

CANADA / JUDGMENT

R. v. Earl

2024 BCSC 971

COURT

Supreme Court of British Columbia

DECIDED

15 May 2024

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2024 BCSC 971 R. v. Earl

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Earl,

2024 BCSC 971

Date: 20240515

Docket: 96941

Registry: Kelowna

Rex

v.

Carey Suzanne Earl

Before: The Honourable Justice G.P. Weatherill

Oral Reasons for Sentence

Counsel for the Crown:

J.N. Saris

Counsel for the Accused:

M.J. Chiu

Place and Date of Trial/Hearing:

Kelowna, B.C.

April 19, 2024

Place and Date of Judgment:

Kelowna, B.C.

May 15, 2024

Introduction

- [1] THE COURT: These are my oral reasons for sentence.
- [2] On October 25, 2023, a jury convicted Ms. Earl of defrauding her employer, Access Human Resources ("AHR"), of monies in excess of \$5,000 contrary to s. 330(1)(a) of the Criminal Code, R.S.C. 1985, c.-46 [Code].
- [3] Ms. Earl is now to be sentenced. The maximum sentence for a s. 380(1) offence is 14 years' imprisonment.
- [4] At trial, the theory put to the jury by the Crown was that Ms. Earl breached her position of trust as AHR's bookkeeper and defrauded it of a total of \$1,350,234 over the course of a seven-year period. The Crown told the jury that despite the substantial amount of money involved in the fraud, all the jury needed to decide to convict Ms. Earl was whether the amount exceeded \$5,000.
- [5] The theory put to the jury on behalf of Ms. Earl was that all the alleged fraudulent transactions were authorized as part of a scheme by AHR's principal, Mr. Clifford Andrusko, to devalue AHR due to a family fight he was having with his then ex-partner. Defence counsel argued that Mr. Andrusko took steps to artificially ensure that AHR showed no profit in the 2011 through 2018 timeframe to ensure his ex-partner would not be able to claim an interest in AHR's increase in value. He argued that Ms. Earl was part of Mr. Andrusko's inner circle, that he confided in her, and that she assisted him in siphoning money out of AHR to accomplish his objectives ("Defence Theory"). Accordingly, the defence argued that there was a reasonable doubt about Ms. Earl's guilt.
- [6] It is evident that by convicting Ms. Earl, the jury accepted the Crown's theory and rejected the defence theory.
- [7] During sentencing submissions on April 19, 2024, it became apparent that the background facts resulting in Ms. Earl's conviction were in dispute. At trial, the Crown alleged that Ms. Earl's fraud totalling \$1,350,234 occurred in four distinct ways:
 - a) by making unauthorized payments to her personal credit cards in the amount of \$848,318.43;
 - b) by adding her son to AHR's payroll, despite him never working there, and depositing his "payroll" into her own bank accounts in the amount of \$206,347.07;
 - c) by paying herself unauthorized payments of \$191,631.25; and

d) by making additional unauthorized payments to herself and her husband of \$103,936.53, (together, the "Earl Payments").

- [8] In support of the fraud allegations against Ms. Earl, the Crown led non-expert evidence from Ms. Pamela Morley, a forensic accountant with the Government of Canada, who reviewed and analyzed AHR's voluminous accounting records in relation to the alleged offence the Crown said proved that Ms. Earl defrauded AHR of the Earl Payments. Ms. Morley reviewed the records and summarized the payments comprising the Earl Payments in a report that was filed in evidence.
- [9] The Crown also led evidence from Mr. Andrusko, AHR's sole officer and shareholder, who testified to Ms. Earl's role performing various bookkeeping functions for the company, including payroll, monitoring revenue and expenses, and other accounting and bookkeeping matters. He testified that Ms. Earl had exclusive responsibility for the payroll process and had exclusive access to AHR's accounting system. Mr. Andrusko also confirmed the accuracy of the accounting records reviewed by Ms. Morley, that the Earl Payments were unauthorized and made without his knowledge or consent.
- [10] Mr. Andrusko stated that in March 2018, he began to have suspicions that Ms. Earl might be wrongfully taking money from AHR but was satisfied with her explanation that his suspicions were due to banking errors that resulted in money being deposited into Ms. Earl's personal account by mistake. However, by the end of the summer of 2018, Mr. Andrusko noted other red flags that alerted him that money belonging to AHR was missing.
- [11] Following an investigation in September 2018, while Ms. Earl was on holidays, Mr. Andrusko's concerns about Ms. Earl were confirmed. He testified that when he confronted Ms. Earl on her return from holidays, she admitted fraudulently taking money from AHR and told Mr. Andrusko that she did not know how she could have done such a thing. She agreed to cooperate with an investigation being conducted by AHR's new bookkeeper.
- [12] At trial, the Defence Theory was put to Mr. Andrusko. It was entirely inconsistent with her confession to him when she was confronted in October 2018. Again, her theory was essentially that the money she took from AHR was at Mr. Andrusko's behest to assist him with an acrimonious family law case that he was involved in at the time. The suggestion was that Mr. Andrusko explicitly and implicitly instructed Ms. Earl to assist him in orchestrating a "flatline" in AHR's value to ensure his ex-partner could not claim an interest in AHR's growth during their relationship. The suggestion was that beginning in 2011, Mr. Andrusko instructed Ms. Earl to secretly siphon off money to make it look like AHR was neither profitable nor growing in value.
- [13] During sentencing submissions, Mr. Chiu described this as an "implicit" understanding between Ms. Earl and Mr. Andrusko. Ms. Earl could discreetly take and "comingle" money to carry out Mr. Andrusko's goals without providing him details in a "wink-wink-nudge-nudge" type of arrangement. He argued that Mr. Andrusko was "wilfully blind" to Ms. Earl taking

and comingling AHR's money with her own and paying her personal expenses openly. He says there was an "implied licence" for her to continue taking money and that Ms. Earl fell into a trap.

[14] When put to him in cross-examination, Mr. Andrusko vehemently denied the Defence Theory and other related suggestions, maintaining throughout that the Earl Payments were entirely unauthorized, made without his knowledge or consent, and resulted from Ms. Earl's theft and fraud. He confirmed that none of the Earl Payments have ever been returned to AHR.

[15] Ms. Earl did not testify at trial nor was any evidence called on her behalf.

Victim impact statement

[16] A victim impact statement was read out in court by Mr. Jordan Oostenbrink, an employee of AHR who knew Ms. Earl during her tenure with AHR. He considered her a friend. He described the significant impact and residual effects Ms. Earl's fraud had and continues to have on AHR, its employees, and the vulnerable youth and adults it supports. He stated in part:

You were held in a position of trust, working for a company supporting vulnerable youth and adults, but yet you decided to steal from Cliff and Access Resources. Those very funds could have been used to enhance the Agency and directly benefit the employees who ensure on a daily basis that the highest standard of care is given to the vulnerable individuals that we support! You selfishly used these funds for your own benefit.

Presentence report

[17] I have had the benefit of reviewing a presentence report filed April 17, 2024, in these proceedings ("PSR"). In it, and while not acknowledging the quantum, Ms. Earl admits to committing fraud against AHR for financial gain. She states that she was under financial pressures at home which caused her to steal money from AHR. She further acknowledges knowing the difference between right and wrong, and that it was wrong to steal from her employer. She did not have any mental health issues, substance abuse issues, or gambling addictions at the time that might explain her actions.

Positions of the parties on sentence

Crown position

[18] The Crown argues that the proper range of sentence for Ms. Earl, given the nature of the offence and the magnitude of the amount involved is between six- and eight-years' imprisonment. In support, it refers to, inter alia:

- a) R. v. Dreger, 2014 BCCA 54, a case involving a 45-year-old bookkeeper/mother with mental health issues who defrauded her employer of approximately \$245,000 over a seven-year period and pled guilty. She ultimately received a sentence of four years' imprisonment.
- b) R. v. Dunkers, 2014 BCSC 1316, a case involving a 57-year-old bookkeeper/mother of three who was found guilty after trial of defrauding a non-profit organization of over \$200,000 over a two-year period by forging signatures and issuing cheques to herself. The sentencing judge imposed a five-year sentence, which was higher than the four-year sentence suggested by both the Crown and defence. A full restitution order was made. Her appeal was dismissed.
- c) R. v. Slobbe, 2010 BCPC 60, a case involving a 63-year-old bookkeeper and office manager of an intermediate care facility who pled guilty to defrauding the business of over \$700,000 and to additionally defrauding senior citizens. She had physical infirmities, including heart disease and other related ailments, and was handed a sentence of six years' imprisonment. The offender's poor health condition and gravity of the offence were both noted and considered in arriving at the six-year sentence. The six-year sentence was upheld on appeal.
- d) R. v. Klyne, 2017 BCPC 26, where a 67-year-old offender stole over \$280,000 over a two-year period from 15 employee pension plan accounts while she was a credit union senior pensions and benefits coordinator. She had a diagnosed gambling disorder and gambled the money away. She admitted the thefts and cooperated with the investigation. She pled guilty at an early stage and had no prior criminal record. She was remorseful and had a series of health issues, including kidney cancer requiring surgery. She needed a scooter to get around and was taking a series of required medications. She was in poor health. Nevertheless, she was handed an 18-month sentence with a full restitution order. The Court noted that despite her guilty plea, full cooperation, remorse, and health conditions, a conditional sentence which the defence sought would not adequately serve the sentencing principles of denunciation and deterrence.
- e) R. v. Lawson, 2016 BCSC 2446, a fraud sentencing case involving an offender who had significant and ongoing health issues requiring ongoing treatment. The Court noted that the Canadian medical system can and does assist offenders while incarcerated. In dismissing the appeal, the Court took judicial notice of the fact that healthcare professionals are available in correctional institutions to monitor, treat, and refer inmates as necessary.

Defence position

- [19] On Ms. Earl's behalf, Mr. Chiu seeks a sentence of two years less one day to be served by way of a conditional sentence order. In support, he refers to two cases: R. v. Reynolds, 2020 BCSC 143, and 2020 BCSC 732 (a decision of my brother Justice G.C. Weatherill), and R. v. Andersen, 2018 BCSC 2062 (one of my decisions):
- a) In Reynolds, the offender was convicted by a jury of tax fraud, evading taxes, and attempted fraud against the Canada Revenue Agency. Although the jury convicted on all three counts in one indictment, there was a factual dispute on quantum and a hearing was conducted

pursuant to s. 724 of the Code to determine, as best the court could, what amount of money was involved in the fraud. At issue was the Crown's decision to combine multiple and distinct events of alleged wrongdoing into a single count. Ultimately, the Court was unable to accept as proven the facts upon which the Crown relied in support of a significant jail sentence. Indeed, the Court determined that it was impossible to conclude that the jury was satisfied beyond a reasonable doubt as to any particular mode of fraud alleged by the Crown and determined that the offender was entitled to the benefit of the doubt created by the manner in which the Crown chose to frame the indictment and prosecute the case. He was therefore sentenced based on far less egregious facts than the Crown proposed. He was given a conditional sentence of two years less one day.

- b) In Andersen, I convicted the offender of fraud contrary to s. 380(1)(a) of the Code for transferring \$2 million dollars to a Spanish company without authorization on the expectation that he would receive over 100 times that amount in return. Mr. Andersen was the innocent victim of a sophisticated scam, not unlike a Ponzi scheme. The Crown sought a five-year custodial sentence and Mr. Andersen sought a provincial sentence to be served in the community. Unlike the cases upon which the Crown relied, the victim of Mr. Andersen's fraud, a U.S. citizen, was motivated by greed as well and did not come to the arrangement he made with Mr. Andersen with clean hands. I was satisfied the cases upon which the Crown relied upon in support of a custodial sentence were distinguishable, and that a fit and proper sentence in the circumstances was a two-year-less-one-day conditional sentence with strict conditions.
- [20] Ms. Earl's submissions on sentencing focused mainly on attempting to diminish her moral culpability and blaming Mr. Andrusko for either expressly or implicitly encouraging her to manipulate AHR's books and take AHR's money for her own use. She produced a series of transcripts of Mr. Andrusko's evidence at trial that she argued impeached his credibility.
- [21] For example, she pointed to intercorporate money transfers Mr. Andrusko had her make, suggesting he was improperly manipulating AHR's books. She focused her submissions on challenging Mr. Andrusko's credibility, arguing that his evidence was unreliable, and that he was involved in the commission of fraud against AHR.

Ms. Earl's circumstances

- [22] Ms. Earl's circumstances were summarized in the PSR. They were not expanded upon during sentencing submissions.
- [23] She is currently age 62 and has no prior criminal convictions. This is her first offence. She has been married twice and has two adult children from her first marriage. She experienced emotional abuse during her first marriage at the hands of her alcoholic husband. She left that relationship and married her current husband in 2003, after moving to Kelowna and obtaining a business diploma at Okanagan College. She worked at an accounting firm before joining AHR in 2006. Her employment with AHR was terminated in October 2018 when the fraud was discovered.

[24] According to the PSR, since her arrest on these charges, Ms. Earl has been diagnosed with depression and several other physical ailments which have impacted her quality of life. Her physical and mental health is described as fragile. She is being treated and is taking medication for rectal cancer (requiring her to wear a colostomy bag permanently), diabetes, high blood pressure, Crohn's disease, celiac disease, depression, and she has been suicidal in the past. She has been bedridden for extended periods of time. Her health conditions require monitoring and treatment on an ongoing basis.

Conclusion regarding the Defence Theory

[25] Before proceeding any further, I will state that I reject the entirety of Ms. Earl's submissions respecting the Defence Theory and quantum. They are based on a theory of the case and facts that are entirely inconsistent with the evidence at trial. Mr. Andrusko's uncontradicted evidence was that, save for some very minor transactions that he could not be sure about, the Earl Payments were unauthorized and fraudulent.

Aggravating and mitigating factors

[26] In considering Ms. Earl's sentence, I am to consider any aggravating and mitigating circumstances that may exist.

Aggravating circumstances

[27] Pursuant to ss. 380.1(1)(a) and (f), and s. 718.2(a)(iii) and (iii.1) of the Code, the following statutory aggravating factors apply here:

- a) at over \$1 million dollars and over seven years, the magnitude, complexity, duration, and degree of planning involved in Ms. Earl's fraud;
- b) Ms. Earl concealed and destroyed records related to her fraud and to the disbursement of the proceeds of her fraud;
- c) Ms. Earl abused her position as a trusted bookkeeper for AHR; and
- d) her fraud had significant financial and emotional impact to AHR's business and employees.

[28] The Crown alleges the following as additional aggravating circumstances:

- a) AHR is a private organization that relied on public funds and whose purpose is to support some of the most vulnerable people in our community;
- b) Ms. Earl used her son as a vehicle to defraud AHR and thereby placed him at risk of civil proceedings; and
- c) ultimately the money Ms. Earl stole was used for personal gain.

Mitigating circumstances

[29] I consider the following as mitigating circumstances:

- a) although not expressly expressing any remorse during sentencing submissions, Ms. Earl expressed remorse to the preparer of the PSR. She stated that she regretted stealing money from AHR. She says that she was experiencing financial difficulties, and her financial need was the motivating factor for her actions. She nevertheless acknowledged that her actions were wrong because AHR "did not deserve to be stolen from". She stated that she was deeply sorry and ashamed for her actions and was willing to accept whatever sentence she receives for her wrongdoing;
- b) Ms. Earl's personal circumstances, including her health issues; and
- c) Ms. Earl's lack of a criminal record and otherwise good character. On the one hand, it is common for first-time fraud offenders to lack a criminal record and be otherwise of good character, but on the other hand, typically it is these features that allow the offender to perpetrate the fraud. This mitigating factor, therefore, is of limited weight. Further, s. 380.1(2) of the Code provides that the court shall not consider as a mitigating factor the offender's employment, skills, status, or reputation in the community if those circumstances were relevant or contributed to the commission of the offence.

Reference letters

- [30] In support of her submission that a conditional sentence order would be a fit and proper sentence, Ms. Earl filed three letters of support: one from her current employer, one from her daughter, and one from her husband. These letters all referenced her ill health and otherwise good character.

Discussion

- [31] The range of sentence for fraud varies depending on the quantum involved, and the aggravating and mitigating circumstances. A significant sentencing principle for large-scale fraud is general deterrence, to discourage people from committing crimes of dishonesty, fraud, or breach of trust: Andersen at paragraph 16, citing R. v. Banks, 2010 ONCJ 339.
- [32] During sentencing submissions, there was a debate over the amount of money stolen by Ms. Earl. The Crown argued that as the trial proceeded based on one count of fraudulent theft over \$5,000 from AHR, and based on Ms. Morley's report, the proven amount that was taken was over \$1.3 million. As Crown put it, "it was an all-or-nothing proposition" for the jury.
- [33] Mr. Chiu argued that although Ms. Earl admits to fraud over \$5,000 in the PSR, she by no means admits the quantum of the fraud that was the Earl Payments. She says there were significant holes in the Crown's evidence and the Crown has not proven beyond a reasonable doubt that the quantum was the Earl Payments as it suggests.

- [34] This was a jury trial. I am therefore bound by the express and implied factual implications of the jury's finding of Ms. Earl's guilt. I cannot make findings inconsistent with the jury's verdict: *R. v. Ward*, 2009 BCCA 409 at para. 12 to 14. Section 724 of the Code requires that I must accept as proven all facts, express or implied, that were essential to the jury's guilty verdict, and I may find any other relevant facts that were disclosed by the evidence at trial to be proven.
- [35] During the trial and other than some very minor transactions, the defence did not attack the quantum of the fraud, but rather proceeded on the basis of the Defence Theory.
- [36] I do not find the factual implications of the jury's guilty verdict to be ambiguous at all. Even if I did, and even though Ms. Earl disputes the quantum of what she stole, I am satisfied beyond any doubt and find as a fact that the quantum of money Ms. Earl stole from AHR over the seven years at issue was well over \$1 million dollars. In other words, while I am not satisfied that the full amount of the Earl Payments was fraudulent (and I say this because Mr. Andrusko was not able to say some minor transactions to which he was referred were not legitimate), I am easily satisfied that the Crown proved that Ms. Earl defrauded AHR of an amount well in excess of \$1 million dollars.
- [37] I am also satisfied beyond a reasonable doubt that a good portion of the money Ms. Earl stole was spent on lavish vacations that included Mexico, Las Vegas, and cruises.
- [38] Accordingly, Ms. Earl, I intend to sentence you based on the fact that you stole over \$1 million dollars from AHR.
- [39] Ms. Earl, as you must realize, you have committed an appalling crime of stealing money from your employer who trusted you. You have breached that trust. You have caused not only serious financial damage, but you have caused AHR's reputation in the community to be tarnished. You have caused damage to your family and friends.
- [40] Your moral blameworthiness is high. Your crime was lengthy, sophisticated, and involved a significant degree of planning. You deleted records from AHR's accounting system, and you manipulated records to try and legitimize payments to your son, your husband, and yourself. I consider your actions egregious.
- [41] With respect, I have not been much influenced by the cases your counsel has referred to. The more relevant authorities are the Crown's cases.
- [42] What happened here, and so there is no doubt, is that you, Ms. Earl, a trusted bookkeeper, helped yourself to well over \$1 million dollars of money from an employer who trusted you implicitly. You took advantage of that trust to spent money on yourself, pay off credit card debt, and fund a lifestyle that included lavish vacations.

Conclusions

- [43] The two sentencing principles that I consider most applicable here are general deterrence and denunciation. General deterrence is of particular importance in cases involving large sums of money and/or breach of trust. General deterrence is required to discourage people who would be tempted to commit crimes of dishonesty and defraud others.
- [44] I am in substantial agreement with the Crown's submissions that the gravity and seriousness of what you did, Ms. Earl, requires a term of imprisonment. In my view, the Crown's position on sentencing is easily sustainable and even quite reasonable, given the facts of this case and the trends in the law.

Sentence

- [45] Ms. Earl, I will ask you please to stand.
- [46] Ms. Earl, I intend to endorse the Crown's submission by imposing a sentence of six years' imprisonment. Anything less would fail to adequately punish and denounce you for the magnitude of your wrongdoing or properly express this Court's condemnation and repudiation of it or recognize the high degree of your moral responsibility for wilfully, deliberately, and repetitively stealing significant amounts of money from your employer who trusted you, for your own selfish use. That money is unaccounted for, and nothing has been paid back.
- [47] In coming to this decision, I have noted and considered your health issues and take judicial notice that you will be entitled to and will have access to medical professionals while incarcerated.
- [48] Whether your sentence, in all the circumstances, is unduly harsh or excessive is a question upon which some people may disagree. Nevertheless, I consider it a fit and proper sentence in the circumstances.
- [49] I also accept the Crown's submission that because this offence involved theft and breach of trust, restitution should be ordered pursuant to s. 738(1)(a) of the Code to compensation AHR, even if you have little or no ability to pay, because you should be deprived the fruits of your crime: Dreger at para. 59.
- [50] The restitution order I am making is for \$1 million dollars. While I am easily satisfied that the amount of money you stole from AHR exceeds that amount, for the reasons I already noted, I am not satisfied that it was the full amount of the Earl Payments.
- [51] You may now take a seat, Ms. Earl.

Ancillary orders

[52] Respecting ancillary orders, I decline to make the Crown's requested DNA order and prohibition order. Given the sentence I have imposed, I do not consider that it would be in the best interests of the administration of justice to do so.

[53] Now, unless I have missed something, that is the end of the matter. Ms. Saris?

[54] CNSL J. SARIS: Thank you, Your Honour.

[55] THE COURT: Mr. Chiu?

[56] CNSL M. CHIU: Thank you, Justice.

[57] THE COURT: All right, thank you, we are adjourned.

"G.P. Weatherill J."

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