

CANADA / JUDGMENT

R. v. Kleiman

2024 BCCA 130

COURT

British Columbia Court of Appeal

DECIDED

28 March 2024

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2024 BCCA 130 R. v. Kleiman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kleiman,

2024 BCCA 130

Date: 20240328

Docket: CA49647

Between:

Rex

Respondent

And

Bram Sun-Lee Kleiman

Appellant

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Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated November 2, 2023 (sentence) (R. v. Kleiman, Port Coquitlam Docket 107445-5BC).

Oral Reasons for Judgment

The Appellant, appearing in person
(via videoconference):

B.S.L. Kleiman

Counsel for the Respondent:

S.E. Elliott, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

March 28, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 28, 2024

Summary:

The appellant was convicted of three counts of breach of probation after having contact with her ex-partner in violation of two court orders. The appellant is affected by autism spectrum disorder which, in her case, manifests itself as an obsessive attachment to particular individuals. She contends that her sentence was excessive, particularly the three-year period of probation during which she is not to contact her ex-partner, and during which she is to be electronically monitored. Held: Sentence appeal dismissed. The sentencing judge did not err in the ways suggested by the appellant. While the sentence will be an onerous one for the appellant, the probation conditions are properly included to protect the public (and particularly the appellant's former partner). The sentence was not unfit.

[1] GROBERMAN J.A.: The appellant appeals from sentence following conviction on three counts of breach of probation (Criminal Code, R.S.C. 1985, c. C-46). She was sentenced to an effective sentence of 18 months imprisonment (which was reduced to nine months to account for time served in custody prior to sentence) and three years' probation. She will be released from custody in May of this year. Her primary goal on this appeal is to modify the terms of the probation order or to eliminate it entirely.

- [2] The appellant is affected by autism spectrum disorder. She is high functioning, with very good cognitive skills and the ability to form strong emotional bonds with others. The psychiatric report entered into evidence at trial states that "[t]hese cognitive and emotional strengths require abilities in the superior range of intelligence and normal range of emotional attachment".
- [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. This behaviour has brought her before the criminal courts on several occasions. It is such behaviour that led to the offences for which she was sentenced on this occasion. The major question in this case is whether the sentence imposed gave adequate consideration to the appellant's mental disorder.

Preliminary Matters

Extension of Time to Apply for Leave to Appeal

- [4] The appellant was sentenced on November 2, 2023, but the notice of application for leave to appeal was not filed until February 7, 2024, more than 30 days after the imposition of sentence. Accordingly, she applied, under s. 3(2) of the British Columbia Court of Appeal Criminal Appeal Rules for an extension of time. I am satisfied that the delay is explained by an application for legal aid, and that no prejudice has been suffered. I would, therefore, extend the time to file the application for leave to appeal to February 7, 2024.

Fresh Evidence

- [5] The appellant applies to adduce fresh evidence on appeal. The evidence consists of letters from two registered psychologists who have been involved in treatment of the appellant's autism spectrum disorder. The letters were prepared for lawyers representing the appellant on various charges between 2015 and 2023. All were available at the time of the sentencing hearing but were not presented to the court.
- [6] As is the frequent practice of the court, we allowed the parties to refer to the "fresh evidence" during the appeal, but with a recognition that we might ultimately rule it inadmissible.
- [7] In my view, the evidence should not be accepted, as it does not satisfy the principles for the admission of fresh evidence as set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. The evidence could have, with due diligence, been produced to the sentencing judge. Indeed, it appears that counsel had the letters at the time of sentencing but made a deliberate decision not to introduce them.

- [8] Importantly, the evidence could not have affected the results of the sentencing proceeding. The information contained in the letters was largely summarized in the psychiatrist's report that was before the trial court. The existence and contours of the appellant's mental disorder were well-established, and the trial judge was not under any misapprehensions as to the extent of the appellant's challenges, or as to the magnitude of the problems that had to be considered in crafting a fit sentence.

Timing of the Appeal

- [9] The appellant has pressed to have this appeal heard expeditiously, and a case management judge accommodated her preferences by having the matter scheduled for hearing today.
- [10] The appellant has often benefitted from the assistance of counsel at hearings and has also generally had her mother attend for support. Today, she is without counsel, and her mother is unavailable. At the outset of this hearing, we encouraged the appellant to consider adjourning the matter in order to allow her to better prepare, and to have a support person available. She expressed a strong preference for going ahead with the hearing today. We have acceded to her preference.

The Circumstances of the Offence

Events Leading up to the Earlier Probation Orders

- [11] The appellant (who, until fairly recently identified as male) was involved in a romantic relationship with Ms. S. Eventually, Ms. S. found the appellant's obsessive behaviour intolerable, and broke off the relationship. The appellant has been unable to accept that the relationship is over, and has repeatedly contacted Ms. S. to the point where Ms. S. felt anxious and afraid and went to the police.
- [12] The effect of the harassment on Ms. S. has been severe. She changed her phone number, her vehicle, her employment and her residence to try to escape from the unwanted attention of the appellant. Still, the appellant called her many times a day, and showed up at the places that she lived and worked. Ms. S.'s mental health deteriorated, and she became withdrawn. Eventually, as I have indicated, she sought assistance from the police.
- [13] The appellant has been before the courts numerous times in respect of harassing behaviour. As such, the situation involving Ms. S. was not new. On March 4, 2022, following a guilty plea to a charge of criminal harassment, the appellant was sentenced. The court imposed a probation order requiring the appellant to have no contact with Ms. S.
- [14] The appellant breached the no contact order almost immediately. Her criminal record indicates that breaches occurred on March 5, March 7, and August 18, 2022. Charges in respect of those breaches were disposed of by way of a guilty plea on April 26, 2023. At that sentencing, the court imposed a sentence of time served (which was equivalent to about seventeen months) and a probation order prohibiting the appellant from being in contact

with Ms. S. It required her, if she found herself in the presence of Ms. S., to leave immediately, without word or gesture.

The May 2023 Charges

- [15] On May 3, 2023, just over a week after that sentence was imposed, the appellant breached it. At 7:30 a.m., she deliberately attended at the parking lot of a hospital where she suspected Ms. S might be working. She located a car that she believed belonged to Ms. S. and waited for Ms. S. to emerge from the hospital. Ms. S. noticed the appellant as she left the hospital and ran to her vehicle. The appellant also ran toward the vehicle. Ms. S. got there first and was able to get in.
- [16] When the appellant got to the car, she tried to open the driver's door, but Ms. S. had locked it. The appellant knocked on the window, and waved her hand at Ms. S. and tried to engage her. Ms. S. called 9-1-1, and recorded the events on her cellphone. It is clear that the appellant was talking to Ms. S. during the event, but her words are not discernable on the video recording.
- [17] After a couple of minutes, the appellant walked away, but then returned after twenty seconds. She stood beside the driver's door and leaned in towards the window. That lasted for about a minute. She then left. She was arrested a short time later and taken into custody.
- [18] A few days later, the appellant attempted to contact Ms. S. by phone. This, too, was a breach of the April 26, 2023 probation order.
- [19] At trial, the appellant did not deny the events leading up to the charges, which were, in any event, captured on video surveillance and on Ms. S.'s cellphone.

Circumstances of the Offender

- [20] The appellant is thirty-eight years old. She was diagnosed with what was then called "Asperger's Syndrome" or "High Functioning Autism" as an adolescent. She has had difficulties forming friendships but appears to have had an intense desire to enter into a romantic relationship with a woman.
- [21] Prior to the appellant's relationship with Ms. S., she was in a relationship with a different woman. When that relationship broke down, the appellant engaged in harassing behaviour. That behaviour also led to police interventions, and eventually to criminal convictions. In total, the appellant has been convicted of breaching or attempting to breach court orders on thirteen occasions. In addition, she has three convictions for criminal harassment. In November 2019, the appellant was convicted of assaulting a police officer causing bodily harm.
- [22] The appellant has been treated by psychologists for many years, but her obsessive behaviour has continued despite their treatment efforts. The appellant shows limited insight into her behaviour, minimizing it and denying that the victims have genuinely chosen to break off all

ties with her. She refuses to accept that her relationship with Ms. S. is over. Instead, it is her position that Ms. S. has expressed fear of her because of a false narrative about the appellant's intentions that has been related to her by others, including the Crown and the police.

The Trial and Decision on Conviction

- [23] The appellant was represented by counsel in the court below. At the outset of the proceedings, counsel indicated that the appellant might not bear criminal responsibility on account of her mental disorder, referring to s. 16 of the Criminal Code.
- [24] The appellant testified. She stated that she found it impossible to comply with the no contact provisions of the probation orders. She made it clear that she considered that the orders prohibiting her from having contact with Ms. S. were unjust and should not have been imposed.
- [25] During the initial phase of the trial for breach of probation, counsel presented a preliminary report from a psychiatrist, expressing the view that the appellant might suffer from psychotic delusions and come within s. 16 of the Criminal Code. Both the Crown and the appellant's counsel suggested that the court adjourn proceedings so that a comprehensive psychiatric examination could take place, and a more complete opinion entered into evidence.
- [26] In his final report, the psychiatrist revised his opinion. He stated:
- Upon further reflection, it is now my opinion that, while I accept the diagnosis of Autism Spectrum Disorder and that [the accused's] strongly-held beliefs are intense and seemingly fixed, they are not of such intensity so as to deprive [the accused] of the capacity to appreciate the nature of [their] actions or to know the wrongfulness of [their] actions.
- [27] The psychiatrist concluded that the appellant "does not have a psychotic delusional disorder" and that her "beliefs are rooted in Autism Disorder but are not of delusional intensity and did not deprive [her] of the capacity to know that [her] actions were legally and morally wrong".
- [28] As a result of the psychiatrists revised opinion, neither the defence nor the Crown pursued a verdict of not criminally responsible on account of a mental disorder.
- [29] The judge considered a number of technical defences raised by defence counsel but rejected them. He was also aware of the appellant's strong personal view that the orders prohibiting her from having contact with Ms. S. were unjust and should not have been imposed. He recognized that such a collateral attack on the probation orders could not amount to a defence, and rightly rejected it:

- [43] [The accused's] belief that the probation orders were unjustified is not a reasonable excuse for failing to comply with the orders. As acknowledged by counsel, there is a general rule against collateral attacks on court orders. Generally, the validity of a court order cannot be attacked when defending against a criminal charge arising from its breach. Court orders must be considered final and binding, unless they are set aside on appeal. The rule against collateral attacks on court orders has been consistently applied in criminal proceedings involving an alleged breach of court order: *R. v. Bird*, 2019 SCC 7.
- [30] The judge also dealt with the effect of the appellant's mental disorder on criminal liability:
- [44] [The accused] also submits that there was a reasonable excuse for failing to comply with the orders because she has an overwhelming need to contact Ms. [S.] due to her autistic condition. She says that she is not capable of complying with the probation orders due to her mental health. [The accused] has acknowledged that she was aware of the conditions and that she was bound by the conditions. The psychiatric evidence indicates that she was not deprived of the capacity to understand the wrongness of breaching the orders. While I accept that [the accused]'s mental health condition contributed to her conduct, the evidence does not establish that she was incapable of knowing that her conduct was wrong. Her belief that it was not wrong to attempt to contact Ms. [S.] is not an objectively reasonable excuse for failing to comply with the conditions.

The Reasons for Sentence

- [31] In its sentencing submissions, the Crown sought a sentence of two years in addition to time served, to be followed by three years of probation. It sought probation conditions that included electronic monitoring and a no contact order, as well as an order that the appellant not possess any device that would allow her to access the Internet. Defence counsel sought a sentence of time served, but acknowledged that a probation order including electronic monitoring and a no contact order was advisable to protect Ms. S. from the appellant.
- [32] In imposing sentence, the judge recognized that the appellant's behaviour was "undoubtedly rooted in a mental health condition". He acknowledged that a mental disorder can be a mitigating factor on sentence, because it is seen as diminishing the moral culpability of the offender. Citing this Court's decision in *R. v. Badhesa*, 2019 BCCA 70 at para. 44, he noted that considerations of deterrence and denunciation should be afforded limited weight in the case of a person suffering from a mental disorder.
- [33] The judge also noted that the appellant has strong family support, particularly from her mother, and treated that as a mitigating factor for sentencing purposes.
- [34] The judge also noted a number of aggravating factors. He mentioned her thirteen convictions for breaching or attempting to breach court orders and that this offence was committed approximately one week after the most recent order was imposed

- [35] The judge also mentioned as an aggravating factor the fact that the appellant, was, at the time of the offence in the hospital parking lot, in possession of rope, scissors, duct tape and a sex toy. The judge noted that the appellant insisted that these were intended to be used for sexual purposes, and not for violence, but considered that, given Ms. S.'s clear indication that she wanted nothing to do with the appellant, the presence of those items gave rise to additional concerns for Ms. S.'s safety.
- [36] Having found that there was no real prospect of rehabilitation during the limited time period of a sentence, the judge considered that the paramount sentencing concern was the safety of society, and particularly Ms. S. He imposed a sentence of 18 months (less credit for pre-sentence custody). He also imposed a three-year period of probation. He rejected the Crown's request to ban the appellant from possessing devices that could access the Internet, but did impose a no contact order, and prohibited the appellant from attending at specific places where Ms. S. was likely to work. He also imposed an electronic monitoring requirement.

Issues on Appeal

- [37] The appellant lists five grounds of appeal in her factum, though the last two are repetitive. I would paraphrase the grounds, slightly, as follows:
1. The sentencing judge, in applying the step-up principle, incorrectly treated the appellant's immediately previous sentence as being a 17-month sentence, when that sentence was based on time served.
 2. The sentencing judge did not take psychological evidence into account as a mitigating factor, instead only relying on psychiatric reports. The appellant, as a result, will find it very difficult to comply with the order that was made.
 3. The sentencing judge incorrectly considered the appellant to be dangerous and to be harassing Ms. S. This was due to the judge's reliance on such things as the BDSM equipment found on the appellant's person when she was arrested, and on the complainant's Victim Impact Statement.
 4. The sentencing judge incorrectly believed that the complainant needed to be protected from the appellant, though she would never harm her, and has not done so in the past.
- [38] I am not persuaded that the alleged errors are made out.
- [39] With respect to the first ground, the judge fully understood the nature of the previous conviction. He understood that the sentence represented time served, but also appreciated that the Crown and defence counsel had both agreed that an effective 17-month sentence was appropriate in that case. The judge recognized certain aggravating factors in the earlier sentence that were not present in the case before him--for example, the appellant's attempt to access the closed witness room from which Ms. S. was giving her testimony.

- [40] I see no basis to doubt that the judge was fully conversant with the factors that gave rise to the April 2023 sentence.
- [41] With respect to the second ground, it is true that the judge did not have the psychologist's letters in evidence, but he was fully aware of the appellant's compulsions, and with her difficulties in abiding by probation orders. I do not accept that the judge erred in failing to appreciate the nature of the appellant's disorder.
- [42] The appellant seems to be of the view that the three-year probation order should not have been made because it sets the appellant up to fail. I acknowledge that, in general, courts will avoid making orders that are particularly onerous from the standpoint of an offender, if such orders are not seen as necessary. Thus, courts will often refrain from making orders that alcoholics refrain absolutely from imbibing, or that individuals suffering from substance-use disorders not use narcotics. Instead, courts will try to tailor their orders to the harm at issue, and attempt to make orders that will protect the public, but, at the same time, are capable of being followed by the offender.
- [43] Where the public cannot be adequately protected without the court making an order that the offender finds difficult to follow, however, there may be little alternative but to require the offender to abide by a condition that they find onerous.
- [44] In this case, the appellant has engaged in incessant harassment of her previous partners and will probably continue to do so unless a strict order is put in place. The judge, 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 Ms. S.--would not be appropriate.
- [45] With respect to the third ground of appeal, I do not see any basis for criticizing the judge's reference to the appellant's possession of bondage equipment at the time of the arrest. While the appellant refers to BDSM as a hobby, and suggests that she always carries around the kit, the judge did not err in his assessment of the situation. The presence of the bondage equipment during an episode of harassment was a cause for concern. The judge did not treat the matter as a particularly important one, and I am not persuaded that he erred in noting it.
- [46] I also am not persuaded that the judge erred in the use he made of Ms. S.'s evidence or her victim impact statement. The appellant rejects the idea that her repeated attempts to contact Ms. S. constituted harassment, or that she is troubled by the appellant's attempts to find her at work and in other environments. The appellant does not accept that these matters constitute harassment or that they are deeply troubling to the victim. As noted, she also appears to believe that any fear expressed by Ms. S. has been influenced by a false narrative that has been unjustly created by third parties. The appellant seems to lack any insight into the psychological harm that her behaviour occasions. While that lack of insight may be attributable to her mental disorder, it is not an accurate reflection of reality. The judge was fully entitled to evaluate the evidence, including the victim's testimony and statement.

- [47] Similarly, the judge made no error in his assessment of the evidence in finding that Ms. S. was in need of protection. Again, the appellant's lack of insight is unfortunate, but it cannot be allowed to control the court's findings.
- [48] While the appellant has not raised issues of the general fitness of the probation conditions, I will comment on them briefly. The three-year period of probation, including electronic monitoring, is a serious restriction of the appellant's liberty.
- [49] Courts have broad discretion in imposing probation conditions. In *R. v. Shoker*, 2006 SCC 44, the majority of the Court described the general scope of probation conditions:
- [13] Before discussing the issue that arises in this case, I wish to make a few general comments about the power to impose optional conditions under s. 732.1(3). The residual power under s. 732.1(3)(h) speaks of "other reasonable conditions" imposed "for protecting society and for facilitating the offender's successful reintegration into the community". Such language is instructive, not only in respect of conditions crafted under this residual power, but in respect of the optional conditions listed under s. 732.1(3): before a condition can be imposed, it must be "reasonable" in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender's successful reintegration into the community. Reasonable conditions will generally be linked to the particular offence but need not be. What is required is a nexus between the offender, the protection of the community and his reintegration into the community .
- [14] The residual power to craft individualized conditions of probation is very broad. It constitutes an important sentencing tool. The purpose and principles of sentencing set out in ss. 718 to 718.2 of the Criminal Code make it clear that sentencing is an individualized process that must take into account both the circumstances of the offence and of the offender. It would be impossible for Parliament to spell out every possible condition of probation that can meet these sentence objectives. The sentencing judge is well placed to craft conditions that are tailored to the particular offender to assist in his rehabilitation and protect society. However, the residual power to impose individualized conditions is not unlimited .
- [50] In *R. v. Duguay*, 2019 BCCA 53, Justice Fitch, for the Court, emphasized that while probation orders are typically aimed primarily at rehabilitation of the offender, protection of society remains a proper consideration:
- [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.

- [51] The appellant's mental disorder appears, at present, to be intractable, and the judge was quite guarded in his views of the prospects of rehabilitation. It is, nonetheless, to be expected that the appellant will gain some insight over time, and it is to be hoped that an effective form of therapy will ultimately be found. In the meantime, though, the judge rightly considered that protection of the public was a paramount consideration in fashioning a probation order.
- [52] I would, in the result, extend the time to apply for leave to appeal from sentence and grant leave to appeal. I would dismiss the application to adduce fresh evidence. Finally, I would dismiss the sentence appeal.
- [53] DEWITT-VAN OOSTEN J.A.: I agree.
- [54] GRAUER J.A.: I agree.

"The Honourable Mr. Justice Groberman"

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