

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Fox*,
2022 BCSC 1692

Date: 20220929
Docket: 30630
Registry: Vancouver

Rex

v.

Patrick Henry Fox

Before: The Honourable Justice Edlmann

On appeal from: A judgment of the Provincial Court, dated March 6, 2020 (*R. v. Patrick Henry Fox*, 244069-5-BC).

Reasons for Judgment

Counsel for the Crown:

J. Horneland

The Defendant, appearing on his own
behalf:

P. Fox

Place and Date of Hearing:

Vancouver, B.C.
September 9, 2022

Place and Date of Judgment:

Vancouver, B.C.
September 29, 2022

[1] Mr. Fox appeals his conviction in Provincial Court for breach of a probation order. The basic facts are not in dispute. Mr. Fox was subject to a probation order imposed by ACJ Holmes in November, 2017. The order included conditions that Mr. Fox not leave British Columbia and that he not be within 100 metres of the United States border.

[2] There would appear to be some disagreement between Mr. Fox and the immigration authorities in both Canada and the United States about his citizenship status. Mr. Fox asserts that he is an American citizen and not Canadian. Both US and Canadian immigration authorities appear to consider him to be a Canadian citizen and not an American citizen. He has been removed from the United States to Canada on more than one occasion.

[3] On March 15, 2019, while still subject to the probation order, Mr. Fox attended at the Canada Border Services Agency (“CBSA”) office at the Douglas Port of Entry. According to Mr. Fox, he went there with the intention of being removed from Canada to the United States. He spoke with CBSA Officer Polisak. The trial judge described Officer Polisak’s evidence about the interaction in the following terms:

[32] [Officer Polisak] conducted an inquiry, came up -- she looked at several databases and that eventually she could not confirm that [Mr. Fox] was not a Canadian citizen. So because he had presented himself from within Canada to that office, there was no basis for directing him to go anywhere; certainly, no basis for directing him to go back to the U.S.

[4] The evidence of Mr. Fox did not diverge substantially from that of Officer Polisak except on whether she said he was inadmissible:

[35] In fact, the gist of Mr. Fox's submission at the end of the day is essentially the same. Mr. Fox testified. The point of dispute in his evidence as compared to the evidence of Polisak is he says that she clearly told him that he was inadmissible in Canada and that, as a result of that, he felt compelled to leave the country as he had, in his mind, no status to remain in the country. He testified that he explained to the officer he had no status in Canada and that he gave her a number of documents and pointed her to a number of informational sources that would establish that he was, in fact, a U.S. citizen,

and he testified that she told him something to the effect of, "based on the information available to me, you appear to be inadmissible to Canada."

[36] He said he went outside at that point, talked to a border officer who asked him where he was going, and he says, "Well, I guess I have to leave because I do not have any-- I am inadmissible in Canada," and he walked to the Customs and Border Patrol on the U.S. side. All of that happened on March 15, 2019, around 4:30 to 5:30, he says.

[5] In the end, the trial judge found that even accepting Mr. Fox's evidence, he had not established a reasonable excuse for breaching the probation order:

[38] ... [E]ven if I accept his evidence at its highest point that somebody told him while he was inside this country that he was inadmissible to Canada, he had a choice at that time. He could leave the country or he could stay in the country and fight that designation or be arrested by Immigration.

[39] A number of different scenarios could arise out of what decision was made in that circumstance, but the point is, is that the decision that he did make was to walk across the Canada-U.S. border, and he did that without any objectively reasonable excuse, and that is the crux of the whole thing and when it comes down to it the question is, did he voluntarily breach this order or not? The answer is, he clearly did.

[6] Mr. Fox raised a number of issues on appeal, several of which were addressed in submissions and he is no longer pursuing. The only issue outstanding is whether the trial judge erred in his application of the law to Mr. Fox's version of the facts. In my view he did not.

[7] The offence of failure to comply with probation order is set out in s. 733.1 (1) of the *Criminal Code*, R.S.C. 1985, c. C-46, in the following terms:

An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty [...]

[8] As noted by the trial judge, there is little question that the *actus reus* of the offence was established. Mr. Fox entered the United States in breach of both the condition not to leave British Columbia and the condition not to be within 100 metres of the US border. The trial judge also quite properly concluded that the *mens rea* of the offence had been established. Mr. Fox left Canada and attended at the US port of entry on his own and without assistance. Although the trial judge did not specifically refer to the subjective *mens rea* standard applicable to breaches of

probation (see *R. v Zora*, 2020 SCC 14 [*Zora*] at para. 50), subjective *mens rea* was established on Mr. Fox's own evidence.

[9] The only issue was whether Mr. Fox had established a reasonable excuse. The onus was on Mr. Fox to establish a reasonable excuse on a balance of probabilities (*R. v. Goleski*, 2014 BCCA 80, cited with approval in *Zora* at para. 37).

[10] The focus of Mr. Fox's submissions on appeal were essentially twofold.

[11] First, that the CBSA officer had gotten the law wrong and that she should have removed him from Canada. In my view, this submission would not assist Mr. Fox even if the officer had erred in her interpretation of the law. Whether or not she was correct to do so, the officer did not order Mr. Fox to leave Canada. Even on his evidence, she simply noted that based on the information before her it appeared he was inadmissible.

[12] The second submission is that it was reasonable for Mr. Fox to proceed to the United States following his conversation with the officer. Mr. Fox was in Canada when he arrived at the CBSA office. There is a well-established process in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and associated regulations for removing an individual from within Canada. The process would involve a report (s.44(1)), a referral (s.44(2)) and most importantly the issuance of a removal order and its enforcement (ss.49-50). The officer quite accurately stated she did not have the power on her own to issue a removal order even if she felt the grounds had been established to do so. The trial judge was justified in accepting her evidence on this issue.

[13] Ultimately, there was no evidence before the trial judge that Mr. Fox was ordered to leave Canada, or that he was otherwise compelled by law to do so. The onus was on Mr. Fox to establish a reasonable excuse, and he failed to do so. I see no basis upon which this Court should interfere with that finding.

[14] The appeal is dismissed.

“Edelmann, J.”