

CANADA / JUDGMENT

R. v. Hopkins

2022 BCCA 182

COURT

British Columbia Court of Appeal

DECIDED

20 May 2022

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2022 BCCA 182 R. v. Hopkins

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hopkins,

2022 BCCA 182

Date: 20220520

Docket: CA48141

Between:

Regina

Respondent

And

Roy Hopkins

Appellant

Before:

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Abrioux

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

October 18, 2021 (sentence) (R. v. Hopkins, Powell River Docket 17014-1).

Oral Reasons for Judgment

Counsel for the Appellant:

B. Movassaghi

Counsel for the Respondent

(via videoconference):

S. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

May 20, 2022

Place and Date of Judgment:

Vancouver, British Columbia

May 20, 2022

Summary:

The appellant pleaded guilty to offences including driving while prohibited and possession of stolen property valued in excess of \$5,000. The appellant and the Crown jointly recommended a sentence for the driving offences, and agreed on an 18-month to two years less a day range for the stolen property offence. The appellant sought a conditional sentence order but the judge instead imposed a custodial sentence of two years less a day. The appellant seeks leave to extend the time to appeal his sentence and, if granted, seeks to appeal his sentence on the basis that the judge erred in not imposing a custodial sentence of 18 months or, alternatively, that the custodial sentence of two years less a day was unfit. He submits that the judge overemphasized his prior criminal record, ignored relevant mitigating factors including his traumatic upbringing and early guilty plea, and did not properly consider his medical condition.

Held: Extension of time to appeal granted; appeal dismissed. It was implicit that the judge had taken into account the guilty plea as that was the basis upon which counsel agreed to the sentencing range. Great deference is owed to the decisions of sentencing judges; no error in principle was committed and the sentence was not demonstrably unfit.

ABRIOUX J.A.:

Introduction

- [1] On September 16, 2021, the appellant pleaded guilty to a number of offences which included driving while prohibited contrary to s. 95(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 and possession of stolen property of a value in excess of \$5,000 contrary to s. 355(a) of the Criminal Code, R.S.C. 1985, c. C-46.

- [2] The Crown and defence jointly recommended short jail sentences, the minimum fines, and driving prohibitions for the Motor Vehicle Act offences.
- [3] The parties also agreed on an 18-month to two years less a day range for the stolen property offence. This allowed the appellant to seek a conditional sentence ("CSO"). Accordingly, the substantive issue for the sentencing judge to decide was whether a CSO was appropriate in this case.
- [4] The judge declined to make a CSO and imposed a custodial sentence of two years less a day less pre-sentence credit.
- [5] Mr. Hopkins now seeks leave to extend the time to appeal sentence. If leave is granted, he submits the judge erred in principle in not imposing a custodial sentence of 18 months, and in the alternative, that the custodial sentence of two years less a day was unfit.
- [6] For the reasons that follow, I would extend the time to appeal sentence and dismiss the appeal.

Background

- [7] The appellant was 53 years of age at the time of his arrest.
- [8] He started committing crimes in Ontario in 1984 and had amassed an extensive criminal record comprising 117 convictions, of which 84 were property offences.
- [9] At the time of his arrest on June 28, 2021, the appellant had multiple outstanding warrants both in British Columbia and Alberta, and was indefinitely prohibited from driving in this province. He was found driving a stolen van with large decals depicting "D.J. Directional Drilling Ltd.". The van, valued at \$10,000, contained a Calgary water services meter valued at \$5,000 as well as a quantity of tools worth approximately \$500. The van had been stolen in Calgary, Alberta, following a break and enter committed during the morning of June 26, 2021 and driven shortly thereafter by the appellant to Powell River. In the reasons for sentence ("RFS"), the judge noted that when the appellant was formally advised of the reasons for his arrest he stated, "whatever, yeah, big fucking deal": RFS at para. 5.
- [10] The van contained certain of the appellant's personal effects including medical records from Alberta to the effect that he had been in the hospital from May 29 to May 31, 2021, having been diagnosed with "congestive heart failure". Upon his release he had been instructed to follow up with his family doctor and cardiologist and adhere to a regiment of medication that had been prescribed. Mr. Hopkins had previously been hospitalized in March and April 2021 but discharged himself contrary to medical advice. He also ceased taking his prescribed medication, and was using methamphetamine: RFS at para. 5.

Parties' Positions on Sentencing and Reasons for Sentence

- [11] The Crown's position was that protection of the public was paramount, and that the appellant's medical issues could be attended to in custody and thus did not warrant a reduction in sentence on compassionate grounds. Crown counsel noted that the appellant was noncompliant with medical advice while in the community, and previously attempted to manipulate the courts by advising that he would refuse medication if detained. Crown counsel submitted that a CSO would endanger the safety of the community and that his "record speaks for itself".
- [12] Defence counsel submitted that a CSO of up to two years in length to be followed by a period of probation was appropriate due to the fact that the appellant suffered from severe heart failure and the presence of "significant Gladue factors". Counsel submitted, however, that a Gladue report was unnecessary. Counsel outlined the mitigating factors to be: (1) the guilty plea; (2) Gladue factors; and (3) the appellant's poor health. Counsel acknowledged the aggravating circumstances of the offence being that it was not a spontaneous act and the offender's "significant criminal record".
- [13] The sentencing judge determined that a Gladue report was required and adjourned the sentencing hearing for one to be prepared. She also expressed concerns as to the sufficiency of the medical information before the court and, in particular, that what had been provided appeared to contradict the appellant's submission that he would die if incarcerated.
- [14] The Gladue report indicated that the appellant, who was a self-described Métis, had a tenuous connection to the Métis people. He grew up in Canada without knowing his father or his Indigenous descent. The judge observed that with no reliable source of familial information, the Powell River Métis Society had indicated that Mr. Hopkin's membership lapsed and their records did not contain any information about his genealogical background. The appellant's childhood trauma developed from institutionalization as a result of the actions of his non-Indigenous mother and her choice of partners: RFS at paras. 11-12.
- [15] In concluding that a custodial sentence was appropriate, the judge stated:
- [13] There are few, if any, mitigating factors in this case. There are numerous aggravating factors such as a criminal record which goes back many years for a total of over 80 offences. Unfortunately, as I have said before, Mr. Hopkins is a prolific offender dating back to the early 1980s.
- [14] The principles of sentencing which apply to the sentencing are set out in section 718 of the Criminal Code stress that deterrence and denunciation should apply for the possession of the motor vehicle as charged which belonged to D.J. Directional Drilling Ltd. There are no mitigating factors other than his guilty plea. The nature of Mr. Hopkins' health then and since he was institutionalized months ago show there is no suggestion he is not receiving appropriate and professional care while in custody.

On Appeal

- [16] The appellant submits that the judge erred in principle by: (1) overemphasizing his criminal record; (2) completely ignoring mitigating factors, namely, his traumatic upbringing, and his very early guilty plea; and (3) not properly considering his medical condition.
- [17] The Crown argues that no error in principle was made by the judge. The alleged errors raised by the appellant were properly addressed. Simply put, Mr. Hopkins having accepted an 18-month to two years less a day range when he sought a CSO now changes his approach on appeal by arguing that the judge erred in principle in not sentencing him to the low end of that range, being 18 months.

Analysis

- [18] An appellate court may interfere with a sentence imposed by a lower court only where there has been a material error that has impacted the sentence in that the sentence would have been different absent the error or where the sentence is demonstrably unfit. As the Court explained in *R. v. Friesen*, 2020 SCC 9:
- [26] Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para.35, cited in [*R. v. Lacasse*, 2015 SCC 64], at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.
- [19] Furthermore, an appellate court may not intervene because it might have weighed the factors differently: *R. v. May*, 2018 BCCA 391 at para. 27.

Did the judge commit an error in principle?

- [20] In my view, it is clear that no error in principle was committed by the judge. The three alleged errors were all appropriately considered and balanced by the judge.
- [21] In fact, it is ironic that the appellant, who was initially prepared to be sentenced without the preparation of a Gladue Report, takes the position that the judge having adjourned the sentencing hearing for a report to be prepared, now argues that she failed to appropriately balance his difficult upbringing in her sentencing analysis.
- [22] In fact, the reasons for sentence show otherwise. As I have noted, the judge observed that the appellant's childhood trauma developed from institutionalization as a result of the actions of his non-Indigenous mother and her choice of partners.

- [23] And as the judge noted at para. 14 of her reasons, quoted at para. 15 above, there was no suggestion that Mr. Hopkins was not receiving appropriate and professional health care while in custody.
- [24] That then leaves the primary issue on appeal. The appellant argued that the judge erred in overemphasizing his criminal record while giving little, if any, weight to the very early guilty plea.
- [25] In my view, it is implicit that the guilty plea was taken into account by the judge. This is because it is apparent that, on the basis of the guilty plea, counsel agreed on a sentencing range of 18 months to two years less a day.
- [26] I am of the view that no material error was made by the judge in imposing a sentence at the top end of the agreed upon range. The judge was faced with the reality of sentencing an offender who clearly had a "prolific" criminal record which included a significant number of property offences. She properly concluded that the principles of sentencing in this case were primarily deterrence and denunciation for an offender such as Mr. Hopkins.
- [27] It bears noting that the appellant did not argue before the judge that a fit sentence would be an 18-month custodial term. Rather, he focussed on the propriety of a CSO. Having been unsuccessful in that regard, it is not for him in this Court to submit that the judge erred in imposing a custodial sentence that was in the range he had agreed to at the sentencing hearing.
- [28] In any event, as Justice Lambert explained in *R. v. Moore*, [1991] B.C.J. No. 2733 (B.C.C.A.):
- where the offender is an incorrigible offender and where protection of the public is a dominant sentencing principle it is not necessary that the shortest sentence which can reasonably be imposed should be imposed. That is to deny the very existence of the need for protection of the public.

[At p. 5.]

- [29] Accordingly, I would not accede to this ground of appeal.

Was the sentence demonstrably unfit?

- [30] A demonstrably unfit sentence is one that constitutes an unreasonable departure from the principle of proportionality, which is assessed on both an individual basis and in relation to the sentences imposed for similar offences in similar cases: *R. v. Lacasse*, 2015 SCC 64 at para. 52. Great deference is owed to the decisions of sentencing judges. In the absence of an error that has impacted the sentence, appellate courts should not interfere with the sentence imposed, unless it meets the high standard of being demonstrably unfit: *Friesen* at para. 26.
- [31] In light of my reasons for concluding that the judge did not commit an error in principle, it follows that the sentence was not, in my view, demonstrably unfit.

Disposition

[32] In my view, the judge committed no reviewable error in reaching her conclusions. She did so having reviewed the evidence and applying the appropriate legal framework. I see no basis on which this Court should interfere with the sentence imposed and while I would grant leave, I would dismiss the appeal.

[33] MACKENZIE J.A.: I agree.

[34] FISHER J.A.: I agree.

[35] MACKENZIE J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Abrioux"

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