
CANADA / JUDGMENT

R. v. Fundal

2017 BCSC 944

COURT

Supreme Court of British Columbia

DECIDED

3 April 2017

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2017 BCSC 944 R. v. Fundal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Fundal,

2017 BCSC 944

Date: 20170403

Docket: X078487

Registry: New Westminster

Regina

v.

Christopher Julius Fundal

Kevin Asi Gonzales

Before: The Honourable Mr. Justice Jenkins

Oral Reasons for Judgment

(Re Accused Christopher Fundal)

Counsel for the Crown:

S.F. Paulson

Counsel for the Accused:

P.W. Janzen

Place and Date of Hearing:

New Westminster, B.C.

March 28 and 29, 2017

Place and Date of Judgment:

New Westminster, B.C.

April 3, 2017

- [1] THE COURT: These are my reasons on the allegation of a breach of the conditional sentencing order. I reserve the right to edit these reasons for clarity and grammar, should a copy be ordered, but the decision will not change.
- [2] On September 22, 2016, Mr. Fundal pled guilty before me to a count of unlawfully trafficking in cocaine on multiple occasions between August 16, 2012, and November 2012, and on that date I received submissions regarding sentencing. Mr. Fundal received a sentence of two years less one day to be served in the community on a conditional sentence, the terms of which included his obligation to keep the peace and be of good behaviour and that during the first six months of his sentence that he honour a curfew and not be outside his residence between the hours of 11:00 p.m. and 5:00 a.m. daily except with the written permission of his supervisor.
- [3] Mr. Fundal was brought back before the court on an allegation that he was in breach of the above terms of his conditional sentence in that, at approximately 1:15 a.m. on March 12, 2017, Mr. Fundal was outside his residence at or near the residence of his girlfriend and his girlfriend's brother and that Mr. Fundal assaulted his girlfriend, Ms. Nguyen, uttered threats to his girlfriend's brother, Mr. Nguyen, committed mischief by throwing a knife through his girlfriend's car window, and breached his conditional sentencing order by being out past his curfew.
- [4] Following the incidents of that morning, statements were given by April Nguyen, Victor Nguyen, and a third person who was present on the morning of March 12, 2017, Mr. Guang. Each of those statements were signed by those persons. The statements are handwritten and were taken approximately two hours after the alleged incident.
- [5] On March 14, 2017, two days after the alleged breach, the Crown sent via fax the materials for disclosure on this application to counsel for Mr. Fundal. The CSO breach allegation included in that material was signed by Mr. Fundal's conditional sentencing order supervisor. That package included the three signed statements as well as the CSO supervisor material which in turn included unsigned summaries of the statements and the summary of evidence of the officer who investigated the alleged breach. The disclosure by the Crown included 45 pages in total. The signed copies of the statements were not attached to the report to Crown, but were included in the 45 pages of material provided with the report to defence counsel. On March 15, 2017, counsel for Mr. Fundal acknowledged he had received the Crown fax, but made no comment as to the materials being deficient. Likely, counsel

had not then had an opportunity to review the materials in detail.

- [6] The report of the probation officer in this case includes a narrative of statements by the above persons plus a statement from a police officer who completed his statement following an interview of the witnesses. However, the report did not include the signed statements of Mr. Nguyen, Ms. Nguyen, and Mr. Guang. Counsel for Mr. Fundal submits that the report to Crown does not comply with the requirements of s. 742.6 of the Code which sets out the procedural requirements for evidence at hearings inquiring into a possible breach of a conditional sentencing order. Section 762.6(4) [sic, 742.6(4)] provides:

An allegation of a breach of condition must be supported by a written report of the supervisor, which report must include, where appropriate, signed statements of witnesses.

- [7] Briefly, the Crown submits that substance should prevail over form and that the signed statements were included in the materials upon which the Crown intended to rely at the CSO breach allegation hearing. The leading case regarding s. 762.6 is *R. v. McIvor*. In *McIvor*, Mr. Justice Charron emphasized Parliament's intent to keep the process for proving a breach of a conditional sentencing order simple and expeditious. At para. 26, Justice Charron stated:

I stated earlier that the contents of the supervisor's report or of any witness statement need not be confined to firsthand knowledge where the information would be otherwise admissible if offered *viva voce* . . .

- [8] This suggests the report and the signed statements need not form a single document to comply with s. 742.6(4). Rather, the fact these documents are conveyed to the offender before the hearing, regardless of whether the signed witness statements are physically attached to supervisor's report, is sufficient. I find that allowing the Crown to include signed witness statements by admitting the signed statements in addition to separate supervisors' reports, rather than requiring those documents be physically attached to the report or combined, properly balances form and substance in a manner consistent with *McIvor*. As such, I find the Crown properly included the signed witness statements with the supervisor's report.

- [9] Counsel also took issue with the manner in which the Crown sought to admit the report which he argued did not comply with s. 742.6(5) of the Code. Section 742.6(5) provides, first of all:

The report is admissible in evidence if the party intending to produce it has, before the hearing, given the offender reasonable notice and a copy of the report.

- [10] This issue was dealt with by our Court of Appeal in *R. v. Johal*, 2016 BCCA 157. While this case was not put before me by the parties, it involves facts similar to the case at bar. Mr. Johal was arrested for breach of conditions while serving a 12-month CSO. At the hearing of the alleged breaches, Mr. Johal objected to the admissibility of the report by his supervisor on the basis that the witness statements attached to it were not signed. The judge adjourned the hearing. On the resumption date, the Crown gave Mr. Johal a new copy of the report with

signed witness statements. Mr. Johal asked the judge to recuse himself. The judge acceded. When the hearing commenced in front of a new judge, Mr. Johal objected to the admissibility of the report on the basis he had not received it "before the hearing." The judge determined the date of the hearing in front of her constituted a new hearing, but that Mr. Johal had full notice of the material in the report in September 2014 during the initial hearing and that he was not prejudiced by the fact that signed statements had not been provided until the morning of December 15, 2014. Subsequently, she admitted the report, found the breaches were made out, and ordered Mr. Johal to serve the balance of his sentence in custody. Groberman J.A., writing for the B.C. Court of Appeal, found no error in the B.C. Provincial Court judge's decision to admit the report on the hearing before her and dismissed Mr. Johal's appeal.

- [11] Accordingly, I am satisfied there has been no prejudice to the defence in this matter due to the procedural error in not having the signed statements directly attached to the report to Crown. The defence had at all times signed statements of the witnesses to the incident along with all other disclosure, and I find that the report of the Crown is fully admissible including the signed statements and that, in substance, the requirements of s. 762.6 [sic, 742.6] have been met by the Crown and find that the acceptance of the report by Crown is consistent with the decisions in McIvor and Johal.
- [12] Having found a breach, the options available to the court are to take no further action against Mr. Fundal, terminate the CSO and commit Mr. Fundal to serve the balance of the conditional sentence in jail, or call upon Mr. Fundal to serve a portion of the remaining balance of the sentence in jail, i.e., suspend the CSO house arrest for a period time and require that he serve a portion of his sentence in jail and require Mr. Fundal to return to the conditions for the balance of the sentence.
- [13] The sentence given to Mr. Fundal on November 15, 2016, included precise and clear terms for his curfew and his obligation to keep the peace and be of good behaviour. He has breached both of those conditions. His actions are unfortunate in that Mr. Fundal who had no prior criminal record, who is a young offender with good family support and a good work record -- was unable to comply with the simple terms of his conditional sentencing order. Trafficking is a very serious offence and Mr. Fundal is fortunate to have received a conditional sentencing order in the circumstances in this case, but Mr. Fundal is still young and maintains the support of his family.
- [14] In these circumstances, I look for a sanction for the breach which is in proportion to the facts surrounding the breach and, after doing so, I find that Mr. Fundal must spend some time in jail as a consequence of his actions.
- [15] I therefore suspend the terms of his conditional sentencing order for a period of 90 days, during which time, Mr. Fundal must be incarcerated before returning to the terms of his conditional sentencing order. The 90 days shall be reduced for the period from March 16, when I believe he was arrested, to March 30, during which Mr. Fundal was in custody during

those 14 days, leaving a balance of the sentence being 76 days in custody. The terms of the conditions of his conditional sentencing order would continue after he serves his time in jail, and those are my reasons.

"Jenkins J."

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