CANADA / JUDGMENT

R. v. Goddard

2019 BCCA 164

COURT
British Columbia Court of Appeal

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2019 BCCA 164 R. v. Goddard

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Goddard,

2019 BCCA 164

Date: 20190510

Docket: CA45684

Between:

Regina

Respondent

And

Jeffrey Alan Goddard

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Fitch

On appeal from: An order of the Provincial Court of British Columbia, dated

October 1, 2018 (R. v. Goddard, 2018 BCPC 335, Surrey Docket 208040-4B).

Counsel for the Appellant:

G.J. Barriere

B.R. Anderson

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

April 15, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 10, 2019

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Newbury

Summary:

The appellant pleaded guilty to breaching a condition of his probation order and was sentenced to one day of imprisonment in addition to time served and three years' probation. He appeals from six conditions of his probation order, alleging that they are unreasonable, overbroad, vague, or unconstitutional. Held: leave to appeal granted; appeal allowed in part. Two conditions are struck. These conditions authorized broad searches of the appellant's home and electronic devices with his consent. If the appellant withheld consent, he was required to report daily to his probation officer. Conditions of this kind should be avoided because they may be seen as coercing the giving of consent and call into question the validity of any waiver of the constitutional right to be free from unreasonable searches. Three other conditions are varied, two by consent, to address concerns about overbreadth and vagueness. A condition requiring electronic supervision is upheld.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

Overview

[1] The appellant pleaded guilty to breaching a condition of his probation that prohibited him from possessing a cell phone capable of accessing the internet contrary to s. 733.1(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. He was sentenced to one day of imprisonment, in

addition to eleven months' credit for pre-sentence custody, to be followed by a three-year probation order. He applies for leave to appeal and, if leave is granted, appeals a number of conditions of the probation order, arguing they are unreasonable, overbroad, vague, or unconstitutional.

Background

[2] The appellant, who is 29 years old, has a criminal record dating back to 2010. His substantive offences include sexual offending against vulnerable individuals, including minors. He also has a history of breaching conditions of his probation.

[3] On June 2, 2011, the appellant was sentenced for three substantive offences committed in 2010: personating a police officer, communicating via a computer to lure a child under the age of 16, and invitation to sexual touching. In the first two offences, the appellant used social media to communicate with boys and girls aged 12 to 16 while pretending to be a police officer. He asked to meet with some of those children. The third offence involved a 14-year-old ward of the state. The appellant invited the child to have a shower with him, stood in front of him naked and asked him for sex. For these offences, the appellant was sentenced to a term of imprisonment and three years' probation.

[4] At the same time, the appellant was sentenced for two breaches of his bail conditions. One of those breaches involved using social media to communicate with children under the false pretense of being a woman whose cousin, a news reporter, wanted to do a commercial with them. He met with some of those children, posing as the news reporter. The other breach was related to his possession or use of an electronic device capable of accessing the internet.

[5] On July 13, 2012, the appellant breached his probation order by posing as a landscaper and using social media to hire three teenage boys to work for him. He was sentenced to 12 days' jail in addition to time served.

[6] The appellant breached his probation order again on June 11, 2013, and October 29, 2013, by failing to report and failing to seek employment. On October 23, 2014, he was sentenced to a further three years of probation for those breaches.

[7] On August 13, 2015, the appellant was sentenced to a further three years of probation for sexually assaulting his cellmate at the Surrey Pretrial Services Centre in October 2014. The victim was 18 years old and particularly vulnerable due to a medical condition. The appellant forced the victim to masturbate him in the cell, telling the victim that if he did not comply, he would "smash his face into the wall and call friends outside of jail to beat him up if he told anyone about it."

[8] On January 12, 2017, the appellant was sentenced to one day in jail in addition to what was described as a "considerable period of time" served for breaching his probation. A neighbor reported that the appellant, who was prohibited from possessing a computer, had an iPhone, a computer, and an internet router in his residence. The police discovered that, contrary to another condition of his probation order, he also had an active internet account.

[9] On July 30, 2017, the date of the offence that is the subject of this appeal, the appellant was subject to two probation orders. He left his residence and contacted the police to inform them that he planned on staying at a homeless shelter. He said he was leaving the residence because death threats had been made against him. The police found the appellant and tried to help him find housing for the night so he would not be in breach of his curfew. The appellant called his mother on his cell phone and asked to stay with her. She refused. He handed his phone to a police officer, asking the officer to speak with his mother. The officer saw that the phone was displaying a 3G data connection, which suggested that it was capable of accessing the internet. The appellant was arrested. A further search revealed that the contract for the appellant's cell phone, which he had purchased less than two weeks previously, included internet access. The search indicated that the appellant had made contact over social media with three males representing themselves to be under 18. The appellant pleaded guilty to one count of breaching his probation order by possessing a cell phone capable of accessing the internet.

Positions at Sentencing

[10] At the sentencing hearing, the Crown and defence agreed that the appellant should be sentenced to one day of jail in addition to his eleven months of pre-sentence custody, and three years' probation. They disagreed on some of the conditions of the probation order.

[11] The Crown's position was that the appellant posed a significant risk of committing serious offences against vulnerable young persons and had a history of failing to comply with court orders. Strict terms were therefore necessary to protect the public against the commission of further offences.

[12] The position of the defence was that some of the conditions sought by the Crown were overbroad, unconnected to the offence for which the appellant was being sentenced, vague, or unconstitutional.

[13] The sentencing judge had before him a psychiatric assessment dated February 14, 2011, a pre-sentence report dated February 17, 2011, and an update to the 2011 pre-sentence report dated January 21, 2013. Unfortunately, no updated pre-sentence report was before the court in relation to this matter.

[14] The author of the 2011 pre-sentence report noted that the appellant appeared to accept little, if any, responsibility for the offences. The probation officer recommended that conditions be imposed to restrict the appellant's access to the internet and to minors. The author of the 2011 psychiatric assessment opined that the appellant was a moderate to high risk to

reoffend. She identified circumstances in which the appellant would be at an elevated risk to commit a sexual offence in the future, including if he fostered relationships with teenage boys or possessed a computer or device with access to the internet.

[15] The author of the 2013 update reported that the appellant was struggling with his sexual identity and desired further counselling and treatment. The appellant admitted that he struggled with telling the truth and abiding by court orders:

[Jeffrey] admits he struggles with being truthful and often develops elaborate explanations for his behaviours which are often deceiving. His risk factors include inappropriate sexual behaviours, and he states he realizes he needs further counselling and programming, especially sex offender treatment in order to explore his sexuality.

[Jeffrey] struggles to abide by the Conditions of Community Supervision Orders, violating them on several occasions. His lack of honesty and integrity make it a challenge for any meaningful intervention and he acknowledges in order for him to avoid being further involvement [sic] in the criminal justice system, he needs to make significant changes in his behaviours.

[16] With respect to the appellant's behavior around technology, the author reported:

[Jeffrey] admits he is not able to manage himself and set boundaries around technical equipment and cannot trust himself around it. He proposed that he not be given permission to have a cell phone stating that he can access the internet without anyone finding out. [Jeffrey] reports it is too much of a risk factor for him to own one and suggests he be limited to a landline. Jeffrey also states he has more knowledge and expertise with computers and technical equipment, more than the regular individual and can easily manipulate devices in order to allow him to access the internet and commence interactions with others.

[Jeffrey] has an overly boastful view of his current offences stating that Corrections and Police were unable to meet his level of technical expertise. He stated criminal justice agencies were unable to stop him from having access to the internet, mostly because he is so capable of technical manipulation. He recalled a home visit conducted by Corrections and laughed when citing the story, noting he had access to an internet cable through the floor but was not caught with it, making him feel in his deception, he was more clever than others.

[17] The sentencing judge found that all 23 probation conditions sought by the Crown were necessary either to facilitate the appellant's rehabilitation or to protect the public from the risk posed by the appellant. Condition 16, which has not been appealed, prohibits the appellant from possessing, using or accessing any computers, cellular telephones, communication devices, data storage devices, game consoles, or any device capable of accessing the internet, except with the written permission of his probation officer.

Issues

[18] The appellant submits that the sentencing judge erred in law by imposing conditions of probation that are unauthorized by the governing legislation and that infringe his Charter rights. In addition, he submits that the judge erred in principle by imposing conditions that are vague and overbroad or otherwise unreasonable because there is an insufficient nexus between those conditions and the protection of the public or the appellant's rehabilitation. He takes issue with six of the 23 conditions.

Analysis

Standard of Review

[19] Sentencing judges have considerable latitude in crafting appropriate conditions of probation: R. v. Shoker, 2006 SCC 44 at para. 14; R. v. Knott, 2012 SCC 42 at para. 1. An appellate court will intervene in this exercise of discretion only where the judge erred in principle or imposed a condition that is clearly unreasonable, or if the order is manifestly inappropriate or renders the sentence unfit: R. v. Bourque, 2013 BCCA 447 at para. 25; Knott at para. 61.

Legal Principles

[20] Section 732.1(3)(h) of the Code, the so-called residual clause, provides that in addition to the enumerated conditions, a sentencing court may impose other reasonable probation conditions that are considered to be desirable for protecting society and for facilitating the offender's successful reintegration into the community. All of the conditions at issue on appeal were imposed pursuant to s. 732.1(3)(h).

[21] A probation order permits the offender to live in the community subject to certain restraints on his freedom, which are imposed for the purpose of rehabilitating him and protecting society: Shoker at para. 10. The primary purpose of a probation order was reiterated recently in R. v. Duguay, 2019 BCCA 53:

[60] As explained in R. v. Proulx, 2000 SCC 5 at para. 32, probation has traditionally been viewed as a rehabilitative sentencing tool. A probation order may have punitive effects or aspects. But punishment is not the dominant purpose of such an order nor is it an inherent aspect of that order.

[61] While the primary purpose of a probation order is rehabilitative rather than punitive, its conditions will inevitably entail some restriction of liberty. As Bennett J.A. noted in R. v. Voong, 2015 BCCA 285 at para. 37, probation orders are designed not only to reintegrate offenders into the community but to protect society. The conditions imposed in pursuit of that goal will frequently be experienced by the offender as entailing "negative consequences". What is prohibited is the imposition of a term of probation for a primarily punitive purpose: Shoker at paras. 10, 13.

[22] In Duguay, this Court addressed the interpretive principles relevant to the scope of s. 732.1(3)(h):

[65] First, while "reasonable conditions" will generally be linked to the particular offence, this is not an absolute requirement. What is required is a nexus between the offender, the protection of the community and the offender's reintegration into the community: [Shoker] at para. 13.

[66] Second, the broad power to craft conditions of probation under the residual clause is an important tool in a sentencing judge's arsenal. The Court recognized in Shoker that it would be impossible for Parliament to contemplate and spell out every possible condition that might serve to advance identified rehabilitative and public protection goals: at para. 14. In R. v. Knott, 2012 SCC 42, the Court confirmed that sentencing judges must retain as much flexibility as the Code permits in crafting individualized sentences that reflect the principles of sentencing, including reliance on community-based sanctions as an alternative to incarceration in appropriate cases: at paras. 1-2, 10, 43; ss. 718.2 (d)-(e) of the Code. There are, in fact, only a few judicially-recognized limits on the kinds of conditions that can be imposed under the residual clause. These limits include the rule against delegation of a judicial function. They also include the need for probation conditions to be clear, unambiguous and enforceable. In addition, in accordance with the language of the residual clause, the conditions must be "reasonable" in the circumstances and "desirable" to achieve the purposes of a probation order. Finally, they must be compliant with other provincial and federal legislation, including the Charter: Shoker at para. 14; R. v. Traverse, 2006 MBCA 7, at para. 24.

[67] Third, just as the wording of the residual clause can inform the sentencing judge's exercise of discretion in imposing one of the enumerated optional conditions, those enumerated conditions can, in turn, assist in interpreting the scope of the "other reasonable conditions" that can be imposed under the residual clause: Shoker, per Charron J., for the majority, at paras. 14, 22; per LeBel J., concurring in the result, at para. 30.

[23] Probation conditions may serve one or both of the stated purposes of rehabilitation and public protection: R. v. Timmins, 2006 BCCA 354 at para. 9. In addition, the conditions must be clear, unambiguous, enforceable, and compliant with federal and provincial laws and the Charter.

[24] With these principles in mind, I turn to the impugned conditions.

Discussion

Condition 10

[25] Condition 10 states:

Condition 10: You must not go to any public park, public swimming area, or community centre where persons under the age of 18 years are present or can reasonably be expected to be present, or a daycare centre, school ground or playground. This condition is to be monitored by electronic supervision.

[26] The appellant submits that Condition 10 should be amended to permit him to attend these locations while accompanied by an adult approved of in advance by his probation officer. The Crown consented to this exception at the sentencing hearing and agrees that it should be modified as the appellant suggests. I would amend Condition 10 accordingly but require the appellant to obtain the required approval in writing.

Condition 12

[27] Condition 12 states:

Condition 12: You will not be found wearing or in possession of any clothing, hats, or any insignia, patch or emblem that represents you falsely as an employee or representative of that business or company. If you are employed by a business or a company you are to provide proof of such employment to your probation officer.

[28] The appellant says that Condition 12 is unreasonable. He says that the condition has no connection to the offence for which he was sentenced. He submits that the only offence on his record that has a bearing on this condition - the breach of his probation by pretending to be a landscaper - was committed more than six years before sentencing. Moreover, he says that there was no evidence that he had ever worn any kind of clothing or hat to facilitate a false representation that he was an employee or representative of a company.

[29] The appellant also says that the condition is overbroad. He argues that he could be in breach of the condition - and therefore be guilty of a criminal offence - simply by wearing a sports jersey. In addition, the appellant says the condition is vague in that it is not clear what behaviour would constitute falsely representing himself as an employee of a company. He suggests, for example, that by wearing a Nike hat, he could be taken as falsely representing himself to be an employee of Nike.

[30] The Crown submits that Condition 12 is neither overbroad nor vague and is appropriate given that the appellant has misrepresented his employment to gain access to young persons in the past. The Crown says that wearing a sports jersey would not give rise to a reasonable inference that the appellant was representing himself as an employee or representative of a sports team. The Crown submits that the phrase "represents you falsely as an employee or representative of that business or company" is not vague, but provides a meaningful standard for assessing the appellant's conduct.

[31] I do not agree with the appellant's position that Condition 12 is inappropriate because it is not directly related to the offence for which he was being sentenced. As noted in Shoker, reasonable conditions will generally be linked to the particular offence but need not be: at para. 13. I am satisfied that the required nexus between the condition and the protection of

the community is present here. The appellant has held himself out as being a law enforcement officer or employed by a business in order to gain access to minors not once, but three times - by posing as a police officer, a news reporter, and a landscaper.

[32] However, the condition is arguably overbroad and vague in its current form. Obviously, it is not the purpose of the order to subject the appellant to criminal liability for wearing a T-shirt or cap bearing the logo of a business. In my view, the condition should be refined to more narrowly target the type of manipulative behavior that motivated its imposition. I would amend the condition as follows:

Condition 12: You will not deliberately hold yourself out as being an employee or representative of any business or company that does not in fact employ you or that you do not in fact represent, or as being self-employed in a business in which you are not legitimately self-employed, whether by your words, clothing, other visual symbol, or in any other manner. If you are employed by or a representative of any business or company, or if you are self-employed, you are to provide proof of that employment to your probation officer.

Conditions 17 and 18

[33] Condition 17 provides:

Condition 17: You shall, upon your consent, allow any peace officer and/or probation officer to examine any device in your possession and permit any peace officer to bring any device in your possession to the police department to verify compliance with this order. You shall provide any peace officer and/or probation officer any passwords, access codes and manuals associated to any device in your possession to enable examination of the device. If you do not consent, you shall forthwith report to your probation officer and thereafter report daily to him or her until the probation officer decides that daily reporting is not necessary.

[Emphasis added.]

[34] Condition 18 provides:

Condition 18: You shall, upon your consent, allow any peace officer and/or probation officer to access your residence to confirm your compliance with the conditions of this order. If you do not consent to allow a peace officer and/or probation officer access to your residence to confirm compliance with conditions of this order, you shall forthwith report to your probation officer and thereafter report daily to him or her until the probation officer determines that daily reporting is no longer necessary.

[Emphasis added.]

[35] Condition 17 authorizes much more than a cursory search of a device found in the appellant's possession for the limited purpose of determining whether it is capable of accessing the internet. With the appellant's consent, Condition 17 authorizes the seizure of the device and forensic examination of the data it stores to ensure compliance with the terms of the order. With the appellant's consent, Condition 18 similarly permits a search of his home, a place in which he obviously has a significant privacy interest.

[36] The appellant, who opposed Conditions 17 and 18 and has not consented to the searches contemplated by those conditions, submits that they: (1) are enforcement conditions not authorized under the residual clause; and (2) infringe the Charter by coercing him to consent to privacy-invasive searches of his electronic devices and his home that would otherwise be unreasonable and violate his s. 8 rights. On this latter point, the appellant submits that any such consent would not be valid as it would be obtained by the threat of daily reporting to his probation officer. The appellant argues that daily reporting would be particularly onerous for him, noting that at the time of the offence he was homeless and reliant on public transportation.

[37] The Crown says that Conditions 17 and 18 do not authorize unconstitutional searches because no search can occur without the appellant's consent. The conditions do not compel the appellant to consent to what would otherwise be unconstitutional searches. The Crown submits that the default requirement of daily reporting is an alternative means of protecting the public if the appellant chooses not to consent. The Crown says daily reporting is not unduly harsh or coercive because it is only mandatory so long as the probation officer considers it appropriate. The Crown points out that judges frequently delegate to probation officers the authority to require offenders to report to them as often as they deem necessary.

[38] The appellant and the Crown devoted much of their argument on this issue to the significance of the Supreme Court of Canada's decision in Shoker. While Shoker is instructive, I do not see it as being dispositive of the issue that arises in this case.

[39] In Shoker, the issue was whether s. 732.1(3)(c) or (h) authorized a condition of probation that required the offender to provide, on demand by a probation officer, samples of breath, urine, or blood for analysis to determine his compliance with an abstention condition. The majority of the Court found that there was no authority in the Code for the imposition of such a condition. Justice Charron remarked in obiter that a probation order could not "compel" an offender to submit to searches of his home:

[22] Section 732.1(3)(h) speaks of "other reasonable conditions". It is reasonable to infer that additional conditions imposed under the residual power would be of the same kind as the listed conditions. However, conditions intended to facilitate the gathering of evidence for enforcement purposes do not simply monitor the probationer's behaviour and, as such, are of a different kind and, because of their potential effect, absent the probationer's consent to such conditions, raise constitutional concerns. For example, could Mr. Shoker be compelled, as a condition of his probation, to make his home available for inspection on demand to

> better monitor the prescription against the possession of alcohol or drugs? Such a condition in effect would subject him to a different standard than that provided by Parliament for the issuance of a search warrant. In my view, it could not reasonably be argued that the sentencing judge would have the jurisdiction to override this scheme under the authority of the open-ended language of s. 732.1(3)(h). It would be up to Parliament, if it saw fit, to enact any such scheme.

[Emphasis added.]

[40] Justice Charron concluded that "it is up to Parliament, not the courts, to balance the probationers' Charter rights as against society's interest in effectively monitoring their conduct": at paras. 23-26. Justice LeBel, concurring in the result, concluded that the authority to impose monitoring conditions exists, but that the condition in issue would breach s. 8 in the absence of a statutory framework consistent with Charter standards: at paras. 40, 42-43.

[41] What distinguishes Shoker from this case is that Conditions 17 and 18 do not require the appellant to submit to searches of his electronic devices or his home. He can refuse to provide consent to these searches. Significantly, however, his refusal comes at the price of daily reporting to his probation officer for as long as the probation officer deems necessary.

[42] The sentencing judge justified the imposition of these two conditions on two bases.

[43] First, the judge sought to distinguish Shoker on the ground that it only applies to searches of bodily samples. While it is true that the issue before the Court in Shoker concerned the propriety of a probation condition authorizing the compelled seizure of bodily samples as an enforcement mechanism, I cannot endorse the sentencing judge's narrow reading of that case. The paragraph quoted above makes clear that the principles underlying the majority's decision were intended to be applicable to searches of an offender's residence. In my view, those principles must also apply to the sort of intrusive searches of electronic devices that Condition 17 contemplates. The judge relied on R. v. Unruh, 2012 SKCA 72, in support of his narrow reading of Shoker. If Unruh stands for the proposition that the reasoning in Shoker applies only to the compelled seizure of bodily samples as an enforcement mechanism, I respectfully disagree. In any event, Unruh is distinguishable from this case because the offender "wholeheartedly consented" to searches of his residence and person during the currency of the probation order. Further, I do not understand the Crown to argue that Conditions 17 and 18 could authorize searches of the appellant's home or devices in the absence of his consent. Rather, the Crown argues that the conditions authorizing searches are constitutionally compliant because they only come into effect upon the consent of the appellant.

[44] Second, the judge concluded that Conditions 17 and 18 were justified on the authority of this Court's decision in Bourque. I note that conditions somewhat similar to Conditions 17 and 18 were imposed by the sentencing judge in Bourque. One of the conditions provided:

Condition 16: You are not to possess any computer or device or telecommunication device capable of accessing the internet. You will allow your Probation Officer or a Police Officer acting on behalf of your probation officer access to your residence to ensure compliance with this term.

Importantly, the propriety of that condition was not in issue on appeal. As a consequence, this Court's judgment does not speak to the issue that arises in this case. With respect, the sentencing judge erred in suggesting during an interchange with the appellant's counsel on the sentencing hearing and in his reasons for sentence that this condition was "upheld" on appeal in Bourque.

[45] Two other conditions of probation imposed by the sentencing judge in Bourque provided:

Condition 38: You are prohibited from owning, having custody or control of, or residing in any premises where animals or birds are present.

Condition 39: Having consented, a probation officer or peace officer acting on behalf of a probation officer may attend any place where you are residing to ensure compliance with this condition.

[46] Condition 39 was appealed, apparently on the sole basis that the words "this condition" were unclear. It was amended to clarify that it related to Condition 38. This Court noted that the appellant had apparently consented to the condition and no issue appears to have been raised with respect to the validity of her consent: at para 45. Importantly, no consequence was imposed for refusing to consent. In my view, this Court's judgment in Bourque cannot be read as authorizing the imposition of Conditions 17 and 18 and provides little guidance for the resolution of this appeal.

[47] The appellant's argument that the sentencing judge did not have jurisdiction under the residual clause to impose Conditions 17 and 18 was raised for the first time in oral argument. The point was not well developed and counsel for the Crown had no meaningful opportunity to respond. It is, in any event, unnecessary to address the point in this case as I have come to the conclusion that the language used in Conditions 17 and 18 raises serious constitutional concerns and should be avoided.

[48] To put this issue in context, I begin by noting that the threat of daily reporting was not imposed as an alternative means of ensuring compliance with conditions designed to prevent the appellant from using the internet to prey upon children. It appears to me to be wholly unrelated to the community safety concerns that motivated Conditions 17 and 18. There is no evidence before us that it would do anything to ameliorate the risk that the appellant will use the internet for nefarious purposes. Rather, it is, in its effect, a retaliatory and punitive measure that appears to be designed to pressure the appellant to waive his constitutional rights.

[49] The central difficulty with the way in which Conditions 17 and 18 are drawn stems from the fact that the appellant is subject to an additional and onerous condition should he refuse to consent to searches being conducted of his electronic devices and home. The validity of any ostensible consent conferred in these circumstances would be open to challenge. I say this

for the following reasons. By consenting to a search of his residence or his electronic devices in the absence of any grounds to believe that he was committing or had committed an offence, the appellant would effectively be waiving his constitutional right to be free from unreasonable search and seizure. For a waiver of constitutional rights to be valid it must, among other things, be voluntary, meaning that the individual can choose one course of conduct over another, free from coercion: Goldman v. The Queen, [1980] 1 S.C.R. 976 at 1005; R. v. Reeves, 2018 SCC 56 at paras. 13, 49-52. From a constitutional perspective, the problem with the conditions is that a refusal by the appellant to consent to the searches entails a significant consequence: the threat of daily reporting.

[50] I find particularly instructive on this point the reasons for judgment of Justice Doherty in R. v. Wills (1992), 12 C.R. (4th) 58 (Ont. C.A.), cited with approval in R. v. Borden, [1994] 3 S.C.R. 145, and Reeves. At issue in Wills was whether the appellant's consent to provide a breath sample to a police officer investigating a fatal accident was valid in law. In addressing that point Doherty J.A. made these observations:

46. The danger to constitutionally protected individual rights implicit in the equating of consent with acquiescence or compliance is self-evident and does not require detailed elaboration. When the police rely on the consent of an individual as their authority for taking something, care must be taken to ensure that the consent was real. Otherwise consent becomes a euphemism for failure to object or resist, and an inducement to the police to circumvent established limitations on their investigative powers by reliance on uninformed and sometimes situationally compelled acquiescence in or compliance with police requests: see Law Reform Commission of Canada, Police Powers: Search and Seizure in Criminal Law Enforcement, Working Paper 30 (1983), at pp. 158-163.

47. While it is necessary to avoid an overly broad approach to consent, it is also necessary to recognize that valid consents reinforce the principle of individual autonomy which underlies the rights set out in the Charter: see R. v. Turpin, [1989] 1 S.C.R. 1296 [at 1316] .... Individuals are free to define their own privacy interests and to yield those interests when so inclined. In recognizing that a valid consent must be an answer to any subsequent claim of a s. 8 violation, our law recognizes that autonomy [citations omitted].

48. When one consents to the police taking something that they otherwise have no right to take, one relinquishes one's right to be left alone by the state and removes the reasonableness barrier imposed by s. 8 of the Charter. The force of the consent given must be commensurate with the significant effect which it produces.

49. The Supreme Court of Canada has applied a stringent waiver test where the Crown contends that an accused has yielded a constitutional right in the course of a police investigation. According to that doctrine the onus is on the Crown to demonstrate that the accused decided to relinquish his or her constitutional right with full knowledge of the existence of the right and an appreciation of the consequence of waiving that right [citations omitted].

51. The exercise of a right to choose presupposes a voluntary informed decision to pick one course of conduct over another.

69. In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that:

(i) there was a consent, express or implied;

(ii) the giver of the consent had the authority to give the consent in question;

(iii) the consent was voluntary in the sense that that word is used in Goldman [[1980] 1 S.C.R. 976 at p. 1005] and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;

(iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,

(vi) the giver of the consent was aware of the potential consequences of giving the consent.

[Emphasis added.]

[51] Given the manner in which Conditions 17 and 18 are drawn, any consent given by the appellant pursuant to those conditions would be susceptible to an argument that because such consent was obtained through coercion (in the form of the threat of daily reporting), the alleged waiver of constitutional rights was involuntary and, thus, invalid. In my view, sentencing courts should avoid imposing terms that are likely to give rise to a violation of constitutional rights.

[52] As Doherty J.A. noted in Wills at para. 48, the "force" (or legitimacy) of the waiver must also be commensurate with the effect it produces. Here, the consequences of the appellant's waiver are serious. By conferring his consent, the appellant would be authorizing his probation officer and any police officer to search his personal electronic devices and home at a time of their choosing. The appellant would effectively surrender to the state his most fundamental privacy interests for a period of three years. Further, the discovery of evidence that he is in breach of his probation order could expose him to criminal liability and a maximum penalty of four years in prison pursuant to s. 733.1(1)(a).

[53] For the foregoing reasons, I would strike out Conditions 17 and 18 in their entirety. While the conditions would likely be unobjectionable without the daily reporting proviso, no purpose would be served by striking out this part of each condition and leaving the rest. The conditions would then provide that the appellant may consent to a search, which is simply a statement of the law (see Reeves at para. 13) and not a condition that should form part of a probation order.

[54] I recognize that cases like this raise particular challenges for probation officers and law enforcement officials attempting to supervise and enforce compliance with court orders designed to protect the public from high-risk offenders. I also recognize that probationers have a reduced expectation of privacy: Shoker at para. 25. Where, as here, public safety concerns are pronounced, a more limited search condition intended to monitor compliance with a term prohibiting the possession of internet-capable devices might be found to pass constitutional muster. Such a condition might, for example, be drafted to require a probationer to show a device in his possession to a police officer or probation officer for the limited purpose of permitting that officer to conduct a cursory search to determine whether the device is capable of accessing the internet. I wish to be clear that I am not deciding that issue in this case. In my view, it would be inappropriate to do so in circumstances where the issue has not been raised by the parties and the Court does not have the benefit of either an evidentiary record or full submissions on the point, including on whether such a condition would, absent a legislative amendment, run afoul of Shoker.

[55] In addition, I wish to be clear that my reasons extend only to the language used in Conditions 17 and 18. Probation conditions of this kind are formulated in many different ways in response to a variety of different contexts. The differences are sometimes nuanced but may well have both constitutional and jurisdictional implications. In my view, the propriety of other formulations of similarly-motivated conditions should be left to be determined on a case-by-case basis.

Condition 21

[56] Condition 21 provides:

Condition 21: This order will be electronically supervised. You must comply with the electronic supervision regulations, including the wearing of and care for the electronic supervision equipment.

[57] The appellant argues that Condition 21 unreasonably infringes on his privacy and should be deleted. He says that there is an insufficient nexus between this term and his circumstances as there was no evidence before the court that he had ever attended a place such as a park or swimming pool in order to facilitate the commission of an offence, and the last substantive offence that involved sexual offending against a minor occurred on August 26, 2010, eight years before the sentencing for this offence. At the time of the offence underlying this appeal, the appellant emphasizes that he was forthcoming with the police and alerted them to his whereabouts. As such, he says the condition is unreasonable and renders his sentence

unfit.

[58] The Crown submits that electronic supervision is reasonable. It says that the order is directly related to the concern at the heart of the order: managing the risk that the appellant poses to young boys. It also says that the condition is relevant to the offence in this case, which involved not only accessing the internet but engaging in some measure of contact with teenage boys via social media.

[59] I see no error in the sentencing judge's decision to impose this condition. The appellant has demonstrated an entrenched pattern of manipulative behaviour and has gone to extraordinary lengths to lure children in the past. The required nexus between the offender and the protection of the community is present: Shoker at para. 13. I would not disturb this condition.

Condition 23

[60] Condition 23 provides:

Condition 23: You must not engage in activities, volunteer work or employment that could bring you in contact with persons under the age of 18 years without the written permission of you probation officer and when so engaged, you must carry that permission on your person.

[61] The appellant submits that Condition 23 is overbroad, unreasonable, and detrimental to his rehabilitation and re-integration into society. He submits that engaging in almost any employment or activity could potentially bring him into contact with minors, other than working in an establishment such as a bar or liquor store. He says that Condition 9, which prohibits him from having contact or communication with anyone under the age of 18, is sufficient to protect the public.

[62] The Crown submits that this condition is reasonable given the appellant's fixation on young boys and the judge's finding that the appellant poses a risk to others. I agree. Some restriction on the appellant's ability to engage with minors through his employment, volunteer work, or other activities is appropriate given his history and demonstrated ability to manipulate and deceive vulnerable young people with whom he comes into contact. However, the Crown is not opposed in this case to a variation of the term to ensure that it is not vague, overbroad, or unduly restrictive.

[63] I note that the language of Condition 23 is recommended in a "Probation Picklist" developed for use by judges in British Columbia. While I do not wish to be taken as ruling on the propriety of the condition as framed by the judge below, given the position the Crown has taken on this appeal, I would amend the condition to read as follows:

Condition 23: You must not seek, obtain or continue any employment, whether or not the employment is remunerated, or become or be a volunteer in any capacity that involves being in a position of trust or authority towards a person under the age of 18 years.

Conclusion

[64] I would grant leave to appeal and allow the appeal to the extent of striking out Conditions 17 and 18 and making the amendments I have described to Conditions 10, 12, and 23.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Newbury"

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