

CANADA / JUDGMENT

R. v. Noor

2011 BCSC 1629

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Supreme Court of British Columbia

DECIDED

30 November 2011

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Noor,

2011 BCSC 1629

Date: 20111130

Docket: X074237

Registry: New Westminster

Regina

v.

Brandon Gary Evald Noor

Before: The Honourable Madam Justice E.A. Arnold-Bailey

On appeal from: Provincial Court of British Columbia, August 19, 2010, (R v. Noor, Port Coquitlam Registry No. 82024-1)

Reasons for Judgment

Counsel for the Crown/Respondent:

John Caldwell

Counsel for Accused/Appellant:

James C. Gopaulsingh

Place and Date of Hearing:

New Westminster, B.C.

June 28, 2011

Place and Date of Judgment:

New Westminster, B.C.

November 30, 2011

Introduction

- [1] The appellant, Mr. Noor, appeals the sentence he received on a charge of Uttering Threats contrary to s. 264.1(1) of the Criminal Code, R.S.C. 1985, c. C-46. He was sentenced to a \$2,500 fine and one year of probation by a provincial court judge on August 19, 2010. A charge of Dangerous Operation of a Motor Vehicle, contrary to s. 249(1)(a) of the Criminal Code was stayed. The Crown proceeded by way of summary conviction. Although the incident in which the appellant threatened the complainant arose in the context of what is commonly referred to as an incident of "road rage," the circumstances of the threatening offence related to a confrontation between the appellant and the complainant and not to the driving of the appellant at the time.
- [2] The appellant respectfully submits that the learned provincial court judge's remarks at sentence make it clear that the judge considered the appellant to have driven his vehicle in a manner dangerous to the public, and that the judge considered that to be a major aggravating factor in determining the appropriate sentence. The appellant respectfully submits that the evidence adduced during sentencing did not establish beyond a reasonable doubt that the appellant drove his vehicle in a dangerous manner. In fact, little was said by the Crown or defence counsel about the appellant's driving prior to him uttering the threatening words to the complainant that constituted the offence to which he pleaded guilty. Thus, it is submitted on appeal that the sentencing judge erred in principle by treating the driving of the appellant, and the risks posed to the public by dangerous drivers, as aggravating factors when considering defence submissions that a conditional discharge with conditions would be a fit sentence.
- [3] The Crown submits that the Court ought to find that the sentencing judge did not err in principle. Counsel for the Crown submits that the offence of threatening occurred within the context of bad driving and the sentencing judge's comments ought to be viewed in that context. He submitted that the judge's comments were made in the overall setting of the appellant weaving in and out of traffic, and situations in which motorists "lose their cool" are relevant to the sentencing principle of general and specific deterrence. However, counsel for the Crown agrees that if I find that an error in principle occurred in this case then deference does not apply and this Court ought to impose the sentence it considers fit.

Relevant Criminal Code Sections

- [4] Section 264.1(1) of the Criminal Code states as follows:

Uttering threats

264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(a) to cause death or bodily harm to any person;

...

Punishment

(2) Every one who commits an offence under paragraph (1)(a) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Idem

(3) Every one who commits an offence under paragraph (1)(b) or (c)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

[5] As this summary conviction appeal is made pursuant to s. 813, s. 687(1) of the Criminal Code is applicable by virtue of s. 822(1). Section 687(1) of the Criminal Code states the following:

Powers of court on appeal against sentence

687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(b) dismiss the appeal.

Effect of judgment

(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

Submissions Before the Sentencing Judge

[6] Crown counsel submitted the following:

The circumstances are, Your Honour, that on the 13th of January, the complainant attends the police detachment and he indicates that the accused had threatened to kill him while driving. It's what one might call as road rage.

He says that he was on his way to work in his 2005 silver Acura. He was driving westbound on Lougheed just at Pitt River Bridge when a black Ford Explorer passed him, that the Explorer wove in and out of traffic, cutting him off.

Eventually there's some driving, and then the accused yelled to him through the complainant's opened window, "Last time I didn't kill you. I'm going to kill you today. Stop or pull over."

There had been a previous incident in March of 2008 involving these two people. I guess maybe they go to work at the same time or what have you. In any event, that's the nature of the threat.

The complainant then -- as a result of motor vehicle checks and so forth, police believed they had a suspect and they presented a photo array to the complainant and he selected the accused. The complainant has perhaps had more impact than one would normally see. I'm just handing up a victim impact statement.

I understand my friend is going to be asking for the court to impose a conditional discharge. I have no indication that the accused has a criminal record and he was born Christmas Day of 1987, making him a relatively young man. The condition, really, that the Crown would seek, regardless of whatever disposition Your Honour imposes, is just to have no contact, directly or indirectly with Christopher Laing, the named complainant.

[7] Defence counsel provided additional information regarding the prior incident between these two men that occurred in March 2008, from which no charges arose, and in which both men appear to have driven unsafely. According to Mr. Noor, Mr. Laing cut Mr. Noor off because Mr. Noor was speeding. Mr. Noor proceeded to pass Mr. Laing and do the same. Mr. Laing then tailgated Mr. Noor, and followed him off the highway. Mr. Noor pulled over near his employer's home, whereupon Mr. Laing approached his vehicle and yelled at him. Mr. Noor was left "somewhat shaken".

[8] With respect to the appellant's involvement in the threatening offence, defence counsel submitted the following:

Then we have January 2009 [roll] around. Mr. Noor sees the complainant's vehicle, which is, as I understand, is a recognizable brand of a sporty Acura. Mr. Noor sees the complainant and foolishly decides to regain some of his pride by attempting to engage the complainant into an altercation. He utters some regrettable words which he's here today to accept responsibility for.

...

So the complainant (sic) has agreed that at some prior point in time, there was an interaction between them. Mr. Noor says that the reason the second incident happened is because of the first incident. He was foolishly trying to regain his pride from an incident that had intimidated him before.

He's been before the court a number of times with respect to this incident. He is remorseful. He's advised me he's -- he wants nothing further to do with the complainant. He's a young man. A criminal record would not be in his best interest, and I would submit it would not be contrary to the public interest in this case.

- [9] Defence counsel described the complainant's victim impact statement as "more excessive than one would expect." He also stated that a previous trial date had been set, and immediately prior to that trial date, the complainant gave another statement to the Crown referring to a further incident between them in August 2008.

Reasons of the Sentencing Judge

- [10] I quote the portions of the reasons of the sentencing judge relevant to this appeal. First, the judge noted the circumstances of the threatening offence:
- [3] The circumstances of the offence, which is now admitted by Mr. Noor, were laid out in submissions by Crown counsel, Ms. Barnes. The circumstances reveal what is, in common parlance, known as a road rage incident.
- [4] On the 13th of January of 2009, both Mr. Noor and the complainant were travelling on Lougheed Highway in the vicinity of the Pitt River Bridge. They had some history of previous unhappy encounters as drivers in and around that area, as I understand it. Undoubtedly, the driving of both the complainant and Mr. Noor are properly subject to criticism, both in terms of the history and of the day in question.
- [5] They had one previous encounter in which Mr. Noor considered the driving of Mr. Laing had put him in danger, and then on the subsequent occasion, the January 13th occasion, Mr. Noor recognized Mr. Laing, who apparently drives a distinctive vehicle, and in the words of his counsel, he sought to regain his pride by making a display of aggression toward Mr. Laing that consisted of some rather worrying driving coupled with words that communicated in no uncertain terms a threat to cause death or bodily harm to Mr. Laing.
- [6] Those are the circumstances of the offence and the relevant background.
- [7] Mr. Noor comes before the court without a criminal record. He is a 22-year-old man who is working full time, and has been with the same employer for five years. He has a girlfriend who is present in the courtroom as a display of support for him in this unhappy interval in his life.

- [8] It is acknowledged, I think, that in all of its particulars, the Crown's narrative is an accurate portrayal of what happened, and there was indeed a previous incident in which Mr. Noor had the encounter with Mr. Laing in which Mr. Noor contends that the conduct of Mr. Laing was conduct that placed himself, Mr. Noor, and possibly other drivers in harm's way.
- [9] Road rage incidents are, I would say, a species of criminal misconduct that call for close scrutiny by the court at times of sentencing. Any instance of threats to cause death or bodily harm are of course taken seriously by the court, but when you combine that kind of conduct with the enhanced risks and dangers associated with vehicles travelling at speed and making manoeuvres with the drivers conducting themselves in ways that put not only themselves at risk, but other drivers at risk as well - and at considerable risk, given the size and weight of vehicles, what they can when they are travelling and potentially colliding with other vehicles, innocent people who are in proximity to them - the potential for a truly calamitous outcome is very real.
- [10] So this form of threatening or this type of offence set in its proper context, invites close and careful scrutiny by the court. This is the kind of conduct that the court must address in a way that reflects the serious risk that it poses to innocent bystanders as well as the parties themselves.
- [11] These are the judge's comments with regards to consideration of a discharge:
- [11] I am confronted with a suggestion from Mr. Gopaulsingh that Mr. Noor is a proper candidate for a conditional discharge. Ms. Barnes for the Crown has really neither endorsed nor declined to endorse that suggestion. She has stood back somewhat from it, but she has said that in the event the court chooses to accept that suggestion, the only condition that she considers would be necessary would be a no-contact condition with respect to the complainant.
- [12] Conditional and absolute discharges are governed by s. 730 of the Criminal Code, and I must consider, before imposing a conditional discharge as a sentence, as I have been invited to do, whether it would be in the interest of Mr. Noor for me to do so, and secondly, whether it would be in the best interest, and not contrary to the public interest for me to do so.
- [13] The first branch of the test is easy to address. Mr. Noor has no criminal record. If he were to be given a conditional discharge, he would have the ability to restore that state of affairs provided he abided scrupulously by the conditions during the course of his conditional discharge. So it would plainly be in his interest for me to sentence him in a way that accords with what has been suggested.
- [14] The more difficult question is whether or not it would be contrary to the public interest for me to discharge Mr. Noor. After some careful consideration, I have concluded that it would not be consistent with public interest. It would be contrary to the public interest to discharge Mr. Noor. The fact that Mr. Noor sought out, once he recognized Mr. Laing, and as Mr. Gopaulsingh put it, allowed his pride or concern to regain his pride to lead him to enter

into Act 2 of a most dangerous and inappropriate pattern of driving, is a concern to the court, as it is indeed a concern to society and as it is indeed a concern to all persons who share the road with individuals like Mr. Noor and Mr. Laing who allow their testosterone and their pride and other aspects of their characters to trump considerations for others and place themselves and others at risk.

- [15] I do not consider that it would be consistent with the public interest to discharge Mr. Noor in these circumstances.
- [16] I say again that Mr. Noor is not the only person with a measure of responsibility for what happened. Mr. Laing's conduct described by Mr. Gopaulsingh and not contradicted by anything Ms. Barnes has said, fell short of the mark as well. But it is Mr. Noor who had the ability to put the matter that occurred before behind him. It is Mr. Noor who chose to reactivate the conflict and in a way that was dangerous to himself, to Mr. Laing and to others who were on the road at the time. He acted in a way uttering threats to cause death or bodily harm that was purposeful and intentional and the kind of conduct that calls for a stern response.
- [17] Mr. Noor, like any person before the court for sentencing, must be sentenced in a manner that reflects various requirements of the criminal law as expressed in the Criminal Code. The [sentence] must be proportionate to the gravity of the offence and the degree of responsibility of the offender. I consider this offence to be an offence of some gravity. I consider Mr. Noor to be fully [responsible] for his volitional conduct in reactivating a conflict in a way that could put himself, Mr. Laing and others in danger.
- [18] I do not consider a conditional discharge would be properly calibrated and properly proportionate to the seriousness of that type of offence. I must be mindful of the objectives of sentencing under s. 718, of which deterrence, both specific and general, and denunciation loom largest, in my view, given the nature of this type of offence.
- [19] All of the factors recorded in s. 718 which go to the objectives of sentencing are, of course, at play here. Those include, in addition to deterrence and denunciation, separation of offenders from society, assist in rehabilitating offenders, promote reparations, promote a sense of responsibility and so on. They are all at play, but they are weighted in different ways in different cases. Denunciation and deterrence are chief among the objectives that bear upon this case, in my respectful view.
- [20] Denunciation, Mr. Noor, means condemnation of your conduct. The sentence that I impose must visibly and emphatically speak against behaviour that puts people on the roads in danger. When you get behind the wheel of a car, a whole set of extra expectations are cast upon you. You are expected, under our law, not to be in a state of impairment, for example, because if you are, you place people at risk. You are expected to rein in your emotions. You are expected to exercise control over your impulse to be aggressive. Why? Because if you do not contain those impulses, a very, very dramatic and calamitous outcome can occur. When you fail to live up to those reasonable expectations and you come before the court for

sentencing, the court has to sentence in a way that speaks emphatically against the conduct that you engaged in. You must have conduct denounced in a way that is intelligible to the average citizen.

- [21] I have to sentence you in a way that holds the potential to reduce or eliminate the likelihood that you will ever do this again and that sends a message to other drivers who may think that their testosterone is more important than the safety of everybody else on the road, and decide to engage in behaviours of the kind you engaged in.
- [22] Rehabilitation is also a part of the sentencing matrix and I do not disregard it. It factors into this case as it does in all cases. You need to work on yourself, Mr. Noor. You need to bring yourself to the point where you are no longer a danger to others when you are behind the wheel of your black Explorer, because your black Explorer can do untold harm if your judgment is eclipsed by your hair-trigger temper.
- [23] In my view, taking all of the purposes, the principles and objectives of sentencing into account, the appropriate sentence to impose in this case is a monetary fine coupled with a period of probation with terms that are intended to safeguard Mr. Laing from further contact with Mr. Noor, and also designed to give Mr. Noor some opportunities to take some counselling such that he can bring his emotions under better control; such that he can control his impulses toward aggression in circumstances of irritation so that he can contain his anger within limits that will prevent him from, in the future, putting himself and others at risk when he is behind the wheel of his black Ford Explorer.
- [24] The sentence I am imposing is a \$2,500 fine followed by a year of probation during the course of which Mr. Noor must keep the peace and be of good behaviour and report to court when required to do so.

[Emphasis added.]

Appellant's Submissions

- [12] The appellant submits that the sentencing judge erred when he concluded that the appellant drove his vehicle in a manner dangerous to the public and considered it a major aggravating factor in determining the appropriate sentence.
- [13] The appellant submits the evidence adduced during sentencing did not establish beyond a reasonable doubt that the appellant drove his vehicle in a dangerous manner. He further submits the sentencing judge thus erred in considering it a major aggravating factor in determining the appropriate sentence. Had the Crown sought to rely on the manner in which the appellant drove his vehicle immediately preceding the threatening, which would have been a disputed fact, the correct procedure is as set out in s. 724(3) of the Criminal Code. In support of this, the appellant refers to several comments critical of the appellant's driving in the sentencing judge's reasons for sentence, including:

- reference to the incident as one of "road rage" (para. 3);
- that the appellant's driving was properly subject to criticism and that he made a display of aggression toward Mr. Laing that consisted of worrying driving (paras. 4-5);
- that the threats were combined with the drivers conducting themselves in ways that put others and themselves at risk (paras. 8-9);
- reference to a dangerous and inappropriate pattern of driving by the appellant (para. 14);
- that the appellant acted in a way that was dangerous to himself and others on the road at the time (paras. 16-17); and
- that the appellant needed to work on controlling himself to the point where he was "no longer a danger to others when... behind the wheel" of his vehicle (para. 22-23).

- [14] The appellant also notes that the Crown's submissions make reference to him weaving in and out of traffic and cutting the complainant off, but did not allege that the driving of the appellant was dangerous. Further, the appellant states the Crown did not suggest his driving should be considered as an aggravating factor in sentencing and neither do the submissions made on behalf of Mr. Noor. In sum, little was said at sentencing about the appellant's driving on the day the offence was committed.
- [15] The appellant also submits that the sentencing judge failed to give appropriate weight to the fact that he pleaded guilty and that he had no prior criminal record.

Respondent's Submissions

- [16] The Crown submits this was a case of road rage where the appellant intentionally pursued the victim through traffic to settle a personal score with the complainant, and that it would have been an error to disregard the appellant's driving conduct.
- [17] In support, the Crown notes it was not contested by the appellant that he had woven in and out of traffic and had cut off the complainant's vehicle in the process of pursuing him. The Crown argues this was not safe driving and it was entirely for the trial judge to consider this behaviour.
- [18] The Crown further submits that a significant punitive sentence for a first-time offender is generally consistent with the approach taken in most cases of road rage where an offender loses patience, pursues another motorist, and commits a violent act towards that motorist.
- [19] Finally, the Crown states the sentencing judge did not commit an error in principle in exercising his discretion to impose the sentence he did, and therefore his decision as to sentence is entitled to deference and ought to be upheld.

Analysis

- [20] I find that the reasons of the sentencing judge indicate he concluded that the appellant had driven in a dangerous manner as part of the offence of threatening to which he had pleaded guilty, and then relied on that as an aggravating factor that militated against granting the appellant a form of discharge. In my respectful view, this is an error in principle, particularly as there was no evidence of dangerous driving alleged by the Crown as part of the circumstances of the threatening offence. I find that the comments of the sentencing judge went significantly beyond placing the threatening offence in the context of an incident of "road rage." He placed too much emphasis on the dangers of the appellant driving dangerously so as to placing others on the road at risk when the criminal offence to which he had pleaded guilty was comprised of a verbal threat to the complainant that arose out of a driving situation. Dangerous driving, either by excessive speeding or other ill-considered manoeuvres through traffic, is a separate criminal offence, and one in the instant case that was stayed by the Crown. Dangerous driving by the appellant, as an obviously aggravating fact in relation to the offence of threatening, would have required either an admission to that effect by the defence, or proof beyond a reasonable doubt in accordance with s. 724(3) of the Criminal Code.
- [21] I have reviewed the victim impact statement and find it appropriately contains no facts relating to other, uncharged incidents (see *R. v. Bremner*, 2000 BCCA 345 at para. 27). Consistent with the position of defence counsel, there is no reference made in the victim impact statement to dangerous driving by the appellant.
- [22] Defence counsel, in his submissions, did note that Mr. Laing described another incident that occurred in August 2008 in which Mr. Laing told Mr. Noor that "with his driving [Mr. Noor] was going to kill someone." I find this statement insufficient to lead to a conclusion that Mr. Noor did, in fact, drive dangerously.
- [23] I find that the judge did focus in his sentencing reasons on the risks of dangerous driving in the context of this threatening offence. Some of his comments raise the very real possibility that he was sentencing Mr. Noor for his driving, as well as for his ill-advised and threatening words that constituted the offence to which he pleaded guilty. The judge's comments in total make it seem likely that he was influenced against the imposition of conditional discharge, at least in part, by the appellant's dangerous driving immediately preceding his commission of the offence of threatening. With regards to the former there is an insufficient basis in the circumstances of the threatening offence as placed before him. Therefore, I find that this aspect of the sentencing reasons indicate that the learned judge committed an error in principle that properly is not entitled to deference.
- [24] To support the sentence imposed the Crown relies upon *R. v. Stone*, 2001 BCCA 728, *R. v. Norman*, [1999] O.J. No. 1749 (Sup. Ct.), and *R. v. Welsh*, 2008 BCPC 149, and seeks to distinguish the case at bar from *R. v. Supeene* (6 December 2010), New Westminster X74233-1 (B.C.S.C.).

- [25] I find the cases of Stone, Norman, and Welsh to be distinguishable on their facts, as in each case serious physical injury was caused by the accused. In Supeene the Crown unsuccessfully appealed a sentence of a conditional discharge in a road rage case against a first-time offender who had plead guilty to unlawfully causing bodily harm to the victim. I agree with the submission of Crown counsel that the case is distinguishable from the present one, as in that case the driver sustained physical injury and his vehicle was damaged.
- [26] In the circumstances of the present case I vary the sentence imposed upon Mr. Noor for the threatening offence to a conditional discharge, accompanied by a term of probation for a period of 12 months, the only term of which is that the appellant have no contact directly or indirectly with the complainant, Christopher Laing.
- [27] I find that this disposition is clearly in the best interests of Mr. Noor as a young, first-time criminal offender in light of his guilty plea and his remorse as expressed at the time of his plea by his counsel. I also find that it is, considering the circumstances of the offender in the context of the offence to which he pleaded guilty, absent any proven aggravating circumstances of driving by him that endangering him or others on the road, not contrary to the public interest. Motorists are to be encouraged to control their tempers, and incidents of violent confrontations are to be denounced and deterred by the Courts. The same applies to driving offences that place the driver or the public at risk. However, it is fundamental that an offender be sentenced only for the offence to which he has pleaded or been found guilty, as supported by any aggravating facts properly before the court.

Conclusion

- [28] For these reasons I find that the sentence imposed upon the appellant, Mr. Noor, by the learned provincial court judge is to be varied to a conditional discharge attached to a term of probation of 12 months, in relation to which the only condition is that Mr. Noor has no contact, directly or indirectly, with the complainant, Mr. Christopher Laing.

"Arnold-Bailey J."

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Prepared on 28 October 2026 · Esheria