

CANADA / JUDGMENT

R. v. Patterson

2023 BCCA 332

COURT

British Columbia Court of Appeal

DECIDED

4 August 2023

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2023 BCCA 332 R. v. Patterson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Patterson,

2023 BCCA 332

Date: 20230804

Docket: CA48892

Between:

Rex

Respondent

And

Edmond John Henry Patterson

Appellant

SEALED IN PART

Before:

The Honourable Mr. Justice Grauer

(In Chambers)

On appeal from: An order of the Provincial Court of British Columbia, dated November 1, 2022 (sentence) (R. v. Patterson, Courtenay Docket 42489).

Oral Reasons for Judgment

Counsel for the Appellant:

P. T. Gardiner

Counsel for the Respondent:

M. Shah

Place and Date of Hearing:

Vancouver, British Columbia

August 2, 2023

Place and Date of Judgment:

Vancouver, British Columbia

August 4, 2023

Summary:

The appellant pleaded guilty to robbery, use of an imitation firearm, and failure to comply with a condition of a release order that prohibited him from possessing a firearm. He applies for leave to appeal his sentence and for release pending the hearing of his appeal.

Held: Leave to appeal is granted and the application for release is dismissed. The appellant has established that his appeal is not frivolous, and leave should therefore be granted in the circumstances. Section 679(4) of the Criminal Code permits release where the appellant can establish that the appeal has sufficient merit, that he will surrender himself into custody, and where detention is not necessary in the public interest. It is not necessary to determine whether the proposed appeal has sufficient merit to meet the first criterion because the appellant has failed to establish the latter two criteria given his extensive criminal record totalling over 60 convictions, including repeated breaches of bail conditions.

GRAUER J.A.:

1. INTRODUCTION

- [1] Mr. Patterson applies for release pending the hearing of his sentence appeal, which is scheduled for October 10, 2023. Because the appeal is from sentence only, leave to appeal must be granted before bail can be ordered.
- [2] In accordance with section 679(4) of the Criminal Code, R.S.C. 1985, c. C 46, I may order that Mr. Patterson be released only if he establishes on a balance of probabilities that:
- a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
 - b) he will surrender himself into custody in accordance with the terms of the order; and

- c) his detention is not necessary in the public interest.
- [3] The Crown opposes the application, maintaining that Mr. Patterson has failed to establish any of the necessary criteria. It is, of course, necessary for Mr. Patterson to establish all three.
- [4] For the reasons that follow, I agree that Mr. Patterson has clearly failed to establish the second and third criteria, and therefore I find it unnecessary to consider the first criterion. Accordingly, I dismiss the application for release. Strictly speaking, I am not required to determine whether leave to appeal should be granted if bail is denied (see *R. v. Davies*, 2019 BCCA 235 at paras. 10, 20). But the application has been made and it is evident to me that leave should be granted; I do so.

2. BACKGROUND

- [5] Mr. Patterson pleaded guilty to robbery contrary to section 344(1)(b) of the Criminal Code of Canada, use of an imitation firearm while committing the indictable offence of robbery contrary to section 85(2) of the Code; and failure to comply with a condition of a release order that prohibited him from possessing a firearm.
- [6] The incident giving rise to these offences occurred on August 16, 2020. At that time, Mr. Patterson was at large on a release order and also subject to a probation order. He entered a Subway restaurant. He had partially obscured his face with a handkerchief. Using what appeared to be a pistol, Mr. Patterson forced the sole, female employee of the restaurant to open the till. He stole \$350 in cash.
- [7] Mr. Patterson initially denied committing the offences, but then confessed. He entered a guilty plea on February 17, 2021.
- [8] On November 1, 2022, the sentencing judge sentenced Mr. Patterson to 23 months for the robbery offence, expressed as 699 days. He was given a credit for time served of 281 days, leaving 418 days to be served.
- [9] The judge also imposed a sentence of 90 days for the breach of the term of his release order offence, to be served concurrently with the robbery charge, and the then-mandatory minimum sentence of one year for the firearm offence, which the Code requires to be served consecutively. The total sentence thus came to 35 months, with the total time to be served coming to just over 26 months. I am advised that the statutory release date is April 6, 2024, some 8 months hence.
- [10] On March 6, 2023, Mr. Patterson filed his notice of application for leave to appeal from sentence. Because his notice was late, he applied for and received an extension of time.
- [11] On March 8, 2023, Mr. Patterson applied for an order appointing counsel pursuant to section 684 of the Code. Justice Groberman granted this application on April 12, 2023.

- [12] On May 9, 2023, Mr. Patterson filed the present application for release. Pending his retention of counsel, and then his counsel's availability, it was not heard until now. I observe that but for his counsel's schedule, the hearing of his sentence appeal could have been scheduled for July, August, or September of this year.
- [13] Mr. Patterson has an extensive criminal record, accumulating between 61 and 64 convictions beginning in 1990 and continuing to the present. His record includes convictions for property offences (theft, mischief, possession of stolen credit cards), violence (assaults, assaulting a peace officer, uttering threats), and drug-related convictions (including trafficking).
- [14] In the course of the prosecution of these offences, he has successfully secured bail several times, and several times has breached his bail conditions. The details of these breaches are discussed below, because they are key to the present application.

3. DISCUSSION

3.1 Overview of the appellant's position

- [15] As briefly reviewed above, the appellant has a lamentable record. His materials describe a difficult childhood that he says has left him with posttraumatic stress disorder and attention deficit hyperactive disorder. He has suffered long-standing addiction problems, homelessness, and significant mental and physical health issues. But he maintains that since his incarceration he has made truly significant rehabilitative progress toward becoming a law-abiding citizen living a life free of crime and active addiction. He is looking forward to continuing on that path, and says he has been clean and sober now for some time. Mr. Patterson is agreeable to any conditions the Court might wish to impose, and submits that he no longer presents any risk of reoffending or failing to comply with terms and conditions.
- [16] He has put forward a plan, which is to enter a Christian-centered residential treatment facility, Joshua House, located in Chilliwack, BC. The facility has confirmed that a bed will be available to him. It imposes strict conditions, and is in contact with law enforcement. Its terms would prohibit Mr. Patterson from leaving the Joshua House program without the "written consent of the Courts".
- [17] In the meantime, he has successfully completed a number of programs while incarcerated, and his attitude, motivation, behaviour, and effort have been rated excellent by the Correctional Service's pay review process.
- [18] According to Mr. Patterson, keeping him in custody is causing unnecessary hardship due to his physical and mental health concerns, as well as personal safety concerns arising from evidence he gave in a different criminal prosecution. He says his life has been threatened more than once. He also maintains that he has valid grounds of appeal that might well result in a reduction of his sentence below what he will be obliged to serve if he has to wait until after the hearing of his appeal on October 10, 2023.

[19] In these circumstances, Mr. Patterson submits, he meets the test for leave and the three criteria for release.

[20] Whether or not he meets the first release criterion, I am satisfied, as indicated above, that he has failed to meet the second and third criteria. Before proceeding to discuss those, I will deal with the question of whether leave to appeal should be granted.

3.2 Leave to appeal

[21] The question is whether the proposed appeal is frivolous, or whether it has a reasonable chance of success: see, for instance, *R. v. Bui*, 2013 BCCA 90 at para. 11.

[22] Mr. Patterson's sentence appeal rests on two pillars: first, he says the judge erred when he made the following comment about aggravating factors:

[26] It is an aggravating factor that Mr. Patterson used violence when he pointed the pellet pistol at Ms. Kaur and then racked the pistol. He clearly did this to intimidate and to scare Ms. Kaur to make her think her life was in jeopardy, thereby ensuring I demand to turn over the money. It is also aggravating that Ms. Kaur was a vulnerable person for the reasons that I have already noted. The experience was no doubt terrifying for her.

[23] Mr. Patterson maintains, and the Crown concedes, that the evidence did not support the statement that Mr. Patterson pointed the pistol at the victim, though he certainly racked it.

[24] The second pillar is that the Code was amended after Mr. Patterson's sentencing to delete the mandatory minimum sentence of one year for the offence of using an imitation firearm in the commission of an indictable offence, although the sentence must still be served consecutively to any other punishment imposed for an offence arising out of the same event. Mr. Patterson maintains, correctly, that he is accordingly entitled to have that one-year consecutive sentence reconsidered.

[25] It follows, as I see it, that it cannot be said that the proposed appeal is frivolous. The Crown nevertheless argues, both on this issue and in relation to the first release criterion, that the errors must be ones that impact the sentence before the court will consider reducing it: *R. v. LaCasse*, 2015 SCC 64 at para. 44. In the particular circumstances of this case, the Crown submits, the errors alleged would not have an impact on the sentence Mr. Patterson received, which is at the low end of the range for such offences.

[26] In my view, that question of impact is a matter for argument before the division that hears the sentence appeal and ought not to be pre-determined by me. Having established that the appeal is not frivolous, Mr. Patterson should be granted leave.

[27] I now turn to discuss the second and third criteria for the granting of bail.

3.3 The second criterion for release: surrendering himself into custody

- [28] The second criterion concerns the risk that Mr. Patterson will not surrender himself into custody in accordance with the terms of the order. He has unequivocally stated in his materials that he will surrender himself and comply with the terms of any order, so that no such risk arises. Unfortunately, while his words may indeed represent his honest intention, his actions in relation to previous release orders and bail conditions do not allow me to have confidence in what he says.
- [29] Mr. Patterson's record includes over 22 breaches of court orders, as well as convictions for failing to appear in court, resisting arrest, assaulting a police officer, obstructing justice, obstructing a police officer, and being unlawfully at large. His breaches of bail conditions include those applying to the very offences giving rise to this appeal.
- [30] After his guilty plea, Mr. Patterson was released on strict conditions, including that he reside at a treatment facility operated by the Vancouver Island Therapeutic Community. He was required to stay at that facility unless in the immediate presence of a staff member, or if given written permission from his bail supervisor for compelling reasons. He was also ordered not to possess or consume drugs or alcohol. He was, however, expelled by the treatment center in May 2021 because of "behavioural issues". He was then able to secure a bed at the Grove Recovery House in Victoria but was expelled from that program a few weeks later due to substance abuse.
- [31] In the result, a warrant was issued under section 512.3 of the Code. That warrant remained outstanding until October 4, 2021, when Mr. Patterson was released on another release order. He breached that release order by failing to report to his bail supervisor. He was arrested and released again on July 13, 2022. Between that date and sentencing, Mr. Patterson accumulated three further breach charges: two breaches of a condition that he abstain from alcohol consumption, and one breach for failing to comply with a curfew.
- [32] In these circumstances, while I applaud Mr. Patterson's intentions and efforts, I find that he has failed to establish on a balance of probabilities that if released, he will surrender himself into custody in accordance with the terms of the order.

3.4 The third criterion for release: detention not necessary in the public interest

- [33] In *R. v. Oland*, 2017 SCC 17 at paras. 23-24, the Supreme Court of Canada confirmed that the words "public interest" in this criterion imported two components: public safety, and public confidence in the administration of justice. The former related to the protection and safety of the public, while the latter involved the weighing of two competing interests: enforceability and reviewability. The Court explained at para. 25 that:

the enforceability interest reflected the need to respect the general rule of the immediate enforceability of judgments. Reviewability, on the other hand, reflected society's acknowledgement that our justice system is not infallible and that persons who challenge the legality of their convictions should be entitled to a meaningful review process -- one which did not require them to serve all or a significant part of a custodial sentence only to find out on appeal that the conviction upon which it was based was unlawful .

[34] In my view, Mr. Patterson has failed to establish either component of the public interest factor in this criterion.

[35] First is the matter of public safety. Once again, I am obliged to conclude that Mr. Patterson's actions in the past, including the recent past, must be given more weight than his present intentions, however salutary. His record of convictions spans 30 years up to the present offences, which he committed in 2020. As the sentencing judge noted at para. 15 of his reasons, there appear to be no gaps of any significance. These convictions comprise not only multiple property offences, but also violence-related offences including assaults, assault-peace officer and uttering threats, and drug-related offences. As the sentencing judge observed at para. 16: "The record reflects that Mr. Patterson has never had much regard for the law and has never thought much about the persons he was victimizing along the way." Given this record, Mr. Patterson's history of failing to comply with court orders, and his substance abuse issues, I conclude there is an unacceptably high risk that he will re-offend if released.

[36] This alone is sufficient to demonstrate that his continued detention is necessary in the public interest. It also leads inescapably to the conclusion that public confidence in the administration of justice would be undermined by his release, notwithstanding the public's interest in reviewability--particularly where there is no challenge to the legality of the conviction.

4. DISPOSITION

[37] Leave to appeal sentence is granted. The application for release is dismissed.

"The Honourable Mr. Justice Grauer"

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