

File No: 244069-6-B
Registry: Vancouver

In the Provincial Court of British Columbia

REGINA

v.

PATRICK HENRY FOX

**REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE N. PHILLIPS**

COPY

Crown Counsel:	C. Johnson
Appearing on his own behalf:	Patrick Fox
Place of Hearing:	Vancouver, B.C.
Date of Judgment:	August 19, 2020

[1] **THE COURT:** Mr. Patrick Henry Fox is before the court today for trial on Information 244069-B-6. This is a matter that the Crown has proceeded by indictment, but it is within the absolute jurisdiction of this Provincial Court. There are two counts on the information, both of which allege that Mr. Fox breached a term of his probation without reasonable excuse between March 7 and March 21, 2019. I will turn to the specifics of the two allegations in front of the court more in the course of giving my decision following this brief trial that was held this morning.

[2] Before the Crown called its only witness in the case, Mr. Fox, who is self-represented, admitted that he was on probation at the times set out in the information. That probation order, which was referred to in some further detail over the course of this trial, is from now Associate Chief Justice Holmes of the Supreme Court of British Columbia, which was imposed by Justice Holmes on November 10, 2017.

[3] The only witness called for the Crown was Detective Constable Jennifer Fontana. Constable Fontana told the court, amongst other things, that she had met with Mr. Fox after being assigned the investigation of this matter, and she identified him in the courtroom. There is no issue taken with respect to the question of identity in the context of this trial.

[4] The officer told the court that she was tasked with investigating a specific website, "www.desicapuano.com," and said that she was aware through that investigation of a person by the name Desiree Capuano, who she understood to be Mr. Fox's ex-partner. The officer also told the court she was aware that Mr. Fox had been before Justice Holmes in 2017 and placed on probation by the Supreme Court

and she was aware of the conditions of that probation order.

[5] After being assigned as the investigator in this matter, she said, amongst other things, that she went onto the Internet and conducted a Google search and found the website, which address I have just stated on the record, quite easily. She said that occurred on March 18, 2019. Subsequent to that time she has checked that website frequently throughout her investigation and checked the morning of this trial, and determined it is still active and available to the public.

[6] She said the gist of the website when she has viewed it is that it contains quite a bit of information. Most of it is about Ms. Capuano stating such things as her address, her phone number, and her email. She said it depicts Ms. Capuano in a very negative light, with negative postings about her and her personal life. The officer said because she has not met with Ms. Capuano but only spoken with her on the phone, she could not comment on whether the website was truthful or not. She said it also included pictures of Ms. Capuano's home and documents from what the officer understood to have been the 2017 Supreme Court trial, including audio clips of certain witnesses' testimony from that trial.

[7] The officer said, as part of her investigative duties in this matter, she determined that the host for the website was an outfit named GoDaddy. She was able to ask them or require them to take the site down for 90 days. However, because the site only allows for a longer disabling by way of an American court order and because of her work demands, she has not been able to obtain such an order so the site is back operating.

[8] Officer Fontana told the court that in June of 2019, she received a

handwritten letter from Mr. Fox, a four-page letter, which was marked Exhibit 1 in this trial. That letter was addressed to her and it was about the investigation into the website in question. She said on June 24, 2019, she met with Mr. Fox and they discussed, amongst other things, the letter. She said in the course of that meeting, which was audio-recorded, Mr. Fox acknowledged being the creator of the website. She was asked by the Crown whether Mr. Fox told her he was the author and she answered, "He asked me if I had received his letter." She said, "I gave him a chance to review the letter and he said, 'Oh, yes,'" and handed it back to her. She said she asked him if he was running it, in other words, the website, and if he created it and he said he had.

[9] Mr. Fox cross-examined Officer Fontana about the matter of the website and she agreed that there had been an earlier website that had a slightly different name and that his June 6, 2019 letter to her referenced the name of the new website, which is "desicapuano" rather than "desireecapuano.com."

[10] The officer was cross-examined about whether she knew when the website was published or created and, in particular, whether it was published or created before or after December 30, 2018. The officer said, in essence, that she did not know when it was published, but she believed it had had to have been after the 2017 trial because it contained information related to that trial. She also referenced knowing it was made public in March from her own examination because she said some information had been sent out to multiple news markets as well as to the Crown.

[11] The officer said that the probation order from Justice Holmes had been

varied. The variation, according to the copy of the order which was marked Exhibit 2 in this hearing, references the date of February 6, 2019, from which she thought an inference could be drawn that Mr. Fox would have been on probation at that time.

[12] The officer was also cross-examined on whether there was anything in the conditions on the probation order that prohibit Mr. Fox from having someone else engage in conduct on his behalf that would put him in violation of Condition 12. In other words, whether there was something in the probation order that would prohibit him, for example, from asking a jail guard to look up something on an innocuous website, such as the CBSA address, on his behalf. The officer answered, "I think accessing an address and posting personal information about someone are very different things." However, when pressed further about whether information could have been put onto the Internet by someone other than Mr. Fox, the officer answered, "Yes, anything is possible."

[13] The officer was questioned about whether she had any idea whether the website in question was made publicly accessible before or after the probation order took effect, to which she said, "I don't have that information." She was also cross-examined about whether Mr. Fox himself made the site publicly available or someone else on his behalf did so, to which she answered, "Well, when we met," that is, in June 2019, Mr. Fox had told her he created the website. She was asked whether it was her understanding that Mr. Fox wanted to be prosecuted for criminal harassment based on the current website, to which she answered, "Yes," and that she understood Mr. Fox had brought the website to light knowing that an investigation would follow.

[14] In re-direct, the officer finally was asked about the new, that is the "desi.com" not the "desiree.com," website. She believed it included information from the old website and new information leading her to think that information would have been uploaded to the new website after Mr. Fox was out of custody. That was an inference she drew.

[15] Mr. Fox's letter to the officer, as I said, was marked Exhibit 1 in this proceeding. It should be read in its entirety in conjunction with my reasons for judgment. I am going to highlight two specific excerpts from that letter. I should say at the outset that the first paragraph of Mr. Fox's letter references investigation into the website hosted as www.desicapuano.com. Starting with the last sentence at the bottom of page 2:

Particularly since my publishing the new website, I have engaged in exactly the same conduct which Justice Heather Holmes declared formed much of the basis of the guilty verdict in 2017 (at the first criminal harassment trial). I mean, if the website constituted criminal harassment at that point, then it must certainly still constitute criminal harassment now. Right?

[16] At the bottom of page 3, the first sentence of the final paragraph states:

So, anyway, in closing, I respectfully request you charge me with criminal harassment and with violating probation by publishing the new website.

[17] That was the evidence led by the Crown at this trial against Mr. Fox. Mr. Fox elected not to call any evidence. The Crown position at the conclusion of the trial was as follows. The Crown acknowledged it had not proven when the new website was created, but said that was not necessary. It was submitted that the Crown had, in fact, proven that Mr. Fox contributed to the website and that the evidence at the

trial leads overwhelmingly to the inference that must be the case. In the letter of Mr. Fox from June 6, 2019, to the officer he acknowledges being the author of the website. He spoke with the officer subsequent to that letter later and admitted to the authorship as conclusive and direct proof to that effect.

[18] Mr. Johnson also noted that the officer testified that when she spoke with Mr. Fox, he told her he had created the website. Based on his admissions to the officer and his letter and the fact that the website remains in existence, should lead this court to find that there has been a clear contravention of the probation order and thus Mr. Fox should be found guilty of Count 1 on the information.

[19] With respect to Count 2, the Crown submitted it is clear that Mr. Fox must have had access to the Internet in order to update the website and post materials on the Internet and, thus the Crown has proven its case on Count 2.

[20] Before turning to Mr. Fox's submissions, I think it is helpful to review the specific wording of both Counts 1 and 2 on the information. Count 1 in its entirety reads:

Patrick Henry FOX, between March 7 and March 21, 2019, at or near Vancouver, in the Province of British Columbia, while bound by a probation order made by The Honourable Madam Justice Holmes in the Supreme Court of British Columbia on November 10, 2017, did without reasonable excuse fail to comply with such order by making publicly available the website, www.desicapuano.com, contrary to Section 733.1(1) of the *Criminal Code*.

[21] Count 2 is almost identical except the breach alleged there is as follows:

... did without reasonable excuse fail to comply with such order by accessing the Internet or any computer or cellular network ...

[22] Mr. Fox submitted in his closing submissions that the Crown does not only

have to prove that he was on probation at the time, which he effectively admitted, but that he was on probation when he engaged in the prohibited conduct, in other words, "by making publicly available," and that the Crown had failed to do so in this trial. Mr. Fox said in his closing that there is no dispute that he published the website and he has been open about that, but he submitted that if he engaged in that conduct before the probation order took effect, then he cannot be found guilty.

[23] 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. He highlighted that the Crown admitted that it did not prove when the website was created or published. Mr. Fox submitted that is a very important issue as to whether his guilt has been established to the requisite degree.

[24] Mr. Fox further acknowledged in his submissions that the court heard that there is content on the website which would have come into being after the 2017 trial. He said that there is no dispute about that, but said all of that information was in his possession before release from jail so that does not prove the website was published before or after that. I am not sure that the evidence established that, but for the purpose of this argument, I will carry on in that vein.

[25] Mr. Fox also submitted that the Crown had failed to prove that he had uploaded or made any of the content on the website which is publicly available. Although he has been transparent about acknowledging creating and publishing the website, he has not admitted to having uploaded specific content and has not done so upon his release from custody.

[26] Finally, Mr. Fox noted condition Number 13 on his probation order, pointing out that he is not charged with violating the specific language in Condition. He said it is open to the Crown to start the process all over again.

[27] Those were the submissions that I heard, the competing submissions, at this trial. Turning, then, to my analysis in this case, I found, first of all, Detective Constable Fontana to be a credible and reliable witness. She gave a brief, but careful, recounting of her involvement in this investigation. Perhaps more importantly as to my conclusion that she was credible and reliable, she was careful not to overstep her knowledge with respect to the technology behind the allegations in front of the court.

[28] Turning specifically now to Count 1 on the information. As I have already referenced, there is no issue that Mr. Fox has been identified as the person charged. There is no issue with respect to jurisdiction having been established beyond a reasonable doubt, nor with the fact that Mr. Fox would have been on probation under Justice Holmes' order between March 7 and March 21, 2019, in Vancouver, British Columbia, as charged on the information.

[29] I want now to turn to the specific language in the probation order. Condition 12 states:

You must not disseminate, distribute, publish, or make publicly available in any manner whatsoever direct or indirectly information, statements, comments, videos, or photographs which refer to or depict by name or description Desiree Capuano, James Pendleton, S. [because there is a publication ban with respect to the next person's name] or any of their friends, relatives, employers, of coworkers.

[30] Let me go back, then, to Mr. Fox's letter. At the top of page 3, Mr. Fox states:

Particularly since my publishing the new website, I have engaged in exactly the same conduct which Justice Heather Holmes declared formed much of the basis of the guilty verdict in 2017 ...

[31] From that, I find that he was acknowledging, as he did again when he spoke in person with the officer later in the month of June 2019, that he engaged in the production of the website. The question for the court is whether that puts him in violation of the probation order as drawn and referencing Count 1 on the information which states that he:

... did without reasonable excuse fail to comply with such order by making publicly available the website, www.desicapuano.com ...

[32] In that regard, I find that by Mr. Fox's own admission in his letter, "Since my publishing the new website, I have engaged in exactly the same conduct," he has clearly been proven beyond a reasonable doubt to have without reasonable excuse failed to comply with Justice Holmes' order in Condition 12 by making publicly available the website. Condition 12 provides an expansive definition of what that would entail, and I find Mr. Fox has breached that term in a number of ways. Specifically Condition 12 states "directly or indirectly publish or make it publicly available in any manner whatsoever." In my view, based upon the evidence in front of the court, there can be no doubt that Mr. Fox engaged in the prohibited conduct under the probation order that is set out in Count 1 on the information and I find the Crown has proven that offence and each element of that offence required beyond a reasonable doubt, and I convict Mr. Fox on Count 1.

[33] Turning to Count 2, and I want to now pause and read Condition 14 of the probation order. It states:

You must not use the Internet or any computer or cellular network except as required to fulfill Condition 13 for the purpose of employment or for sending personal emails.

[34] I give no consideration to Condition 13. I think Mr. Fox is persuasive with respect to what he said about Condition 13. The specific question for me in this analysis is whether Mr. Fox has breached Condition 12 because that is the way Count 2 references the probation order. So the only issue that is still in dispute is whether Mr. Fox accessed the Internet or any computer or cellular network.

[35] While on the evidence before the court today, I find it is likely that Mr. Fox had to engage in such conduct to publish the new website, I am unable to conclude that is the only inference which can be drawn. It is possible that he had someone else do so on his behalf. While that conduct may have run contrary to Justice Holmes' order, it does not, in my opinion, amount to proof beyond a reasonable doubt that he accessed the Internet or any computer or cellular network in accordance with how Count 2 is worded. Accordingly, I have a doubt on that matter and I enter an acquittal with respect to Count 2.

(REASONS CONCLUDED)