

CANADA / JUDGMENT

R. v. McNeil

2006 BCCA 375

COURT

British Columbia Court of Appeal

DECIDED

15 August 2006

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2006 BCCA 375 R. v. McNeil COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. McNeil, 2006 BCCA 375 Date: 20060815 Docket: CA033810 Between: Regina Respondent And Brian Christopher McNeil Appellant Before: The Honourable Madam Justice Newbury The Honourable Madam Justice Levine The Honourable Madam Justice Kirkpatrick Oral Reasons for Judgment D.N. Fai Counsel for the Appellant M.T. Ainslie Counsel for the (Crown) Respondent Place and Date: Vancouver, British Columbia 15 August 2006

- [1] LEVINE, J.A.: Brian Christopher McNeil applies for leave, and if leave is granted, appeals the sentence of 18 months in prison (after giving credit for six months of pre-sentence custody), imposed by a provincial court judge on January 25, 2006, after the appellant pleaded guilty to six offences involving possession of stolen mail keys; possession of stolen mail (including credit cards and other pieces of identification); and possession of two driver's licences that had been forged by inserting the appellant's picture in place of the owner's photograph.
- [2] The appellant claims that the sentence is excessive; the sentencing judge sentenced the appellant for matters to which he did not plead guilty or admit; and the sentencing judge did not properly apply the "step-up principle". He also claims that he should have been given seven, not six, months credit for pre-sentence custody.
- [3] The first of the charges to which the appellant pleaded guilty was possession of a mail key under circumstances that give rise to the inference that it has been used, or was intended to be used, for the purpose of breaking in, contrary to s. 351(1) of the Criminal Code. On April 20, 2005, the appellant was seen by a police officer getting into a car. The police officer knew the appellant was prohibited from driving. On his arrest, a homemade mail key was found in the appellant's sock. He had in his possession a driver's licence belonging to another individual, but with the appellant's photograph on it. When contacted by police, the owner of the licence told them he had been waiting for his driver's licence to arrive in the mail, but he had not received it. The appellant was released on bail with a condition, among others, that he not possess any identification not in his name or drive a motor vehicle.

- [4] The other five charges to which the appellant pleaded guilty were two counts of possession of stolen property contrary to s. 355 of the Code, one count of possession of mail keys, under s. 351(1) of the Code, and two counts of forging a driver's licence, contrary to s. 367 of the Code. On October 13, 2005, the appellant was arrested on an outstanding warrant. He was found in possession of two driver's licences with his picture replacing that of the owner of the licence; other items of identification for the same two individuals; identification belonging to a third individual, as well as hand-written notes of that person's address, home and cell phone numbers, date of birth, amount of money in his bank account and the amount of available credit, and a notebook listing names and apparent attempts at practising or forging that person's signature; mail belonging to a fourth individual; and two forged mail keys which police later learned fit the mail boxes linked to the address from which some of the mail had been stolen.
- [5] The appellant has a substantial criminal record spanning 1992 to September 2004, when he was convicted of theft, possession of instruments, possession of a prohibited weapon and breach of probation. His record includes 17 property offences, three obstruction offences, eight breaches of probation or a recognizance, drug offences, and other crimes. As noted by the sentencing judge, the offence committed in April 2005 occurred a few months after the appellant was released from jail having just served a sentence for other offences; he was on probation at the times all of the offences were committed; and was on bail for the first offence when the subsequent offences were committed in October 2005.
- [6] The appellant has a history of drug addiction, to which his counsel attributes his criminal behaviour.
- [7] At sentencing, the Crown suggested a sentence of 18 months in jail, less credit for pre-sentence custody of three months and 12 days. The defence position was that nine to 12 months in jail, less seven months credit for pre-sentence custody, would be appropriate; alternatively, defence counsel suggested a conditional sentence of six to nine months. On appeal, the appellant seeks a reduction of the sentence to nine to 12 months in jail, less credit of seven months, leaving a range of two to five months in jail.
- [8] The sentencing judge noted (in para. 2 of her Reasons for Sentence) that there was no evidence that the appellant had used the stolen or forged items for his own benefit and he was not charged with theft of mail, but said the items led to "an irresistible inference" about how he obtained possession of them. She characterized the offences as "extremely serious", and commented (at para. 12): This is, unfortunately, the kind of behaviour that if it is not met sternly by the court is going to result in the public having a complete lack of faith in its mail system and a complete lack of faith in the validity of the driver's licensing system and a lack or a lessening of faith by people in the financial field regarding the validity of documents that we all take for granted, that we all rely on every day. I am referring to identification, bank cards, credit cards and documents of that nature. These are crimes that go to the root of how people live in our society and unless these crimes are checked in a serious way, unless the courts and others deal very seriously with these types of offences,

which frankly are identity theft offences, it will lead to a lessening of the whole social fabric that we all rely on.

- [9] The appellant's claims that the sentence is excessive, and that the sentencing judge sentenced him for matters to which he did not admit, focus on these aspects of the reasons for sentence. He claims that Crown counsel, and the trial judge, relied on authorities where the accused had used stolen or fraudulent documents to defraud people of substantial amounts of money, which the appellant had not done, and that she sentenced him as if he had pleaded guilty to mail and identity theft or uttering forged documents, instead of simply possessing items obtained by the commission of an offence. He claims further that the sentencing judge was not entitled, in the absence of evidence, to take into account the effect on society of such crimes.
- [10] There is no merit to these arguments. As she stated in her reasons for sentence, there was no evidence that the appellant used these items for his benefit, but the sentencing judge was not only entitled, but required, to draw an inference from their possession about how he had obtained them and that he intended to use them. Such an inference is an element of the offence of possession of the mail key. The charge under s. 351(1) of the Code was that the appellant "did commit an offence of possessing an instrument suitable for the purpose of breaking into a place, under circumstances that give rise to the reasonable inference that the instrument has been used or is or was intended to be used for such purpose" (underlining added). The inference drawn by the sentencing judge is indisputably reasonable, and was, in fact, admitted by the appellant when he pleaded guilty. The inference was appropriately applied to determine the seriousness of the offence and the moral culpability of the appellant. (Underlining added.)
- [11] As for the impact of a particular offence on the community, as this Court said in *R. v. Calderwood* (1995), 57 B.C.A.C. 237 at para. 14: a resident Provincial Court judge is entitled to take judicial notice of recent unlawful conduct in the community, and of the community's attitude towards that conduct. Such local knowledge is a relevant consideration in deciding whether a discharge should be granted, or if not, what sort of sentence would be appropriate.
- [12] Similar sentiments about the seriousness of crimes involving identity theft were expressed by other judges in cases cited to the sentencing judge in this case: *R. v. Tonks*, 2003 BCPC 475; *R. v. Dueck*, 2003 B.C.P.C. 538, as well as in *R. v. M.W.F.*, 2005 BCPC 679, and *R. v. Walowina*, 2006 BCPC 154.
- [13] Indeed, a sentencing judge's awareness of the community's circumstances is the primary reason that an appellate court must show deference to the judge's decision and may not interfere with a sentence unless the judge has made an error in principle, failed to consider a relevant factor, or overemphasized an appropriate factor, or the sentence is demonstrably unfit: see *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 89. In that case, the Supreme Court of Canada emphasized (at para. 91), the "unique qualifications of experience and judgment"

possessed by sentencing judges "who preside near or within the community which has suffered the consequences of the offender's crime", providing them with "a strong sense of the particular blend of sentencing goals that will be 'just and appropriate' for the protection of that community."

- [14] In my opinion, there is similarly no merit to the arguments that the sentencing judge erred in not allowing seven months credit for pre-trial custody, or by not applying the "step-up principle". Both of these matters are within the discretion of the sentencing judge, in the context of her consideration of all of the circumstances and the principles of sentencing, and neither gives rise to an error in principle. In *R. v. Bush*, 2006 BCCA 350 at para. 9, this Court noted that the step-up principle has little application where denunciation and deterrence, not rehabilitation, are the principle objectives of sentencing, as is the case here.
- [15] For all of these reasons, I would grant leave to appeal, but dismiss the appeal.
- [16] NEWBURY, J.A.: I agree.
- [17] KIRKPATRICK, J.A.: I agree. "The Honourable Madam Justice Levine"

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