

CANADA / JUDGMENT

R. v. E.Z.O.

2023 BCCA 122

COURT

British Columbia Court of Appeal

DECIDED

6 March 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCCA 122 R. v. E.Z.O.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. E.Z.O.,

2023 BCCA 122

Date: 20230306

Docket: CA48724

Between:

Rex

Respondent

And

E.Z.O.

Appellant

Restriction on publication: A publication ban has been automatically imposed under s. 110(1) of the Youth Criminal Justice Act restricting the publication of information that would identify a young person referred to in this judgment by the initials E.Z.O. This publication ban applies indefinitely unless the information is published by that young person under s. 110(3) or the court has ordered publication.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

On appeal from: An order of the Provincial Court of British Columbia, dated November 2, 2022 (R. v. E.Z.O., Vancouver Dockets 24253-7-BC; 24364-1; 24379-1; 24393-1).

Oral Reasons for Judgment

Counsel for the Appellant:

T.B. Martin

Counsel for the Respondent:

M.J. Sheardown

Place and Date of Hearing:

Vancouver, British Columbia

March 6, 2023

Place and Date of Judgment:

Vancouver, British Columbia

March 6, 2023

Summary:

Appeal from sentence. Two terms of the probation order are in issue. The Crown agrees both terms require amendment. The two terms are: a term requiring the appellant to obey all rules and regulations of the residence in which he lives; and a term requiring participation in treatment directed by the youth worker. Held: Appeal allowed. The evidence did not disclose the rules and regulations of the residence except in most general terms, and did not foreclose material change to them after the order was made by the court. Thus the term was not properly reviewed by the court before it was made, and its indeterminate flexibility at the instance of the residence's management was incompatible with the court's judicial function. On the treatment order, the issue of the ability of a mature minor to refuse treatment, and nature of the contemplated treatment were not addressed by the court. The order is amended as agreed by counsel.

[1] SAUNDERS J.A.: The appellant, convicted under the Youth Criminal Justice Act, S.C. 2002, c. 1, following his guilty pleas to robbery, aggravated assault, and breach of a youth sentence by possessing bear spray, seeks leave to appeal sentence and if granted, appeals from sentence. He was 16 years old at the time of sentencing, and will be 18 in September of this year.

- [2] The appellant was sentenced to a custodial sentence and a probation order. The appeal concerns two terms of the probation order:

Condition 4: You must reside as directed by your Youth Worker and obey all the rules and regulations of that residence and not change your residence without obtaining the prior written permission of your Youth Worker.

...

Condition 6: You are to attend for and participate in any assessment, treatment, counselling or programming as directed by your Youth Worker, including but not limited to that which is offered through Youth Forensic Psychiatric Services.

- [3] The respondent Crown agrees that the appeal of these two terms should be allowed. I agree. Both the appellant and the Crown are correct, in my view, in saying that errors of principle were made when the judge imposed these terms. I consider that we must grant leave to appeal sentence and allow the appeal by varying the two conditions. In my view it is the way they are fashioned that requires us to intervene, as it is our duty to correct the errors.
- [4] On Condition 4, the evidence that was before the court did not allow for the term as drafted to be imposed, and on Condition 6, the term failed to consider the law of consent to medical treatment that applies to minors.
- [5] So now I will turn to the two conditions which the appellant says reflect errors in principle. Condition 4 requires the appellant to obey rules and regulations. He says, through his counsel, that requirement is impermissibly vague and amounts to an impermissible delegation of the judicial function. Alternatively, he contends that it is unreasonable, unnecessary, and unfit.
- [6] Condition 6 contains a condition for mandatory treatment. The appellant, through his counsel, says that the judge erred in principle by imposing a requirement of attendance for and participation in treatment without providing for his consent to treatment, or at least without limiting it to exceptional circumstances. He says this requirement violates s. 7 of the Charter of Rights and Freedoms. In the alternative, he contends it is unreasonable, unnecessary and unfit.
- [7] As I have noted, the Crown agrees that the appeal should be allowed to remove, in Condition 4, the words "and obey all the rules and regulations of that residence", and to add in Condition 6, the words "except that you shall not be required to submit to any treatment or medication to which you do not consent", in that way removing any requirement for involuntary treatment.

- [8] We must approach this appeal considering our limited role in such matters. We may intervene to vary sentence only: (1) where the sentence is demonstrably unfit; or (2) where there is an error in principle, failure to consider a relevant factor, or an over-emphasis of the appropriate factors, and such error had an impact on the sentence: *R. v. Lacasse*, 2015 SCC 64; *R. v. Friesen*, 2020 SCC 9.
- [9] In my view, as I will explain and as acknowledged by the Crown, the sentencing judge made an error of the second sort in respect of each of the two conditions, impacting the sentence. I conclude that the conditions should be varied as proposed by the parties.
- [10] The power to craft individualized conditions of probation is broad, but it is not unlimited: *R. v. Thibodeau*, 2022 BCCA 386. In *R. v. Duguay*, 2019 BCCA 53 at para. 66, this court affirmed the need for probation conditions "to be clear, unambiguous and enforceable", "reasonable" in the circumstances and "desirable" to achieve the purposes of a probation order", and "compliant with other provincial and federal legislation". In my view, the words in issue in Condition 4 do not meet this standard.
- [11] Section 38 of the Youth Criminal Justice Act establishes the purpose of sentencing a young person:
- 38 (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.
- [12] Section 38(2)(e.1) of the Act requires that conditions as part of a youth sentence may only be imposed if: "(i) it is necessary to achieve the purpose set out in s. 38(1); (ii) the young person will reasonably be able to comply with the condition; and (iii) the condition is not used as a substitute for appropriate child protection, mental health or other social measures". This provision, s. 38(2)(e.1), was added to the Youth Criminal Justice Act in 2019: S.C. 2019, c. 25, s. 371.
- [13] In *R. v. Zora*, 2020 SCC 14, released after the introduction of s. 38(2)(e.1), Justice Martin for the Court observed in the context of considering amendments to the bail conditions of the Criminal Code, R.S.C. 1985, c. C-46 that were enacted at the same time as s. 38(2)(e.1), in a passage that resonates in this appeal:
- [95] Fourth, broad conditions requiring an accused to follow or be amenable to the rules of the house or follow the lawful instructions of staff at a residence may be problematic, especially for accused youth. In *J.A.D.*, the Court of Queen's Bench for Saskatchewan found that such a condition was void for vagueness and an improper delegation of the judicial function (para. 11). These types of conditions prevent the accused from understanding what they must do to avoid violating their condition, as the rules of the house can change based on the whims of the person who sets them (*K. (R.)*, at paras. 19-22). Imposing a condition that delegates the creation of bail rules to a surety or anyone else bypasses the judicial official's obligation to

uphold the principles of restraint and review and assess whether the rules of the house truly address any of the risks posed by the accused.

- [14] This court, in the past, has denied leave to appeal from a decision of a summary conviction appeal judge dismissing the appellant's appeal of a sentence in which a term similar to the impugned portion of Condition 4 was imposed, for example, *R. v. E.A.*, 2015 BCCA 463. But that approach has been overtaken by s. 38(2)(e.1), and in my view, no longer applies - greater detail is required if one is to go beyond the standard, and powerful, condition to keep the peace and be of good behaviour.
- [15] In this case, I am persuaded that the term requiring obedience to the rules and regulations must be deleted, for four reasons. First, the sentencing judge did not have before her the substance of the residence's rules and regulations that she required the appellant to obey. Rather, the manager of the residence provided an imprecise summary of them, such as "respecting the staff", "doing chores", and "cleaning up". Although the sentencing judge properly sought to clarify those rules and regulations, the witness was not in a position to answer her reasonable questions. In this circumstance, it cannot be said that the rules and regulations of the residence were properly reviewed by the court for content, reasonableness, or clarity.
- [16] Second, arising from this gap in the evidence, the result here is a condition that, considering the potential penal consequences to the appellant of non-compliance, is impermissibly vague. Third, there is no evidence in the record that could give the court confidence that the residence's rules and regulations were not subject to material change by management. Such indeterminate flexibility in the material content of standards incorporated into a probation order is, in my view, incompatible with the court's judicial function, remembering that breach of the term could result in penal consequences. Fourth, there was a vacuum of information necessary for the judge to properly consider s. 38(2)(e.1), and indeed no reference was made in the reasons to the requirements of that provision.
- [17] I conclude that the words "and obey the rules and regulations of that residence" must be deleted from Condition 4.
- [18] Turning to Condition 6, the appellant says that it was an error to impose the term providing for involuntary treatment. The appellant makes two submissions. First, he says that this term is contrary to s. 7 of the Charter, and second, that the judge erred in principle in failing to take into account the right of a mature minor to refuse to consent to medical treatment.
- [19] I agree with the appellant on the second submission and accordingly will leave the Charter issue to another case.
- [20] Section 42(8) of the Youth Criminal Justice Act provides:

Nothing in this section abrogates or derogates from the rights of a young person regarding consent to physical or mental health treatment or care.

[21] The s. 42(8) question here is whether there is a right regarding consent to treatment that may apply to the appellant.

[22] In *R. v. Rogers* (1990), 61 C.C.C. (3d) 481 (B.C.C.A.), this court held, in a sentencing case of an adult offender, that a condition compelling the offender to receive psychiatric treatment or medication is contrary to s. 7 of the Charter and is not saved by s. 1 absent exceptional circumstances. The Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181, codifies that right to refuse medical treatment. In *Rogers* the court added a term to the conditions of probation, given the particular need for treatment in that case. The extra term required the appellant to report daily to his probation officer if he did not consent to the treatment recommended. It is also not unknown to have a requirement referring the issue back to the court again in the event of a lack of consent. There may be other solutions.

[23] In *Rogers* Mr. Justice Anderson for the court said:

The fact that the probation order in this case is invalid, as being contrary to the Charter, does not solve the problem confronting the court. While the rehabilitation of the appellant is important, the court must consider the risks involved in permitting the appellant to be at liberty on probation. In other cases, where the trial judge finds as a fact that an accused person is suffering from schizophrenia or a like illness and refuses to consent to prescribed treatment or medication, it might very well be that the trial judge would not consider probation. The risk to society might be too great and only incarceration may afford the necessary protection.

I do not think it is possible to say that a particular form of probation order will be appropriate for all cases. The sentence to be imposed on each offender must be based on the general principles of sentencing which include a consideration of the circumstances of the offence and of the offender. The result is that different conditions may be imposed in probation orders depending on the circumstances of each case. To the extent possible, the conditions should be designed to ensure the protection of the public. However, they should not compel an offender to undergo medical treatment including the compulsory taking of medication. It is with those considerations in mind that I now consider the conditions numbered 1 to 4 in the probation order in the case at bar.

[24] Consistent with the concept of minority, there are limitations on the right of a minor to determine consent to treatment. Those limitations are defined in jurisprudence which holds that a minor may be capable of giving or refusing consent to medical treatment "if he or she has sufficient maturity, intelligence and capability of understanding what is involved in making informed choices about the proposed medical treatment": *Van Mol v. Ashmore*, 1999 BCCA 6; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30. The right of a minor to consent to health care is codified in the *Infants Act*, R.S.B.C. 1996, c. 223, s. 17, with the critical test being that the youth understands the nature and consequences and the reasonably foreseeable benefits and risks of the care. And so it is that in certain circumstances, a youth may be capable of deciding the issue of consent in respect of treatment. I will call this youth "the mature minor".

- [25] In this case, the sentencing judge did not individually tailor Condition 6 to address the applicability of the potential right of a mature minor to refuse or consent to medical treatment, to the case before her. I conclude that imposition of the condition requiring the appellant to attend for and participate in any treatment without consideration of his potential right to refuse medical treatment, is a failure to consider a relevant factor of the sort that allows us to intervene.
- [26] Further, the nature of the treatment captured by this term is ambiguous. It lacks any description of the type of treatment contemplated and is, so to speak, a blank cheque for treatment of any sort. Without more definition in Condition 6, it cannot be said that the judge addressed the issues set out in s. 38(2)(e.1)
- [27] In my view, these considerations applying to Condition 6 are ones that call for our intervention so as to cure the deficiencies. The Crown is content with allowing the appellant his own choice on taking treatment in this case. I would leave the issue by adding at the end of Condition 6 the language proposed by the Crown "except that you shall not be required to submit to any treatment or medication to which you do not consent".
- [28] For these reasons, I would give leave to appeal sentence. I would allow the appeal and vary the terms of the probation order to remove in Condition 4 the words "and obey all the rules and regulations of that residence", and to add to Condition 6 the words "except that you shall not be required to submit to any treatment or medication to which you do not consent".
- [29] FENLON J.A.: I agree.
- [30] HUNTER J.A.: I agree.
- [31] SAUNDERS J.A.: Leave to appeal is granted. The appeal is allowed to the extent indicated in these reasons.

"The Honourable Madam Justice Saunders"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/23/01/2023BCCA0122.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-e-z-o-2023>

Prepared on 25 October 2026 · Esheria