

CANADA / JUDGMENT

R. v. Jacobs

2020 BCCA 287

COURT

British Columbia Court of Appeal

DECIDED

14 October 2020

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2020 BCCA 287 R. v. Jacobs COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Jacobs, 2020 BCCA 287 Date: 20201014 Docket: CA46973 Between: Regina Appellant And Devin Andrew Jacobs Respondent Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Goepel The Honourable Madam Justice DeWitt-Van Oosten On appeal from: An order of the Provincial Court of British Columbia, dated March 16, 2020 (sentence) (R. v. Jacobs, Vanderhoof Docket 47284-2). Oral Reasons for Judgment Counsel for the Appellant (via videoconference): C. Lusk Counsel for the Respondent (via videoconference): F.F. Fatt Place and Date of Hearing: Vancouver, British Columbia October 14, 2020 Place and Date of Judgment: Vancouver, British Columbia October 14, 2020 Summary: Following plea negotiations, Mr. Jacobs pleaded guilty on five counts including break and enter and committing an indictable offence contrary to s. 348(1) of the Criminal Code. He was sentenced on the terms presented in a joint submission. The sentence on the break and enter and committing an indictable offence was a conditional sentence of 12 months followed by 12 months' probation. After sentence was imposed it came to the attention of the Crown that by s. 742.1 of the Code, a conditional sentence was not available on that offence, that is, the sentence was illegal. The Crown appealed to correct the illegal sentence on terms that did not prejudice Mr. Jacobs, who consented to the appeal. Held: Appeal allowed. The sentence of a conditional sentence of 12 months followed by a 12-month probation order is set aside and a sentence of one day of incarceration followed by 22 months of probation is imposed in its place.

- [1] SAUNDERS J.A.: The Crown appeals a conditional sentence of 12 months followed by 12 months of probation, for one count of break and enter and committing an indictable offence contrary to s. 348(1) of the Criminal Code. The sentence was imposed following plea negotiations which resulted in Mr. Jacobs' guilty pleas on this count and four others, and a joint submission on sentence to which the judge acceded.
- [2] After sentence was imposed, it came to the attention of the Crown that s. 748 did not permit a conditional sentence on this offence. The Crown has properly brought this appeal to correct the illegality and proposes that the sentence on the count of break and enter be set aside and a sentence that will still foster the animating principles of public protection and rehabilitation that informed the joint submission, without prejudice to Mr. Jacobs, be imposed in its place. It says that in the unusual circumstances and history of this case, a

sentence of one day of incarceration and 22 months of probation, on the same terms as the 12-month probation order originally imposed by the judge, would be fit. The Crown notes, in considering fitness, that the terms of the conditional sentence orders are more stringent than those on the probation order, and by the time of this hearing, Mr. Jacobs has already served a portion of the conditional sentence order in issue. It says the sentence proposed would be a solution to the illegality of the sentence imposed, while accomplishing the objectives identified.

- [3] To enable this appeal to be heard the Crown requires both an extension of time to August 20, 2020 to appeal, and leave to appeal sentence. In my view both of those orders should be granted and the appeal should be allowed as proposed.
- [4] Counsel for Mr. Jacobs consents to all orders proposed by the Crown.
- [5] The circumstances are candidly recounted in affidavits filed by the Crown and in their statement filed in this appeal. As a result of the plea negotiations, Mr. Jacobs pleaded guilty to several offences, including to a charge of breaking and entering a place and committing theft contrary to s. 348(1)(b) of the Criminal Code. Mr. Jacobs and a co-accused had been jointly charged with breaking into outbuildings/sheds on vacant property on July 13 and 15, 2019, and stealing various items including a tool box and jerry cans.
- [6] Consistent with the joint submission, the judge sentenced Mr. Jacobs as follows:
Information Crown Proceeded Date of Offence Offence Sentence Kamloops 108755-1-A Summarily October 5, 2019 Breach of Recognizance "Time Served" Credit granted of 41 days jail Vanderhoof 47284-3-A Summarily December 7, 2019 Breach of Recognizance "Time Served" Credit granted of 45 days jail Vanderhoof 47237-KC-2 Count 1 Indictment July 21, 2019 Assault Peace Officer "Time Served" Credit granted of 180 days jail Vanderhoof 47237-KC-2 Count 3 Indictment July 21, 2019 Theft under \$5000 180 Day CSO Vanderhoof 47284-2 Indictment July 13-15, 2019 Break and enter a place and commit an indictable offence (theft) 12-month CSO Consecutive to 47237-KC-2 count 3, Followed by a 12-month probation order
- [7] The Crown proceeded by indictment in relation to count 47284-2 (Vanderhoof), break and enter a place and committing an indictable offence contrary to s. 348(1). On any analysis, a conditional sentence order was unavailable, whether by s. 742.1(c) where a break and enter is committed in relation to a dwelling house contrary to s. 348(1)(d), and/or by s. 742.1(f)(ix) where a break and enter is committed in relation to a place other than a dwelling house contrary to s. 348(1)(e) and the Crown proceeds, as here, by way of indictment.
- [8] In the circumstances I have outlined, the illegality of the sentence and a proposed solution that will not prejudice Mr. Jacobs justify the extension of time. Likewise they demand that leave to appeal be granted and that the appeal be allowed on the terms proposed.

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- [9] I would grant leave to appeal, extend the time to appeal as earlier stated and allow the appeal by setting aside the sentence imposed on charge 47284-2 (Vanderhoof), and imposing in its place a sentence of one day incarceration to be followed by 22 months of probation on the terms provided by the trial judge for the probation order that is being replaced.
- [10] GOEPEL J.A.: I agree.
- [11] DEWITT-VAN OOSTEN: I agree.
- [12] The appeal is allowed on the terms I have recited. "The Honourable Madam Justice Saunders"
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