

CANADA / JUDGMENT

R. v. Kleiman

2024 BCCA 426

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 426 R. v. Kleiman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kleiman,

2024 BCCA 426

Date: 20241230

Docket: CA50221

Between:

Rex

Respondent

And

Bram Sun-Lee Kleiman

Applicant/Appellant

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Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

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

May 24, 2024 (sentence) (R. v. Kleiman, Port Coquitlam Dockets

106493-5C, 107445-1, 107445-5BC, and 108313-2C).

The Appellant, appearing in person (via videoconference):

B. Kleiman

Counsel for the Respondent:

M.A. Street

Place and Date of Hearing:

Vancouver, British Columbia

December 18, 2024

Place and Date of Judgment:

Vancouver, British Columbia

December 30, 2024

Summary:

The appellant applies for leave to appeal an order of a Provincial Court judge declining to change the optional conditions of three probation orders, relieve the appellant of the need to comply with one or more conditions of those orders, or shorten their duration. HELD: The application is denied. Neither an extension of time to file the application nor leave to appeal is warranted. The appellant has not established a reasonable chance of success in the appeal.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] The appellant, Bram Sun-Lee Kleiman, applies for leave to appeal a May 2024 Provincial Court judgment dismissing an application to vary three probation orders pursuant to s. 732.2(3) of the Criminal Code, R.S.C. 1985, c. C-46. She also seeks an extension of time to file her request for leave.
- [2] In certain circumstances, s. 732.2(3) allows a judge to: (a) change a probation order's optional conditions; (b) relieve an offender of compliance with one or more of the optional conditions; or (c) decrease the length of the probation order.
- [3] The appellant represented herself in the Provincial Court. Among other things, she asked the court to cancel the three orders and issue a new and "amalgamated" order with "much cleaner" and less confusing wording.

- [4] The application was dismissed on the basis that the appellant did not establish a change of circumstances, which is a legal pre-requisite to amending an optional condition: Criminal Code, s. 732.2(3)(a). The judge also concluded that it would be inappropriate to relieve the appellant from compliance with the terms of the orders or reduce their duration (ss. 732.2(3)(b) and (c)), because doing so would jeopardize the safety of the victim. The judge considered the victim's safety to be paramount.

Provincial Court Proceedings

- [5] In March 2022, the appellant pleaded guilty to criminal harassment and two breaches of a release (bail) order. The charges arose from the appellant's conduct following the termination of a relationship with a woman whom the appellant met through an online gaming community. The conduct included repeated unwanted contact and attending at the victim's workplace.
- [6] After assigning the appellant credit for four and one-half months' pre-sentence custody, the sentencing judge imposed a cumulative sentence of one day of imprisonment and three years' probation.
- [7] The probation order (set to expire in March 2025), includes the following optional conditions:

You are not to have any contact, directly or indirectly, with [the victim], except that you may write letters directed to [the victim] which you will give to your Probation Officer and she will transmit them to [the victim] if [the victim] consents.

You are not to go to any home, place of work, school or worship of [the victim] that is known to you or may become known to you, and should you see her, you must leave her presence without word or gestures.

- [8] Shortly after this sentence was imposed, and again in August 2022, the appellant breached the probation order. In April 2023, she pleaded guilty to two breaches of probation, as well as related breaches of a bail order. She was sentenced to a cumulative 501 days' imprisonment (already served by virtue of credit for pre-sentence custody), and three years' probation. The second probation order was more restrictive than the first and contains the following optional conditions:

You must have no contact or communication, directly or indirectly, with [the victim].

You must not go to or be within 200 meters of any place where [the victim] lives, works, attends, school, worships, or happens to be. If you see them, you must leave their presence immediately without any words or gestures.

[Emphasis added.]

[9] In May 2023, the appellant committed further breaches. Six months later, in November 2023, she was found guilty of three breaches of probation and sentenced to a cumulative 18 months' imprisonment (minus nine months' credit for pre-sentence custody), and a three-year probation order. The third probation order also includes no-contact and non-attendance conditions:

You must have no contact or communication, directly or indirectly, with [the victim].

You must not go to or be within 200 metres of any place where [the victim] lives, works, attends school, worships, or happens to be. If you see her, you must leave immediately without any words or gestures.

You must not go to the following hospitals [13 hospitals are listed in the order], or any of the adjacent parking lots of any of the named hospitals.

The exception is: If you attend the emergency department due to a genuine medical emergency. If requested by your probation officer, you must provide proof of your attendance at the hospital. This condition will be monitored and supervised electronically.

[Emphasis added.]

[10] The November 2023 sentence was appealed to this Court. The appeal was dismissed in March 2024. In reasons for judgment indexed at R. v. Kleiman, 2024 BCCA 130, the Court noted that the appellant has been diagnosed with autism spectrum disorder:

[2] She is high functioning, with very good cognitive skills and the ability to form strong emotional bonds with others

[3] Unfortunately, the appellant's mental disorder manifests itself through a fixation with former romantic partners and resulting compulsive behaviour. After a relationship ends, she engages in repeated harassment of her former partner by contacting them against their wishes

[11] In support of her sentence appeal, the appellant argued that the three-year probation order was demonstrably unfit because it "sets the appellant up to fail". This Court acknowledged that judges will generally avoid making an order that is particularly onerous for an offender if unnecessary: at para. 42. However, it is also the case that:

[43] Where the public cannot be adequately protected without the court making an order that the offender finds difficult to follow there may be little alternative but to require the offender to abide by a condition that they find onerous.

[Emphasis added.]

[12] This Court concluded that the sentencing judge who imposed the probation order in November 2023:

- [144] rightly considered that his duty was to impose the restrictions on the appellant, even though she will find compliance challenging. The alternative--leaving the appellant free to harass [the victim]--would not be appropriate.
- [13] In May 2024, the appellant applied in the Provincial Court to amend all three probation orders pursuant to s. 732.2(3) of the Criminal Code, including the one she had recently appealed.
- [14] The appellant represented herself at the Provincial Court hearing. To my understanding, her application was not advanced by a probation officer. The appellant made various submissions to the judge. Among other things, she said:
- she is subject to three probation orders that are "all very similar" and "intended to do the same thing", namely, protect the victim;
 - but, they also have "slightly different wording" which presents an issue for the appellant, "particularly with [her] autism";
 - the probation orders are not workable for her. She needs some way of sending communications to the victim, even if those communications are not accessed by her, to avoid a build up of thoughts and feelings that, if suppressed, can erupt "like a volcano";
 - two of the probation orders direct the appellant to "immediately" leave the victim's presence if she encounters her, and for "someone with autism, acting immediately is not necessarily or not realistically possible" and it causes the appellant stress;
 - the existence of three probation orders allows the Crown to charge her with multiple breaches "on a single action";
 - she finds some of the wording open to interpretation and therefore unclear. For example, the November 2023 probation order requires that she not possess any knives, axes, or other sharp-bladed instruments that are "used, designed to be used or intended to be used to cut things". From the appellant's perspective, it is difficult to tell "whether or not something is necessarily intended to be used to cut something". The uncertain wording leaves the appellant feeling "unsafe". She feels she is going to be breached "no matter what" and the uncertainty of whether she is or is not compliant "leads to breaches that otherwise would not have happened";
 - the listing of so many different hospitals on the third probation order is "ridiculous"; and,
 - some of the optional conditions (such as a residency condition and a requirement for electronic monitoring) are not necessary.
- [15] Before a judge can change an optional condition in a probation order relying on s. 732.2(3) (a), they must be satisfied that there has been a relevant change in circumstances between the date the order was imposed and the date of the application: *R. v. Bennett*, 2005 ABCA 119 at para. 10. The appellant told the judge that there had been a change in her circumstances. She described it this way:

I was immediately breached as soon as I got out, not even 24 hours later and there was no chance for [the first] probation order to work because [it] doesn't work. And combining it into a single order that actually works as it's supposed to by providing protection to [the victim] that apparently she feels she needs at this point if they believe that she needs some level of protection then that's fine, but there also needs to be something reasonable so that I'm not being set up to fail by a probation order that essentially has me immediately in breach as soon as I get out

[16] In support of her application, the appellant tendered a letter from her treating psychologist with a clinical speciality in autism spectrum disorders. The psychologist explained the appellant's challenges in complying with the probation orders:

As an autistic individual, [the appellant] has what is often termed "perseverative" thinking patterns. [She] has an incredibly strong need to communicate [her] thoughts/perspectives to [the victim] and is unable to appreciate her perspective in this case While I understand that [the victim] most likely has no interest in communicating with [the appellant], [the appellant] persists in searching for methods to share [her] thoughts [The appellant] is under the belief that if [she] were to have [the option of putting electronic communications directed to the victim in an online folder for access by the victim if she chose], it would greatly reduce the likelihood that [the appellant] would breach the other conditions in future.

[17] The Crown opposed the variation application.

[18] First, the Crown said it was impossible to amalgamate the three probation orders. These orders were imposed in separate sentencing proceedings and the judge had no authority to revisit the proceedings, stand in appellate review of the orders, or set one or more of them aside. Second, a change in circumstances is a legal prerequisite to amending an optional condition under s. 732.2(3)(a) and the appellant failed to meet that threshold. The Crown said the only thing that had changed since the imposition of the first March 2022 probation order was an escalation in the appellant's breaching behaviour. Third, and in any event, Crown counsel said the wording of the probation orders is not unclear. The second and third orders contain more restrictive prohibitions on contacting the victim and attending at her workplace, but the fact that they are more restrictive does not render them confusing.

[19] In reply to the Crown's submissions, the appellant asserted personal hardship arising from the orders and asked that the judge reduce their duration on that basis: Criminal Code, s. 732.22(3)(b). She said the orders are " making it impossible for [her] to actually live [her] life at all and it's putting somebody else under the false impression that they need this sort of protection when they really don't ".

Provincial Court Judgment

- [20] The judge dismissed the application in oral reasons. He found that the information in the psychologist's letter was "not new information" and consequently, it did not "represent a change of circumstances" within the meaning of s. 732.2(3)(a): *R. v. Kleiman* (24 May 2024), Port Coquitlam 106493-5C, 107445-1, 107445-5BC, and 108313-2C (B.C.P.C.) at para. 3.
- [21] The judge also found there was no basis on which to relieve the appellant of any terms of the orders or decrease their duration under ss. 732.2(3)(b) or (c). He recognized that the appellant may find it difficult to comply with the probation orders because of her personal circumstances. However, the judge was of the view that protecting the victim is more important: at para. 5. He found no merit to the appellant's suggestion that the no-contact provision in the March 2022 probation order was more likely to prevent breaches than the absolute prohibitions contained in the second and third orders: at para. 4.

Applications for an Extension and Leave to Appeal

- [22] The Crown accepts that the applications for an extension of time to file and leave to appeal the Provincial Court judgment are properly before this Court, as opposed to the Supreme Court.
- [23] Section 675(1)(b) of the Criminal Code entitles an appellant who was convicted in proceedings by indictment to appeal their sentence, with leave. Under s. 673 of the Criminal Code, the term "sentence" is defined to include the type of order at issue here, namely, a disposition made pursuant to s. 732.2(3). The November 2023 probation order, which was addressed in the Provincial Court judgment, arose out of a prosecution by indictment. All three probation orders were addressed together and as part of the same proceeding under s. 732.2(3). Accordingly, the Crown accepts and I agree that in these circumstances, the appellant is entitled to challenge the dismissal of her Provincial Court application in this Court: Criminal Code, s. 675(1.1).

Discussion

Extension of time to file

- [24] In support of an extension, the appellant has filed affidavits which show that she applied to Legal Aid BC to assist with her proposed appeal before expiry of the prescribed deadline for filing. She received an answer from Legal Aid BC in July 2024 (they denied funding). Then, there was confusion over which court the appellant should properly access to advance her appeal. Initially, she tried to file her application in the Supreme Court. The application was returned to her on the basis that the Supreme Court did not have jurisdiction. The appellant then turned to this Court. Initially, she was told that the matter belonged in the Supreme Court. Ultimately, clarification on the jurisdictional issue was achieved through case management in October 2024, resulting in the filing of an application for leave to appeal in this Court on November 14, 2024.

[25] The Crown does not take issue with these circumstances or their relevancy to the extension analysis (as set out in *R. v. Khungay*, 2020 BCCA 269 at para. 29 (Chambers) and other cases). However, the Crown says the proposed appeal is "hopeless" and consequently, it is not in the interests of justice to grant an extension.

Application for leave to appeal

[26] To obtain leave to appeal from sentence, the appellant must show that her proposed appeal is not frivolous and has a reasonable chance of success: *R. v. Bodnarchuk*, 2007 BCCA 450 at para. 5 (Chambers); *R. v. Beasley*, 2023 BCCA 135 at para. 25 (Chambers).

[27] In her application for leave, the appellant articulated the following grounds of appeal:

- the probation orders are demonstrably unfit;
- the judge erred in not considering medical evidence; and,
- the judge erred in [his] assumption that the March 2022 probation order had been given a chance to work.

[28] The appellant has filed a written submission in support of her application. Among other things, she states that the conditions of the three orders are unreasonable and "cannot be complied with". The appellant says the orders are intended to address the same issue (protection of the victim), but contain different wording, which renders them confusing. The appellant contends there is no need for three separate orders--one will do. She says the existence of three orders is unfair. When she is prosecuted for a breach of one order, it results in a prosecution for breach of the other orders and she ends up with multiple convictions arising from the same set of factual circumstances.

[29] Before me, the appellant reiterated these submissions, but also made additional points. This included the submission that she is not guilty of the substantive offence (criminal harassment) that has led to further orders, breaches of those orders, and the appellant's incarceration. The appellant also emphasized that from her perspective, the second and third of the three probation orders are particularly problematic because they set her up to fail. She says the conditions of those orders fail to appreciate that to achieve the appellant's compliance, there must be some way for her to send communications to the victim, even if the victim does not access and read them. The March 2022 order attempted to facilitate that scenario for the appellant's rehabilitation (and ultimately, the victim's safety), and the appellant says it was unreasonable for the subsequent sentencing judges to take a different approach. Finally, the appellant says the judge erred by assuming that the first probation order did not achieve what it set out to do because the appellant breached it shortly thereafter. From the appellant's perspective, that order was not given sufficient time to work and the judge's assumption was unwarranted.

[30] The Crown opposes the application for leave to appeal, saying it has no possibility of success. The Crown argues that the Provincial Court judge did not have jurisdiction to meld the three probation orders or stand in review of them. In dismissing the application, the judge properly considered the governing provisions and the evidence adduced by the appellant. On the record before him, it was open to him to find that the appellant had not established a change in circumstances. He could also reasonably exercise his discretion in favour of protecting the victim. The Crown submits that differences in wording between the first, second, and third probation orders are of no materiality. The appellant is obliged to comply with the most restrictive of the orders and the no-contact and non-attendance provisions in the November 2023 order are definitively stated. Finally, the Crown says the application to amend the probation orders, or to relieve the appellant from them, represented "nothing more" than another attempt to gain access to the victim.

Analysis

- [31] It is not necessary for me to make the latter finding to resolve the applications before me and I decline to do so. Although the appellant is high functioning and has good cognitive skills, it is undisputed that her neurodevelopmental condition can manifest itself in fixation, compulsive behaviour, a strong (perhaps overwhelming) need to communicate her thoughts and perspectives, and limited insight into the effects of her behaviour. See 2024 BCCA 130 at para. 22. The application brought under s. 732.2(3) of the Criminal Code is as equally reflective of those challenges as it is a deliberate attempt to get around the probation orders for the specific purpose of accessing the victim.
- [32] However, I agree with the Crown that the applications for an extension of time and leave to appeal should be dismissed on the basis that the appellant's proposed appeal has no reasonable chance of success.
- [33] In challenging the Provincial Court judgment, the appellant has not identified a legal error committed by the judge, a misapprehension of the record, a failure to consider a factor relevant to the s. 732.2(3) analysis, or that the judge took matters into account that were not pertinent to his determination.
- [34] In my view, on the record before him and in light of the appellant's submissions, it was open to the judge to decide that the appellant had not established a change in circumstances of the nature contemplated by s. 732.2(3)(a) that would allow for amending the terms of the probation orders. In assessing the application, it was also reasonable for the judge to consider the safety of the victim, and in light of the circumstances surrounding the appellant's continued offending, to decide that the absolute prohibitions on contact and non-attendance must remain in place. Although the appellant's behaviour may be explained, at least in part, by her neurodevelopmental condition, the fact remains that her fixation with the victim and her repeated conduct puts the victim's physical and psychological safety at risk: 2024 BCCA 130 at paras. 44-51. Indeed, before me, the appellant continued to assert a belief that the victim is not actually afraid of her, that any fear she may have is likely the

product of having been misinformed by the Crown or the police, and that if the appellant had a chance to explain things to her, the victim's perspective would change. Regrettably, the appellant continues to show limited insight into the impact of her behaviour.

[35] In this context, the judge's decision to not amend the probation orders, relieve the appellant of their conditions, or shorten the duration, is consistent with this Court's comments in *R. v. Duguay*, 2019 BCCA 53, namely, that:

[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"

[Emphasis added.]

[36] I also note from my reading of the Provincial Court transcript that although the appellant brought her application under s. 732.2(3) of the Criminal Code, her submissions in support of the application were more in the nature of submissions that would be made on appeal. She took issue with the length of the probation orders, the need for the second and third orders given the existence of the first, the wording and workability of the conditions attached to the orders, their necessity or connection to her offending behaviour, and importantly, she asked whether the optional conditions were reasonable in light of her neurodevelopmental challenges. I agree with the Crown that functionally, these submissions invited the judge to conduct a comprehensive review of the three orders and, effectively, re-sentence the appellant. This is not the purpose of s. 732.2(3) and if approached in this manner, it would circumvent the appeal process and the highly deferential standard of review that attaches to that process at both the summary conviction and indictable level.

[37] Indeed, specific to the third probation order (imposed in November 2023), there had already been an appeal of that order by the time of the Provincial Court application, and the order was upheld. One of the submissions made on appeal was that the terms of the order set the appellant up to fail (the same position taken under s. 732.2(3)). This Court rejected that submission, finding that it did not provide a sufficient basis for variation of the sentence: 2024 BCCA 130 at paras. 42-44.

[38] The appellant has also attempted to appeal the first probation order, but only recently, and her application for an extension of time to file that appeal and the application for leave to appeal have been dismissed: *R. v. Kleiman*, 2024 BCCA 425. To my understanding, there has been no appeal of the second probation order.

- [39] In *R. v. Etifier*, 2009 BCCA 292, this Court noted that "[s]ection 732.2(3) is designed to give the sentencing court jurisdiction to make changes in probation orders to accommodate unforeseen developments, changes in circumstances, and the accused's ongoing needs and capacities". Thus, "[w]hile it grants the sentencing judge very broad discretion to change a probation order, its focus is on allowing the court to monitor and adjust the order as new information comes to light, or as circumstances develop": at para. 7, emphasis added.
- [40] In my view, the appellant's application in the Provincial Court extended well beyond the purpose of s. 732.2(3) and challenged the fitness of the probation orders themselves, including the reasonableness of the optional conditions. In those circumstances, the judge was entitled to take the position that he did, including on the issue of victim safety. He found there was nothing before him to show a change in circumstances, or that the victim's safety was no longer a matter of concern. To the contrary, all indications were (and are) that the need to protect the victim from the appellant's fixated views and obsessive conduct remains critical. The appellant is currently incarcerated. As I understand it, she has been detained pending a trial on new criminal charges involving alleged breaches of her probation orders and/or attempts to establish contact with the victim.
- [41] I cannot see a division of this Court interfering with the judge's exercise of discretion under s. 732.2(3).

Disposition

- [42] For all of these reasons, I dismiss the application for an extension of time to file and the application for leave to appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

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