

COURT OF APPEAL

ON APPEAL FROM THE PROVINCIAL COURT OF BRITISH COLUMBIA FROM THE
JUDGEMENT OF PHILLIPS J., PRONOUNCED IN VANCOUVER ON AUGUST 19, 2020.

REGINA

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

APPELLANT'S FACTUM

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PATRICK HENRY FOX

IN-PERSON

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TABLE OF CONTENTS

	<u>PAGE</u>
PART I – STATEMENT OF THE FACTS.....	1
PART II – ERRORS IN JUDGMENTS.....	10
PART III – ARGUMENT.....	11
PART IV – NATURE OF RELIEF SOUGHT.....	23
PART V – LIST OF AUTHORITIES.....	24

Part 1: Statement of Facts

1. On 2020-08-19 I was convicted, in the BC Provincial Court, by Judge Nancy Phillips, of breach of probation (CCC s. 733.1), and sentenced to 6 months in jail followed by a 6 month probation order.

Background

2. On 2017-06-28 I was convicted of criminal harassment and of possession of a firearm in a place other than authorized. The criminal harassment allegation was based, in large part, on a website I had created about my ex-wife, Desiree Capuano (desireecapuano.com) (*R. v. Fox*, 2017 BCSC 2361 at para 35).
3. On 2017-11-10 I was sentenced, by Justice Heather Holmes, to a term of imprisonment of 3 years and 10 months (with credit for 25.5 months pretrial custody) and 3 years of probation. The probation order included a condition which prohibited me from publishing, disseminating, or making publicly available any information about Capuano; and a condition that required me to remove the website from public accessibility within 24 hours of my release from custody.
4. In 2018 the website went offline when the hosting plan expired and was inadvertently not renewed on time. Shortly thereafter, the associate of mine in the U.S. who had been handling my affairs while I was in custody, arranged to have the website put back online. That was done without my involvement or knowledge. The original domain name, desireecapuano.com, was no longer available so the website was put back online under the domain name desicapuano.com. But even though the domain name was different, it was the same website.
5. From 2017-11-10 through 2018-12-29, while I was in custody at FRCC, serving my sentence, I was not on probation. I was not subject to any of the probation conditions imposed by Justice Holmes.

6. At no time while I have been in custody at either NFPC or FRCC, since 2016, has internet access been available to the inmates at those facilities. While I have been in custody, since 2016, I have had absolutely no access to the internet - including email.
7. On 2018-12-30 my sentence completed, I was released from FRCC, the probation order imposed by Justice Holmes came into effect.
8. In mid March 2019 Crown Counsel became aware of the website hosted under the domain desicapuano.com.
9. On 2019-03-15 I was arrested and detained on an unrelated matter and on 2019-04-04 I was transferred to the Burnaby RCMP and charged with breaching other conditions of the Justice Holmes probation order. The investigation into the current breach allegations was transferred to the Vancouver PD.
10. On 2019-06-06 I sent a letter to Det. Jennifer Fontana, referencing the website hosted at desicapuano.com, and requesting to be charged with criminal harassment and breach of probation related to the website. I did not actually state anywhere in that letter that I had any involvement in the website since it was put back online; nor did I make any reference to when it was put back online.
11. On 2019-06-24 Det. Fontana interviewed me at NFPC regarding this matter. However, I am unable to accurately and objectively describe the interview as I no longer have access to the disclosure material.
12. On 2019-12-04 an indictment was sworn, containing two counts of breach of probation, one of which is the charge for which I was convicted and am now appealing (I was acquitted of the other count).

Summary of Trial Proceedings

13. On 2020-08-19 the trial proceeded. Crown Counsel called one witness, Det. Fontana.
14. Det. Fontana testified that when she was assigned the case she was able to verify the website was accessible at the URL www.desicapuano.com on 2019-03-18. And that she checked the website "quite frequently throughout the investigation". She testified that she had accessed the website earlier that day and it was "still active" (TR p17139-p18117).
15. Det. Fontana testified that in addition to information about Capuano the website also contains extensive information and artifacts relating to the investigation, prosecution, and legal proceedings of the index offense (criminal harassment) (TR p1916-13).
16. Det. Fontana testified that she had been successful in having the website temporarily suspended by the hosting provider for 90 days, but anything more would require a U.S. court order. Det. Fontana stated she had not "been able to obtain one of those yet" (TR p19118-25).
17. Det. Fontana testified she had received the 2019-06-06 letter I had sent her (TR p19126-p2011) (Ex 1). She falsely testified I stated in the letter that I am the creator of the website (TR p2517-8). When questioned about whether I stated in the letter WHEN I had created or published the website, Det. Fontana became very evasive but eventually admitted I had not (TR p29118-45).
18. Det. Fontana testified that when she spoke to me on 2019-06-24 at NFPC I did not state when I published or created the website (TR p29147-p3015). When questioned about whether she had any first-hand knowledge about when the website became publicly accessible, Det. Fontana again became evasive (TR p3016-28).

19. When questioned about whether she knew if the website was made public before or after 2018-12-30, Det. Fontana first responded she believed it was made public in March [2019] but on further questioning she admitted she became AWARE of it in March [2019] but that she [had] no knowledge of whether the website had been made publicly accessible before or after 2018-12-30 (TR p30129-p31133). Throughout that line of questioning Det. Fontana remained very evasive.
20. During the trial, Crown Counsel and the judge agreed and acknowledged that a probation order does not come into effect until the person's prison sentence is completed (TR p3215-27).
21. Det. Fontana testified that she knew my period of incarceration/prison sentence ended and the probation order commenced on 2018-12-30 (TR p33122-29).
22. After Det. Fontana admitted she did not have any knowledge of whether the website was made publicly available before or after 2018-12-30, Crown Counsel sought to draw attention to Condition 13 of the probation order (TR p35110-24) which required me to remove from the internet particular content (e.g. the desireecapitano.com website) which had been published prior to, and was publicly accessible at the time of, my release from custody/the probation order coming into effect. However, I was not charged with breaching Condition 13.
23. Det. Fontana testified that while I was in custody prior to 2018-12-30, it was possible "other people" could have put stuff onto the internet on my behalf or otherwise (TR p37125-30).
24. Det. Fontana testified that Capuano's personal safety is not in danger (TR p38126) and that this case is generally a low priority for her (TR p3811-29).
25. When asked again, and very directly, whether she was saying she had no idea whether the website was made publicly accessible before or after the probation

order took effect, Det. Fontana responded "I don't have that date on hand" (TR p38l30-26).

26. On re-examination Crown Counsel again sought to raise Condition 13 of the probation order, having Det. Fontana read it in (TR p40l19-37). I objected, pointing out that I have not been charged with breaching Condition 13 (TR p40l45-47).
27. In closing submissions, Crown Counsel admitted it hadn't proven when the website was created (TR p46l31-33). But he goes on to say he isn't required to prove that - that he is only required to prove I was involved in, contributed to, or operated the website in some way while I was on probation (TR p46l35-39).
28. In closing submissions, I argued that the Crown was required to prove I was on probation at the time I engaged in the prohibited conduct and since the Crown failed to provide any evidence of when the conduct occurred they could not possibly prove it occurred while I was on probation (TR p48l43-p49l5). I further pointed out that the result of having engaged in that prohibited conduct prior to the probation order coming into effect, namely the continued public existence of the website into the period of probation, still did not breach the condition I was charged with breaching because that condition only prohibited me from engaging in particular conduct (i.e. putting the website online) - it did not require me to engage in any particular conduct (e.g. taking the website offline) (TR p49l11-17).
29. In closing submissions I did, again, raise my objection to the Crown's attempt to confuse the issues by drawing attention to Condition 13. I stressed that I am not charged with breaching that condition but that the Crown is free to re-indict me on a charge of breaching that condition (TR p50l20-27).
30. In reply, Crown again acknowledged he had failed to establish when the website was created or published (TR p50l34-40).

31. In her RFJ the judge stated, at para 10, referring to Det. Fontana's testimony "The officer said, in essence, that she did not know when it was published...". The judge then goes on to say "She also referenced knowing it was made public in March...".

32. In her RFJ the judge relied substantially on the letter I sent to Det. Fontana (at paras 15-17, 30-32). Throughout her RFJ the judge consistently misquoted the letter saying "Particularly since my publishing the new website...", whereas the letter actually said "Particularly since by publishing the new website...".

Part 2: Errors in Judgment

33. The verdict was unreasonable and not supported by the evidence because the Crown failed to prove that the conduct prohibited by the probation condition occurred during the time specified on the indictment, or that it occurred while I was even on probation.

Part 3: Argument

34. As a preliminary matter I address the issue of when a probation order becomes effective. Pursuant to section 732.2 of the Canadian Criminal Code:

(1) A probation order comes into force

(a) on the date on which the order is made;

(b) where the offender is sentenced to imprisonment under paragraph 731(1)

(b) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release at the expiration of the sentence of imprisonment; or

(c) ...

35. Therefore, even though the sentence and probation order were imposed on 2017-11-10, the probation order did not take effect until I was actually released from FRCC on 2018-12-30. During the period from 2017-11-10 through 2018-12-29 I was NOT on probation and NOT subject to the probation order imposed by Justice Holmes on 2017-11-10.

36. Any conduct which occurred prior to 2018-12-30 could not possibly constitute a breach of probation because I was not on probation at that time.

37. It appears to me that there may be some misunderstanding on the parts of the Crown and the judge about when exactly the probation order took effect. It took effect on the day I was released from FRCC (2018-12-30) NOT on the day it was imposed (2017-11-10).

Probation Condition #12

38. Probation Condition 12 reads, in relevant part:

You must not disseminate, distribute, publish or make publicly available in any

manner whatsoever, directly or indirectly, [herein referred to as the "Content"].

39. Condition 12 is the condition I have been accused and convicted of breaching.

40. It appears to me, from the Crown's arguments and submissions and from the judge's Reasons for Judgment (RFJ) that the Crown and the judge seem to be saying that by taking no particular action to take the website offline between the dates of 2019-03-07 and 2019-03-21 I "made it publicly available" between those dates. However, to "make publicly available" means the specific actions that cause something which is not currently publicly available to become publicly available. Once the thing in question IS publicly available I can no longer "make it publicly available", I can only allow or cause it to "remain publicly available". The condition says nothing about content which is "already publicly available" and it says nothing about allowing or causing such content to "remain publicly available", the condition ONLY prohibits "making" something publicly available.

41. Since the act of "making the content publicly available" occurred BEFORE the probation order took effect the conduct could not have breached ANY condition of the order.

42. The indictment stated that I breached the probation order "by making publicly available the website, www.desicapuano.com..." between the dates of 2019-03-07 and 2019-03-21. It does not state that I breached the order by allowing or causing the website to "remain publicly available" between those dates. Nor does it state that I breached the probation order by failing to take any particular action to cause the content to cease to be publicly available. Therefore, the allegation is that between the dates of 2019-03-07 and 2019-03-21 I engaged in some particular conduct which caused content which was NOT, at that time, already publicly available to become publicly available. And, very significantly, that I did so between the dates of 2019-03-07 and 2019-03-21.

43. In order for the Crown and the judge's interpretation of Condition 12 to work it would have to read "You must not disseminate, distribute, publish, make publicly available, or cause to remain publicly available...". But it does not! The wording of Condition 12 addresses only the act of causing something which was not publicly available to become publicly available.
44. The Crown and the Crown's witness clearly stated they had no knowledge of and no evidence of whether the content was "made publicly available" before 2018-12-30 (when the probation order took effect) or after (TR p3016-p31133; p46131-34; p50134-40). Therefore, they could not possibly know, and the Crown failed to prove, that the prohibited conduct occurred during the period of probation - and more importantly, during the period stated on the indictment.
45. Condition 12 only prohibited me from putting content on the internet - it did not require me to remove content from the internet.

Probation Condition #13

46. Probation Condition 13 reads, in relevant part:
- Within 24 hours of your release from custody you will take all necessary steps to ensure that [herein referred to as the "Content"], is no longer accessible via the internet or by any other means.
47. It should be noted that at trial I argued that Condition 13 has no relevance because I was only charged with breaching Condition 12, not Condition 13 (TR p40145-p4112; p50116-27). In her RFJ the judge agreed, saying "I give no consideration to Condition 13. I think Mr. Fox is persuasive with respect to what he said about Condition 13" (at para 34). Nevertheless, I shall address condition 13 in anticipation of the Crown seeking to rely on it in their response.
48. Condition 13 states only "Within 24 hours of your release from custody..."; it does

not state "Within 24 hours of your release from custody and thereafter...". And, it states "...is no longer accessible..."; it does not state "...is no longer accessible and remains no longer accessible...". Therefore, the conduct required by Condition 13 was required to be executed one time, during the 24 hour period following my release from custody - NOT continuously, repeatedly, or perpetually during the duration of the probation order. In addition, Condition 13 specifically states "...is no longer accessible..."; it does not state "...is not accessible..." which means Condition 13 applies ONLY to content which was actually accessible during the stated time (i.e. the 24 hours following my release from custody on 2018-12-30). Any content "made accessible" after that 24 hour period would be covered by Condition 12.

49. Since the indictment is only concerned with the time from 2019-03-07 through 2019-03-21 Condition 13 could not possibly apply because Condition 13 is only concerned with the 24 hours following my release from custody on 2018-12-30.

50. The argument may be made that if the website was put online BEFORE the probation order took effect on 2018-12-30, then that would mean I breached Condition 13 because I was required to take it down within 24 hours of my release from custody. However:

- 1) I was not charged with or convicted of breaching Condition 13;
- 2) it would have been far outside the time frame stated on the indictment;
- 3) Crown has presented no evidence that the website was ACTUALLY online in that 24 hour period - if it had been taken offline at any point within the 24 hours following my release, then put back online after the end of that 24 hour period then there would be no breach of Condition 13;
- 4) regardless of any admissions I may have made that I published the current website, the fact is I was in custody at FRCC at that time and had absolutely not access to the internet to be able to put the website online - so, it would have been physically and logistically impossible for me to be the person who published or put the current website online. Which can only mean, contrary to my admissions, someone else actually put the website online.

52. In her RFJ, at para 10, the judge referred to Det. Fontana's testimony saying "She also referenced knowing it was made public in March..." but, in fact, on cross-examination it was determined that Det. Fontana did not know that the website was "made public" in March - she "became aware of it" in March (TR p3016-p31130). On further questioning Det. Fontana admitted she had absolutely no idea when the website became publicly accessible or was "made public" (TR p3114-30).

53. In her RFJ, the judge repeatedly and consistently erroneously stated (at paras 15, 30-31) my letter to Det. Fontana said "Particularly since my publishing the new website..."; whereas the letter actually said "Particularly since by publishing the new website...". This is very significant because under the judge's erroneous wording I would be stating that subsequent to publishing the website (i.e. during the period of probation) I have engaged in conduct which is prohibited under the probation order - thereby breaching the probation order. Whereas under the actual wording I used in the letter, I am stating I engaged in the conduct which is prohibited under the probation order but I am NOT stating it occurred during the period of probation. And if I was not on probation at the time I engaged in that conduct then it cannot possibly breach the probation order.

54. At paras 31-32 of her RFJ the judge found that through my own admissions to Det. Fontana I did engage in the conduct which was prohibited under the probation order - and there is no dispute about whether or not I did engage in the conduct. The dispute, however, is WHEN I engaged in the conduct. If I did so, as I say I did, BEFORE 2018-12-30 then I was not on probation at the time and it could not possibly have breached the probation order which wasn't even in effect. Nowhere in her RFJ does the judge state that she finds I engaged in the prohibited conduct: (1) while I was on probation; and (2) within the period of time stated on the indictment. In fact, a statement of such finding is conspicuously missing from the RFJ.

55. Even if I had engaged in the prohibited conduct after the probation order took effect,

as long as it wasn't between the dates specified on the indictment, namely 2019-03-07 through 2019-03-21 then I would not be guilty of the charge on the indictment.

56. Even the Crown acknowledged he failed to prove when the website was actually published or made publicly available (TR p46131-33). Though, in fact, he failed to prove when ANY of the alleged conduct occurred - only that it occurred some time after 2017-11-10.

57. In closing arguments, Crown Counsel stated "What the Crown is required to do is to prove that Mr. Fox was involved in that website or contributed to that website or operated that website in some way while he was on probation" (TR p46136-42). But that is not entirely accurate. Crown is dramatically expanding the scope of Condition 12 here (see analysis of Condition 12, above). Moreover, Crown failed to prove that any of the conduct he alleged occurred while I was on probation! The Crown did not offer one single piece of evidence of WHEN the conduct occurred (other than that it was some time after I was sentenced on 2017-11-10).

58. In his closing arguments, Crown also stated "...the Crown relies on that portion of the letter which clearly, I say, establishes that after being sentenced to jail and while on probation Mr. Fox published the website of which we've heard in this matter and as a result of that, I say that he's clearly guilty with respect to Count 1" (TR p47126-32). However, Crown is mistaken in that respect because, as shown above, a probation order does not take effect until the person's custodial sentence is finished and he is released from custody (CCC s. 732.2(1)). Therefore, the probation order I am accused of breaching did not take effect until 2018-12-30 when I was released from FRCC. For the 13 months between when that sentence was imposed and when I was released from custody I was not on probation. Or, more specifically, at the time when the website was put online and the new content (e.g. that related to my cases) was added to it I was not on probation yet.

59. In her RFJ, at para 8, the judge references Det. Fontana's testimony, stating "[Det.

Fontana] said she asked him if he was running it, in other words, the website, and if he created it and he said he had." I would like to point out, however, that according to Det. Fontana's testimony my response was in the past tense, not the present. There is no dispute that prior to the period of probation I did create and maintain the website. But again, because I was not on probation at that time it could not possibly constitute a breach.

60. I believe the judge misapprehended the term "made public" as is evidenced by her statement in paragraph 10 of her RFJ, when referring to Det. Fontana's testimony. The judge stated "The officer said, in essence, that she did not know when it was published...She also referenced knowing it was made public in March...". Although the terms "published" and "made public" have the same meaning, the trial judge seems to be understanding "made public" to mean "remained public".

61. Moreover, at paragraph 23 of her RFJ, the judge stated "He said the fact that the website continued to be publicly available still does not put him in contravention of the probation order which he said only proscribes certain conduct not captured by that ongoing conduct." Here the judge seems to be suggesting that the website remaining publicly available actually constitutes ongoing conduct on my part. But in reality the opposite would be true - once the website is online and publicly available it requires no further action or intervention to remain as such; in fact, it would actually require explicit action for it to cease to be online and publicly available.

Part 4: Nature of Order Sought

62. I seek an order allowing the appeal, and quashing the conviction and directing that verdicts of acquittal be entered on all counts or, in the alternative, ordering a new trial.

List of Authorities

R. v. Fox, 2017 BCSC 2361