CANADA / JUDGMENT

R. v. McKinnon

2005 BCCA 222

COURT
British Columbia Court of Appeal

DECIDED
7 April 2005

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2005 BCCA 222 R. v. McKinnon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. McKinnon,

2005 BCCA 222

Date: 20050407

Docket: CA032630

Between:

Regina

Respondent

And

Troy Dax McKinnon

Appellant

Before:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Low

Oral Reasons for Judgment

D.L. Kripp

Counsel for the Appellant

S.J. Brown

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

7 April 2005

[1] HALL J.A.: The appellant, Troy McKinnon, who will turn 22 in October of this year, appears to have a serious substance abuse problem that causes him to have difficulty with the law. The latest incident occurred at the end of May 2004 when he was involved with the possession of weapons and assaultive behaviour. It appears that at the time he was under the influence of drugs. It is to be noted that in January 2003 and August 2003 he was required to not possess weapons. The appellant has something of a youth court record beginning in 1999 in Hamilton including assault convictions and weapons offences.

[2] At the time when he was sentenced in November of 2004 by Mr. Justice Halfyard, he had been in custody for approximately six months. He had pleaded guilty to being in possession of a weapon for a purpose dangerous to public peace, assault with a weapon, possession of a restricted weapon, and failure to comply with the earlier orders which prevented him from having weapons.

[3] On the evening of 31 May 2004, a citizen saw a man outside his home and when asked by the householder to explain what he was doing on the property he produced and fired a handgun and then fled from the scene. The gun was not apparently fired at the householder. A report was made to the police who having received a tip about suspicious people at a Smithers pub made a patrol along Highway 16 and found a vehicle containing the appellant and others. There were weapons in the vehicle including a weapon that the appellant was attempting to conceal. The police officers felt that the appellant was under the influence of a drug or alcohol. The police arrested a number of individuals in the vehicle. The police seized a handgun that had in it three rounds. I note that one of the people that was with the appellant on this occasion and who was also arrested, was charged with weapons offences and at the time of the sentencing of the appellant, this person apparently was at large, having absconded. It is clear from the circumstances that at the time of these offences the appellant had committed multiple breaches of existing orders and was clearly in most undesirable company.

[4] The appellant has some support in that he apparently has an opportunity for a job set up by his father and also the support of a girlfriend who the judge noted supports him and has plans for both of them in the future.

[5] The learned judge sentenced the appellant to a sentence of one year in custody in addition to the six months he had already served and also put him on a probation order containing a number of terms.

[6] At the proceedings at sentence, as I read them, both the appellant and counsel for the appellant made submissions to the judge that he had served enough time in custody and he wished now to be released to a drug and treatment centre. It was submitted that methodology of a four month residential program would assist him in ridding himself of his drug and alcohol problems. I note this portion for instance at p. 29 of the sentence proceedings which I think reflects in general what counsel and the appellant were urging the judge to do. This passage is from lines 17-21 of the proceedings on p. 29, when the appellant says:

that if I am released and go through my treatment and rehabilitation and in a facility designed to help me with those problems, that I will not be back before the courts.

[7] The appellant, as I said, has a background where he seems to get into difficulty because of his substance abuse problems and even though he is a young person, he has a most unenviable record. It seems to me that unless he makes a firm resolve to change his ways that he will probably face increasingly heavy sentences if he runs afoul of the law in future.

[8] The appellant comes before us today seeking to have certain terms of the probation order excised on the basis that they are out of accord with the judgment of this Court in the case of R. v. Shoker, is a decision of this Court of 16 December 2004. The reference is 2004 BCCA 643. I should note for the record that the sentence proceedings before the learned sentencing judge occurred on 26 November 2004, approximately three weeks before the delivery of judgment by this Court of the Shoker case. In that case it was found that the imposition of certain terms requiring the individual to submit to drug testing and urinalysis testing on the demand of a probation officer or a peace officer were unconstitutional. As well, a requirement in the order to take treatment could not be sustained in that case because the individual had not consented to that as a term of the probation order. That arises out of the provisions of the Criminal Code that require an individual to consent in certain circumstances to take treatment before a court may so order. The apposite section is 732.1(3)(g) which reads:

if the offender agrees, and subject to the program director's acceptance of the offender, participate actively in a treatment program approved by the province;

In other words, such a provision may be placed in the probation order if the accused person consents.

[9] Counsel for the Crown in the present case in response to the argument of the appellant that these terms were illegally placed in his probation order suggests firstly that there was a form of consent in the submissions by counsel for the appellant and the appellant to the inclusion of the term relating to the residential treatment. Counsel for the Crown acknowledges that the mandatory testing provision is not sustainable in light of the Shoker case. Alternately, counsel for the Crown suggests that if the Court finds that he did not consent, then it would be possible to remit the matter to the learned sentencing judge so that he can deal with the matter under the provisions of s. 732.2(3). Therein provisions are made for a court that

sentences someone to make changes in optional conditions in certain circumstances.

[10] As I read the provisions of s. 732.2(3)(a), a change to be made in the optional conditions under that particular sub-section is to be conditional upon a change in circumstances. The ability to make a change under sub-sections (b) and (c) of that section are conditioned upon the court relieving the offender under (b) of certain terms or (c) decreasing the period for which the order is to remain in force. I cannot see that (b) and (c) are applicable in the circumstances of the instant case and it seems to me that (a) is not applicable because I am not sure that I can perceive a change in circumstances.

[11] Having regard to the totality of what was said at the sentencing proceedings, it seems to me that anything that was said by either the appellant or his counsel relating to residence in the drug and alcohol treatment centre for the four month program was at all times put forward upon the assumption or presumption that the court would order no further custodial period and would order that the appellant attend at the Luke 4 House, as it was described, for a treatment program. It seems to me that in the event what occurred was that the learned sentencing judge felt that an additional period of custody was required and he sentenced the appellant to a sentence of one year, and in addition put him on probation including in the order this term of taking the residential treatment program.

[12] Counsel for the appellant suggests that it would not be desirable to remit the matter back to the sentencing judge because clearly he had in mind that the appellant could benefit from being in custody for a while and perhaps getting some treatment while in custody. Counsel submits that to now require him to additionally undergo a residential treatment program, having regard to the fact that he has had a substantial period in custody and has taken some programs, would really not work towards his rehabilitation but would exceed the needs of legitimate rehabilitation and would probably not assist him in getting on with his life and attaining a career which ultimately would be, I should think, the surest way of getting this man out of his habit of criminal offending.

[13] It seems to me that there has not been here such a change in circumstances that would allow us to invoke the provisions of s. 732.3(a) of the Code. Rather what exists here is a sentence that inadvertently, at the time it was imposed, was an illegal sentence. The judge of course could not have been aware of what this Court was going to decide some three weeks later in the Shoker case.

[14] Therefore, I am not disposed to adopt the suggestions of the Crown either to the effect that there was consent to take a program or alternatively, if there was not consent, that we should remit the matter back to the original sentencing judge for reconsideration. It seems to me that the time that this man has served should in part serve to assist in his rehabilitation. It seems to me that a continuing probation order with the particular terms that counsel referred to as being necessary to excise in order to make it a legal order would meet the case. In particular the order would have to be amended so that part of Condition 5 be excised, part of Condition 7 be excised, Condition 8 should be excised in its entirety, and

Conditions 9, 10, 11 and 12 should be excised in their entirety. Aside from that, he will continue to be governed by the terms of the probation order which will take effect when he is released. Of course he will be required to keep the peace and be of good behaviour and I note that by the provisions of Condition 5, he is to take any alcohol and drug counselling as may be arranged by the probation officer and through counsel today, he has agreed that he is willing to abide by that term.

[15] So I think that if we leave that term in place coupled with the general provisions of keeping the peace and being of good behaviour, that should achieve what is requisite. I observe again that the term of incarceration of one year that I may say with respect was I think correctly imposed by the trial judge given the circumstances of this offence and this offender will conduce to the objectives of deterrence and rehabilitation to the extent that the law can achieve such with respect to this offender.

[16] I would grant leave to appeal and allow the appeal to alter the terms of the probation order in the fashion I have indicated but I would otherwise dismiss the appeal.

[17] RYAN J.A.: I agree with my colleague, Mr. Justice Hall.

[18] I would only add this, that in my view, even if we were to take the view that the appellant did consent to taking the treatment in accordance with the probation order, it seems to me that imposing a jail sentence along with what amounts to a partly custodial sentence attached to a probation order, in the circumstances of this case, would result in an unfit sentence.

[19] I would, as I say, I agree with my colleague.

[20] LOW J.A.: I agree with both my colleagues.

[21] RYAN J.A.: Leave is granted. The appeal is allowed to the extent as set out by my colleague but to be more certain, I will repeat it again.

[22] Condition 5 of the probation order is amended by removing the last sentence. Condition 6 is removed. Condition 7 is amended by removing the words "and when you are a resident of the Luke 15 House" and Conditions 8, 9, 10, 11 and 12 are removed. That should cover everything.

(discussion with counsel)

[23] RYAN J.A.: Condition 6 should be in conformity with s. 732.1. It ought to be amended to incorporate the words of the section rather than remain as it stands now, my colleagues being in agreement.

"The Honourable Madam Justice Ryan"

"The Honourable Mr. Justice Hall"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.bccourts.ca/jdb-txt/ca/05/02/2005bcca0222.htm

CASE PAGE https://chat.esheria.ai/case-law/canada/r-v-mckinnon-2005

Prepared on 29 October 2026 · Esheria