

CANADA / JUDGMENT

R. v. Rogers

2026 ONCA 312

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Rogers

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Judges

Huscroft, Grant; Thorburn, Julie; Dawe, Jonathan

Subject

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Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Rogers, 2026 ONCA 312[1]

DATE: 20260504

DOCKET: COA-25-CR-0092 and COA-25-CR-0133

Huscroft, Thorburn and Dawe JJ.A.

DOCKET: COA-25-CR-0092

BETWEEN

His Majesty the King

Respondent

and

Bradley Rogers

Appellant

DOCKET: COA-25-CR-0133

AND BETWEEN

His Majesty the King

Appellant

and

Bradley Rogers

Respondent

Bradley Rogers, acting in person

Jennifer Gibson and Eunwoo Lee, for the respondent (COA-25-CR-0092) and appellant (COA-25-CR-0133)

James Foy, appearing as amicus curiae

Heard: April 23, 2026

On appeal from the sentence imposed by Justice P. Tamara Sugunasiri of the Superior Court of Justice on January 6, 2025.

REASONS FOR DECISION

- [1] Bradley Rogers was tried and found guilty on a single count of invitation to sexual touching. He received a one-year conditional sentence, followed by one year of probation. Mr. Rogers has served the conditional sentence, and is now on probation.
- [2] Mr. Rogers seeks leave to appeal against his sentence,[2] arguing that the sentencing judge should have granted him a conditional discharge. The Crown cross-appeals, arguing that the sentencing judge erred by not making a mandatory DNA collection order, and by not following through on her stated intention to make an order subjecting Mr. Rogers to additional restrictive terms pursuant to s. 161(1) of the Criminal Code, R.S.C. 1990, c. C-46. The Crown also argues that the sentencing judge erred by including terms that she had said would form part of the s. 161(1) order in Mr. Rogers's conditional sentence and probation orders, where they were unlawful.

[3] For the following reasons, we dismiss Mr. Rogers's sentence appeal. We allow the Crown's appeal in part, to the extent of making a DNA collection order and correcting the unlawful terms of Mr. Rogers's probation order. However, we decline the Crown's request that we also make a s. 161(1) order.

A. background facts [4] Mr. Rogers and the complainant's mother, C.D., were co-workers. He first met the complainant, C.D.'s daughter Z.D., when Z.D. was five years old and C.D. occasionally brought her to work. In 2014, when Z.D. was 11 years old, Mr. Rogers sent her a series of sexualized Facebook messages, including messages that stated: "Can we hug from behind?" and "I so wanna feel your tight as[s]". Some years later, when Z.D. was 18 years old, Mr. Rogers sent her further Facebook messages telling her that she was "hot" and "sexy". This led to Z.D. realizing that Mr. Rogers's previous messages were inappropriate, and she reported him to the police.

[5] Mr. Rogers was found guilty at trial of invitation to sexual touching, contrary to s. 152(1)(a) of the Criminal Code, based on the sexualized Facebook messages he was found to have sent to Z.D. in 2014. The Crown sought a sentence of 12 months' imprisonment followed by probation for two years. The sentencing judge imposed a 12-month conditional sentence followed by 12 months' probation.

B. Mr. Rogers's sentence appeal [6] When Mr. Rogers committed his offence in 2014, the offence of invitation to sexual touching, when prosecuted by indictment, had a maximum punishment of 10 years' imprisonment and a mandatory minimum sentence of one year imprisonment. When Mr. Rogers was sentenced in January 2025, several trial-level decisions had declared the mandatory minimum sentence to be unconstitutional and of no force and effect: see e.g., *R. v. Mootoo*, 2022 ONSC 384; *R. v. Fluet*, 2023 ONSC 3858; see also *R. v. B.J.T.*, 2019 ONCA 694, 378 C.C.C. (3d) 238, at paras. 66-75, where this court upheld the striking down of the mandatory minimum one year sentence for the offence of sexual interference (Criminal Code, s. 151(a)). The Crown accordingly acknowledged that a conditional sentence was an available sentencing option for Mr. Rogers: see Criminal Code, s. 742.1(b).

[7] Mr. Rogers, who represented himself at sentencing, did not expressly ask for a discharge, but made submissions about the "devastating" impact a criminal record would have on his employment prospects. In response, the sentencing judge told him he had already been found guilty of the offence, and that a finding of guilt was "the same thing as being convicted". Crown counsel on appeal fairly acknowledges that this was incorrect, since s. 730(1) of the Criminal Code gives sentencing judges the option of granting an absolute or conditional discharge "instead of convicting the accused", as long as the offence at issue has a maximum sentence of less than 14 years and no mandatory minimum sentence.

- [8] Mr. Rogers argues that in light of the sentencing judge's legal error, we should now substitute a conditional discharge. In response, the Crown argues that the sentencing judge's legal error had no impact on the sentence she imposed on Mr. Rogers, because her reasons as a whole make it clear that she would not have found a conditional discharge appropriate. Appellate intervention is only justified where such an error actually had an impact on the ultimate sentence: see *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44.
- [9] We agree with the Crown's submissions on this issue. The sentencing judge could only have granted Mr. Rogers a conditional discharge if she found that doing so would not be "contrary to the public interest": Criminal Code, s. 730(1). This would have required her to consider whether a discharge and probation would have "a sufficient denunciatory and deterrent effect in the circumstances": *R. v. M.R.*, 2017 ONCA 985, at para. 2. Equally, the sentencing judge could not impose punitive conditions on Mr. Rogers as part of a conditional sentence order unless she concluded that these conditions were necessary to achieve the applicable principles and objectives of sentencing: see *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 37.
- [10] We are satisfied that the sentencing judge's reasons show that even if she had properly considered the option of granting Mr. Rogers a conditional discharge, she would have rejected it as not adequately addressing the goals of denunciation and deterrence. The sentencing judge explained:

Where the abuse of children is involved, I must ensure that the conditional sentence meets the primary sentencing objective of denunciation and deterrence.

...

[A] conditional sentence can meet those objectives if properly crafted.

In your case, Mr. Rogers, your circumstances are such that a conditional sentence with house arrest and GPS ankle monitoring would meet the goals of deterrence and denunciation. Further, serving the sentence in the community would further rehabilitation which I believe is possible for you.

...

In your circumstances as a first-time offender leading an otherwise pro-social life, house arrest for one year is sufficiently onerous to meet the goal of denunciation and deterrence while encouraging rehabilitation. [Emphasis added.]

- [11] These reasons reveal that the sentencing judge concluded that nothing short of a conditional sentence of imprisonment, with significant punitive conditions, would adequately achieve the primary sentencing objectives of denunciation and deterrence. It follows that she must have been satisfied that no lesser punishment – including either a suspended sentence and probation, or a conditional discharge and probation – would be a fit sentence for Mr. Rogers. In these circumstances, we agree with the Crown that the sentencing judge's failure to

recognize the statutory availability of a conditional discharge and probation had no impact on her ultimate sentencing decision, which is otherwise entitled to appellate deference.

- [12] Accordingly, while we grant Mr. Rogers leave to appeal his sentence, we dismiss his sentence appeal.

C. The Crown's sentence appeal [13] The Crown appeals two main aspects of the sentencing judge's orders.

- [14] First, pursuant to s. 487.054 of the Criminal Code, the Crown appeals the sentencing judge's failure to make a DNA order under s. 487.051(1). She explained in her reasons that she was declining to order Mr. Rogers to provide a DNA sample "pursuant to s. 487.051(2) of the Code". However, since the offence of invitation to sexual touching is a primary designated offence under s. 487.04(a), the applicable statutory provision was s. 487.051(1), which makes a DNA order mandatory.
- [15] Amicus curiae agrees that the sentencing judge erred by not making the mandatory DNA order, and Mr. Rogers does not dispute this. We agree that this was an error, and that we have the power to make the order that should have been made by the sentencing judge: see *R. v. F.(P.R.)* (2001), 57 O.R. (3d) 475 (C.A.), at para. 12.
- [16] The Crown's second ground of appeal is essentially that the sentencing judge erred by stating in her reasons that she would be making an order under s. 161(1) of the Criminal Code with certain specified terms and then failing to make this order. The sentencing judge then compounded her error by converting the terms she said she would impose pursuant to a s. 161(1) order, into terms of the conditional sentence and probationary orders, where some of them were unlawful.
- [17] Section 161(1) of the Criminal Code permits a court sentencing an offender for various offences committed against persons under the age of 16, including invitation to sexual touching, to prohibit the offender from doing any of the things listed in s. 161(1)(a) through (d). Under s. 161(2), the duration of an order made under s. 161(1) "may be for life or for any shorter duration that the court considers desirable". Section 161 orders are an additional form of punishment: *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 49-57.
- [18] The Crown did not ask the sentencing judge to make a s. 161(1) order. The Crown did request that Mr. Rogers's probation order include a term that he have "no contact directly or indirectly with C.D. or Z.D.", as well as a term that prohibited him from being alone with anyone under the age of 18. The sentencing judge also raised the prospect of including a further term prohibiting Mr. Rogers from having "social media friends under the age of 18". However, these restrictions were only discussed as possible terms that Mr. Rogers might be subjected to while he was on probation.

[19] The prospect that Mr. Rogers would be subjected to a s. 161(1) order, and that some of its terms would have a lifetime duration, only emerged for the first time when the sentencing judge was imposing sentence. In her oral reasons, she stated:

Pursuant to Section 161(1) of the Code I further order:

a) You shall have no contact with Z.D. or C.D. or be within 2 km of their homes or where you know them to be for the duration of your life;

[b]) During your conditional sentence and probation period you shall not seek, obtain, or continue employment, whether or not the employment is remunerated, or become a volunteer in a capacity that involves being in a position of trust or authority towards a person under the age of 16;

[c]) During your conditional sentence and probation period, except for your own children if you are to have any, you shall not have any contact, including communicating by any means, with a person who is under the age of 16 unless you do so under the supervision of a person over the age of 30, except for incidental contact in the course of employment or other daily activities; and

[d]) During your sentence and probation period and a period of three years after the end of your probation period, except for your own children if you are to have any, you shall not have any social media contacts under the age of 16.

Like with the conditional sentence and probation order, Section 161(3) of the Code permits you to seek a variation of these conditions where there is a material change of circumstances after I make this order.

[20] The sentencing judge did not proceed to issue a s. 161(1) order. Instead, she included variations of these four terms, with somewhat different language, in both the conditional sentence and the probation orders.

[21] Crown counsel and amicus curiae agree that the conditional sentence order is now spent, and that no useful purpose would be served by us varying its terms. We will accordingly focus on the probation order, which is still in effect.

[22] Counsel agree that three of the terms that the sentencing judge included in the probation order are unlawful. Specifically, terms 7, 8 and 14 of the probation order impose the following conditions on Mr. Rogers:

7. Do not contact or communicate in any way, either directly or indirectly, by any physical, electronic or other means, with: Z.D. or C.D. for the duration of your life

8. Do not be within 2 kilometre(s) of any place where you know any of the person(s) named above to live, work, go to school, frequent, or any place you know the person(s) to be, for the duration of your life, EXCEPT for required court attendances

...

14. During your sentence and probation period and a period of three years after the end of your probation period, except for your own children if you have any, you shall not have any social media contacts under the age of 16. [Emphasis added.]
- [23] Counsel agree that the problem with these terms is that they all purport to impose restrictions on Mr. Rogers that extend beyond the 12-month term of his probation that began when he finished serving the conditional sentence. The duration of these three terms also runs afoul of s. 732.2(2)(b) of the Criminal Code, which provides that “no probation order shall continue in force for more than three years after the date on which the order came into force.”
- [24] We agree that these three terms are unlawful as drafted. We also agree that they can be fixed by deleting the underlined words above: that is, by removing the phrase “for the duration of your life” from terms 7 and 8, and by deleting the phrase “and a period of three years after the end of your probation period” in term 14.
- [25] Crown counsel also fairly points out that one of the terms the sentencing judge said she meant to impose as part of a s. 161(1) order would have been unlawful if such an order had been made. Specifically, s. 161(1) did not empower the sentencing judge to order Mr. Rogers to have no contact with C.D. and Z.D. for life, since they are both over the age of 16 and thus not captured by s. 161(1)(c).
- [26] However, the Crown argues that we should now make a s. 161(1) order that includes the other terms the sentencing judge said she meant to impose on Mr. Rogers, on the basis that her “failure to implement the s. 161 order in the correct form was an error in principle.”
- [27] In response, amicus curiae argues that it would have been procedurally unfair for the sentencing judge to have made a s. 161(1) order, since the Crown had not asked for such an order and Mr. Rogers was never given any notice that the sentencing judge was considering making one. Amicus submits that we should decline to make a s. 161(1) order on appeal.
- [28] We agree with amicus curiae. As a matter of fairness, Mr. Rogers was entitled to notice that the sentencing judge was considering making a s. 161(1) order on her own motion and to an opportunity to make submissions about these terms: see *R. v. Nahanee*, 2022 SCC 37, [2022] 3 S.C.R. 3, at paras. 43-50.
- [29] We do not agree with the Crown that no notice was required because the sentence Mr. Rogers received, viewed globally, was less severe than what the Crown was seeking. While the Crown’s primary position was that Mr. Rogers should receive a jail sentence and probation, Crown counsel also made submissions about the terms that should be included if the sentencing judge instead imposed a conditional sentence and probation. The critical point is that the Crown never suggested that any of these terms should extend beyond the duration of Mr. Rogers’s probation, which the Crown submitted should last for two years, and which by law could be no longer than three years: Criminal Code, s. 732.2(b).

- [30] We also do not agree that Mr. Rogers received sufficient notice when the sentencing judge referred to the terms that had been recommended by the author of the pre-sentence report, which included terms that he “not contact or communicate ... with the victim” and “not be within 200 metres of the victim”, and asked him to comment on “how long of a period” would be appropriate for these terms to remain in force. Viewed in context, Mr. Rogers would have understood the sentencing judge to be inviting submissions about the length of a probation order, not about the appropriateness of her making a lifetime order under s. 161(1).
- [31] Finally, we do not agree with the Crown that the sentencing judge’s failure to give Mr. Rogers notice of her intention to make a s. 161(1) order had no impact on his sentence: see Nahanee, at paras. 51-61. A lifetime order prohibiting Mr. Rogers from being within 2 kilometres of any place he knows the complainant or her mother to be could significantly interfere with his daily life and freedom of movement – for instance, if he were to learn that the complainant or her mother were living or working less than two kilometres from his own residence or workplace. As amicus curiae notes, even though Mr. Rogers could apply to the trial court under s. 161(3) to have the s. 161(1) order varied based on changed circumstances, this process could take some time.
- [32] If this had been pointed out to the sentencing judge, she might very well have decided that the salutary effects of her proposed s. 161(1) order were outweighed by its potential deleterious impact on Mr. Rogers, for many of the same reasons she gave when she declined to subject him to the “onerous obligations” of a registration order under the Sex Offender Information Registration Act, S.C. 2004, c. 10.
- [33] In these circumstances, we find that it would not be in the interests of justice for us to now make a s. 161(1) order. We agree with amicus curiae that the situation here is distinguishable from that in *R. v. Vannoordennen*, 2026 ONCA 236, where the sentencing judge, without having heard submissions, made a s. 161(1)(d) order barring the self-represented accused from using the internet for 20 years, with no exceptions. This court decided that the appropriate remedy in that case was to vary the terms of the s. 161(1)(d) order to include various exceptions, noting that the accused in that case had been put on notice that the Crown was seeking a s. 161(1) order with different terms, and that there was a basis in the record to also include a term limiting his use of the internet.
- [34] Here, the Crown did not seek any s. 161(1) order at trial, and no such order was actually made. Moreover, most of the terms the sentencing judge said she planned to include in a s. 161(1) order would not have extended beyond the end of Mr. Rogers’s probation, and have already been included as terms of his probation order. Having regard to the Crown’s position at trial, we are not persuaded that it would be appropriate for us to now make a s. 161(1) order that would restrict Mr. Rogers’s freedom of movement and use of the internet beyond the term of his probation.

[35] We accordingly grant leave to the Crown to appeal Mr. Rogers's sentence and allow the sentence appeal, but only to the limited extent of varying the terms of his probation order, as discussed above.

D. Disposition [36] In the result, we grant Mr. Rogers leave to appeal his sentence, but dismiss his sentence appeal.

[37] We grant the Crown's appeal pursuant to s. 487.054 of the Criminal Code and make an order under s. 487.051(1) requiring Mr. Rogers to provide a DNA sample. At Mr. Rogers's request, this DNA collection order shall be made returnable on June 1, 2026.

[38] We also grant the Crown leave to appeal sentence and allow the appeal in part, by varying terms 7, 8 and 14 of Mr. Rogers's probation order, as discussed above. In all other respects the Crown's sentence appeal is dismissed.

"Grant Huscroft J.A."

"Thorburn J.A."

"J. Dawe J.A."

[1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.

[2] Mr. Rogers is also appealing his conviction, but the appeals were bifurcated.

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