

CANADA / JUDGMENT

R. v. Kuebler

2021 BCCA 291

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 291 R. v. Kuebler COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Kuebler, 2021 BCCA 291 Date: 20210716 Docket: CA47456 Between: Regina Appellant And Markus Kuebler Respondent Before: The Honourable Madam Justice Fenlon The Honourable Mr. Justice Fitch The Honourable Mr. Justice Abrioux On appeal from: An order of the Provincial Court of British Columbia, dated April 9, 2021 (sentence) (R. v. Kuebler, Dawson Creek Docket 35165-1-K). Oral Reasons for Judgment Counsel for the Appellant: C. Lusk Counsel for the Respondent (via videoconference): S. Catona Place and Date of Hearing: Vancouver, British Columbia July 16, 2021 Place and Date of Judgment: Vancouver, British Columbia July 16, 2021 Summary: Crown appeal from a six-month conditional sentence order imposed following the respondent's guilty plea to criminal harassment. The sentence is illegal. A conditional sentence of imprisonment cannot be imposed for the offence of criminal harassment where the Crown proceeds by indictment: s. 742.1(f)(ii) of the Criminal Code. Held: Applications to adduce fresh evidence dismissed; leave to appeal granted; appeal allowed; the conditional sentence order is set aside; a sentence of "time served" is substituted; and, the probation order is increased from 18 months to 20 months to give effect to the agreement of the parties and the intention of the sentencing judge.

- [1] FITCH J.A.: This is a Crown appeal from a six-month conditional sentence order ("CSO") imposed on the respondent following his guilty plea to criminal harassment contrary to s. 264 of the Criminal Code, R.S.C. 1985, c. C-46. The sentence gave effect to a joint submission made following the respondent's entry of a guilty plea. The judge also imposed an 18-month probation order to follow the CSO. A variety of ancillary orders were made at the time of sentencing, but none of them are in issue on appeal.
- [2] Although the respondent is a young, first-time offender, the seriousness of the offence more than justified the two-year period of community supervision the sentencing judge considered to be necessary and appropriate.
- [3] It is common ground that the sentence is illegal. A conditional sentence of imprisonment for the offence of criminal harassment cannot be imposed where, as here, the Crown proceeds by way of indictment: s. 742.1(f)(ii), Code.

- [4] By this appeal, the Crown seeks to rectify the illegal portion of the sentence while giving effect to the intention of the sentencing judge that the respondent be subjected to a 24-month period of community supervision. The Crown says that it seeks to achieve these goals without putting the respondent in a worse position than he agreed to be in at the time of the guilty plea.
- [5] The Crown submitted in its Statement filed on appeal that its goals can be achieved by substituting for the illegal CSO, a two-month jail sentence followed by a 22-month period of probation on the same terms imposed by the sentencing judge.
- [6] By way of explanation, the Crown notes that this Court has held that where a CSO is varied on appeal to a custodial term, the offender is to be given credit for any portion of the CSO that has been served: see *R. v. Andrew*, 2008 BCCA 141 at paras. 28-29, 32; *R. v. Graham*, 2012 BCCA 376 at para. 8. Following this line of authority, the Crown says in its Statement that the respondent should not face a period of incarceration if we accede to its proposal. This is because the sentence was imposed on April 9, 2021. When the Crown formulated its position, it anticipated that as of today's date the respondent would have served three months and one week of the CSO. The Crown says he should receive 1:1 credit for any time served when the CSO was running and not suspended. As the credit to be received would be greater than the two-month period of incarceration proposed by the Crown in its Statement, the Crown says that the respondent should not serve any jail time if the appeal is allowed and the sentence varied accordingly. To be clear, it is not the Crown's intention that the respondent be incarcerated as a consequence of appellate variation of the sentence.
- [7] Matters have developed somewhat since the Crown filed its Statement. By notice of motion filed July 15, 2021, the Crown seeks to adduce fresh evidence it says is relevant to the determination of this appeal. The fresh evidence establishes that on June 17, 2021, the respondent was alleged to have breached the condition of his CSO prohibiting him from possessing any weapon as defined by the Code. A warrant issued for the appellant's arrest and he was taken into custody that day. In addition, the respondent now faces two firearms-related offences alleged to have been committed on June 16, 2021. To complete the picture, the respondent was released on bail for the breach allegation and the additional substantive offences on June 30, 2021. On July 12, 2021, the CSO breach allegation was withdrawn by the Crown.
- [8] The fresh evidence the Crown seeks to adduce includes a rough calculation done by a BC Corrections analyst to the effect that when proper credit is given, the respondent will have served, as of today's date, 105 days of his original 183-day CSO. In response to a question posed by the Crown, the analyst says, "I believe that replacing the 6 month CSO with a 3 month sentence of imprisonment would mean there is no additional time to serve" (emphasis added). In light of this new information, the Crown now seeks the substitution of a notional three-month custodial term, running from April 9, 2021, to be followed by a 21-month probation order.

- [9] The respondent, who has disclaimed any reliance on the notion that his conviction followed an uninformed guilty plea that would not otherwise have been entered and is, thus, the product of a miscarriage of justice, takes no issue with the position taken by the Crown or with the remedy proposed in its Statement, as amended in oral argument.
- [10] Despite this, the respondent also applies to adduce fresh evidence on the appeal. The respondent deposes that he is a permanent resident of Canada who is now subject to removal proceedings on grounds of serious criminality pursuant to s. 36(1)(a) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA].
- [11] I emphasize that the respondent does not seek an extension of time to appeal conviction for the purposes of having his guilty plea set aside. Rather, his sole concern, and the reason he has applied to adduce fresh evidence on appeal, is to alert the Court to the fact that, by virtue of s. 64(2) of the IRPA, imposition of a sentence of at least six months would preclude him from appealing a removal order on humanitarian grounds. For obvious reasons, that is a result he seeks to avoid.
- [12] With this background in mind, I turn to consider how the illegal portion of this sentence is best addressed at this stage.
- [13] While we have considered the fresh evidence adduced by both parties, I would not admit it as doing so would, for the reasons that follow, have no impact on the result: *R. v. Lévesque*, [2000] 2 S.C.R. 487 at para. 32.
- [14] While the Crown is correct in its assessment of this Court's jurisprudence, it notes in its Statement that, "Ultimately, it is Corrections who will determine the amount of any credit that the respondent receives towards any jail sentence imposed by this Court." Further the Crown says only that it is "likely" that the respondent will receive credit at a rate of 1:1 for any time served under the CSO. I am troubled by the lack of clarity on this issue.
- [15] In addition, as I noted during oral argument of the appeal, as the respondent has already served 105 days of the six-month CSO imposed by the sentencing judge, increasing the probation order to 22 months on appeal would subject the respondent to a longer period of community supervision than he agreed to at the time of the plea. Further, it is my view that substituting a "notional" custodial sentence at this stage serves no useful purpose. Finally, the disposition proposed on appeal is not one the respondent agreed to when the plea resolution discussions came to fruition. If we accede to the position of the Crown it will, however, be reflected on the Canadian Police Information Centre (CPIC) database as the sentence imposed in this matter. The variation proposed by the Crown may be a consequential one should the respondent be sentenced in the future.

- [16] Given these circumstances, I think the better course is to substitute for the illegal CSO a sentence of "time served". I would vary the probation order by increasing it to 20 months on the same conditions imposed by the sentencing judge. In the result, the respondent will be subject to a period of community supervision that approximates, but does not exceed, the agreement of the parties at the time of the plea or the intention of the sentencing judge.
- [17] It should go without saying that the disposition I am proposing will not serve as a precedent in sentencing offenders for criminal harassment.
- [18] For the foregoing reasons, I would dismiss the applications to adduce fresh evidence. I would grant leave to appeal, allow the appeal from sentence, set aside the CSO, substitute a sentence of "time served", and increase the probation order from 18 months to 20 months on the conditions imposed by the sentencing judge.
- [19] FENLON J.A.: I agree.
- [20] ABRIOUX J.A.: I agree.
- [21] FENLON J.A.: The applications to adduce fresh evidence are dismissed. Leave to appeal is granted, the appeal is allowed, the CSO is set aside, and a sentence of "time served" is substituted, along with a probation order of 20 months on the same conditions imposed by the sentencing judge. "The Honourable Mr. Justice Fitch"

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