

CANADA / JUDGMENT

R. v. Kirkpatrick

2016 BCCA 316

COURT

British Columbia Court of Appeal

DECIDED

13 July 2016

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2016 BCCA 316 R. v. Kirkpatrick COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Kirkpatrick, 2016 BCCA 316 Date: 20160713 Docket: CA43733 Between: Regina Appellant And Michael Nicholas Kirkpatrick Respondent Before: The Honourable Chief Justice Bauman The Honourable Madam Justice Newbury The Honourable Mr. Justice Harris On appeal from: An order of the Provincial Court of British Columbia, dated June 30, 2015 (R. v. Kirkpatrick, Prince George Registry Nos. 39307, 40609, 40659, and Kamloops Registry No. 99731). Oral Reasons for Judgment Counsel for the Appellant: E. Campbell Respondent appearing In Person (via videoconference): M.N. Kirkpatrick Place and Date of Hearing: Vancouver, British Columbia July 13, 2016 Place and Date of Judgment: Vancouver, British Columbia July 13, 2016 Summary: Crown appeal of allegedly illegal sentence imposing consecutive conditional sentence appeals in excess of two years. Appeal allowed: the sentences were improper. Sentences substituted to rectify illegality, but accomplish the objectives of the sentencing judge.

- [1] HARRIS J.A.: This is an application by the Crown for an extension of time to appeal, leave to appeal and, if leave is granted, an appeal of a sentence imposed on Mr. Kirkpatrick on the ground that the sentence is illegal. The Crown seeks to substitute a legal sentence that is consistent with the sentencing judge's intent and concerns.
- [2] On June 30, 2015, Mr. Kirkpatrick was sentenced on four counts of driving while prohibited and one count of obstruction. He had a lengthy history of driving while prohibited and impaired driving. His driving record is fairly described as atrocious.
- [3] The sentence imposed is set out below: Information Crown Proceeded Date of Offence Offence Sentence Prince George 39307-1 Summarily 13 Sept 2013 Count 1: Drive while prohibited ("DWP") 6 month CSO Prince George 40659-1 Indictment 13 June 2014 Count 1: DWP 21 month CSO consecutive to 39307-1 Prince George 40609-1 Indictment 2 July 2014 Count 1: DWP 21 month CSO concurrent to 40659-1 Kamloops 99731-1 Summarily 5 May 2015 Count 1: DWP, Count 2: obstruct 6 month CSO on each count, concurrent to each other and to 39307-1

- [4] Mr. Kirkpatrick was entitled to credit for time in custody and I proceed on the basis that the sentence is in addition to that time. Furthermore, eight days before this sentence was imposed, Mr. Kirkpatrick was sentenced to four months' jail for drug trafficking. It is clear that counsel and the judge did not know of this sentence. One consequence of the sentence was that it made it impossible for Mr. Kirkpatrick to report to his Conditional Sentence Order ("CSO") Supervisor as he was required to do.
- [5] The Crown contends, and I agree, that the sentence is illegal in several respects. First, the combined length of the sentence exceeds two years less a day. Second, their combined length, after credit for time served, exceeds two years less a day. Third, their combined length after both credit for time served and the custodial sentence being served when these sentences were imposed, exceed two years less a day. I adopt the analysis set out by the Crown in its statement at para. 14 setting out the applicable legal principles.
- [6] To rectify the illegal sentences, the Crown seeks a 10-month reduction in the 21-month CSOs, concurrent with each other, but consecutive to the 6-month CSOs. In addition, the Crown seeks a one-year probation order following the 11-month CSOs.
- [7] The substitute sentences would render the CSOs legal because the aggregate sentence is 23.5 months.
- [8] The sentencing judge crafted sentences of a reasonably lengthy time intended to foster Mr. Kirkpatrick's rehabilitation, through residential treatment (which apparently did not, in fact, occur), and protect the public. In doing so she rejected the Crown position of 18 months jail, less 84 days' credit and a 10-year driving prohibition. The Crown did not appeal the sentences imposing CSOs, although in my view it may well have had a viable appeal that if successful would have resulted in a longer sentence. Indeed, there may have been a viable argument that given Mr. Kirkpatrick's record a sentence of jail time would have been fit.
- [9] Not having challenged the fitness of the sentence, the Crown only much later realized that the sentences imposed were improper. The issue it takes now on appeal is limited to addressing the illegality of the sentence, rather than contesting whether it is demonstrably unfit. In these circumstances, I would accede to the Crown's argument that we should substitute a sentence that best approximates to the objectives of the sentence that was imposed. I agree that to accomplish those objectives a probation order of one year is required at the conclusion of the CSOs. Accordingly, I would make the following orders:
- a) Granting an extension of time to appeal;
 - b) Granting the application to adduce fresh evidence;
 - c) Granting leave to appeal; and
 - d) Allowing the appeal to the extent of (i) reducing the CSOs on Prince George files 40659-1 and 40609-1 to 11 months in addition to 72 days credit for pre-sentence custody, concurrent to each other and consecutive to the sentence on Information 39307-1, and (ii) adding a

probation order for one year with the following terms: · you shall report in person to a probation officer within 72 hours of the expiration of your conditional sentence order at 101 - 250 George Street, Prince George, and thereafter as and when directed by your probation officer; · you shall take any counselling as directed by your probation officer; and · you shall not occupy the driver's seat of any motor vehicle.

[10] BAUMAN C.J.B.C.: I agree.

[11] NEWBURY J.A.: I agree.

[12] BAUMAN C.J.B.C.: The orders set in the reasons of Mr. Justice Harris are made by the Court. "The Honourable Mr. Justice Harris"

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