
CANADA / JUDGMENT

R. v. Swanson

2002 BCCA 243

COURT

British Columbia Court of Appeal

DECIDED

15 April 2002

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2002BCCA0243

Citation:

R. v. Swanson

Date: 20020415

2002 BCCA 243

Docket:

CA028112

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

JERRALD EDWIN SWANSON

APPELLANT

Before:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Levine

The Honourable Mr. Justice Low

K. McGee

Counsel for the Appellant

W.J.S. Bell

Counsel for the Respondent

Place and Dates of Hearing:

Vancouver, British Columbia

February 27 and March 7, 2002

Place and Date of Judgment:

Vancouver, British Columbia

April 15, 2002

Written Reasons by:

The Honourable Madam Justice Ryan

Concurred in by:

The Honourable Madam Justice Levine

The Honourable Mr. Justice Low Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

- [1] This is an appeal from sentence. Leave was effectively granted on April 26 last year when the division hearing this appeal adjourned the matter so that post-sentence materials could be prepared and filed.
- [2] The appellant was convicted on December 10, 2000 of one count of breach of probation. The Information charging the appellant read:

Jerald Edwin SWANSON, on or about the 10th day of August, 2000, at or near Winlaw, Province of British Columbia, while bound by a probation order made by The Honourable Judge Takahashi on the 3rd day of February, 2000, did without reasonable excuse, fail to comply with such order by having contact with Winnie Swanson, contrary to Section 733.1(1) of the Criminal Code.

- [3] The Crown proceeded by indictment. On December 19, 2000 the trial judge sentenced the appellant to two years less one day. This was the appellant's thirteenth conviction for breach of a court order offence. The maximum sentence for this offence is two years' imprisonment with probation to follow for three years. The appellant appeals on the basis that the length of sentence is unfit in the circumstances.

Factual Background to the Offence

- [4] The facts which form the foundation of the charge are the following. The appellant was bound by a probation order which forbid him to visit the home of his mother in Winlaw without the written permission of his probation officer. On August 10, 2000 at about 3:00 p.m. police officers attended to a call at the mother's home in Winlaw. Mrs. Swanson, a woman of about 85 years of age, answered the door. The officers found the appellant hiding in a bathroom with the lights off. He had a moderate smell of alcohol about him.
- [5] The appellant had lived with his mother for over 10 years until 1999. In 1997 his mother contacted the police on a number of occasions regarding the appellant's behaviour. No charges were laid. In 1999 the appellant started a fire in a bathroom at the home which required the attendance of the local fire department. While there is some suggestion that the fire might have been started accidentally, the only explanation offered by the appellant for the fire was that he was "pissed off".
- [6] The appellant continued to drink and abuse drugs in his mother's home. His unpredictable behaviour worried his mother to the extent that the police swore an Information pursuant to s. 810 of the Criminal Code on June 10, 1999. He was released on an undertaking not to return to his mother's home. Between June 10 and June 28 when he agreed to be bound by a recognizance pursuant to s. 810, the appellant was arrested and charged four times for breach of the undertaking.
- [7] On June 28, 1999 the appellant was sentenced for four counts of breach of an undertaking. In total he was sentenced to a three-month conditional sentence with conditions that he not attend his mother's home. The jail sentence was to be followed by probation for 18 months with the same no contact provisions. By July 12 he was back in court, having been found to have breached the conditions of his sentence. He was sentenced to serve the remainder of one of his sentences in custody. By August he had been released and had breached his conditions. He was placed in jail once again.
- [8] On September 9, 1999 the appellant was released from custody. He returned to his mother's home the next day. On September 10 he was arrested and pleaded guilty to breach of probation. He was sentenced to six months by way of conditional sentence. The resulting order permitted him to visit his mother at her home if he had not been drinking.
- [9] On September 23 the appellant was drunk and back at his mother's home. Over the next five months the appellant was arrested, charged and sentenced to jail three more times.
- [10] On February 4, 2000 the appellant was sentenced to nine months in jail for breach of probation. He was released on August 5, and on August 10 was arrested once again at his mother's home. As I mentioned earlier, this last incident forms the subject-matter of the breach of probation we are dealing with on this appeal.

Proceedings at Sentence

[11] The transcript of the sentencing proceedings reveals the difficulties the court faced in sentencing Mr. Swanson. The following is an excerpt from the submissions of defence counsel and the court's interaction with counsel:

[Defence Counsel]: Still the most difficult situation is this, that if Your Honour -- I think Your Honour has had the benefit of reading the psychiatric report. The problem is is that this is Mr. Swanson's home. He knows no other home. At the present time he cannot reside there or even be there, because his mom is so old and frail that she -- THE COURT: And he gets drunk and makes life miserable for his mom, because she's so old and frail. [Defence Counsel]: He does not recognize that, Your Honour, that's the problem. So the difficulty has been for the last three years, through myself, through the efforts of other good counsel, what to do. Each time he is sentenced, he gets out. I think this time it was three days later. THE COURT: And he goes home. [Defence Counsel]: And it's because he is unable to get into any other kind of safety net. Now, each and every single one of his brothers and sisters refuses to deal with him. THE COURT: I can understand that, too. [Defence Counsel]: But that, again, throws him back on his own resources, which are scanty and actually non-existent. This morning, a couple of his old acquaintances have been in the courthouse dealing with other matters. I've canvassed them, hoping that maybe one of them could do something. They can't. What can the court do? I don't know. The problem is is that for these offences he's not really -- he's not abusive to his mother. He doesn't hit her, he doesn't hurt her. He's dangerous to her frame of mind, because she thinks he might build a fire, or start a fire accidentally or something like that. He believes she's protecting the family estate. His sister lives in Winlaw, but she won't even go across the river to see her own mom. So in other words, this is an -- and that is not understandable to me, and I've tried to deal with that. Can't get anywhere. So his mom is alone in Winlaw. He feels she's being preyed upon by others in the neighbourhood, which may have some truth to it. He, therefore, goes like a homing pigeon home. We put him in jail. He gets out. He goes -- I don't know what to say. I don't know what to suggest. I'd like to suggest, and I've suggested to Jerald, that he promise this court that he's going to go up to Social Services, if he's released in the early a.m., and deal with them all day until he has a place to stay. But that's what he was going to do last summer and he didn't. So I really don't know what to say except this is a case where our system has a hole in it big enough for Jerald Swanson to fall through, and as a result of that we're keeping him in the most expensive hotel in the province, and we're going to keep him there, I guess, indefinitely, and it's very sad.

[12] After this discussion Crown counsel advised the court that Mrs. Swanson did not want her son to return home. Counsel for the Crown suggested that Jerrald Swanson be sentenced to a short period of incarceration to be followed by probation. The court then turned to Mr. Swanson and asked if he had anything to say. This followed:

THE COURT: Okay. What do you want to tell me now? THE ACCUSED: Your Honour, I know she -- I know she wants me home. I -- I cook for her. THE COURT: Jerald, she says she doesn't. THE ACCUSED: I clean -- I clean. Well, I don't know who the fuck he was talking to, but it sure wasn't her. I know she wants me home. I know I was at K.R.C.C. once before, and she (indiscernible) go

in the R.C.M.P. in Nelson, and she talked to some woman there. She thought it was a -- an officer. I guess it was just the receptionist or something. She said that she wanted -- she wanted me to go home. She wanted everything -- any papers to sign, she wanted all that dropped. The woman -- the woman said, "Yeah, okay, okay, that's fine." So mom thought everything was okay. THE COURT: Mr. Swanson -- THE ACCUSED: And then it turns out it wasn't. THE COURT: Mr. Swanson, you can't go home until your mom dies. THE ACCUSED: Well, it's a bunch of fucking bullshit. THE COURT: Well, I know. THE ACCUSED: How many times have you been to Winlaw? THE COURT: I've been to Winlaw twice in the last week, sir. THE ACCUSED: Well, do you know where she lives? THE COURT: No, I don't know your mother, and I'll probably never have the privilege of meeting her, but I do know -- THE ACCUSED: (indiscernible) know the place. THE COURT: -- that you can't go home probably until she dies, because she don't want you home. THE ACCUSED: She wants me home.

[13] In the end it became quite clear that Mr. Swanson was determined to return to his mother's home, court order or not. The trial judge sentenced him to two years less a day.

The Appellant's Circumstances

[14] The appellant is now 50 years of age. He was born in Nelson and has spent most of his life in the Slokan Valley. The Swanson family is said to be one of the pioneering families in the area. The family home is in Winlaw where Winnie Swanson, the appellant's mother currently resides.

[15] After leaving high school in 1970 Jerrald Swanson had a series of labouring jobs, but apart from cutting firewood and shake blocks, he has not had any steady employment since 1973. He has suffered from an astonishing number of accidents and injuries beginning in 1981, most as the result of alcohol consumption. He has had multiple head injuries from car accidents, severe epileptic seizures and fights. He is also a drug user and an alcoholic. He has a bullet lodged in his brain which cannot be removed. These problems have left the appellant with significant brain damage. His cognitive abilities are compromised. It appears that he is unable to change his life pattern.

[16] The appellant has a number of brothers and sisters from whom he is estranged. The siblings are unwilling to have the appellant live with them for the same reason the mother is afraid to have him in her home.

[17] The appellant is entitled to a small disability pension. The Ministry of Human Resources has attempted to find him housing in the area, but because of persistent problems with his personal hygiene, alcoholism and difficult behaviour, it seems that it is now almost impossible to find Mr. Swanson a place to reside in the Slokan Valley.

Reports Prepared for this Appeal

[18] A number of reports have been prepared for the assistance of the court on this appeal.

[19] The first is a psychiatric/psychological report prepared by Dr. Lamba. The report paints the picture of an individual who has significant problems for which there seems to be no treatment or even help beyond that of Mr. Swanson himself. Mr. Swanson has refused to participate in any treatment for his substance abuse problems. Dr. Lamba does not consider Mr. Swanson's lack of co-operation to be due to any problems with comprehension, thought organization or speech, but rather an "oppositional defiant attitude". It is Dr. Lamba's opinion that Mr. Swanson is not suffering from a mental illness. Mr. Swanson does have a substance abuse problem (alcohol and drugs) and is a personality-disordered individual with dependent, self-destructive and anti-social traits. Dr. Lamba says that Mr. Swanson's disturbed behaviour is a consequence of his personality and poor attitude. Dr. Lamba notes that Mr. Swanson fails to take responsibility for his actions and in fact denies his actions cause hardship to others. Dr. Lamba says that Mr. Swanson has a sense of entitlement and engages in oppositional behaviour. Dr. Lamba concludes:

Cognitive testing does not indicate any particular organic factors that cause him to behave the way he does. The cognitive testing does not indicate that he has specific deficits that require uniquely different living arrangements either. With regard to treatment requirements, what the cognitive testing indicates is: Mr. Swanson demonstrated an average level of general reasoning ability, revealing better performance on tasks of verbal reasoning ability compared with tasks of visual perceptual ability. This pattern of performance appears to be attributed to his difficulty with timed tasks, due to his slow speed, which in addition to the information discussed above, is confirmed by his relative strength on an untimed task assessing visual information processing. The results of testing suggest that given his average intellectual abilities, Mr. Swanson would be capable of taking part in individual or group treatment. However, given his difficulty with performance speed, any interventions with Mr. Swanson should take this into consideration and allow him sufficient time to process information and perform tasks. My comment from the overall assessment of Mr. Swanson is that he is in no way uniquely different than many 'run of the mill' offenders who have personality problems and alcohol abuse problems. I do not see him as requiring any unique treatment program and he could be treated in any of the many residential alcohol treatment programs in the province. It might be helpful to geographically separate him from his mother and then monitor him closely for any absconding behaviour from the residential treatment program.

[20] The second report we have is a post-sentence report prepared September 21, 2001 and updated this February by a very experienced probation officer, Mr. Busby. According to Mr. Busby, who has done extensive groundwork, Mr. Swanson has exhausted the resources and goodwill of those who might help him in the Slokan Valley. Mr. Busby has concluded that it will be very difficult for Mr. Swanson to find accommodation in the Slokan Valley outside temporary housing in a hotel somewhere. Mr. Swanson has reported to all who may be interested that he intends to return to his mother's home on his release. His mother is fearful of the day he returns. The court adjourned the hearing of this appeal so that we might make further inquiries of Mr. Busby as to the resources available to Mr. Swanson on his release. Mr. Busby made considerable efforts but could offer no suggestions which might

assist the court in ensuring or at least encouraging Mr. Swanson to obey its orders.

Discussion

- [21] The unhappy aspect of this case is that the behaviour which led to the imposition of the s. 810 order was not entirely criminal in nature. S. 810(1) provides:

An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property. [Emphasis added.]

- [22] If the s. 810 informant establishes that there are reasonable grounds for his or her fear, the justice who hears the complaint may order that the defendant enter into a recognizance, with conditions if necessary, for a period of time not exceeding 12 months in duration. The purpose of the recognizance is to ensure that the defendant keep the peace and be of good behaviour.
- [23] A plain reading of s. 810(1) indicates that there need be no criminal intent on the part of the person who is likely to cause the harm. It is enough that the person named in the Information simply be the cause of the apprehended harm. In the case at bar the acts complained of by Mrs. Swanson involve her son's excessive alcohol and drug abuse in the home. The appellant has been found in his mother's home in a filthy, drunken and unkempt condition emaciated and surrounded by liquor bottles, beer cans and prescription drug containers. He is abusive and unpredictable in this state. The appellant was in such shape when he set fire to the bathroom in 1999. Mrs. Swanson fears he may set fire to the home again intentionally or unintentionally.
- [24] The appellant's actions became criminal in nature when he refused to abide by the order made under s. 810 to stay off his mother's property. Placed on probation as part of the sentencing process for violation of the s. 810 order, the appellant has repeatedly refused to abide by the orders of the court. It seems that nothing has or will deter him.
- [25] The question for this Court is whether the sentence of two years less a day was a fit sentence for the appellant's thirteenth conviction for breach of recognizance, condition or probation.
- [26] In my view the sentence, though heavy, is not unfit. The appellant has many difficulties but is not unable to understand the nature of the order. He has been given several opportunities to find alternative housing but is obstinate and determined to return to the family home.
- [27] Mr. McGee, counsel for Mr. Swanson suggested that the court sentence the appellant to time served and to place him on probation with a condition that he not return to the family home. Mr. McGee was hopeful that the appellant might understand by now that his mother was being properly cared for in her home and does not wish to see him.

[28] I do not see any point in placing Mr. Swanson on further probation orders which he has every intention to breach. Every opportunity has been extended to Mr. Swanson, every resource available has been tapped in an attempt to help him. Nothing has worked in the past, nothing but a change in attitude will help him in the future.

[29] I would grant leave but dismiss the appeal.

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Mr. Justice Low"

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