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CANADA / JUDGMENT

## R. v. Noddle

2021 BCCA 235

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COURT

British Columbia Court of Appeal

DECIDED

16 June 2021

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2021 BCCA 235 R. v. Noddle

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Noddle,

2021 BCCA 235

Date: 20210616

Docket: CA42968

Between:

Regina

Respondent

And

Darren Ross Noddle

Appellant

Before:

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Butler

On an application to reinstate an appeal from: Orders of the

Provincial Court of British Columbia, dated October 28, 2014 (conviction), and

December 1, 2014 (sentence) (R. v. Noddle, Victoria Docket 161556-5-KC).

The Appellant, appearing in person:

D.R. Noddle

Counsel for the Respondent:

J.J. Saulnier

Written Submissions Received from the Appellant:

June 11, 2019

Written Submissions Received from the Respondent:

May 31, 2019

Place and Date of Judgment:

Vancouver, British Columbia

June 16, 2021

Written Reasons by:

The Honourable Madam Justice MacKenzie

Concurred in by:

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Butler

Summary:

The appellant applies to reinstate his appeal from conviction and application for leave to appeal sentence for criminal harassment, which were dismissed in 2016 when a division of this Court denied his application for an extension of time. Held: Application dismissed. It is not in the interests of justice to reinstate the appeal. The appellant's application for an extension of time was denied because he was flouting the order sought to be appealed and had taken no steps to prosecute the appeal from conviction and application for leave to appeal sentence. He has shown no error or change of circumstances warranting a reconsideration of this decision. Nor has he provided an explanation for the delay in bringing the application for reinstatement. The appellant has not demonstrated how the alleged non-disclosure of a CD recording of the appellant's police interview could support a meritorious ground of appeal.

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

- [1] Darren Noddle applies to reopen his appeal against conviction and an application for leave to appeal sentence in Appeal No. CA42968, which were dismissed on April 13, 2016, in reasons indexed as *R. v. Noddle*, 2016 BCCA 164, leave to appeal ref'd [2017] S.C.C.A. No. 319. The appeal was dismissed for the reasons of Justice Groberman when the Court denied Mr. Noddle's application for an extension of time to appeal his conviction and to apply for leave to appeal his sentence for criminal harassment (the "First Harassment Conviction").
- [2] On April 26, 2019, the case management judge directed this application be addressed in writing unless otherwise ordered by the Court. The application is appropriately addressed in writing. It was referred to this division in April 2021. It seems the materials filed in support of the application were somewhat difficult to identify and to relate to the within appeal.
- [3] As noted in *R. v. T.L.C.*, 2012 BCCA 131 at para. 2, this application is more properly described as one seeking to "reinstate" the appeal against conviction and application for leave to appeal sentence. I will use the term "reopen" as did the parties in their written materials.
- [4] Mr. Noddle appears to argue in essence that the Crown breached its disclosure obligation by failing to disclose a "CD of Arrest", which affected his right at trial to make full answer and defence. The CD of Arrest is an audio- and video-recorded police interview of Mr. Noddle following his arrest in 2013 preceding the First Harassment Conviction.
- [5] For the reasons that follow, I would dismiss this application to reopen the appeal from conviction and application for leave to appeal sentence. There is no merit to the application and it is not in the interests of justice to grant it.

## Background

- [6] The summary of the background provided by the Crown will put the application in context, but the reasons of Justice Fitch in *R. v. Noddle*, 2019 BCCA 140 (Chambers), and the reasons in the court below in *R. v. Noddle*, 2018 BCSC 1780 and 2018 BCSC 2013, provide further detail.
- [7] Mr. Noddle and the complainant were former classmates who briefly reconnected by email in 2008 when he lived in Ontario and she lived in Victoria, British Columbia. They had only one brief meeting in person. Later in 2008, the complainant told Mr. Noddle she did not want further contact, and it stopped for a few years. But from 2012 to 2013, Mr. Noddle again contacted the complainant, sending her romantic and bizarre emails and voicemails. She told him to stop and that he was scaring her.
- [8] In December 2013, Mr. Noddle left the complainant a voice message saying he was at the back of her office building. On the advice of the police, she left her home and went to a hotel. Mr. Noddle was arrested and charged with what became the First Harassment Conviction.

- [9] The police interviewed Mr. Noddle for about 30 minutes after his arrest on December 9, 2013. This interview is depicted in the copy of the audio- and video-recorded police interview to which Mr. Noddle refers as the "CD of Arrest" that he apparently filed later in applications under s. 684 of the Criminal Code, R.S.C. 1985, c. C-46, for the appointment of counsel. The Crown has viewed the court copy (but was not given a copy), and is not aware of the existence of a transcript of the interview. In the CD of Arrest, Mr. Noddle discusses, among other things, his relationship with the complainant and his medical problems.
- [10] In May 2014, while on bail preceding the First Harassment Conviction, Mr. Noddle again went to the complainant's office. He was consequently charged with breaching his recognizance. In October 2014, he was convicted of the First Harassment Conviction, the subject of this application to reopen. He was also convicted of three counts of breaching his recognizance. In December 2014, Mr. Noddle was sentenced to one day in jail after credit for pre-sentence custody, and placed on probation for three years. A condition of his probation was not to contact the complainant.
- [11] However, Mr. Noddle was convicted of breach of probation after he communicated with the complainant from Australia in August 2017. He was not reporting to his probation officer then and his whereabouts were largely unknown.
- [12] Mr. Noddle's probation ended in December 2017, but shortly afterward, between December 2017 and February 2018, he sent four packages to the complainant. Mr. Noddle was again charged with criminal harassment, and convicted on May 18, 2018 (the "Second Harassment Conviction"). He was also convicted of two breaches of probation and received two consecutive six-month jail sentences.
- [13] On October 1, 2018, Mr. Noddle received a nine-month jail sentence for the Second Harassment Conviction. His statutory release was on about March 1, 2019.

### **Appeal of the First Harassment Conviction (CA42968)**

- [14] The deadline for filing an appeal and an application for leave to appeal sentence from the First Harassment Conviction for which Mr. Noddle was sentenced on December 1, 2014, would have been approximately December 31, 2014. However, he did not file the notice of appeal against conviction and notice of application for leave to appeal sentence until July 30, 2015. On the same day, Mr. Noddle filed a notice of application for an extension of time to appeal.
- [15] On January 22, 2016, Justice Bennett, the case management judge at the time, referred the appeal to a division of this Court to decide whether the appeal should be dismissed.
- [16] By the time of the hearing of Mr. Noddle's application for an extension of time to appeal conviction and sentence on April 13, 2016, over 16 months had elapsed since sentence, transcripts had not been ordered, and Mr. Noddle had done almost nothing to prosecute his appeal (2016 BCCA 164 at para. 3).

- [17] Mr. Noddle offered this Court no reasonable explanation for the delay, nor were the merits of the appeal "conspicuous." Further, Mr. Noddle was in breach of his probation order and there was an outstanding warrant for his arrest. The Court found Mr. Noddle had repudiated the jurisdiction of the Court and was flouting the very order for which he sought leave to appeal. Mr. Noddle presented no realistic plan to prosecute the appeal and provided no material to either justify an extension of time, or put this Court in a position to hear the appeal (2016 BCCA 164 at paras. 4-9).
- [18] The Court ultimately dismissed Mr. Noddle's application to extend time to appeal the conviction and to seek leave to appeal sentence. Consequently, his conviction and sentence appeals stood dismissed (2016 BCCA 164 at para. 12).

### **Application to Reopen the Appeal from the First Harassment Conviction and Sentence (CA42968)**

- [19] Mr. Noddle was sentenced for the Second Harassment Conviction on October 1, 2018. On October 1, 2019, this Court dismissed his appeal from conviction and application for leave to appeal sentence for want of prosecution (CA45736) in reasons indexed as 2019 BCCA 342. Before that hearing and during case management before Fitch J.A., Mr. Noddle brought an application under s. 684 of the Criminal Code for the appointment of counsel (in CA45736).
- [20] During his s. 684 application for the unsuccessful appeal from the Second Harassment Conviction, Mr. Noddle said he wished to apply to reopen the appeal from the First Harassment Conviction and application for leave to appeal sentence (CA42968). Put another way, he wished to reopen the refusal of his application for an extension of time to appeal this conviction and for leave to appeal sentence, which had resulted in the dismissal of his appeal. Mr. Noddle also applied for a s. 684 appointment of counsel for the reopening application. On April 26, 2019, Fitch J.A. dismissed both s. 684 applications (CA42968 and CA45736). In the course of doing so, he described the reopening application:
- [21] With respect to the appellant's application for leave to reopen the dismissed extension of time application in CA42968, he argues that there is merit in the reopening application because the Crown breached its disclosure obligation by failing to disclose to him a video which he refers to as the "CD of Arrest". He says the alleged non-disclosure infringed his right to make full answer and defence.
- [22] The appellant filed the "CD of Arrest" in support of these applications. It consists of an audio- and video-recorded interview of the appellant by a police officer following his arrest in 2013 on the first criminal harassment charge.
- [23] The appellant also provided a number of explanations for why he did not proceed with his appeal until long after the appeal period expired. I note that these explanations were before the division when the extension of time application was dismissed.

- [24] It appears from the appellant's filings that he has been denied legal aid for the reopening application. The appellant advised me on an earlier case management appearance and confirmed with me on the hearing of these applications that he has not yet completed his filings on the application to reopen the dismissed extension of time application. The appellant was unable to identify, with precision, the additional material he wishes to file in support of the reopening application, but requested an opportunity to file further material even if the s. 684 applications are dismissed.
- [21] After setting out the legal principles applicable to reopening appeals for reasons other than on the merits, Fitch J.A. dismissed Mr. Noddle's application for the appointment of counsel on the reopening application (CA42968). He said this:
- [44] The overarching factor is the interests of justice: *R. v. T.L.C.* at para. 27. In *R. v. Clymore*, [1999 BCCA 225,] this Court held that it was not in the interests of justice to reopen the appeal of a person who had failed to appear in court on serious criminal charges: at para. 17.
- [45] In my view, the appellant has not raised any arguable issues that could support the conclusion that it is in the interests of justice to reopen his appeal. As noted above, a division of this Court determined that the appellant was flouting the very order he sought to appeal and had taken no steps to prosecute his appeal despite being warned that his application was at risk of being dismissed. While the appellant has reiterated his explanation for not proceeding with an appeal in a timely manner, he has not shown any error or misunderstanding of the facts in the decision to dismiss the application to extend time. The appellant's two-and-a-half-to-three-year delay in bringing forward the reopening application is excessive and largely unexplained. It is not clear to me how his argument regarding the Crown's alleged failure to disclose could be relevant to the considerations that motivated the decision to dismiss the extension of time application. In any event, the merits of the underlying appeal are not obvious. In my view, it is not in the public interest to appoint counsel and require the expenditure of public funds on the appellant's reopening application.
- [22] Justice Fitch also gave directions on how the within reopening application was to proceed:
- [46] If the appellant wishes to proceed on his own with the reopening application, he must complete that application by filing four copies of the additional material he wishes to rely on by May 17, 2019. The appellant's written argument in support of the re-opening application shall not exceed 10 double-spaced pages. The Crown will have two weeks from the date the appellant advises that his filings on the reopening application are complete to respond. The appellant has requested that he be given 10 days to reply to the Crown's submissions. I make that order. Unless otherwise ordered by the Court, I direct that the reopening application be dealt with in writing. I direct that the Crown's responding submissions not exceed 10 double-spaced pages. The appellant's reply shall not exceed five double-spaced pages.

[23] In response to the above directions, Mr. Noddle filed certain documents under a cover page entitled, "Appellant's Reply On Appellant's Application To Reopen Appeal" on June 11, 2019. The next page purports to be an affidavit sworn June 11, 2019, in which Mr. Noddle states:

1. Crown failed to disclose my "CD of Arrest" that gives rise to re-open my appeal
2. This affidavit includes a 5 page reply to re-open
3. This affidavit includes Exhibit Book 1 in support of my 5 page reply.
4. This affidavit includes a [sic] authorities supporting my 5 page reply. And Exhibit Book 3

[24] What appears to be Mr. Noddle's 25-paragraph argument on this application to reopen begins on the third page of his materials.

Grounds to Reopen

### Applicable Legal Principles

[25] T.L.C. set out the applicable legal principles and factors relevant to a reopening application that has been dismissed other than on the merits:

[26] It is beyond question that this Court has discretion to reopen (i.e., reinstate) an appeal/application that has been dismissed/refused other than on the merits; the applicant must satisfy what has been said to be the "heavy onus" of showing that it is in the interests of justice to do so: *R. v. Blaker* (1983), 6 C.C.C. (3d) 385 at 392, 393 (B.C.C.A.). The Crown's factum contains a helpful list of factors considered in deciding whether to grant such an order:

- (a) the length of delay between the dismissal and the application for reinstatement, and the adequacy of the explanation offered for that delay: *R. v. Findlay* (1996), 79 B.C.A.C. 106 at para. 13;
- (b) whether the Appellant contributed to the delay: *R. v. Blaker* at p. 393;
- (c) whether the Appellant had a bona fide intention to pursue the appeal throughout the proceedings: *R. v. Clymore*, 1999 BCCA 225, 134 C.C.C. (3d) 476 at para. 14;
- (d) whether the initial Order was made in error, or the Court was operating under some misunderstanding of the material facts: *R. v. Henry* (1997), 100 B.C.A.C. 183 at para. 18;
- (e) the effect reinstatement would have on public confidence in the administration of justice: *R. v. Clymore* at para. 16;
- (f) the seriousness of the charges: *R. v. Blaker* at p. 392;
- (g) the merit of the appeal: *R. v. Blaker* at p. 392; *R. v. Clymore* at para. 14.

- [27] Although not exhaustive, the above list does provide a useful guide for the court. Which factors will be of importance in a particular case will depend on the circumstances of that case. The overarching factor is the interests of justice.
- [28] With respect to the "heavy onus", it is important to keep in mind that it applies not to each individual factor, but to the two essential criteria for reinstatement, namely: (a) the earlier disposition was not on the merits; and (b) reinstatement is in the interests of justice: *R. v. Chan*, 2008 BCCA 200, 255 B.C.A.C. 35 at para. 11.

## Discussion

- [26] Mr. Noddle's argument is unclear and what is discernable is unpersuasive. I have already replicated above Fitch J.A.'s apt description of Mr. Noddle's grounds to reopen (2016 BCCA 164 at paras. 21-24) and can add nothing more. As Fitch J.A. observed, Mr. Noddle's complaint seems to be related to non-disclosure of the CD of Arrest. But no relevance to such alleged non-disclosure is either suggested or apparent. It was not relevant to this Court's reasons for denying the extension of time and consequently dismissing the appeal from the First Harassment Conviction and application for leave to appeal sentence. Mr. Noddle has advanced no new argument to suggest the non-disclosure could support a meritorious ground of appeal.
- [27] Mr. Noddle has not met the onus of establishing it is in the interests of justice to reopen/reinstate the appeal to grant the application for an extension of time to file the notice of appeal and application for leave to appeal sentence. In dismissing the extension application, Groberman J.A. observed that Mr. Noddle failed to appeal his conviction or sentence in a timely manner and had done nothing to move the appeal along. He was also in violation of his terms of probation and there was an outstanding warrant for his arrest.
- [28] Just over a week after being sentenced for the First Harassment Conviction, Mr. Noddle left British Columbia without notice to his probation officer. He made no case for the extension sought and offered no reasonable explanation for the lengthy delay in bringing the appeal. He failed to move with dispatch toward a hearing. The merits of the appeal were not "conspicuous" and Mr. Noddle did not present any reasonable plan to prosecute the appeal. He provided nothing to justify an extension or to put the Court in a position to hear the appeal.
- [29] As Groberman J.A. summarized in 2016 BCCA 164:
- [9] Mr. Noddle has failed to show reason why the time to appeal should be extended and has failed to pursue the appeal with diligence. He has also repudiated the jurisdiction and is flouting the order that he seeks leave to appeal. In the circumstances, I am satisfied that the appropriate course is to deny an extension of time. It follows that the conviction and sentence appeals would stand dismissed.

Before this division, Mr. Noddle has provided no new material or argument that persuades the Court it would be in the interests of justice to reopen the appeal from conviction and application for leave to appeal sentence.

### Disposition

[30] It follows that I would dismiss the application.

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Butler"

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