

CANADA / JUDGMENT

R. v. Zora

2017 BCSC 2070

COURT

Supreme Court of British Columbia

DECIDED

15 November 2017

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2017 BCSC 2070 R. v. Zora IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Zora, 2017 BCSC 2070 Date: 20171115 Docket: 38980 Registry: Courtenay Regina Respondent v. Chaycen Michael Zora Appellant Before: The Honourable Mr. Justice Thompson On appeal from: An order of the Provincial Court of British Columbia, dated March 29, 2017 (R. v. Zora, Courtenay Docket No. 38980). Reasons for Judgment Counsel for the Appellant: S. Runyan Counsel for the Respondent: R. Carrier Place and Date of Hearing: Courtenay, B.C. November 7, 2017 Place and Date of Judgment: Courtenay, B.C. November 15, 2017

- [1] Mr. Zora appeals from conviction on two counts of failing to comply with a bail condition: his recognizance required him to present himself at the door of his residence within five minutes of a peace officer attending there for the purpose of confirming compliance with a house arrest condition. The question on this appeal is whether the trial judge erred in law by applying the wrong standard of proof of mens rea.
- [2] Section 145(3) of the Criminal Code is the charging provision, and it provides in relevant part:
- (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance . . . and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.
- [3] The subsection is not clear as to what mens rea is required for a conviction. There is a line of cases, led by R. v. Legere (1995), 95 C.C.C. (3d) 89 (Ont. C.A.), holding that s. 145(3) charges a true criminal offence and failure to take steps that a reasonable person would take to ensure that they are in a position to comply with the recognizance will not support a conviction. However, in R. v. Ludlow (1999), 136 C.C.C. (3d) 460 (B.C.C.A.), Hall J.A., writing for himself and Cumming J.A., thoroughly considered the question and expressed the opinion, albeit in obiter, that the mens rea requirement is largely objective. Esson J.A. dissented, but not on this point.

- [4] Both parties to this appeal interpret the trial judge's reasons for judgment as adopting the Ludlow approach. With one caveat, the parties agree that the outcome of this appeal turns on whether the mens rea element of s. 145(3) is as described in Ludlow as the respondent submits, or whether the Crown was obligated to prove subjective intent as the appellant contends. The caveat is the respondent's curative proviso submission: if the trial judge erred by not holding the Crown to the standard of proving subjective intent, then it is an error of no moment because the Crown fully met the higher standard on the basis of the accused's recklessness.
- [5] The appellant argues that the trial judge erred in law in applying the approach set out in Ludlow. The appellant did not put his case on the basis that the Ludlow holding was obiter. Rather, he argues that Ludlow ought not to be followed because:
- (1) In Ludlow the Court of Appeal did not refer to *R. v. Docherty*, [1989] 2 S.C.R. 941, which held that a similar Code provision (now 733.1(1)) dealing with non-compliance with probation orders constitutes a full mens rea offence;
 - (2) Jurisprudence on s. 733.1(1) since Ludlow continues to cast doubt on the Ludlow reasoning;
 - (3) There is ambiguity in the wording of s. 145(3) as evidenced by the various cases that interpret the mens rea requirement differently, and in these circumstances the principles of statutory interpretation obliged the trial judge to give the benefit of the doubt to the accused.
- [6] The Crown submits that *Docherty* and the other cases considering s. 733.1(1) are treating a subsection that has different words and a different legislative history than s. 145(3) and therefore do not detract from the authority of Ludlow. Further, the Crown argues that the ambiguity referred to by the appellant is manufactured -- there is no case in British Columbia dealing with s. 145(3) that departs from Ludlow, and that I ought to affirm that the trial judge was correct to apply a modified objective standard.
- [7] I am not persuaded that the trial judge erred by following the Ludlow approach to the mens rea requirement. I agree that s. 145(3) is ambiguous, and it may be, as the appellant contends, that the reasoning in Ludlow runs against the grain and trend of other persuasive authority. However, although obiter, Ludlow is a considered decision from our Court of Appeal that in my opinion ought to be treated as weighty authority in this province until such time as it may be reconsidered or overruled. Ambiguity in a charging provision does not license a trial judge in this province to give the benefit of the doubt to the accused in circumstances where the Court of Appeal has wrestled with and pronounced on the meaning of the ambiguous words.
- [8] The appeal is dismissed, with appreciation to counsel for their carefully-prepared written arguments and concise oral submissions. "Thompson J."

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