife. When the fraud came to light, the marriage ended, in part because of Mr. Collins' misplaced distrust of his wife.
- [8] Ms. Dreger's brother, Ken Dreger, was the outside accountant responsible for auditing the company's books. When he asked her about some of the expenses, she told him the company had a bad spending habit. There is no suggestion that Mr. Dreger was complicit in the fraud.
- [9] In March 2011, Ms. Dreger went on stress leave. A new bookkeeper, Ms. Ruf, was hired to replace her. Ms. Ruf began to go through the accounts and bank reconciliations. She found a number of problems with the accounts, including a Visa card that had significant payments made to the account, but could not be located within the company. After considerable checking, she and Mr. Collins discovered that Ms. Dreger was the owner of the Visa card.
- [10] On May 19, 2011, Mr. Collins contacted the RCMP and retained a forensic accounting firm to conduct a complete audit. The fraud in excess of \$245,000 was discovered.
- [11] Mr. Collins confronted Ms. Dreger with the fraud on May 31, 2011. Initially, she denied the acts, but then admitted she committed the fraud.
- [12] She was charged on October 4, 2012, and pleaded guilty on January 29, 2013. She consented to a civil judgment in the sum of the fraud, eliminating the need for a civil trial in the matter.

- [13] An order for restitution was made as part of the sentence. Ms. Dreger has paid nothing towards restitution since being caught in May 2011.

A. Ms. Dreger's Circumstances

- [14] Ms. Dreger is now 45 years old. She grew up in a stable family environment, although the family moved frequently for her father's work. She completed high school in Nanaimo and worked at a variety of jobs. Her son was born in 1992. Unfortunately, her son's father, her fiancé, was killed in a trucking accident in 1994. She returned to college in her early thirties. When she was hired by Mr. Collins in 2002, Ms. Dreger was around 33 years old. She had just finished an office administration and bookkeeping course at Malaspina College, and was the single parent of a ten year old son.
- [15] When she began stealing from Mr. Collins, she was living a very frugal existence. She came to enjoy the more comfortable lifestyle she had as a result of stealing from Mr. Collins, and her fraud escalated significantly.
- [16] Ms. Dreger reunited with an old friend and they married in June 2009. Unfortunately, her new husband died in November 2009 from a diabetes related illness.
- [17] Ms. Dreger's father died after the offences were revealed, but before she was sentenced.
- [18] She has been diagnosed with an anxiety disorder, and takes medication for this condition.
- [19] Ms. Dreger submitted a letter to the sentencing judge expressing her remorse.

I cannot express how ashamed I am of the actions and choices that I had taken that have brought me to this point in my life and I regret all of the pain, the hurt and the broken trust that I have caused to John Collins and wish that I could take it all back.

I used to blame how John treated me as to why I did it but I can't blame others as no one forced me to do what I did. Getting caught helped me face how bad things had gotten in my life. I am not a bad person and I am working at changing my life as I don't want what I did to define me or my life. I accept whatever the court feels is an appropriate punishment and I look forward to paying for my crime and moving past it.

I would like to take this time to apologize to the court, to Mr. Collins, and to my family for all of the trouble and turmoil that I have caused. I'd also like to apologize to my family for the shame and the embarrassment that I have brought to them and to thank them for all of the support, understanding, and unconditional love that they have given to me in spite of this.

Thank you.

- [20] On the date of the sentencing, the Crown produced a print-out from a website blog that had been written by Ms. Dreger. In it she talks about her life, and her "dream job". She then makes unfounded and derogatory allegations against her employer, and indicates his conduct is why she left her job. She does not mention the fraudulent acts.

B. Victim Impact

[21] The offence had a serious impact on Mr. Collins. His business was significantly damaged, and he is still trying to rebuild it. His marriage fell apart and, he "lost his family". He feels completely betrayed by Ms. Dreger's actions. He stated:

It is impossible to put into words the amount of stress, strain and anguish that I have endured and am still enduring every day. The large financial losses are just a small part of this. The personal loss to me can never be repaired.

[22] At the sentencing hearing, counsel agreed that the normal range of sentence was three to five years. Counsel for Ms. Dreger sought a conditional sentence order and the Crown sought a four year sentence.

C. Sentencing Judge's Reasons

[23] The sentencing judge set out the circumstances of the offence, and then discussed the sentencing range, which, as noted above, was agreed to be between three and five years. He referred to this court's decision in *R. v. Gaugler*, 2011 BCCA 508, and quoted this court in terms of the range:

The Crown sought a sentence in the range of three to five years. This position, no doubt, reflects the guilty plea and other mitigating factors, as the outside end of the sentencing range is potentially much higher.

The sentencing judge then said, "I think it more accurate to say that the range of sentence in this kind of case where there is a guilty plea is three to five years" (emphasis added).

[24] He then said that the second mitigating factor was that Ms. Dreger had no criminal record. He said this was true of many of the cases put before the court. He concluded that this was not a mitigating factor that could reduce the sentence below three to five years.

[25] He then considered the aggravating factors, which I have summarized as follows:

- 1) Ms. Dreger exposed her brother to the risk of criticism and perhaps professional disciplinary proceedings.
- 2) The offences had a severe impact on Mr. Collins and his company, which is an aggravating circumstance under s. 380.1 of the Criminal Code, R.S.C. 1985, c. C-46.
- 3) The offence was a breach of trust.
- 4) There had been no attempt at restitution.
- 5) Her expression of remorse lacked genuineness.

[26] As for the impact of the offence on Mr. Collins, and specifically its role in the break-up of Mr. Collins' marriage, the sentencing judge said this:

- [20] Mr. Collins and his wife have since parted company. He takes responsibility for that. He says that a very significant factor in the breakup of their marriage was the false accusation which he levied against his wife and, as he puts it, the fact that he chose to believe Ms. Dreger rather than his wife. I can well imagine the agony that has caused him.
- [21] Sadly, even at this trial, Ms. Dreger does not take responsibility for that. She says, through her counsel, that the Collins' marriage was on the rocks anyway. That is very distressing.
- [27] In submissions, counsel for Ms. Dreger had said this about the marriage:
- And she felt that this marriage was already deteriorating. It was her understanding well before the fraud was discovered that Mr. Collins and his spouse had been separated and that the ultimate demise of the marriage, she's certainly not questioning it was contributed to by her fraud, but she wants it to be clear that it may be a mistake for Your Honour to conclude that because of her fraud, that caused the marriage to end. Life is much more complicated than that, and I submit that her version of it perhaps has a ring of -- ring of truth to it.
- [28] The sentencing judge later found that this submission detracted from the genuineness of her expression of remorse because she did not accept responsibility for the impact the fraud had on Mr. Collins marriage.
- [29] In assessing the authenticity of Ms. Dreger's remorse for the fraud the sentencing judge said:
- [24] A fourth aggravating factor is my concern at the expression of remorse made by Ms. Dreger here at the sentencing hearing. When first confronted with her fraud by Mr. Collins, she said, "I am sorry. I don't know why I did it." Here at the sentencing hearing, she made a much more fulsome expression of remorse for the fraud but not, as I hear her, for the impact on Mr. Collins' marriage.
- [25] I am concerned about the sincerity of that expression of remorse by the fact that there is, even today, posted on a website used by Ms. Dreger, a public statement accusing Mr. Collins of sexually harassing her and mentally abusing her during the course of her employment. The fact that she could make that allegation in a public forum, even today, indicates to me a lack of sincere concern for the impact which her crime has had upon Mr. Collins.
- [30] The sentencing judge concluded that these "aggravating factors" justified a sentence at the upper end of the range, and as noted, imposed a sentence of five years.

II. LAW

- [31] At the commencement of the offence in 2003, the maximum penalty for fraud pursuant to s. 380 of the Criminal Code was ten years. On September 15, 2004, the legislation was amended and the maximum penalty increased to 14 years. At the same time, s. 380.1 came into force, which codified aggravating circumstances for the purpose of sentencing in fraud cases. Section 380.1 was amended again on November 1, 2011, adding more aggravating circumstances, one of which was relied on by the sentencing judge and is set out below:

(c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation.

[32] The sentencing judge was correctly told that the maximum sentence was ten years.

[33] Section 11(i) of the Canadian Charter of Rights and Freedoms states:

11. Any person charged with an offence has the right

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[34] The question of whether the increase in the available maximum penalty (14 years from ten years) fell under s. 11(i) was not argued in this appeal, and I do not think it affects the resulting sentence as the sentencing judge was aware of the ten year maximum.

[35] It also was not argued that the change in the Criminal Code sections presented a Charter issue, however, given the sentencing judge's reliance on s. 380.1(c.1), which was not in force at the time the offences were committed, it is appropriate to address it. In terms of the recent codification of aggravating factors, it is clear that the effect of fraud on vulnerable victims would have been an aggravating factor that could have been taken into account by a sentencing judge regardless of the amendment. Thus, it was an appropriate factor for the sentencing judge to consider in this case.

III. THE PARTIES' POSITIONS

[36] Ms. Dreger submits that the sentencing judge erred in his analysis of the submissions before him, and in his reliance on factors which were not, in law, aggravating factors. She submits that the sentence should be reduced to three years.

[37] The Crown submits that the sentencing judge did not err, but if he did, the sentence was not demonstrably unfit and the appeal should be dismissed.

IV. DISCUSSION

[38] The standard of appellate review of a sentence is well-known, and set out in *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 90:

Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code.

- [39] I would first like to discuss the so-called "range of sentence". At the time of the commission of these offences, there was no minimum sentence (one was introduced in 2011 for offences where the sum stolen was in excess of \$1 million). Therefore, the theoretical range of sentence was a suspended sentence (or fine) and ten years (now 14) in prison.
- [40] The range of sentence is, in part, an expression of the parity principle found in s. 718.2(b) of the Criminal Code:
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
- [41] In *R. v. A.J.C.; R. v. Joseph*, 2004 BCCA 268 at para. 35, 186 C.C.C. (3d) 227, Finch C.J.B.C. said that sentencing ranges "serve merely as guidelines" and are "not conclusive of the appropriate sentence in any given case". In *R. v. D.D.* (2002), 163 C.C.C. (3d) 471 (Ont. C.A.) at para. 33, Moldaver J.A. said:

Before going further, I wish to emphasize that the ranges which I have identified are not meant to be fixed and inflexible. On the contrary, sentencing is not an exact science and trial judges must retain the flexibility needed to do justice in individual cases. The suggested ranges are merely guidelines designed to assist trial judges in their difficult task of fashioning fit and just sentences in similar cases.

- [42] Indeed, in *R. v. Nasogaluak*, 2010 SCC 6, the Court said, at para. 44:

The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[Emphasis added.]

- [43] In this case, the sentencing judge concluded that the range of sentence for fraud with a guilty plea was three to five years. In finding this, he relied on this court's observation in *Gaugler*, noted above. In concluding this was the appropriate range, the sentencing judge failed to take into account that Ms. Gaugler stole \$2.4 million dollars over a ten-year period, which is the rationale behind saying the range could have been much higher. She received a sentence of four years. Thus, the sentencing judge began with a wrong premise, and as a result, did not give sufficient weight to Ms. Dreger's guilty plea.

- [44] I turn to the aggravating and mitigating circumstances. These factual circumstances help the judge to craft a sentence, along with the principles of sentencing, and in particular, the fundamental principle of proportionality (s. 718.1, *Nasogaluak* at paras. 41-42) where the judge examines the moral blameworthiness of the offender and the circumstances of the offence.
- [45] Simply, an aggravating factor is one that will tend to increase the severity of the sentence, whereas a mitigating factor will weigh in favour of a more lenient sentence. If the accused disputes an aggravating factor the Crown has the burden of proving the factor beyond a reasonable doubt: *R. v. Gardiner*, [1982] 2 S.C.R. 368. If the Crown disputes a mitigating factor, the accused has to prove the factor on a balance of probabilities: s. 724(3)(d) of the Criminal Code. The accused is not entitled to rely on disputed mitigating factors in the absence of such proof: *R. v. Holt* (1983), 4 C.C.C. (3d) 32 at 51-52 (Ont. C.A.), leave to appeal ref'd [1983] S.C.C.A. No. 474.
- [46] In this case, the sentencing judge correctly considered the breach of trust as an aggravating factor. He also correctly identified the significant detrimental effect on Mr. Collins and his company as an aggravating factor. While there was no evidence that Ms. Dreger's brother was facing criticism or disciplinary proceedings, it is a reasonable inference that the outside auditors would likely face difficulties as a result of her conduct. Ms. Dreger did not dispute this fact when alleged by the Crown, and in my view, the effect on others is a relevant circumstance to consider.
- [47] Where the sentencing judge erred is in his treatment of Ms. Dreger's remorse. It is clear from the reasons that the sentencing judge did not accept her expression of remorse as genuine, which he is entitled to do, however, he went on to treat this as an aggravating factor.
- [48] The sentencing judge considered the fact that she did not make any effort at restitution, that, in his view, she did not accept responsibility for the demise of Mr. Collins' marriage, and that she posted the blog. The judge considered these as factors that detracted from her expression of remorse and as aggravating factors.
- [49] Courts of appeal are not consistent on the question of whether lack of remorse can ever be an aggravating factor in sentencing. The New Brunswick Court of Appeal in *R. v. Nash* 2009 NBCA 7, leave to appeal ref'd [2009] S.C.C.A. No. 131, stated that a failure to express remorse could only be considered an aggravating factor in exceptional circumstances. The Nova Scotia Court of Appeal has set out a similar principle: *R. v. Hawkins*, 2011 NSCA 7.
- [50] However, this Court has been clear that lack of remorse is not an aggravating factor. In *R. v. Muhammad*, 2004 BCCA 396 at paras. 9-10, Hall J.A. said this:
- [9] I had occasion, recently in a case, to refer to the *Zeek* [*R. v. Zeek*, 2004 BCCA 42] case and other cases that dealt with this difficult question of how remorse is to be treated in questions of sentence. The principle that I gleaned from the cases is that lack of remorse is not an

aggravating factor, but if an accused displays remorse that is something that can work in favour of an accused person. The way I would put it is that lack of remorse is a somewhat neutral factor in sentencing, but if an accused demonstrates remorse, it may lead the court to conclude that the accused has begun on the road to rehabilitation by recognizing that the conduct he or she engaged in was unacceptable. To that extent remorse can be treated as a positive circumstance that might reduce what would be an otherwise fit sentence for a particular offence.

- [10] In the instant case, I consider that the learned trial judge fell into error when she stated that lack of remorse could be an aggravating factor. That however, leaves the question at large as to whether or not that particular error should lead to the allowance of this appeal. I note that in the Zeek case, although it was found to be error to treat lack of remorse as an aggravating circumstance, that appeal was dismissed because the court was not persuaded that the sentence imposed was an unfit one.
- [51] The issue was not fully argued in this appeal, thus I would not entirely close the door to an argument that a lack of remorse could be an aggravating factor in the most exceptional case; where, for example, it demonstrated that the accused, by virtue of his attitude toward his offending, was a risk to the public. If such an exception exists, this case does not fall within it, and in my respectful opinion, the sentencing judge erred by treating a lack of remorse as an aggravating factor.
- [52] The next question is whether those errors led the sentencing judge to impose a demonstrably unfit sentence. In my respectful view, it did.
- [53] We have been referred to a number of sentencing decisions from all courts in this province. Each case will turn on its own facts. We were provided with sentences within the range of three to five years, and while I agree that this offender fits within that range, it would be incorrect to see this as an inflexible set range of sentence.
- [54] This Court examined the availability of different ranges of sentences for fraud in *R. v. Bodnarchuk*, 2008 BCCA 39 at para. 11:
- [11] Burkart [2006 BCCA 446] and Dickson [2007 BCCA 561] recognize that, in accordance with the Criminal Code and the authorities, conditional sentences should be considered in every case where the minimum criteria are met. As the Chief Justice said in Dickson (at para. 35):

Applying the law as laid down in Proulx, the proper approach when the minimum criteria for a conditional sentencing order are met is to consider, taking into account the fundamental purpose and principles of sentencing, whether there are sufficient reasons for not imposing a conditional sentence, or whether there are considerations which would mandate imprisonment, even though a conditional sentencing order would otherwise be appropriate. There is no presumption one way or the other.

See also paras. 63-64, where the Chief Justice said:

This Court has said more than once that general deterrence is central to the sentencing process in cases involving large scale frauds with serious consequences for the victims. In many cases, convictions for serious fraud have led to the imposition of custodial sentences: see *R. v. Khan*, [2002] B.C.J. No. 2950, 2002 BCCA 703 and *R. v. Autenreith*, [2003] B.C.J. No. 2291, 2003 BCCA 521.

However, in cases of serious fraud or serious theft where there are extreme personal mitigating circumstances, the courts have held that the principle of general deterrence can be satisfied by a conditional sentence: see *R. v. Bunn*, [2000] 1 S.C.R. 183, *R. v. Kratky*, [1997] B.C.J. No. 3167 BCSC and *R. v. Anderson-Davis*, [2000] B.C.J. No. 88, 2000 BCSC 42.

- [55] The sentencing principles are set out in ss. 718 to 718.2 of the Criminal Code. This case involves a significant fraud, motivated by greed. Ms. Dreger pleaded guilty very early in the proceedings, and she consented to a civil judgement in the amount of the fraud, saving Mr. Collins from a civil trial. She has no criminal record. When the offences began she was a single mother, raising a young child after his father, her fiancé, died. She has suffered other losses in her life, including her husband and more recently, her father.
- [56] She gave a statement to the court apologizing for what she had done and indicated remorse for her actions. She did not take full responsibility for the breakdown of Mr. Collins' marriage, but she did accept considerable responsibility. I do not think this latter fact weighs against her.
- [57] However, she did post a blog which said scurrilous things about Mr. Collins. She did not name him, but it is clear to anyone who knows the people involved, to whom she is referring. In her statement to the court she said she no longer blamed her actions on his conduct, but she did not remove the blog. This blog is a factor that can be taken into account to reduce the weight to give to her expression of remorse.
- [58] Ms. Dreger took a substantial sum of money from her employer, who had trusted her implicitly. This occurred over a seven year period. Her crime had a significant effect on her employer and his company, as well as other employees and the outside auditors. Her moral blameworthiness is high, and general deterrence is a significant sentencing factor. It is clear that a term of imprisonment is required, and her counsel does not now suggest otherwise. Weighing all of the circumstances and applying the principles of sentencing, I conclude that a sentence of four years is a fit sentence.
- [59] I should comment on the restitution order. It is clear that Ms. Dreger has no money to make restitution. The sentencing judge tacked on the restitution order after he imposed a sentence. This is not the correct approach to the imposition of a restitution order. A restitution order is part of the sentence, and should not be an "afterthought": *R. v. Nanos*, 2013 BCCA 339 at para. 14. In *Nanos*, this court set out the correct approach to imposing a restitution order as a stand-alone order. The court also confirmed the principle that where the offences involve theft or breach of trust restitution should be ordered to compensate the victim, even if the offender has little or no ability to pay, because an offender should be deprived of the "fruits of his crime" (para. 17).

[60] Therefore, I would not interfere with the restitution order.

V. CONCLUSION

[61] I would grant leave to appeal, allow the appeal and set aside the sentence of five years and substitute a sentence of four years in prison. I would not disturb the order for restitution.

[62] TYSOE J.A.: I agree.

[63] GOEPEL J.A.: I agree.

[64] TYSOE J.A.: Leave to appeal is granted. The appeal is allowed. A sentence of five years' imprisonment is set aside and a sentence of four years' imprisonment is substituted in its place.

"The Honourable Madam Justice Bennett"

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