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CANADA / JUDGMENT

## R. v. Tymiak

2012 BCCA 40

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COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 40 R. v. Tymiak

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Tymiak,

2012 BCCA 40

Date: 20120126

Docket: CA033573

Between:

Regina

Respondent

And

Gregory Glen Tymiak

Appellant

Before:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, 24 November 2005 (R. v. Tymiak, Penticton Docket No. 31330)

The Appellant appeared in person

Counsel for the Respondent:

M.J. Brundrett

Counsel for the Intervenor, Attorney General of Canada:

K. J. Elvin-Jensen

Place and Date of Hearing:

Vancouver, British Columbia

January 12th and 13th, 2012

Place and Date of Judgment:

Vancouver, British Columbia

January 26th, 2012

Written Reasons by:

The Honourable Chief Justice Finch

Concurred in by:

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Chief Justice Finch:

I.

- [1] Mr. Tymiak applies to reopen his sentence appeal which was dismissed as abandoned by a division of this Court on 14 July 2009. If the application is granted, he seeks additional orders for the appointment of counsel and other relief. Mr. Tymiak was self-represented on this application, appearing by videoconference from his place of detention.
- [2] The principal ground put forward for reopening the appeal is that the sentencing judge did not consider, or consider adequately, Mr. Tymiak's Aboriginal heritage as required by s. 718.2(e) of the Criminal Code. In his oral submissions, Mr. Tymiak advanced other grounds as well. The Crown opposes the application to reopen.
- [3] The applicant was convicted in British Columbia Supreme Court on 3 December 2004, of a number of offences committed in January 2003, relating to the "home invasion" of a residence in Penticton, involving an assault on one of its occupants. An appeal from conviction was dismissed by this Court in reasons pronounced 5 March 2009 (R. v. Tymiak, 2009 BCCA 98, [2009] B.C.J. No. 465).

- [4] Following Mr. Tymiak's conviction, the Crown applied for an order declaring him to be a long-term offender. In written reasons pronounced 24 November 2005, the sentencing judge made that declaration. The judge then imposed a custodial sentence of 12 years, to run concurrently with a sentence of ten years which the applicant was already serving for offences committed in Alberta, of which he was convicted on 24 April 2003.
- [5] In addition to the 12-year custodial sentence, the Supreme Court also imposed a ten year term of supervision in the community, in accordance with s. 753.2 of the Corrections and Conditional Release Act.
- [6] Counsel, on behalf of the applicant, filed a notice of appeal against sentence. On 11 June 2009, Mr. Tymiak filed a Notice of Abandonment of the sentence appeal, and on 14 July 2009, this Court dismissed the sentence appeal as abandoned.
- [7] As indicated, the basis of this application is that the sentencing judge did not consider, or consider adequately, the applicant's Aboriginal heritage.

## II.

- [8] Mr. Tymiak was born on 30 November 1981, and he was 23 years old at the time the B.C. sentence was imposed.
- [9] There is nothing in the sentencing judge's reasons of 24 November 2005, to suggest that the question of Aboriginal heritage was raised in the hearing of the long-term offender application. Mr. Tymiak testified on that hearing, and it does not appear that he was asked to answer any questions concerning his Aboriginal heritage. There is nothing in the transcript of counsel's submissions on that hearing which addresses the matter.
- [10] The Crown points out that Mr. Tymiak has filed no material explaining why the matter of his Aboriginal heritage was not relied on either at the sentencing hearing or as a basis of a sentence appeal.
- [11] Mr. Tymiak has now filed an affidavit of his mother, Judith Mary Beaudry, in which she deposes that her father was "part Saulteau", her mother was "part Cree", that she considers herself Métis, and that (as of 3 October 2011) she was in the process of applying for her Métis status card.
- [12] Appended to Mr. Tymiak's affidavit of 19 July 2011 is a "Program Performance Report" on his completion of a program for persons of Aboriginal descent who are in custody ("In Search of Your Warrior Program" ("ISOYWP")), in which there are references to the applicant's childhood, his experiences as a victim of bullying, and conflicts with his family.
- [13] Mr. Tymiak draws attention to this passage in the report:

Mr. TYMIAK explored racism and its impact on violence, and wrote in his journal; "This was a good session, I looked back at racism as an adolescent and how this affected the way I felt about my ethnic identity. I knew I could hide behind the colour of my skin, and did not want to get picked on so I hid part of my identity. I was ashamed then, and this played a role at lashing out on other ethnic groups. I addressed the issue before coming in (jail) because I respect all ethnic cultures."

[14] In his submissions to us, Mr. Tymiak said that the references to his "ethnic identity" and to knowledge that he "could hide behind the colour of my skin", meant that he knew as a teenager he had Aboriginal ancestry, but that that was not apparent from his skin colour, and he kept that ancestry hidden to avoid being bullied.

[15] Mr. Tymiak was interviewed prior to his admission into the ISOYWP program, and the report says this concerning the interview:

Gregory, at the time, was limited in his knowledge of culture, tradition and Aboriginal Spirituality. He has been following the teachings of the sweat at Mission. He wants to continue to learn about the teachings and of the ceremonies. He also wants to research his Aboriginal background, this is one of the teachings Elders speak about in our longhouse, identity. Knowing who you are, your roots, this is part of healing and change.

[16] During his time in custody, Mr. Tymiak has also participated in and completed a program for "Aboriginal Offender Substance Abuse". It records that he began to use drugs at age 13, and began to consume alcohol at age 11.

[17] However, as was the case before the sentencing judge, there is nothing before us as to what effect, if any, the applicant's claimed Aboriginal heritage had on his education, development, antisocial behaviour, or life experience in general.

III.

[18] This Court has jurisdiction to set aside an order dismissing an appeal that has not been decided on its merits. The test is whether, in all the circumstances, it is in the interests of justice that the order be set aside or varied: see *R. v. Henry*, 2009 BCCA 12, [2009] B.C.J. No. 46 and *R. v. Clymore*, 1999 BCCA 225, [1999] B.C.J. No. 800.

[19] Section 718.2(e) of the Code is in mandatory terms. It reads:

A Court that imposes a sentence shall also take into consideration the following principles:

....

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[20] It seems clear from the sentencing judge's reasons at paras. 32-34, where he refers in part to ss. 718.1 and 718.2, that the applicant's Aboriginal heritage was not brought to his attention, because s. 718.2(e) is not mentioned.

[21] The leading case on the application of s. 718.2(e) is *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 CCC (3d) 385. Passages relevant for the purposes of this appeal include the following:

[69] ... While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. ...

....

[75] ... Section 718.2(e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

...

[79] ... Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

[80] As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: for this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code?

...

[83] ... for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. ....

[84] However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre, the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. ...

[85] Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. ...

[Emphasis added.]

[22] In its summary, the Court stated:

[93] 11. Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

[Emphasis added.]

[23] What is clear from this discussion is that while the terms of s. 718.2(e) are mandatory, the purpose of the provision is to direct sentencing courts to find alternatives to imprisonment, where possible, especially in cases where the offender is of Aboriginal heritage.

[24] On the record in this case, in the circumstances of this offender, and these offences, it is very difficult to see any real alternative to imprisonment. As noted at para. 79 of Gladue, "Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing."

[25] The question on this application, therefore, is whether, in all the circumstances, it is in the interests of justice to reopen the sentence appeal so that consideration might be given to the appellant's asserted Aboriginal history. I will assume for this purpose that the appellant's mother is Métis, and that the appellant is similarly entitled to be considered as a person of Aboriginal heritage.

[26] On the evidence before us on this application, we are left to speculate as to what effects, if any, that heritage may have had on the applicant, which might differentiate him from the non-Aboriginal population. We do not know whether any such effects would require the Court to reconsider the long-term offender declaration, and to impose a custodial sentence of lesser duration.

[27] There is nothing before us to show that "unique background and systemic factors ... may have played a part in bringing [Mr. Tymiak] before the courts." What does emerge from this record, and from the reports on Mr. Tymiak's participation in the prison programs, is that the factors that may have led Mr. Tymiak into a criminal lifestyle are common to many offenders, both Aboriginal and non-Aboriginal. Those factors include family discord and eventual separation of his parents, early abuse of drugs and alcohol, disinterest in and difficulty at school, early association with other young people engaged in an anti-social lifestyle, a tendency to be easily led, and impulsive behaviour without regard for consequences.

- [28] Section 718.2(e) is directed to reducing the incarceration of Aboriginal persons, by finding other appropriate sentences. It is difficult at this point to consider that any sentence other than significant jail time would have been appropriate. While it is conceivable that there are circumstances in Mr. Tymiak's past that could serve to mitigate this sentence, there is presently no evidence of what they might be.
- [29] Mr. Tymiak put forward a number of other grounds of appeal which, in his submission, might be arguable if his sentence appeal were reopened. He referred to the 10 programs he has completed while in custody, to his relative youth, and to the emphasis that the sentencing judge placed on his prospects for rehabilitation. He also referred to indicia suggesting that he is a substantially reformed person, and that it would be useless for him to continue "wasting" his life in prison when he could be out and doing something useful.
- [30] There appear to be some reasons to believe that Mr. Tymiak has made considerable progress towards his ultimate rehabilitation, and that he is developing a more mature and responsible understanding of himself in relation to others. However, these are matters that are properly left to the consideration of the correctional authorities. They may be factors in determining the timing of his ultimate release from custody, and any conditions that may apply upon that release. They are not matters that this Court could properly consider on an appeal from sentence: see *R. v. Jimmie*, 2009 BCCA 215, [2009] B.C.J. No. 969 and *R. v. K.R.H.*, 2002 BCCA 575, [2002] B.C.J. No. 2364.
- [31] Mr. Tymiak also suggested that he was not fully advised when he abandoned his sentence appeal, and that he did not understand the legal consequences of taking that step. His former counsel has filed an affidavit, upon Mr. Tymiak having waived solicitor-client privilege, as to the circumstances in which Mr. Tymiak instructed her to abandon the sentence appeal. I am not satisfied that Mr. Tymiak was not properly advised, or that the assistance of his then counsel was ineffective.
- [32] Mr. Tymiak directed the Court to consider the Ontario Court of Appeal decision of *R. v. Kakekagamick*, 214 O.A.C. 127, 211 C.C.C. (3d) 289. Given the particular circumstances of Mr. Tymiak's application, this judgment does not assist him.
- [33] I am therefore of the view that it would not be in the interests of justice to reopen the sentence appeal. I would not foreclose that possibility in the future, if the sort of evidence referred to in *Gladue* became available. At this time, however, the possibility of a variation in the sentence imposed is only hypothetical.
- [34] I would dismiss the application to reopen the appeal against sentence.

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Mr. Justice Hinkson"

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