
CANADA / JUDGMENT

R. v. E.R.D.R.

2016 BCSC 1758

COURT

Supreme Court of British Columbia

DECIDED

23 August 2016

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. E.R.D.R.,

2016 BCSC 1758

Date: 20160823

Docket: 48719-2

Registry: Vernon

Regina

v.

E.R.D.R.

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Before: The Honourable Madam Justice Beames

Oral Reasons for Sentence

Counsel for the Crown:

M. Cissell

L.A. Vizsolyi

Counsel for the Accused:

J.R. Avis

Place and Date of Trial/Hearing:

Vernon, B.C.

August 23, 2016

Place and Date of Judgment:

Vernon, B.C.

August 23, 2016

- [1] THE COURT: [E.R.D.R.] is before me today for sentencing on one count of sexual assault of E.A., the victim as described in the indictment before the court, contrary to s. 271 of the Criminal Code.
- [2] [E.R.D.R.] entered a guilty plea to that offence and over the last number of months this court has heard a challenge brought by [E.R.D.R.] to the constitutionality of the mandatory minimum sentence prescribed by s. 271(a) for that offence, namely a one-year term of imprisonment.
- [3] I heard the constitutional challenge, as well as extensive submissions with respect to the appropriate sentence in this matter, in March of 2016, over three days. At that time, I also was provided with expert reports which I read and a presentence report which I read, and I heard the evidence of Dr. Stevenson, a forensic psychiatrist, who prepared a court-ordered report following an assessment of [E.R.D.R.]
- [4] The decision with respect to that original hearing was rendered on March 30, 2016 (2016 BCSC 684), and in my reasons, I concluded that the mandatory minimum sentence did not breach [E.R.D.R.'s] s 12 Charter rights, but on the reasonably foreseeable analysis required by R. v. Nur, 2015 SCC 15, I found that it did amount to a breach or required the imposition of grossly disproportionate sentences, and therefore amount to a breach of s. 12.
- [5] Crown sought, at the time of the original hearing, leave to make submissions on s. 1, if I did find a breach of s. 12, and defence sought at the time of the original hearing leave to make further submissions with respect to sentencing. Leave was granted with respect to both issues.
- [6] Yesterday I heard and this morning I decided the s. 1 issue. I have now heard further sentencing submissions from both Crown and defence.
- [7] In my reasons on the constitutionality of s. 271 that I gave on March 30, 2016, to which I referred a moment ago, I set out in, in my view, sufficient detail for sentencing purposes, the circumstances of the offence and the circumstances of the offender, and that was in paragraphs 5 through 7 of my reasons. I summarized the expert evidence in paragraphs 8 through 10, and I dealt with the impact of the offence on the victim and on her legal guardian in paragraph 11.

- [8] In those reasons, I summarized my view with respect to the range of appropriate sentence for this offender on this offence, and specifically I said that I was of the view at that time that the appropriate range was nine to 18 months, and I also summarized the mitigating and aggravating factors as I saw them in paragraphs 20 through 22 of my reasons.
- [9] I do not intend to repeat my findings or the summaries of the circumstances of the offence, of the offender, the impacts on the victim, or on the aggravating and mitigating factors, and I would simply refer any reader of these reasons back to that March 30, 2016, decision.
- [10] It is Crown's position that the appropriate sentence that ought to be imposed on [E.R.D.R.] should be at the upper end of the range that I provided in my reasons of March 30, 2016, which I will note, and I noted in my original reasons, is clearly a reflection of my reasons and not of what Crown's position initially was, which was that the range of sentence for [E.R.D.R.] should be upward of 30 months in all of the circumstances.
- [11] In any event, Crown's position today, framed as it is to be consistent with my reasons, is that the appropriate sentence is something in the neighbourhood of 14 to 18 months.
- [12] The defence position on sentencing today is that the appropriate range of sentence is 90 days.
- [13] The Criminal Code contains numerous provisions with respect to sentencing, all of which a sentencing judge has to consider and apply as best as possible to the individual offender on the individual offence before the court. The provisions that are engaged in this particular sentencing hearing are 718, 718.01, 718.02, 718.1, and 718.2.
- [14] I have heard the defence submission which urges me to reconsider my original view with respect to the range of sentence. It rests, in my view, largely on the individual circumstances of [E.R.D.R.], the submission that [E.R.D.R.'s] mental health issues and specifically his autism spectrum disorder ought to be a strong mitigating factor, and that the delay in bringing this matter to conclusion, nearly three years from the date that the charge was laid, ought to also be a mitigating factor. Defence of course points to the other factors that I set out in my original reasons of March 30, 2016, including [E.R.D.R.'s] lack of a criminal record in the past, his admission, his guilty plea, his remorse to the extent that he is capable, and to the fact that this was a one-time event and not, as is the case in many of the cases that were put before me in March and that we commonly see in these courts, a pattern of repeated behaviour.
- [15] Notwithstanding defence counsel's submissions today, in my view, a sentence of 90 days would not adequately reflect the seriousness of the offence, the moral blameworthiness of the offender, and society and Parliament's obvious concern with respect to the harm done by child sexual assault.
- [16] In summary, the submissions that I have heard today do not change my view with respect to the appropriate range of sentence.

- [17] I have taken into account and tailored my decision with respect to sentence, to reflect what I find are the real mitigating factors in this case, which do include [E.R.D.R.'s] mental health disorder, in the sense that I accept that it lessens his moral blameworthiness as compared to someone committing the same offence who did not suffer from the mental health disorder that he has, and I also recognize that his mental health disorder may well make incarceration much more difficult for [E.R.D.R.] than for other offenders.
- [18] I will say, to specifically address the issue raised by defence counsel today, that I am not satisfied the delay in this case warrants any further reduction in sentence or becomes a standalone mitigating factor in the way it was applied in the case of *R. v. Bosley* [1992] O.J. No. 2656 (Ont. CA) and the related cases that were referred to me today.
- [19] Taking into account then all of the circumstances of this case and the circumstances of [E.R.D.R.], I have concluded that the appropriate sentence in this case is as follows:
- [20] First of all, a term of imprisonment of 12 months. That term of imprisonment is to be followed by a period of probation for a period of three years.
- [21] The terms of probation will include, Mr. Clerk, the mandatory conditions under s. 732 and you can reference Mr. Justice Betton's pick list, as you call them, Clause 200, which are as follows:
- [E.R.D.R.], you will keep the peace and be of good behaviour.
 - You shall appear before the court when required to do so by the court.
 - You shall promptly notify the court or your probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.
- [22] The additional terms will be as follows, and Mr. Clerk, I have provided you with a copy of the list from Crown. First of all, paragraph 1 from that list, with a slight modification:
- [23] You are to report within 72 hours of your release from custody to the Vernon Community Corrections office at 3101 29th Avenue in Vernon, British Columbia, and you are to report thereafter as directed and in the manner directed by your probation officer.
- [24] You shall reside at a residence approved -- actually, I stop myself by saying it is not possible to get prior approval when you have come out of custody, is it?
- [25] MS. CISSELL: Yes, it is.
- [26] THE COURT: It is?
- [27] MS. CISSELL: My Lady, corrections -- I don't have the scope of that right now, but probation has a very limited amount of time in which they are to gather the address and approve it.
- [28] THE COURT: Before release or within hours?

- [29] MS. CISSELL: And they attempt to do that before release.
- [30] THE COURT: Do you know?
- [31] MR. AVIS: I'm not aware of that, My Lady.
- [32] THE CLERK: I'm sorry, My Lady [inaudible/3:19:28 P.M.] all the details there.
- [33] THE COURT: I think what I am going to do is make this order with respect to paragraph 2, Mr. Clerk, for your assistance. I am going to not make reference to the words "in advance".
- [34] THE CLERK: Thank you, My Lady.
- [35] THE COURT: So you shall reside at a residence approved by your probation officer, and you shall not change your residence at any time without first obtaining the written consent of your probation officer, including any temporary place you rest or reside in the course of employment, should you have any.
- [36] Number 3, Mr. Clerk, from that list: You shall allow a peace officer or probation officer to enter your place of residence at any time in order to ensure compliance with the conditions of your probation order.
- [37] You must provide your probation officer with the names, age, and gender of any person living in the residence in which you reside, regardless of whether or not the individual is a temporary or permanent resident of the home.
- [38] With your consent, as communicated by your counsel in the course of these proceedings, you are to attend, participate in, and complete any such program, counselling, or assessments as may be directed by your probation officer, which programs, counselling, or assessments may include an assessment by Forensic Services, Sex Offender Program through Adult Forensics, and/or programming maintenance group, as well as programs offered by the Corrections Branch. You are to provide consent for your counsellor or facilitator to communicate regularly with your probation officer concerning your progress.
- [39] You shall immediately advise the probation officer of all intimate or dating relationships with parents or guardians of children under the age of 18, and provide the names, contact information, and addresses to your probation officer.
- [40] You are not to leave the Province of British Columbia without the prior written consent of your probation officer or a court of competent jurisdiction. Such consent is to include your method of travel, the dates you will be travelling, where you will be staying, with whom you will be travelling, your destination, and the purpose of your travel.
- [41] Finally, you will not have any contact, directly or indirectly, with the victim in this matter, E.A., or attend any school or residence of E.A. Should you find yourself at those locations, you are to leave immediately without speaking to or contacting E.A.

[42] In addition to the term of imprisonment and the probation, I am also going to impose an order, a prohibition order, pursuant to s. 161(1) of the Criminal Code as follows:

- pursuant to subsection (a), you are prohibited from attending a public park or public swimming area where persons under the age of 16 are present or can reasonably be expected to be present, or at a daycare centre, schoolground, playground or community centre, except in the direct and immediate presence of your mother, S.P.;
- subsection (b), you are prohibited from seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in any capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; and
- subsection (c), you are prohibited from having any contact -- including communicating by any means -- with a person who is under the age of 16 years, unless the offender -- or unless you do so under the direct supervision, and that is to say in the personal presence of, your mother, S.P.

[43] The s. 161 order will commence upon your release from custody and it will continue for a period of five years.

[44] I will also make an order with respect to your registration under what is called SOIRA, that is to say the sex offender registration, pursuant to s. 490.012 and .013, and that will be for a period of 20 years.

[45] I will order that you provide a sample of your DNA pursuant to s. 487.051, and I will order that you be prohibited from possessing any firearms pursuant to s. 109 of the Criminal Code, and that will be for a period of 10 years.

[46] That concludes my decision. Is there anything arising?

[47] MR. AVIS: Just one issue, My Lady, I know some -- some justices are comfortable doing this, some aren't, but I wonder if Your Ladyship would consider -- when [E.R.D.R.] is to be assessed by the correctional service, whether Your Ladyship would consider making a recommendation that he go to Ford Mountain Correctional Institute -- Correctional Centre, rather, which I understand is a special facility for sex offenders. Obviously you have the programming that's appropriate there, but it also would go some way, I think, to allaying any safety concerns with having a person with such social deficits with that sort of conviction on -- on the record.

[48] THE COURT: I, of course, cannot bind the corrections authorities, but do you have any issue with me making a recommendation that [E.R.D.R.] be incarcerated at Ford Mountain Institute? Is that the proper name?

[49] MR. AVIS: I think it's Ford Mountain Correctional Centre, but I could be wrong.

[50] THE COURT: Ford Mountain Correctional Centre.

- [51] MS. CISSELL: Crown takes no objection to that, My Lady, certainly in terms of a recommendation.
- [52] THE COURT: I will make that recommendation and hope that it gets some weight.
- [53] MR. AVIS: Thank you, My Lady.
- [54] THE COURT: But of course without any guarantee. Anything else arising?
- [55] MS. CISSELL: No, My Lady.
- [56] MR. AVIS: No, My Lady.
- [57] MS. CISSELL: Thank you, My Lady.
- [58] MR. AVIS: Thank you, My Lady.
- [59] THE COURT: [E.R.D.R.], I know you are about to leave the courtroom and the sheriffs are acting before I am even finished, which is a peculiar sort of circumstance, it is not even four o'clock, but [E.R.D.R.], I have given the sentence that I have given. You have recognized and taken responsibility for your actions, and I express to you only the hope that with treatment, counselling, supervision, and support of your mother, no doubt, that you will not find yourself in the position where you are back before the court.
- [60] THE ACCUSED: Thank you, Your Honour.
- [61] THE COURT: Thank you very much, counsel.
- [62] MR. AVIS: Thank you, My Lady.
- "Beames J."

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