

CANADA / JUDGMENT

## R. v. Purdy

2020 BCSC 231

### COURT

Supreme Court of British Columbia

### DECIDED

21 February 2020

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2020 BCSC 231 R. v. Purdy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Purdy,

2020 BCSC 231

Date: 20200221

Docket: 27828

Registry: Vancouver

In the Matter of an Application Pursuant to s. 745.6 of the Criminal Code for a  
Reduction in the Number of Years of Imprisonment Without Eligibility for Parole  
Regina

v.

Kelvin Kingsbury Purdy

Corrected Judgment: The text of the judgment was corrected at paragraph [12] on 05 May 2020.

Before: The Honourable Mr. Justice Thompson

Reasons for Judgment

Counsel for the Attorney General of British Columbia:

R. Picha

The Applicant, appearing in person:

K. Purdy

**Places and Dates of Hearing:**

Nanaimo, B.C.

February 11-12, 2020

**Place and Date of Judgment:**

Vancouver, B.C.

**February 21, 2020**

- [1] This is a ruling on the screening determination in relation to Mr. Purdy's application for a reduction in the number of years of imprisonment without eligibility for parole. In 2005, Mr. Purdy was convicted of the 2003 murder of his estranged wife, and sentenced to life imprisonment with a 19-year period of parole ineligibility. Mr. Purdy is presently 51 years of age. He is eligible to apply for full parole on 12 December 2022. For the reasons that follow, I conclude that Mr. Purdy's application for a waiting-period reduction must be dismissed.
- [2] Mr. Purdy has two separate proceedings underway: this application under s. 745.6 of the Criminal Code for a waiting-period reduction, and an application under s. 696.1 for ministerial review of his conviction on the grounds of miscarriage of justice. I have nothing to do with the latter. I am the judge designated by the Chief Justice under s. 745.61(1) to make the screening determination of whether a jury will be empanelled to consider Mr. Purdy's application for a waiting-period reduction.
- [3] The Criminal Code provisions that address judicial screening of waiting-period reduction applications are, in material part, as follows:

**Judicial screening**

745.61 (1) On receipt of an application under subsection 745.6(1), the appropriate Chief Justice shall determine, or shall designate a judge of the superior court of criminal jurisdiction to determine, on the basis of the following written material, whether the applicant has shown, on a balance of probabilities, that there is a substantial likelihood that the application will succeed:

- (a) the application;
- (b) any report provided by the Correctional Service of Canada or other correctional authorities; and
- (c) any other written evidence presented to the Chief Justice or judge by the applicant or the Attorney General.

## Criteria

- (2) In determining whether the applicant has shown that there is a substantial likelihood that the application will succeed, the Chief Justice or judge shall consider the criteria set out in paragraphs 745.63(1)(a) to (e), with any modifications that the circumstances require.
- [4] The s. 745.63(1) criteria referred to in s. 745.61(2) are the character of the applicant, the applicant's conduct while serving his sentence, the nature of the offence for which he was convicted, any information provided by a victim, and any other matters that the judge considers relevant. These are the same criteria that a jury would consider if the case proceeds to that stage. For an application to succeed, s. 745.63(3) provides that the jury members must unanimously agree that the waiting period ought to be reduced.
- [5] A possible constitutional issue was addressed during a pre-hearing conference. Prior to 2011 amendments to s. 745.61, the screening threshold was whether there was a "reasonable prospect" that the application will succeed. This threshold was elevated by the amendments to a "substantial likelihood" that the application will succeed. The question arises of whether it is constitutionally permissible to employ a higher threshold than what was in place when the offence was committed and Mr. Purdy was sentenced. By agreement at the pre-hearing conference, it was resolved that the constitutional issue will be addressed if I conclude on the balance of probabilities that there is a reasonable prospect but not a substantial likelihood of success. This was the procedure adopted by my colleagues in *MacMillan v. British Columbia (Attorney General)*, 2015 BCSC 2298, and *R. v. Soomel*, 2018 BCSC 2240. In this case, because I have concluded that Mr. Purdy has fallen short of establishing a reasonable prospect of success, it turns out to be unnecessary to consider the constitutionality of applying a higher threshold.
- [6] One other procedural issue arose. By its terms, s. 745.61(1) directs that the screening decision is to be made on the basis of written material. Naturally, oral hearings can be difficult to endure for those impacted by murders, such as a victim's family and friends, and I doubt that Parliament intended that oral screening hearings would be convened as a matter of course. I asked for and received submissions from the parties on whether and in what circumstances a screening judge is permitted to direct an oral hearing. The parties' submissions were in agreement that a screening judge has the jurisdiction to order an oral hearing in the interests of procedural fairness, and for the purposes of this proceeding I accepted this consensus.
- [7] The Attorney General submitted that the Court has the authority to direct an oral hearing, but argued that an oral hearing is unnecessary in this case. Mr. Purdy does not have counsel, and he identifies as Métis. He requested an oral hearing. The Attorney General agreed that Mr. Purdy being without counsel and identifying as Métis are relevant considerations when exercising the discretion whether to convene an oral hearing. My decision to convene an oral hearing took account of these considerations. My decision was also based on the unfocused nature of the written submission I received from Mr. Purdy on the issue of

whether there ought to be an oral hearing. I was concerned that if Mr. Purdy was restricted to making a written submission on the screening determination issue, he would not focus on the statutory criteria. I concluded that an oral hearing ought to be held to allow the Court to provide Mr. Purdy, as an in-person litigant, with the encouragement he might need to make a properly focused submission. I should say that if I had formed the impression from reading Mr. Purdy's application and the other material provided that his application was frivolous or otherwise devoid of merit, I would not have directed an oral hearing.

- [8] The written material provided by Mr. Purdy for consideration on the screening determination includes: (1) his application; (2) a booklet that includes many letters of support, photos of his children, and other relevant documents including an Elder Progress Review written in 2015 and a document authored by Mr. Purdy in 2018 titled "Re-Integration Wellness Plan"; and (3) a copy of a book completed by Mr. Purdy in 2012 and self-published in 2013. The Attorney General submitted four volumes of material that bears on the screening determination criteria, as well as an affidavit of one of Mr. Purdy's daughters. At the hearing, I heard submissions from Mr. Purdy and counsel for the Attorney General.

### Character of the Applicant

- [9] This factor calls for an examination of Mr. Purdy's character prior to and at the time of the murder, and an examination of any changes that might have occurred since: *R. v. Swietlinski*, [1994] 3 S.C.R. 481 at 492, 501.
- [10] The following paragraphs from the sentencing judge's unreported reasons provide some insight into Mr. Purdy's character prior to and around the time of the murder:
- [43] What then are the aggravating or mitigating factors discussed in 718.2? In terms of mitigating there is, of course, the fact that Mr. Purdy has no previous criminal record, and secondly that prior to 2003 from all that can be gleaned from the evidence both on this hearing and during the trial, he was a good and loving parent and husband. He was gainfully employed and had provided for his family.
- [44] In terms of aggravating circumstances, he has in essence orphaned two children and killed a woman who had done him no wrong other than to drift away from him. In the course of doing so he terrorized her in the months preceding December the 12th such as to induce a substantial state of fear from him. The killing was done in circumstances of an ambush during which Mrs. Purdy was terrorized with fear, as can be imagined, and suffered substantial injuries resulting in her death, including defensive injuries. Finally, this killing was done with some forethought.
- [11] While it is true that Mr. Purdy had no previous criminal record, he was described by the sentencing judge as a "domineering, narcissistic person" (para. 32). His actions in the time leading up to the murder terrorized his estranged wife. The sentencing judge described him as "a man who simply does what he wishes without regard to others or any restraints placed upon him" (para. 32). There was a mutual restraining order in place from 22 May 2003. And,

while awaiting trial Mr. Purdy made email contact with a Crown witness on the morning she was scheduled to testify at a voir dire. This was in breach of a no contact order and he apparently took advantage, illicitly, of access to a computer in the jail canteen to send the email.

- [12] In considering Mr. Purdy's character, the main focus must be on what changes have occurred that could justify a reduction of the penalty he received in 2005. Is he a different man than he was 15 years ago?
- [13] One of the documents in evidence is a book published by Mr. Purdy in 2013. It is 223 pages long, and is a long-form argument that he was wrongfully convicted. I agree with the Attorney General's submission that in the book Mr. Purdy advances conspiracy theories involving his lawyers, the prosecutors, and the various judges involved in his case. One striking example of this is his 199 person "defence list of suspects" in relation to which he seeks DNA testing. The list includes police officers, jurors, prosecutors, his own lawyers, the trial judge, and appeal judges up to and including the former Chief Justice of Canada. Mr. Purdy accuses the jurors who convicted him of bias, and it is troubling to see the jurors' names listed in his book.
- [14] In 2009, one of the jurors attended at the Nanaimo RCMP detachment to complain about harassment by Mr. Purdy's stepfather, a man the juror was acquainted with. Mr. Purdy's stepfather had contacted this juror on two occasions to discuss the jury verdict. The police sent a letter advising Mr. Purdy's stepfather that this conduct was inappropriate and that any further contact could result in criminal harassment charges. While there is no evidence that establishes that Mr. Purdy knew of his stepfather's contact with this juror, in 2013 Mr. Purdy made direct mail contact with this same juror, and this juror's daughter-in-law.
- [15] This juror's son died in July 2013. Mr. Purdy learned this from his stepfather who sent him a copy of the obituary. Mr. Purdy also sent a condolence card directly to the residential address of the juror. He also sent a condolence card to the juror's daughter-in-law at her residential address along with review of the book that is in evidence. Notably, in the book Mr. Purdy refers to this juror as a "ringer for the Crown." Considered in context, I doubt that Mr. Purdy's intention when he sent this material was to express sympathy, and it is not surprising that this contact from Mr. Purdy was not well received by the juror and his family. They were angry and fearful. Both the juror and the RCMP wrote to the warden at Pacific Institution, where Mr. Purdy is incarcerated, to try to prevent further contact with this juror or his family.
- [16] Mr. Purdy is Métis and beginning in 2015 he set out to gain further knowledge about Indigenous culture. An Elder Progress Review was prepared that year by an Indigenous Elder. The report recounts that Mr. Purdy was born in 1968 in Dryden, Ontario. Mr. Purdy completed high school and some post-secondary education. While incarcerated, he has completed several Corrections Services psychological courses designed to promote the establishment and maintenance of healthy relationships. In 2013, while incarcerated, he

completed his degree. He has also published books. Mr. Purdy participated in various Indigenous ceremonies, and took an interest in making drums and star blankets. He created a new political party and was particularly busy during the 2015 federal election campaign. The report notes that he continues to work with Elders, and participate in one to one counseling sessions.

- [17] Another Elder Progress Review was completed in 2018. It was reported that Mr. Purdy faithfully attended all ceremonies and continued his one on one counselling sessions. He is said to personify a man who is committed to healing.
- [18] In late 2018, Mr. Purdy was thoroughly assessed by an experienced psychologist, Dr. Barry Cooper. Before preparing his report, Dr. Cooper consulted with Mr. Purdy's parole officer and an Elder working with Mr. Purdy. Dr. Cooper concluded that there are some indications of Narcissistic Personality Disorder, but there was not enough information to confirm this diagnosis. There were no signs or symptoms of a major mental disorder, and a psychiatric assessment was necessary. The tests conducted by Dr. Cooper ruled out Psychopathic Personality Disorder. Dr. Cooper considers Mr. Purdy a moderate risk for intimate-partner violence recidivism.
- [19] Late last year, Mr. Purdy applied for an escorted temporary absence ("ETA") from Pacific Institution to attend for a day at the Kwikwexwelhp Healing Village, located within a minimum security prison. At the same time, he applied for day parole. The Parole Board granted his application for the ETA but refused his application for day parole. I have reviewed the warden's recommendation on the ETA application, his parole officer's appraisal report on the ETA application, and the Parole Board's 16 January 2020 decision in relation to day parole.
- [20] The Parole Board's decision reviewed Mr. Purdy's history, including the fact that his parents separated when he was very young, apparently due to his mother's infidelity. His father tried to raise him and his brother, but was unable to do so and he was in foster care from age two to five where he was abused. At age five he was adopted by a loving family, and enjoyed a good and stable childhood thereafter. He did well in school and excelled in sports. After high school he attended university for a year, then spent a year in the Armed Forces and worked in various jobs.
- [21] The Parole Board took note of Mr. Purdy's father's Indigenous heritage and his recent strong commitment to Indigenous spirituality and culture, but indicated that it is not clear how he was impacted by government colonization policies. The Board acknowledged Mr. Purdy's submission that attachment to Indigenous spirituality and culture helps him be more in tune with his emotions, and gives him a sense of belonging.

- [22] The Board acknowledged that Mr. Purdy has no other criminal convictions and was assessed as a low risk for general and violent offending and as a moderate risk for intimate partner violence, and is working with Elders and living on an Indigenous unit at Pacific Institution. He has not been violent, follows institutional rules, and is working towards a transfer to minimum security. (Mr. Purdy has remained in medium-security settings since he was sentenced in 2005.)
- [23] However, the Board found that these considerations were outweighed by others. The Board noted his failure to accept responsibility for the murder of a very vulnerable woman -- his submissions to the Parole Board included the claim that police officers might have been involved in his estranged wife's death. The Board also pointed to his failure to demonstrate any visible signs of empathy, and his lack of insight into his risk factors. The Board described Mr. Purdy as highly egocentric. He was adjudged to be without a viable release plan. His risk to reoffend was found to be "undue", and the Board denied his application for day parole.
- [24] Considering all of the written material and oral submissions, it may be that Mr. Purdy has made some progress, particularly since committing to explore Indigenous spirituality and culture, but I think it likely that his character is in important ways much the same as it was when he was sentenced in 2005.

### Conduct While Serving His Sentence

- [25] With few and immaterial exceptions, Mr. Purdy has obeyed Correction Services rules while imprisoned. He is quiet and polite with staff. The evidence supports his assertion that he has not used alcohol or drugs while in prison. Indeed, there is no evidence that Mr. Purdy has ever used illicit substances.
- [26] It is of course to Mr. Purdy's credit on this application that he has been well-behaved while serving his sentence. However, I respectfully endorse the cautionary note sounded by Justice Martin in *R. v. Morrison*, 2012 ABQB 619 at para. 121:

[I]ndividuals convicted of intimate partner violence may not be generally violent, but they may nevertheless target, control and abuse those closest to them. Individuals convicted of domestic violence may be of no risk to general society and they may not be otherwise criminally minded. Violent tendencies may go unseen to all but those with whom they are most intimately involved. . . . Evidence that Mr. Morrison is not of a generally violent character and is at a low risk for general violence in the future may therefore be of less assistance to a jury when the index offence he committed was spousal murder. He is said to have succumbed to situational stressors but while in prison Mr. Morrison has not had an intimate relationship and it is therefore not possible to assess his actual progress in the very realm in which he has previously experienced such extreme difficulties.

## Nature of the Offence

- [27] The circumstances of the offence were described by A. MacKenzie J.A. at paras. 5-8 of her reasons for the Court of Appeal (*R. v. Purdy*, 2012 BCCA 272) dismissing Mr. Purdy's appeal from the imposition of the 19 year period of parole ineligibility following his second-degree murder conviction:
- [5] On the morning of December 12, 2003, the appellant travelled some 40 minutes on Vancouver Island from Duncan to Nanaimo to confront his estranged wife with whom he had been angry for months regarding their separation, her relationship with a new partner, and what he perceived as her attempts to alienate their two children from him. Mrs. Purdy had continued to reside in the matrimonial home after the separation. The appellant had learned from a phone call between Mrs. Purdy and their eldest daughter the previous evening that Mrs. Purdy would be staying at her home alone and not at the residence of her new partner. She would therefore be following the same route and routine in travelling to work in the morning as during the marriage. At approximately 6:20 a.m. on December 12, while Mrs. Purdy was walking to work, Mr. Purdy attacked her with a knife, stabbing her 21 times and killing her.
- [6] The appellant and the victim married in 1993, and separated in April 2003. As the sentencing judge put it, the appellant began to hate Mrs. Purdy and perpetrated incidents of harassment and minor non-personal violence towards her and her new partner that escalated to an incident involving assault upon her partner.
- [7] The sentencing judge noted that the appellant's antagonism towards his estranged spouse "waxed and waned over the months following April [2003] up until late November [2003], but would involve acts or statements that resulted in Mrs. Purdy fearing him and what he might do to her" (para. 15). The court in family proceedings issued a restraining order to put a stop to the appellant's harassing conduct.
- [8] The judge also observed that by December 11, 2003, the RCMP had obtained a warrant for the appellant's arrest for breaches of the restraining order, which they intended to execute the following day. However, Mrs. Purdy was killed in the early hours of the morning, so the planned intervention came too late.

## Victim Information

- [28] I have reviewed the victim impact statements provided to the sentencing judge in November 2005. The Purdy children were then 11 and 5 years old, and were assisted in making their statements by a social worker. The deceased's mother -- the children's maternal grandmother who stepped in to raise the children -- also provided a statement. At para. 27 of his unreported reasons, the sentencing judge aptly described each victim impact statement as speaking of loss, anguish, and fear.

- [29] The elder child is now 25 years old, and she recently swore an affidavit. She deposes that after conviction, Mr. Purdy and some members of his family tried to get her to change the evidence she gave at Mr. Purdy's trial. She refused, and since then she says she is afraid that he will come after her and all of the persons he thinks are responsible for putting him in jail.

### Other Relevant Considerations

- [30] The Supreme Court of Canada has clearly recognized that the Canadian criminal justice system has failed Indigenous peoples including Métis. I take judicial notice of the broad systemic and background factors affecting Indigenous people generally, including the history of colonialism, displacement, and the residential schools policy. This history continues to translate into lower educational attainment, higher unemployment and lower incomes, higher rates of substance abuse and suicide, and higher levels of incarceration. Indigenous persons are grossly overrepresented in Canadian prison populations. See *R. v. Ipeelee*, 2012 SCC 13 at para. 60.
- [31] The "Re-integration Wellness Plan" recently prepared by Mr. Purdy, the Elder Progress Reviews, and Dr. Cooper's report have provided useful case specific information. I think I have been placed in a similar position to sentencing judges who have read a Gladue report. While I have taken judicial notice of the effects of colonialism, including on educational attainment, vocational success, substance use and mental health, it is notable that Mr. Purdy has succeeded educationally and vocationally, and has never abused substances. On the whole, his mental health seems relatively sound. All of that said, Mr. Purdy's Métis heritage and his concentrated efforts in recent years to advance and make use of his knowledge of Indigenous spirituality and culture is relevant and weighs in his favour on this application.
- [32] Much of Mr. Purdy's written material and oral submissions addressed an issue that is not relevant to my determination: the soundness of his murder conviction. His appeals from conviction are exhausted: *R. v. Purdy*, 2008 BCCA 95, application to reopen appeal ref'd, 2010 BCCA 413, and leave to appeal ref'd [2011] S.C.C.A. No. 431. As I mentioned earlier, he is pursuing a ministerial review of his conviction. Perhaps understandably, the issue of whether he was wrongfully convicted seems to be front-of-mind for Mr. Purdy and be a higher priority than this waiting-period reduction application. My repeated efforts during Mr. Purdy's oral submission to re-direct his submissions to criteria that I am entitled to consider on this application met with limited success.

### Conclusion

- [33] While I do not characterize Mr. Purdy's application as entirely hopeless or frivolous, when I take account of all of the relevant circumstances I assess his chances of persuading all members of a 12-member jury to reduce his parole eligibility period as fairly dismal. I acknowledge that his murder conviction is his only criminal conviction, and his Métis heritage and good behaviour while in prison would be to his credit in the eyes of a jury. However, the disturbing facts surrounding the offence, the persistent serious character

concerns, and the victim information, taken together, would in my opinion seriously hobble his chances. I assess his odds of success at less than ten percent.

- [34] I appreciate that some courts interpreted the "reasonable prospect" test as imposing an extremely low threshold. For instance, in *R. v. Kent*, 2001 MBQB 350 at paras. 43-44, it was held that a jury should be empanelled in any case that was "not hopeless." On the other hand, in *R. v. Dulay*, 2009 ABCA 12 at para. 6, the test was held to be the equivalent of a "reasonable possibility" of success. In *R. v. Phillips*, 2012 ONCA 54 at paras. 6-7, the Court rejected the "not hopeless" formulation as being at odds with the words "reasonable prospect" and held that such a low threshold would frustrate the purpose of judicial screening. In *R. v. Yu*, 2014 BCSC 206 at paras. 16-20, Justice Kloege surveyed the jurisprudence on this issue and perceived a trend of the tightening up of the test.
- [35] I find the reasoning in the Ontario Court of Appeal endorsement in *Phillips* to be persuasive:
- [6] We agree with the application judge that the statutory test embodies more than merely showing that a case is not hopeless. The normal meaning of the words suggests a higher test. Moreover, as the application judge pointed out, lowering the threshold to having to establish only that a case is not hopeless would frustrate the purpose of the judicial screening stage.
- [7] In passing, we note that it is generally preferable when a court is applying a statutory test to use the language in the legislation. Inserting what are considered to be synonymous words or phrases into an analysis often tends to confuse rather than clarify.
- [36] In my opinion, a less than ten percent chance of success is a "thin" or "slight" prospect, or perhaps "some" prospect, but I am not persuaded on a balance of probabilities that it amounts to a "reasonable" prospect of success. Accordingly, Mr. Purdy's application to reduce the waiting period for parole eligibility is dismissed. In the result, Mr. Purdy remains eligible to apply for parole in December 2022. He is not entitled to make another waiting-period reduction application.

"Thompson J."

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