

CANADA / JUDGMENT

R. v. McGee

2020 BCCA 362

COURT

British Columbia Court of Appeal

DECIDED

17 December 2020

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2020 BCCA 362 R. v. McGee

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. McGee,

2020 BCCA 362

Date: 20201217

Docket: CA46920

Between:

Regina

Respondent

And

Jason Kenneth Andrew McGee

Appellant

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 March 20, 2020 (R. v. McGee, 2020 BCPC 113, Surrey Docket 235133-1).

Counsel for the Appellant, appearing in person

(via videoconference):

J. K. A. McGee

Counsel appearing as Amicus Curiae

(via videoconference):

K. Westell

Counsel for the Respondent

(via videoconference):

J. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

December 7, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 17, 2020

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant pleaded guilty to aggravated assault and was given a three-year global sentence, which the appellant is seeking to appeal. As a result of challenges faced by the appellant in presenting his appeal, an amicus curiae was appointed to make submissions to assist the court. The amicus submits that the sentencing judge erred in principle in failing to consider the mitigating effects of the appellant's mental illness, in failing to deal properly with the question of the appellant's perceived lack of insight into his mental illness, and in failing to order a pre-sentence report in the circumstances. The appellant argues that the sentencing judge failed to take into account relevant facts surrounding the offence. The amicus, without submissions, also raises the issue of the circumstances of the appellant's guilty plea. Held: leave to appeal granted; appeal dismissed. An appellate court is obliged to give wide latitude to sentencing judges. There is no principled basis for interfering with the judge's sentence; the judge considered the fitness assessment before him, was not obliged to order a pre-sentence report given the information at

hand, and properly considered the appellant's mental illness in mitigation of the sentence that would otherwise have been appropriate. In any event, even if the judge committed an error in principle, it was not one that impacted the sentence. In the circumstances, the sentence cannot be said to be demonstrably unfit. As this was not a conviction appeal and there was no request to withdraw the guilty plea, there was no basis for appellate intervention in respect of the guilty plea or the facts going to the essential elements of the offence, nor would intervention have been warranted in any event.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

- [1] The appellant seeks to appeal from the three-year global sentence he received on March 20, 2020, for aggravated assault, following a guilty plea.
- [2] At the time of sentencing, the appellant had been in custody for a total of 225 days. After receiving credit on a 1.5:1 basis, his net sentence was a further 757 days of imprisonment.
- [3] The appellant is self-represented, but, in the circumstances, *amicus curiae* was appointed and has made submissions to assist the court. Those circumstances are of significance in this matter: the appellant has been diagnosed with schizophrenia. The *amicus* submits that the sentencing judge erred in principle in failing to consider the mitigating effects of the appellant's mental illness, and in failing to deal properly with the question of the appellant's perceived lack of insight into his mental illness. The result, the *amicus* submits, was a sentence that was unduly severe and, therefore, unfit.
- [4] The circumstances of the offence are as follows.
- [5] Just before midnight on August 7, 2019, the appellant jumped out of some bushes right next to his mother's home as the victim was leaving it, and stabbed the victim three times with a knife. The appellant fled the scene before police arrived, but he was arrested the next day. The victim had three stab wounds, which the Crown alleged at sentencing were in the back, although the appellant contended in his statement to the court below that the wounds were in the victim's shoulder and under his arm.
- [6] The victim was taken to hospital for medical treatment and was released the same evening for injuries that, while serious, were not life-threatening.
- [7] At the time of the offence, the appellant was 28 years old. He was subject to bail conditions at the time, and, in committing the offence, he violated two of them by going to his mother's home, and possessing a weapon. Indeed, he had eight prior convictions, including a conviction for assault in 2016, and one for arson in 2017. The other six were for breaching court orders.
- [8] The appellant was also subject to a Rogers order at the time of the assault, which typically requires an accused or convicted offender to maintain contact with a treating physician, take counselling and treatment as recommended, and notify their bail supervisor or probation officer if they refuse to consent to medication.

- [9] A psychiatrist completed a fitness assessment less than a month before the sentencing hearing. The assessment noted that the appellant continued to suffer psychotic episodes due to schizophrenia, but had improved considerably after two months of treatment and medication at the Forensic Psychiatric Hospital, and could now engage in meaningful conversations. He was found fit, although the author reported that he lacked insight into his mental illness, denied symptoms, and exhibited poor judgment.
- [10] In his reasons for sentencing, the judge said this, after an exchange with the appellant:
- [10] In any event, it does not look like he is open to any form of treatment. In fact, he was on very strict conditions, I gather, including a Rogers order at the time that this offence was committed. He does not believe that this act occurred in a way that necessarily compromises public safety, thinking it was a private act at a residence. That is the degree of his lack of insight into his conduct. He maintains that Mr. Walters could have defended himself, it was not entirely by surprise, again minimizing his conduct and not demonstrating a lot of insight or remorse, in my view.
- [11] Ultimately, the question is not whether he deserves a provincial sentence or a federal sentence but rather what is a fit sentence under the circumstances of this offender and of this offence.
- [12] I have reviewed the cases that have been provided by Crown. I agree I am bound by a range that falls something between 16 months and six years, a very broad range, and I agree with defence counsel that certainly sentencing is a uniquely tailored and discretionary process, not amenable, necessarily, to any kind of a formulaic approach.
- [13] Nonetheless, the factors that are at play here in my view strongly urge in the direction of a federal penitentiary term, in particular with regards to the Nguyen 2016 Court of Appeal case which articulates the range, as well as noting that the lower end of that range, the range in essence being sought by defence, is more appropriately applied in the case of fights, consensual or otherwise, that might escalate out of control, whereas the higher end, towards the six-year end of the range, where the offence involves the use of a weapon without any provocation or without any opportunity to defend. As has been pointed out, all three of those factors are present in this case so I think that certainly moves things significantly towards the six-year end.
- [14] The Crown's submission is nothing close to that. In my view, the Crown's submission is a reasoned, fair and equitable sentence that balances all the sometimes competing considerations, including the fact that this is a guilty plea and I think to some extent, in my view at least, recognizing that there are underlying mental health concerns, even if they are untreated and to some extent for which Mr. McGee himself is responsible for not better recognizing and participating in terms of the voluntary treatment.

- [15] The sentence, in my view, of three years less time served is indeed a fit sentence and that is the sentence that I will impose. Mr. McGee has enhanced credit for 338 days and so the net term will be 757 days.
- [11] An appellate court is obliged to give wide latitude to sentencing judges, who are in the best position to determine, having regard to the circumstances, a just and appropriate sentence: *R v Lacasse*, 2015 SCC 64. Accordingly, appellate intervention is only warranted if the sentence is (a) demonstrably unfit, or (b) based on an error of law, error in principle, failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor, that had an impact on the sentence. Even if such an error is established, the court must then consider the fitness of the sentence by conducting its own sentencing analysis: *Lacasse* at paras 11, 44, 52; *R v Agin*, 2018 BCCA 133 at para 56; *R v Williams*, 2019 BCCA 295 at para 44.
- [12] As the Supreme Court of Canada stated in *Lacasse* at para 53, a fitness inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the Criminal Code, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle.
- [13] Mr. McGee submits that the sentencing judge erred in failing to take into account a number of factors, including: that he did not start the confrontation but was assaulted first; that he acted in self defence, taking out his pocketknife to defend himself; that his pocketknife was not legally a weapon; that the victim could have defended himself if he tried; that the judge's statement that Mr. McGee lacked insight was unfounded, because Mr. McGee suffers from post-traumatic stress syndrome, not schizophrenia; and that, in all of the circumstances, the sentence was not proportional, and out of line with other cases. In Mr. McGee's submission, the sentence should have been in the range of 15 to 20 months plus probation.
- [14] We explained to Mr. McGee that, as he did not appeal from his conviction, it is not open to us to revisit the facts on which the conviction was based, including whether he was reacting to an assault and defending himself. We are obliged to take the facts going to the essential elements of the offence as established or admitted before the sentencing judge.
- [15] Related to this subject, the amicus raised for our consideration, without making submissions, the circumstances of Mr. McGee's guilty plea. There has been no request to withdraw the guilty plea (which can only be made in the context of a conviction appeal). Nevertheless, a review of the transcript indicates that the sentencing judge proceeded carefully in ensuring that Mr. McGee knew what he was doing in pleading guilty, and that he was aware of what the charge of aggravated assault meant. In addition, the plea was a component of an agreement that involved the Crown entering a stay of proceedings on a separate information alleging that the appellant assaulted a different complainant. Even if there had been a conviction appeal before us, I could see no basis for interfering in this regard.

- [16] But the issues of how the appellant's mental illness was treated, and whether the sentence was proportional, are validly raised.
- [17] In this regard, the amicus asserted that it was understood by all parties involved in the sentencing proceeding, including the judge, that the appellant's offending was related to his mental illness. Accordingly, the amicus submitted, the sentencing judge was obliged to consider whether the mental illness interfered with the appellant's ability to have insight into the nature and extent of his illness and its effects on his overall behaviour and offending. This was, the amicus argued, essential to a consideration of moral culpability, mitigating and aggravating factors, and the appropriate weight to be given to the principles of denunciation and deterrence.
- [18] Instead, the amicus maintained, the sentencing judge erred in principle by failing adequately to consider the mitigating effect of the appellant's mental illness in the sense of decreased moral culpability, and the concomitant attenuation of the weight to be afforded to the concepts of general and specific deterrence.
- [19] Moreover, the amicus submitted, the judge not only failed to treat the mental illness generally as a mitigating factor, but also proceeded to treat the appellant's lack of insight into his illness as an aggravating factor.
- [20] As the amicus points out, Canadian courts have repeatedly held that where mental illness contributes to the commission of an offence, it is a mitigating factor, and the sentence may be reduced: see, for instance, *R v Forner*, 2020 BCCA 103 at para 25, where this court held that the sentencing judge erred in principle by considering the appellant's mental health to be an aggravating factor as well as a mitigating factor, and by focusing on her consumption of alcohol as a significant aggravating factor where it was related to her mental illness. As this court said in *R v Badhesa*, 2019 BCCA 70:
- [42] When mental illness causes or contributes to the commission of an offence, it is a mitigating factor and a sentence may be reduced because the offender's moral culpability is attenuated. In these circumstances, general deterrence is a less weighty consideration because a mentally ill offender is not an appropriate medium for making an example to others: *R. v. Belcourt*, 2010 ABCA 319 at para. 8
- [21] If the judge had sentenced the appellant towards the high end of the range, normally recognized as appropriate to the sort of circumstances that characterized the appellant's offence (use of a weapon, no provocation, no opportunity to defend, breach of bail conditions), then it would certainly be arguable that the judge had erred in principle by failing to give proper consideration to the effect of mental illness on the offender's moral culpability.
- [22] But that is not what occurred. Here, the judge did take into account the appellant's "underlying mental health concerns" as a mitigating factor; indeed, apart from the guilty plea, it was the only factor he discussed as justifying the reduction in sentence from

something towards the high end of the range at six years, to three years. The other factors present in this case, including the circumstances of the offence, the appellant's record, and the fact that in approaching his mother's residence and possessing a weapon, he violated his bail conditions, all supported a significantly longer sentence.

- [23] As the amicus submits, it would have been an error in principle for the judge to treat the appellant's lack of insight as an aggravating factor, given that it arose out of his illness. Lack of insight is, however, relevant to the protection of the public, a fundamental purpose of sentencing, and to the delicate balancing of sentencing objectives under s. 718 of the Criminal Code, including separation of the offender where necessary, and the offender's rehabilitation. The judge was accordingly entitled to take public safety into account, as well as the appellant's mental health issues, as he did, in balancing the "competing considerations".
- [24] Alternatively, the amicus contends that the judge had insufficient data available to him, being limited to the fitness assessment, and should have ordered a pre-sentence report with an appropriate psychiatric component.
- [25] I note that no such submission was made on behalf of the appellant before the sentencing judge. While it was open to the judge to order one on his own motion, the judge did have before him the psychiatrist's fitness assessment, together with the information provided by Mr. McGee and by the Crown. In these circumstances, I am satisfied that the judge acted permissibly within his discretion in proceeding as he did.
- [26] In conclusion, I can find no principled basis for interfering with the judge's sentence. Even if he had committed an error of principle, for the reasons just discussed I cannot see that it was one that impacted the sentence. Nor can it be said, in the circumstances I have described, that the sentence is demonstrably unfit.
- [27] Accordingly, I would grant leave to appeal, but I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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