

CANADA / JUDGMENT

R. v. Fizell

2012 BCCA 240

COURT

British Columbia Court of Appeal

DECIDED

30 May 2012

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2012 BCCA 240 R. v. Fizell COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Fizell, 2012 BCCA 240 Date: 20120530 Docket: CA039788 Between: Regina Respondent And Jason William Gerald Fizell Appellant Before: The Honourable Mr. Justice K. Smith The Honourable Mr. Justice Chiasson The Honourable Madam Justice Bennett On appeal from Provincial Court of British Columbia, February 24, 2012 (R. v. Fizell, Vancouver Registry 223287-3-C; 225821-1-T) Oral Reasons for Judgment Counsel for the Appellant: P.E. Briggs Counsel for the (Crown) Respondent: K. Andani Place and Date of Hearing: Vancouver, British Columbia May 30, 2012 Place and Date of Judgment: Vancouver, British Columbia May 30, 2012

- [1] BENNETT J.A.: Mr. Fizell appeals a sentence imposed on February 24, 2012 of a total of 12 months imprisonment followed by one year of probation.
- [2] On January 19, 2012, Mr. Fizell was seen by police in the downtown eastside with a group of men who were inspecting a bicycle. A police officer saw Mr. Fizell swinging a set of nunchaku sticks, which is a prohibited weapon. When arrested, Mr. Fizell was found in possession of two laptop computers, including one that had been stolen about 40 minutes earlier from an automobile.
- [3] Mr. Fizell was released on bail pending his trial. At 1:45 a.m. on February 6, 2012, the police were called to a theft from an automobile in progress. They found Mr. Fizell with pay stubs stolen from a vehicle and a bag of automobile breaking instruments.
- [4] He was detained on these charges until he entered pleas of guilty to possession of a prohibited weapon, possession of stolen property - one laptop computer, one count of theft and one count of possession of automobile breaking instruments. He was sentenced to four months' imprisonment on the January 19 counts and eight months consecutive on the February 6 counts, for a total of 12 months, plus, as noted, the one year of probation.
- [5] Mr. Fizell seeks leave to appeal and to change the 12 month sentence to a conditional sentence order. Section. 742.1 Criminal Code, R.S.C. 1985, c. C-46 reads: 742.1 If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence

punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

- [6] Mr. Fizell has a criminal record with 94 convictions. He is a drug addict. He managed for a period of approximately 18 months to stay drug-free; however, he suffered a serious hand injury at his employment which resulted led him to resume using drugs. He received an \$11,000 settlement from Workers' Compensation for his injury and spent it on drugs.
- [7] He likely committed the instant offences to support his drug habit.
- [8] At sentencing, Mr. Fizell put forward a rehabilitation plan where he would return to residential rehabilitation and, hopefully, return to a drug-free lifestyle. This plan was not put into place when Mr. Fizell was first charged in January, but only when he was charged again and detained in February. Counsel advised us that a similar plan is potentially in place if Mr. Fizell is released today.
- [9] Mr. Fizell cites recent decisions of this Court that suggest that when a drug addict is well on the road to rehabilitation, it would be an error to send him or her to prison for a property offence if imprisonment would thwart the rehabilitation effort: *R. v. Bay*, 2011 BCCA 297; *R. v. Glickman*, 2011 BCCA 293; *R. v. Preston*, (1990), 47 B.C.L.R. (2d) 273, 79 C.R. (3d) 61 (C.A.).
- [10] The learned sentencing judge considered the rehabilitation plan, but concluded that the principles of sentencing would not be properly addressed by the imposition of a conditional sentence order given Mr. Fizell's criminal history.
- [11] Mr. Fizell had a period of time drug-free, but he was not, at the time of sentencing, involved in a rehabilitation program that would have been interrupted by the imposition of a prison sentence. His situation is very different from that of the offenders in *Bay* and *Glickman*.
- [12] Great deference is shown to sentencing judges. Absent an error in principle, overemphasis of a sentencing factor, or a sentence that is demonstrably unfit, this Court will not interfere with the discretion exercised by a sentencing judge: *R. v. M.*(C.A.), [1996] 1 S.C.R. 500 at para. 90; and *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163 at para. 14.
- [13] In my view, the sentencing judge committed no such error and the sentence is not demonstrably unfit. I would grant leave but dismiss the appeal.
- [14] I would like to add that Mr. Briggs said everything he could on behalf of his client. The fact that Mr. Fizell was drug-free for 18 months is very encouraging and I hope that, despite this setback, he is able to continue with the rehabilitative process.

[15] K. SMITH J.A.: I agree.

[16] CHIASSON J.A.: I agree.

[17] K. SMITH J.A.: Leave is granted. The appeal is dismissed. "The Honourable Madam Justice Bennett"

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