
CANADA / JUDGMENT

R. v. Elder

2017 BCSC 1164

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1164 R. v. Elder

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Elder,

2017 BCSC 1164

Date: 20170707

Docket: 64312

Registry: Chilliwack

Regina

v.

Wilfred Ernest Elder

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment

on Bail Review

Counsel for the Crown:

P.R.J. Blessin

Counsel for the Accused:

P.W. Janzen

Place and Dates of Trial/Hearing:

Chilliwack, B.C.

March 6, 2017

May 23, 2017

Place and Date of Judgment:

Chilliwack, B.C.

July 7, 2017

- [1] On November 3, 2015, Crown counsel laid Information No. 64312-B1, Chilliwack Registry, against Wilfred Ernest Elder charging him with four counts related to breaches of a long-term supervision order. The only matter still before the court is Count 2 of the indictment (Chilliwack File No. 64312-2) dated September 27, 2016, which relates to an alleged failure to participate in counselling with a mental health professional to address issues on the management of his emotions and mental health.
- [2] In 1988, Mr. Elder was found to be a long-term offender pursuant to s. 753.1 of the Criminal Code.
- [3] On April 25, 2014, the Parole Board issued a long-term supervision Certificate pursuant to the Corrections and Conditional Release Act, S.C. 1992, c. 20. It remains in effect until April 24, 2024, the ten-year maximum period mandated by s. 753(3)(b) of the Criminal Code. The conditions attached to the Certificate were imposed by the Parole Board. The Certificate number is U80A00020019. Mr. Elder signed the Certificate acknowledging as follows:

I fully understand and accept the conditions of my long term supervision (attached), any special conditions noted below or attached and any instructions given by my parole supervisor in respect to any condition of my release. I understand that if I violate them, my long term supervision may be suspended. I also understand that failure or refusal without reasonable excuse to abide by the conditions of the long term supervision order is an offence under section 753.3(1) of the Criminal Code of Canada.

- [4] Further noted in the Certificate are the provisions of s. 753.3(1) of the Criminal Code as follows:

An offender who is required to be supervised by an order made under paragraph 753.1(3)(b) and was, without reasonable excuse, fails or refuses to comply with that order is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

- [5] The conditions stated in the Certificate were as follows. The allegedly breached condition relevant to this matter is underlined. The Crown is not proceeding on the other counts following findings made at the preliminary inquiry:

Special Conditions

NOT TO CONSUME ALCOHOL

Not to consume, purchase or possess alcohol.

NOT TO CONSUME DRUGS

Not to consume, purchase or possess drugs other than prescribed medication taken as prescribed and over the counter drugs taken as recommended by the manufacturer.

OTHER SPECIAL CONDITION

Participate in counselling with a mental health professional to address issues relating to managing your emotions and your mental health.

AVOID CERTAIN PERSONS

Not to associate with any person you know or have reason to believe is involved in criminal activity and/or substance abuse.

REPORT RELATIONSHIPS

Immediately report all intimate sexual and nonsexual relationships and friendships with females to your parole supervisor.

RESIDE AT A SPECIFIC PLACE

To reside at a Community Correctional Centre or a Community Residential Facility or other residential facility (such as private home placement) approved by the Correctional Service of Canada.

No direct or indirect contact with the victims or any member of the victims' families.

[6] Counsel for Mr. Elder advised the court that Mr. Elder had spent extensive periods in the previous 15 or 20 years in the Federal penitentiary system; and in the community, under various forms of supervision. He noted that a breach of condition occurred when Mr. Elder was on the long-term supervision order and residing at the residential facility, pursuant to a residency condition of his long-term supervision order.

FAILING TO ATTEND COUNSELLING

[7] In overview, on the alleged breach of failing to participate in counselling, counsel advised that he had an alternative to a participating in counselling and that was to participate in an employment program called the Triangle Employment Program. Although Mr. Elder applied to enter the program, counsel advised that he did not gain entry but did obtain a job, working part-time at a local restaurant. Mr. Elder missed three sessions in June but returned in late July. I will deal with those details further on in these reasons.

[8] Counsel agree that the Crown must prove both the *actus reus* and *mens rea* of the alleged offence and that the *mens rea* is one of general intent.

- [9] The Crown called two witnesses: Ms. Monica McDowell, Mr. Elder's parole officer; and Mr. John Kay, who is the Programs Officer, responsible for the counselling program that Mr. Elder was to have attended during his stay at the Community Corrections Centre ("CCC").

TESTIMONY

Ms. McDowell

- [10] Ms. McDowell was employed as a parole officer with the Correctional Service of Canada ("CSC") at the material time in April 2014 through August 25, 2015. The CSC employed her for 13 years. Her duties included supervision of Mr. Elder.
- [11] Ms. McDowell reviewed the conditions set out in the Certificate. As for the counselling condition, she was unsure at the time she went over the conditions when he would start with the counselling, or how often it would be, stating it was discussed only in general.

Periods of suspension

- [12] Ms. McDowell confirmed periods when Mr. Elder was not present in the CCC, due to suspensions, breaches etc.:

§ There was a suspension in July 2014. He returned to the CCC in September 2014.

§ He was then suspended in November 2014. He returned to the CCC in March 2015.

§ He was suspended again in February 2015 and returned to the CCC in March 2015.

§ Thereafter, he was continually at the facility from March 2015 to August 2015.

- [13] On September 1, 2015, Ms. McDowell forwarded a report to the Parole Board which was in the process of deciding whether to return Mr. Elder to the community or recommend criminal charges. She advised in the report to Mr. Kay that Mr. Elder had not been attending the maintenance program.

- [14] On cross-examination, counsel put to Ms. McDowell entries from a case management log kept for Mr. Elder. The following entries were noted:

On July 23, 2015 a meeting [with] Mr. Kay [at which he] had advised [Ms. McDowell] that Mr. Elder had missed the program for the last three weeks. [Transcript March 6, 2017, p. 39.]

- [15] Ms. McDowell was not sure whether it would be correct to say Mr. Kay had advised her "not in late June, but in late July, that [Mr. Elder] was not attending [the sessions]". But she did agree that there was some discussion with Mr. Kay about Mr. Elder's working and his wanting to work rather than attend any programming.

- [16] Ms. McDowell agreed that what probably ultimately happened was her saying to Mr. Elder that if he was going to be working as he was in the restaurant and in construction for the same employer, he should try to arrange the work so it did not conflict with the programming in the CCC. She was unsure whether she had told Mr. Elder that if he could

not schedule his work to avoid a conflict with the Wednesday morning maintenance program he was to let her know. Counsel put to her an entry made on July 27, 2015, as follows:

I advised him only if the work could not be arranged for after 10:30 a.m. Wednesday mornings and as a one-off, he is to text me ASAP if this occurs as well so I am aware. [Transcript March 6, 2017, p. 40.]

- [17] Ms. McDowell agreed that is what she would have told Mr. Elder. She also agreed that another concession made at about that time was increasing his curfew. She somewhat hesitatingly agreed she "lifted the no-go off Salish Park" if he were to attend the program regularly. But there was no question that she agreed he could miss the program if he could not avoid conflicting with work arrangements. [Transcript March 6, 2017, p. 41.]
- [18] As for the information she had received from Mr. Kay reporting that Mr. Elder had missed three sessions of the program, she agreed she wanted to discuss this with the Director and decide the appropriate response, which was to sit down and have the said foregoing July 27, 2015 conversation.
- [19] In summary, on or about July 23, 2015, Ms. McDowell heard from Mr. Kay about Mr. Elder's non-attendance of the program. This was followed by a discussion with the Director about the appropriate response; and followed by a meeting with Mr. Elder, on July 27, 2015, to discuss his non-attendance in the program. Ms. McDowell could not recall the exact date, but agreed that sounded reasonable. She agreed that at that time she did not think, in discussions with the Director, that it was necessary to suspend Mr. Elder's long-term supervision order.
- [20] Ms. McDowell agreed, however, that on August 5, 2015, she received information unrelated to his attendance at the program which she reported to the Director and which led to his long-term supervision order being suspended. The suspension and Mr. Elder's arrest was not related to Mr. Elder's non-attendance; rather, to the aforesaid August 5, 2015 matter. I gathered the alleged non-attendance breach was added to the other matters, which have been dealt with already.
- [21] The programming which a person the CCC engages in custody receives is determined through discussions between the Programs Officer, the Director of the facility, and the parole officer. The programming designed would depend on the nature of the offence and the level of risk due to the nature of the offence. There is a sex offender stream, an Aboriginal stream, and a multi-level stream. Mr. Elder was in the sex offender stream that allowed them to assess the level of risk and other relevant considerations.

PROGRAMMING

- [22] Programming refers to work done with the offender while incarcerated. It is administered by the CSC. There are varying degrees of intensity, from medium to high. After the initial programming, the focus shifts to maintenance. The maintenance can take place within an institution or in the community.
- [23] Maintenance programming in the community can take on a variety of forms. For example, it could consist of just a check-in discussion with a mental health professional. It can consist of a meeting with a specific person, such as a Registered Nurse, who generally is the mental health professional with whom the offender would check with. It can also take the form of counselling by a psychologist or psychiatrist, or other mental health professional, whichever provides the most effective approach. Where the offender is Indigenous, as Mr. Elder is, the counselling can also take place with an Indigenous Elder. In fact, the Parole Board did authorize a change in the condition to allow Mr. Elder to have the counsel of an Elder. This was in place for a time but, for reasons not made clear in the evidence, was not kept up.
- [24] Application of the programming does not end with the offender's release on a long-term offender order. The programming continues on a maintenance basis after the offender is in the community. So, for example, an offender in a sex offender stream program while incarcerated would continue on a maintenance basis in a CCC facility. When Mr. Elder was previously in custody, he was engaged in a sex offender program. When he arrived at the CCC, the team caseworkers had to come up with a plan for him. The idea being that he would continue in a similar maintenance stream in the CCC. Ms. McDowell clarified, however, that it was not counselling, rather, "actually, programming". She explained she tended to use those words a "bit interchangeably."
- [25] Mr. Kay was responsible for administering the Sex Offender Maintenance Programming. He is referred to as a Program Officer, alternatively as a Correctional Program Facilitator. Asked how many individuals would be referred to the program on an ongoing basis, he was unsure but thought that the numbers were fairly low, between about two and 10; normally a small group. She testified that individuals would be required to participate in the program once a week.
- [26] Asked whether any exceptions were permitted or discussed in Mr. Elder's case that would allow him to not attend the program, Ms. McDowell stated there had been some discussion with him about his wanting to attend the Triangle Resources Program; a six-week program. Mr. Elder had expressed an interest in that. She stated he was advised to apply and that they would then be discussing, "if he got into the program, whether we would be able to defer him for a period of six weeks or not." [Page 15, lines 7-9.]

Triangle Resources Program

- [27] Ms. McDowell explained the Triangle Resources Program is an employment program that would be attended between 9:00 a.m. and 3:00 p.m., four or five days weekly, Monday to Thursday, or Monday to Friday. Participants look into résumés, work on mock interview skills, and have a job placement person assigned to them; it is essentially about getting someone a job.
- [28] Ms. McDowell agreed that she discussed the possibility with Mr. Elder that if he participated in the Triangle Program with approval, he might not have to attend the programming requirements with Mr. Kay. She understood that Mr. Elder did make the application and went to the interview but was not accepted to the program, as he already had a part-time job. In so far as not being accepted to the program is concerned, Ms. McDowell said it did not affect his requirement to attend Mr. Kay's programming. Ms. McDowell said entry into the Triangle Program never got to the point of discussions with her, the Director and the Program Facilitator, Mr. Kay.
- [29] On cross-examination, Ms. McDowell agreed that she, Mr. Kay and other members of the case management team were trying to find prosocial committee activities in which Mr. Elder could participate; one of which was seeing if he could get into the community and find work. She confirmed the Triangle Program was designed to help people in entering the labour market. She agreed Mr. Elder's attending that program and getting into a pre-employment program was a positive development. Ms. McDowell confirmed she promoted his applying to enter the Triangle Program; and that about the time that they were discussing that, on his own he found work as a dishwasher in a local restaurant. The work shift was usually about 5:00 p.m. to 9:00 p.m. Ms. McDowell confirmed she was supportive of that endeavour. She was also aware that the owner hired Mr. Elder to do some renovation or construction work and that he did do so. She supported that. She agreed there was some discussion about extending the curfew to accommodate Mr. Elder's work in the restaurant, but noted that the other odd jobs were done during the day. In any case, Ms. McDowell agreed she was supportive and encouraged Mr. Elder to not only work in the restaurant but also take on odd jobs.
- [30] Ms. McDowell was aware that Mr. Elder did not gain admission into the Triangle Program in part because he already had work.
- [31] Ms. McDowell agreed that she had various means, including the sign-in and sign-out book, and cell phones, of ascertaining where Mr. Elder was at a given time and if it consisted with what he was telling her about his activities. She also spoke to his employer.
- [32] Ms. Dowell agreed her ongoing interactions with Mr. Elder, could be characterized as give-and-take negotiations on her expectations for him.

Procedural Steps

[33] The following discussion is about the procedures followed by Corrections and the Parole Board when a person under long-term supervision has allegedly breached a condition of the LTSO [Long-Term Sentence Order] Conditions, I have included some of this background information. Despite it being somewhat tangential, LTSO breaches are not commonly before the court and this brief overview puts matters in context and explains why, during some periods, Mr. Elder would not be in a position to participate in Mr. Kay's program. I will speak to that later in these reasons.

What happens after a breach of a LTSO?

- [34] Asked what happens if the offender breaches a LTSO Order condition, Ms. McDowell explained that the process is similar to that of a parole breach, whether day or statutory release, with the warrant issued based on certain information, issued by the Director, coming from the CSC. When a warrant is issued, the police are contacted and they then execute the outstanding warrant.
- [35] From that point forward, the process continues differently than is the case for a regular parole process, particularly with respect to the processing of dates. Corrections normally have 30 days to complete a report and to make a decision whether to cancel warrant locally or refer the matter to the Parole Board for a decision. If the warrant is cancelled, Mr. Elder would be brought back to the centre, at which point 'they' would like additional restrictions, such as reducing a curfew or adding an additional program or other conditions. Otherwise, the person is returned back to the operation of the LTSO Certificate.
- [36] Ms. McDowell explained that there is no such thing as a revocation of an LTSO, as could occur with parole; rather a report to the Parole Board could recommend the "suspension cancelled". A referral to the Parole Board to have the "suspension cancelled" could be accompanied by recommended additional conditions, a reprimand, or a delay in the offender's release of up to 90 days. The Parole Board has to make a decision within 90 days of the issuance of the warrant. If the Board fails to do so, it loses jurisdiction. The offender can be kept in custody during that entire 90 days.
- [37] As for the decision on whether to lay a charge, the case management team, in consultation with the Parole Board, decides whether a file should be sent to Crown for charge approval.
- [38] If the Crown finds the information sufficient, then the Director and Ms. McDowell would recommend to the Parole Board the laying of an information.
- [39] On cross-examination, Ms. McDowell confirmed that the jail portion of Mr. Elder's sentence had ended. Were Mr. Elder not subject to a LTSO, he could leave the institution and live wherever he wanted to, subject to completion of a community strategy plan. That is, a person subject to a LTSO remains supervised and subject to the jurisdiction of the Parole Board until expiration of the LTSO.

- [40] After the warrant for Mr. Elder's arrest was issued by Ms. McDowell's supervisor, Mr. Elder was taken first to city cells; ultimately ending up in a Federal penitentiary, until his return.

Conditions General and Special, and Conditions of Release

- [41] Ms. McDowell explained the difference between general conditions and special conditions. Some general conditions apply to every person being released on a LTSO. These conditions are set out in a document with the subheading "CONDITIONS OF RELEASE", marked as Exhibit 2. They are very similar to those conditions typically included in a probation order, such as remaining within territorial boundaries, obeying the law and keeping the peace, advising the parole officer of any change of address, etc. The general conditions do not require a person on a LTSO to participate in programming such as those set out in the special conditions portion of the LTSO Certificate.

Counselling v. Programming

- [42] Asked to clarify the "Participate in counselling with a mental health professional to address issues related to managing your emotions and your emotional health", Ms. McDowell testified that was not for psychological counselling. Were that the case, she testified, they would have a condition to follow psychological counselling, to meet with a mental health professional. Ms. McDowell agreed that were Corrections specifically wanting the offender to see a psychologist or a psychiatrist, we would see such a specific condition, for example, for assessments and treatments by a psychologist or a psychiatrist.

JOHN KAY TESTIMONY

- [43] Mr. Kay was employed as a Program Officer before retirement from Corrections. Before becoming a Program Officer, he worked for Provincial Corrections as a probation officer for about 22 years. He explained that a Program Officer delivers programs for offenders while they are on parole or while in custody. The program he provided was not counselling, but more like teaching in the classroom. His training with Correctional Services taught him how to become effective in delivery of the information. He received his training as a Program Officer through the Justice Institute, and attended there about five days a week. He had ongoing training as a probation officer; and then when he became employed by the CSC, they were introducing a new format for the delivery of programs, the Integrated Correctional Program Model (ICPM).
- [44] Mr. Kay acknowledged he is not a psychiatrist or psychologist. The Sex Offender Program is not a one-on-one session, more like a class and it is not the same as group counselling.

- [45] He recalled Mr. Elder was referred to him to attend the Sex Offender Maintenance Program he was running. After an interview, Mr. Elder became part of the Community Maintenance Program. He had previously been engaged in it while in custody. The program Mr. Kay taught was essentially a review of what had already been covered in custody. There were a total of 12 review sessions, plus additional sessions could be added. He was not a mental health professional. He did not have training in psychology or psychiatry or counselling.
- [46] As far as attendance in the program is concerned, participants are expected to attend every class unless they have a proper reason not to do so; for example, illness or an okay from the probation officer. He otherwise did not know of any exemption.
- [47] On Mr. Elder's attendance, he stated that he was sometimes cooperative and participated; other times he was aggressive and argumentative.
- [48] There is no strict structure to the order in which the sessions proceed. Depending on the circumstances, sometimes the instruction starts in the middle of the program and then goes back, and sometimes proceeds on a continuous basis.
- [49] Asked about Mr. Elder and the Triangle Program, Mr. Kay recalled case team discussions about that, presumably including Ms. McDowell. He knew from discussions with colleagues that there was a plan to help Mr. Elder find work in the community. They agreed that it would be good for Mr. Elder. He recalled Ms. McDowell was okay with Mr. Elder being absent from the program so he could participate in the Triangle Program. Mr. Kay knew Mr. Elder had a part-time job as a dishwasher and that his participation was being encouraged. He was aware from his discussion with Mr. Elder and Ms. McDowell that Mr. Elder wanted to work in the community, preferring that over attending Mr. Kay's program. Mr. Kay testified he believed Mr. Elder could both attend the program and work; but was aware Mr. Elder wanted to work.
- [50] On cross-examination, counsel reviewed the contents of an email dated November 20, 2015, sent to Ms. McDowell, Mr. Elder's probation officer at the time, and copied to Ms. Natalie Day, the Acting Director of the CSC. He had been asked to provide a summary of Mr. Elder's attendance at the program.
- [51] Mr. Kay kept a record of Mr. Elder's attendances.
- [52] Mr. Elder understandably had some difficulty recalling his attendances even with the aid of the contents of the February 2015 email. He had no information for 2013 or 2014. Briefly, from his testimony, refreshed from the contents of the email, it appeared Mr. Elder was absent in February 2015 only on the 25th. He happened to be custody around that time. In March 2015, he was absent on the 4th, 11th and 18th but he was also in custody during that period. Mr. Kay was not sure if he was aware of that conjunction of events. In March 2015, Mr. Elder did not miss any days.

[53] In May 2015, he attended on the 6th, 13th and 20th. Mr. Kay saw no indication he missed a session in that period.

[54] In June 2015, he attended on the 10th and 24th; and missed only the 17th. In July 2015, he missed two days, but attended on the 5th and 29th. After his arrest, around August 5, 2015, he could no longer attend any sessions.

VERDICT

[55] For the following reasons, I find Mr. Elder not guilty of Count 2 of the indictment, that:

[F]rom the 1st day of June, 2015 to the 30th day of July 2015, inclusive, at or near Chilliwack, in the Province of British Columbia, did, without reasonable excuse, fail or refuse to comply with a long-term supervision order, to participate in counselling with a mental health professional to address issues related to managing your emotions and your mental health, contrary to Section 753.3(1) of the Criminal Code.

[56] As we saw earlier, s. 753.3(1) provides that an offender guilty of that offence is liable to imprisonment for a term not exceeding 10 years.

[57] As I noted at the outset of these reasons, counsel agree that mens rea must be proven and that the mens rea is one of general intent.

[58] This is not a strict liability offence. Mr. Elder is innocent until proven guilty and the terms of the indictment, its essential elements, have to be proven beyond a reasonable doubt.

[59] Mr. Kay was not a mental health professional trained to address issues relating to Mr Elder's emotions and his mental health. He had no training in psychology or in psychiatry. The sessions he no doubt ably taught were not a form of counselling, either individual or group-based. There is no evidence as to the particulars of the course content and no evidence that it contained anything resembling counselling related to Mr. Elder's emotions or mental health. That is not to say that it would not have been of some value and of indirect benefit related those matters, but there is no satisfying evidence to that effect. In any case, anything other than proof that Mr. Elder was missing counselling sessions conducted by a mental health professional for his mental health and benefit does not satisfy the essential elements of the indictment. The actus reus has not been proven beyond a reasonable doubt.

[60] Further, by June or July 2015, Mr. Elder was engaged in discussions with his parole officer, Ms. McDowell, not only about participating in the Triangle Program, but negotiating extensions of his curfew so that he could complete his restaurant obligations. It is clear Mr. Elder was being encouraged to pursue employment and that the Program Officer was supportive of this endeavor and willing to accommodate missing sessions if Mr. Elder was able to make the arrangements at work to avoid any conflicts.

- [61] Further, I am left with a reasonable doubt as to whether Mr. Elder refused to participate in counselling. He and Mr. Kay engaged in negotiating accommodations that would enable Mr. Elder to work, which Ms. McDowell and the Acting Director were supportive of. Ms. McDowell felt that working in the community would be more helpful to Mr. Elder than attending Mr. Kay's classes.
- [62] Further, missing a small handful of program sessions is not the same as intentionally refusing to participate. There is no evidence Mr. Elder received a clear directive; the circumstances gave room for a misunderstanding. I am left with a reasonable doubt Mr. Elder intentionally refused to participate; and as noted, the Crown has not proven beyond a reasonable doubt Mr. Elder actually did breach the condition stated in Count 2, as worded.
- [63] No criticism of the Crown witnesses' actions two years ago should be implied from these conclusions. They testified in a straightforward way and when not sure about a matter said so.
- [64] I find Mr. Elder not guilty of Count 2.

"N. Brown J."

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