

CANADA / JUDGMENT

R. v. El-Kaaki

2020 BCCA 183

COURT

British Columbia Court of Appeal

DECIDED

23 June 2020

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2020 BCCA 183 R. v. El-Kaaki

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. El-Kaaki,

2020 BCCA 183

Date: 20200623

Docket: CA46862

Between:

Regina

Respondent

And

Mustapha El-Kaaki

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated May 11, 2020 (R. v. Elkaaki, Vancouver Dockets 257229-1, 103574-1-T, 103574-2-BT, and 103574-3-AT).

Oral Reasons for Judgment

The Appellant, appearing in person

(via videoconference):

M. El-Kaaki

Counsel for the Respondent:

C. Lusk

Place and Date of Hearing:

Vancouver, British Columbia

June 23, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 23, 2020

Summary:

The appellant received a sentence of just under five months' imprisonment for six offences, including two counts involving counterfeit bills and one count of break and enter. She appealed her sentence on two grounds: (1) that the sentence was harsh in light of the COVID-19 pandemic and an increased risk of infection associated with a custodial setting; and (2) complying with a probation order presents difficulty for the appellant because of her personal struggles. Held: Leave to appeal is granted, but the appeal from sentence is dismissed. The appellant received a sentence at the low end of the applicable range, giving effect to her COVID-19 concerns. In the circumstances of this case, a one year probation order with assessment and counselling terms was reasonable.

Introduction

- [1] DEWITT-VAN OOSTEN J.A.: On May 11, 2020, the appellant pleaded guilty in the Provincial Court to six offences: uttering and possessing counterfeit money; two counts of breach of probation; failure to attend court; and break and enter of a business (with theft). After granting credit for time spent in pre-sentence custody, the judge imposed an additional 75 days' jail, followed by one year of probation. The appellant's release from prison is set for June 29, 2020.
- [2] The appellant has appealed the sentence on the counterfeit offences, as well as the break and enter. She represented herself on the appeal and raised two concerns. First, she submitted that an additional 75 days in custody is an unduly harsh sentence in light of the COVID-19 pandemic. Second, she is worried about the probation order, candidly acknowledging that probation orders are problematic for her in light of her mental health and memory struggles.

- [3] The Crown did not oppose leave to appeal, but did oppose any variation of sentence. It submitted that the appellant received a lenient sentence in light of her criminal history. Her COVID-19 concerns were given effect by the judge in his decision to impose a prison term at the low end of the range. The Crown said a probation order is necessary to support the appellant's rehabilitation and protect the public.
- [4] Appeals from sentence attract a deferential standard of review. Intervention by this Court is only available where it has been shown that the sentencing judge committed a material error that affected the sentence (such that the sentence would have been different but for the error) or that the sentence is demonstrably unfit: *R. v. Agin*, 2018 BCCA 133 at paras. 56-57; *R. v. Lacasse*, 2015 SCC 64; *R. v. Friesen*, 2020 SCC 9.
- [5] Applying this standard, I would dismiss the appeal. Leave to appeal was granted at the start of the hearing.

Offences

- [6] Five of the appellant's six offences for which she was sentenced were committed in Ontario and waived to British Columbia for disposition. The use and possession of counterfeit money occurred in February 2018. The appellant twice presented a \$50 counterfeit bill to purchase cigarettes. She succeeded once. On the second attempt, the store cashier rejected the bill. When arrested two weeks later, the appellant was in possession of two counterfeit bills. She was on probation at the time of those offences and breached the order by failing to keep the peace and be of good behaviour and by not reporting to her probation officer. The appellant also failed to attend court when required.
- [7] In December 2019, the appellant was in Vancouver. The break and enter involved breaking a window at an optical store, reaching in and stealing eyeglasses. When arrested, the appellant told police she broke the window because she was cold. Police recovered the eyeglasses. At the time of that offence, the appellant was serving a six-month conditional sentence order.

Sentencing Hearing

- [8] The appellant was represented by legal counsel at sentencing. She sought a disposition of "time-served" and asked for release to a recovery facility focused on substance abuse. The appellant said she has had limited access to residential treatment in the past, and requires this form of intervention to address the factors underlying her offending behaviour. She provided the judge with a letter from an abstinence-based recovery home confirming bed availability.
- [9] The Crown sought a global sentence of five months' jail, less credit for time spent in pre-sentence custody (resulting in 82 days of additional imprisonment). The Crown also requested that the judge impose one year of probation.

Reasons for Sentence

- [10] In sentencing the appellant, the judge noted the guilty pleas as a mitigating factor. The judge also made note of a "disrupted childhood"; victimization in school; and the fact that the appellant's challenges with substance abuse appear to have resulted, at least in part, from an addiction to prescribed opioids following treatment for injuries sustained in a car accident. The judge also acknowledged the possibility of cognitive impairment flowing from that accident and continuing mental health struggles, ones that have "contributed to an ongoing pattern of homelessness and [inability] to stabilize with regard to residence or employment".
- [11] The judge noted that the offences in this case did not involve violence and that the appellant has no prior convictions for possession of counterfeit bills or break and enter. Although material tendered at sentencing showed that the appellant has not done well on probation, the judge was satisfied that given her expressed desire for residential treatment, and the completion of some programming while awaiting sentencing, rehabilitation remains a "valid" consideration for this offender.
- [12] The judge took judicial notice of the public health concerns surrounding COVID-19, accepting that incarceration during the pandemic carries a "collateral" risk for offenders--namely, an increased risk of infection arising out of close confinement with others. There was no indication before the judge that the appellant had particular health vulnerabilities that increase the potential of a more severe impact if infected. However, the judge did not consider evidence of particular vulnerabilities to be necessary before giving COVID-19 weight in the sentencing process, and he allowed it to inform his determination on quantum. At the hearing of the appeal, the appellant informed this Court that she suffers from asthma. This information was not before the sentencing judge. At the same time, she also advised that the inmate population where she is currently incarcerated appears lower than usual.
- [13] Ultimately, the judge decided that the appellant's circumstances warranted a sentence at the "low end of the range". He granted 68 days' credit for time spent in pre-sentence custody and then imposed a further 75 days' jail (concurrent) for each of the two counterfeit offences and the break and enter. The two counts of breach of probation and the failure to attend court each received one day in custody, concurrent to one another and the substantive offences.
- [14] The judge also imposed one year of probation with numerous terms. The order includes a condition that the appellant attend counselling for substance abuse as directed by a probation officer. In addition, the judge ordered that the appellant "attend at the direction of [her] probation officer for a psychiatric intake, assessment, counselling or treatment program through Forensic Psychiatric Services or another community mental health organization". The probation order directs that the appellant take all medication prescribed for her, and, if she withdraws her consent to medication, that she report to her probation officer. At sentencing, the appellant was asked whether she objected to the terms involving psychiatric treatment. She said she had no concerns.

Discussion

[15] For the purposes of sentencing, the judge had access to a pre-sentence report and a psychological assessment.

[16] The pre-sentence report summarized the appellant's long-standing use of drugs and alcohol, starting when she was ten years old:

Moustapha indicates she started experimenting with illicit substances when she was 10 years old. She started with marijuana. She first tried alcohol when she was approximately 15 years old and then in her late teens experimented with cocaine and ecstasy. Moustapha states she was in a bicycle accident in 2005 and was hospitalized for a few weeks. She was also in a motor vehicle accident in 2009. After the last accident, Moustapha states she was prescribed OxyContin. Once the medication prescription ended, she sought opiates on the streets. She initially started using heroin and then moved to Fentanyl. Moustapha has been using Fentanyl daily since 2010 and occasionally uses crystal methamphetamines with Fentanyl to extend the effects of Fentanyl as it is quite expensive. Moustapha indicates she was not using drugs nor was she high on the night she committed the break and enter. Moustapha states she has never been to a recovery home or a treatment centre, nor has she ever seen a counsellor to target her substance use. Moustapha maintains she would rather be in a treatment centre than on the streets and would like to stop using drugs (at p. 5, emphasis in the original).

[17] The pre-sentence report also set out an extensive criminal history, including multiple offences involving theft, stolen property and non-compliance with court orders. The offences and sentences as summarized in the report were not generally disputed before the sentencing judge:

Moustapha received her first court disposition when she was 14 years old. Since 2005, she has accrued at least 34 dispositions with 89 offences. Moustapha has received a custodial sentence for all but three offences. Moustapha's history consists of a number of "minor" offences - 15 theft offences, six mischief offences and one possession of stolen property under \$5000. She has a number of violent offences including nine common assaults, two convictions for assaulting a peace officer, two forcible confinement offences, two criminal harassment offences, two uttering threats offences and one assault with a weapon offence. She has also been convicted four times for possessing a scheduled substance, three times for failing to attend court, once for driving [while] intoxicated and once for possessing an ID document. Of her 89 offences, 38 convictions are for breaching some type of court order. Ontario file notes indicate she is a repeat domestic violence offender with serious offences in this area (at p. 10).

[18] The psychological assessment addressed the appellant's risk of re-offending. She was placed at a "high risk of violent and nonviolent recidivism". The assessor saw the appellant as someone who quickly relapses to the use of substances on her release from custody and commits crime to support that habit. Identified treatment needs include substance abuse, poor behavioural controls (exemplified by anger and impulsivity), antisocial attitudes (including attitudes supportive of violence and hostility against intimate partners),

employment challenges, relationship problems and a lack of insight. The assessor opined that when released into the community, the appellant would require an "extremely structured release plan" and "significant support" to connect with available resources.

- [19] With this information in hand, the judge imposed a global sentence of just under five months' imprisonment for the appellant's six offences. In my view, the judge committed no error in principle in doing so. Nor has the appellant established that the prison term and probation order are demonstrably unfit. To the contrary, I agree with the Crown that the appellant received a lenient sentence given the number of offences at issue, the fact that they were committed while subject to one or more court orders, and the extent of the appellant's criminal record.
- [20] Two of the offences involved the use and possession of counterfeit bills. These are crimes for which the principle of deterrence attracts heightened significance: *R. v. Le*, [1993] B.C.J. No. 165 (C.A.). The general range of sentence for unsophisticated counterfeit offences involving lesser sums of money has been noted at the appellate level as six months to two years less a day imprisonment: *R. v. Rafuse*, 2004 SKCA 161 at para. 12. The sentence imposed on the appellant fell below the bottom end of that range, notwithstanding two counts and multiple prior convictions for theft-related offences and other crimes of dishonesty.
- [21] The judge's reasons for sentence demonstrate that he was alive to the relevant mitigating factors in this case, including the guilty pleas; the less serious circumstances surrounding the offences; the appellant's personal struggles (both in childhood and as an adult); the contribution nexus between those struggles and the appellant's offences; and her desire to engage in rehabilitative treatment.
- [22] The judge was not dismissive of the appellant's COVID-19 concerns. He was prepared to take judicial notice of the pandemic, as well as a heightened risk of infection arising from close confinement in a custodial setting. He furthermore accepted that this was an appropriate "collateral" factor to consider in the determination of quantum, even without an evidentiary foundation on health vulnerabilities specific to the appellant. Whether this was the correct legal approach to the issue is not necessary for the Court to decide, as the judge gave the appellant the benefit of his conclusions. He imposed a prison term of shorter duration than requested by the Crown, even though acknowledging that the Crown's position appropriately accommodated COVID-19 considerations. The judge also directed that all of the appellant's sentences run concurrent.
- [23] Finally, in light of the risk assessment in the psychological report, the appellant's personal circumstances, her treatment needs, and the expert opinion that she will need a "structured release plan" and "significant support" on her release from custody, the decision to follow the prison term with a one-year probation order was reasonable. The terms of the order are numerous, but for an offender with multiple risk factors and a history of recidivistic offending connected to those factors, the order is appropriately focused on community supervision, counselling and treatment. At sentencing, the appellant agreed to the treatment

conditions, including an obligation to report to a probation officer if she chooses to withdraw her consent to medication. She acknowledged in the pre-sentence report that she has no family ties to Vancouver nor an established support system.

- [24] Sentencing involves an inherently individualized assessment, informed by the circumstances of the offence and the offender. The ultimate goal is to impose a just sanction that is proportionate to the gravamen of the offence(s) and the moral blameworthiness of the offender: s. 718.1, Criminal Code, R.S.C. 1985, c. C-46. In my view, the sentencing judge met his mandate in the circumstances of this case and there is no principled basis on which to intervene with his determination.

Disposition

- [25] For the reasons provided, I would dismiss the appeal.

- [26] SAUNDERS J.A.: I agree.

- [27] FENLON J.A.: I agree.

- [28] SAUNDERS J.A.: The appeal is dismissed with thanks for your submissions today. Thank you.

"The Honourable Madam Justice DeWitt-Van Oosten"

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