

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Fox*,
2022 BCCA 404

Date: 20221125
Dockets: CA46979; CA47391
Docket: CA46979

Between:

Rex

Respondent

And

Patrick Henry Fox

Appellant

-and-

Docket: CA47391

Between:

Rex

Respondent

And

Patrick Henry Fox

Appellant

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Hunter
The Honourable Madam Justice Horsman

On appeal from: Orders of the Provincial Court of British Columbia, dated August 19, 2020 (conviction) (*R. v. Fox*, Vancouver Docket 244069-6-B), and November 26, 2020 (conviction) (*R. v. Fox*, Vancouver Docket 244069-7-B).

Oral Reasons for Judgment

The Appellant, appearing in person:

P.H. Fox

Counsel for the Respondent:

D.M. Layton, K.C.

Place and Date of Hearing:

Vancouver, British Columbia
November 25, 2022

Place and Date of Judgment:

Vancouver, British Columbia
November 25, 2022

Summary:

Appeals CA46979 and CA47391 arising from convictions for breach of probation orders. The appellant was found guilty of criminally harassing his former wife by creating a website in her name that was designed to denigrate, humiliate and intimidate her with the goal of ruining her life and causing her to commit suicide. The first probation order prohibited the appellant from publishing, disseminating, or making publicly available any information about his ex-wife. The second probation order required the appellant within 48 hours of his release from custody to take steps to ensure any website relating to his former wife was no longer available on the internet or otherwise. Held: appeals dismissed. There is no merit to either appeal. The appellant admitted to creating and publishing the website containing information about his former wife and maintained he would never take it down. The appellant was convicted by his own words.

[1] **STROMBERG-STEIN J.A.:** These are reasons of the Court.

[2] In 2017, a jury found Patrick Fox guilty of criminally harassing his former spouse and of being in possession of firearms in an unauthorized place. Underlying his conviction was Mr. Fox's creation of a website in the name of his former spouse, which was designed to denigrate, humiliate and intimidate her, and which contained private information about her family, friends, and associates. Mr. Fox's stated goal was to ruin her life and cause her to commit suicide.

[3] On November 10, 2017, now Associate Chief Justice Holmes sentenced Mr. Fox to a period of incarceration followed by three years' probation (the "Holmes Order"). Condition 12 of the Holmes Order prohibited Mr. Fox from publishing, disseminating, or making publicly available any information about Mr. Fox's ex-wife. Mr. Fox was released on December 30, 2018, and the Holmes Order came into effect.

[4] On March 12 or 13, 2019, someone notified the media and Crown counsel that there was a new website that replicated the content of the earlier website, and added allegations of corruption in relation to Mr. Fox's criminal harassment trial. Disclosure materials and transcripts from the jury trial were posted on the website. On March 18, 2019, Vancouver Police Department Detective Constable ("DC") Fontana confirmed that the website was publicly accessible.

[5] In June 2019, DC Fontana received a letter dated June 6 from Mr. Fox indicating that he had created a new website hosted in the name of his ex-wife under a new domain. He asked to be charged with breach of probation and criminal harassment.

[6] On June 24, 2019, DC Fontana interviewed Mr. Fox. During this interview, Mr. Fox advised DC Fontana that he had created and was running or maintaining the website.

[7] On December 4, 2019, Mr. Fox was charged with breaching the Holmes Order between March 7 and March 21, 2019, by making publicly available the website domain.

[8] At the trial of the breach of the Holmes Order before Judge Phillips, Mr. Fox admitted he created and published the website, and was bound by the Holmes Order during the period covered by the Information. DC Fontana was the sole witness at trial. Mr. Fox did not testify. His defence was the Crown could not prove whether he published the website before the probation order came into effect, and his failure to take down the website was not a breach of the order. The position of the Crown was that it did not matter when the website was published, because it was “publicly available” during the relevant time described in the Information.

[9] Judge Phillips concluded the Crown had proved the probation breach beyond a reasonable doubt, as the probation condition prohibiting the making of the information in issue publicly available “directly or indirectly ... in any manner whatsoever”. On August 19, 2020, Judge Phillips convicted Mr. Fox of breaching the Holmes Order, and her reasons give rise to Mr. Fox’s conviction appeal No. CA46979.

[10] We will now consider the merits of the appeal from Phillips P.C.J., as this impacts the appeal from Rideout P.C.J. Mr. Fox argues his conviction is unreasonable as the judge erred in law in interpreting the probation order,

misapprehended evidence, and provided insufficient reasons. In our view, there is no merit to any of these grounds of appeal.

[11] There was no dispute the probation order was effective on December 30, 2018. There is no dispute the Crown could not prove when anything was posted on the website, including if it was before the probation order came into effect. The dispute revolved around the interpretation of Condition 12 of the Holmes Order. Contrary to Mr. Fox's view, there was overwhelming evidence in support of Judge Phillips' conclusion Mr. Fox made information referring to his ex-wife publicly available "directly or indirectly ... in any manner whatsoever" during the period of his probation, and specifically between March 7 and March 21, 2019, as indicated on the Information. The website contained essentially the same content as the website that led to Mr. Fox's criminal harassment conviction. In his police interview with DC Fontana, Mr. Fox admitted he was running or maintaining the website; his letter to DC Fontana suggested he was involved in running or maintaining the website, he admitted publishing the website and creating some of the content, and he asked to be charged with criminal harassment. The evidence was overwhelming, from the mouth of Mr. Fox, that he breached Condition 12 of the Holmes Order.

[12] The judge, in her reasons for conviction, misquoted Mr. Fox's comment in his letter to DC Fontana: "Particularly, since my publishing the new website, I have engaged in exactly the same conduct". In fact, Mr. Fox wrote: "Particularly, since by publishing the new website, I have engaged in exactly the same conduct". It is a word without a difference in the context of the meaning of the sentence, and does not change the meaning of what he wrote. In our view, this error did not play an essential role in the judge's reasoning process in convicting Mr. Fox.

[13] We would dismiss Mr. Fox's appeal from conviction on CA46979.

[14] Judge Phillips sentenced Mr. Fox to 6 months' incarceration and 6 months' probation (the "Phillips Order"). The Phillips Order included a condition that required

Mr. Fox to take down the website within 48 hours of his release from custody, as follows:

Within 48 hours of your release from custody you will take all necessary steps to ensure that any website, social media page, or other publication, which you have authored, created, maintained or contributed to, which contains any information, statements, comments, videos, pictures which refer to or depict, by name or description, [your former spouse] or any of her friends, relatives[,] employers or co workers, including the websites published under the domain [website domain name deleted] and [website domain name deleted] are no longer available via the [I]nternet or by any other means.

[15] We would note Mr. Fox has filed a notice of abandonment in relation to his sentence appeal.

[16] On August 20, 2020, Mr. Fox was released from custody and the Phillips Order came into effect.

[17] On September 17, 2020, Mr. Fox was arrested and charged with breaching the Phillips Order for failing to take down the website between August 19, 2020, and September 16, 2020. Mr. Fox was interviewed by DC Dent on September 17, 2020. The interview was video and audio-recorded.

[18] At the trial on November 26, 2020, DC Dent testified that on September 16, 2020, he accessed one of the website domain names referred to in the Phillips Order. Its home page contained an entry dated August 19, 2020, at 1:53 p.m., which was written as a first person letter to David Eby, then the Attorney General of British Columbia. The entry referred to the proceedings before Phillips P.C.J., and referred to the probation condition that required he take down the website within 48 hours of his release: "I told the judge 'that's just not going to happen'." He emphasized "how ineffectual and impotent the Canadian justice system is. They can't even make a little pissant nobody like myself take down a website. They can lock me up for [the] rest of my life, but I will never take down the website." He noted 48 hours had passed and the website was still online. He referred to the *R. v. Fox* section as exposing corruption and collusion of Crown, defence counsel and the judge. He indicated by the time Mr. Eby read the letter "I will probably be back in custody, but

in case you haven't figured it out, I just don't give a fuck." Mr. Fox contends this letter was written the day before the probation order came into effect. We would note the accuracy of the date on the letter was not established at trial.

[19] With the agreement of Mr. Fox, rather than playing the video of his police interview, DC Dent was permitted to testify about statements recorded in a Task Action Report that Mr. Fox made during the 65-minute interview. During this interview, Mr. Fox makes various inculpatory statements. He now maintains DC Dent misstated what he said during the interview, and his inculpatory statements were said in a sarcastic and joking manner. However, the Division has viewed the video, which forms part of the new evidence Mr. Fox seeks to adduce on appeal, and Mr. Fox's assertions are not accurate.

[20] At the commencement of the interview, Mr. Fox told DC Dent it was important to have a good quality audio and video recording of the interview so he could put it on the website later; he admitted the website had been updated by someone, and referred to a number of details on the website, but he did not admit to personally posting anything; he said a lot more content needed to be added to the website, but that it was very time consuming and "I haven't been the most productive"; he said he had been ordered to take down the website but he believed it was not illegal and it exposes misconduct and corruption in the criminal justice system and of his "evil, horrible cunt of an ex-wife"; he had been waiting to be arrested and was surprised it took the police so long; he had viewed the access logs for the website and could see that various city, police and government agencies had visited it, but he believed a website's access logs could be seen by anyone clicking on the website. When asked by DC Dent what it would take for him to take down the website, Mr. Fox said he wanted the government to admit that everything on his website is true, for the government to admit he did not commit criminal harassment and overturn all his convictions, and for his ex-wife to get throat cancer and to die a slow, miserable death. He said that never in his life would he take down the website, and locking him up in jail was not going to stop or change anything. He stated he was a software

engineer and evidenced great detail about how to remove a website from the internet.

[21] In cross-examination, DC Dent acknowledged he could not say whether Mr. Fox had transferred ownership or control of the website to someone else after the probation order was made on August 19, 2020.

[22] Mr. Fox did not testify. He argued at trial that he never admitted owning or controlling the website or publishing anything on it. He submitted that any statements he made about posting more information on the website reflected his future plans once the probation order expired. His position was the Crown had not established that he did not, within 48 hours of his release from custody, remove the website, and it was possible the website was taken down within 48 hours of his release and subsequently put back online. Mr. Fox said there was a gap in the evidence, and it had not been proven beyond a reasonable doubt that he failed to comply with the probation order.

[23] Judge Rideout convicted Mr. Fox of breaching the Phillips Order by failing to take down the website. In doing so, he concluded:

[19] There were statements made by Mr. Fox that clearly implicated him beyond a reasonable doubt in relation to access to the website, social media, or other publication which was prohibited by Judge Phillips. What happened within forty-eight hours remains uncertain and perhaps only speculation as to what took place, and I am not going to speculate what happened. The point is that the information contained in the website was available via the [I]nternet between the dates as set out [on the Information]. It is more than clear that it was the accused who was involved in that website. Ownership aside, he was inputting the information and from his own mouth himself, essentially convicted himself.

[24] Judge Rideout sentenced Mr. Fox to one year of incarceration and one year of probation, on the same terms as the Phillips Order. Mr. Fox has appealed both his conviction and sentence (CA47391). We are only addressing the conviction appeal at this time.

[25] On the conviction appeal, he alleges that the Crown failed to make timely pre-trial disclosure of his interview with DC Dent, or provide a witness list; there was

Crown, police and judge misconduct amounting to an abuse of process; the judge erred in admitting the David Eby letter; the judge erred by finding DC Dent credible and reliable; the judge erred in interpreting the probation order; and the verdict is unreasonable.

[26] In our view, there is no merit to any of the grounds of appeal. The judge did not err in admitting the highly relevant David Eby letter, or in finding the police witness credible and reliable. There is no evidence of Crown, police or judge misconduct, and no abuse of process. With respect to disclosure, there is no evidence of prejudice from the late disclosure. Disclosure was complicated by the fact that, in the past, Mr. Fox had abused the implied confidentiality of Crown disclosure by posting it on the website, and he failed to return to the Crown a laptop that contained electronic disclosure. Mr. Fox clearly anticipated that the interview with DC Dent would be led in evidence at his trial. Mr. Fox's letter of October 31 anticipated that the Crown's case would include his "admissions". Mr. Fox received the full electronic disclosure package three days before the start of the trial, which included the Task Action Report and DC Dent's will-say. Mr. Fox agreed at trial, in answer to questions from Judge Rideout, that he had received disclosure in relation to his interview with DC Dent. Mr. Fox agreed that the Crown did not need to play the video of the interview, and he was not raising any objection to the admission of evidence about the interview through the testimony of DC Dent. He did not ask for an adjournment to allow himself more time to review the electronic disclosure. At trial was the time to raise any prejudice arising from late disclosure, and not for the first time on appeal.

[27] As Judge Rideout said, Mr. Fox "from his own mouth himself, essentially convicted himself."

[28] Finally, Mr. Fox's argument that Judge Rideout misinterpreted Condition 4 of the Phillips Order is also without merit. Mr. Fox suggests that Condition 4 only required him to temporarily make the website publicly inaccessible in the 48 hours following his release from custody, at which time he was then free to make the

website available again. This interpretation would lead to an absurd result. On this interpretation, Mr. Fox could comply with the terms of his probation by temporarily taking down the website for a matter of seconds, provided that this occurred in the 48 hours after his release from custody, following which he was free to make the website publicly available on an indefinite basis. This interpretation is contrary to the plain wording of the Phillips Order and its surrounding context. It would defeat the very purpose of the probation order in protecting Mr. Fox's ex-wife from continued harm. The correct interpretation of Condition 4 of the Phillips Order is that it required Mr. Fox to take all necessary steps to ensure that the website was not available during the entire currency of his probation order, and that he had to do so within 48 hours of his release. Judge Rideout did not err in interpreting Condition 4 in this manner.

[29] We would dismiss Mr. Fox's appeal from conviction on CA47391.

[30] The final matter we must deal with relates to Mr. Fox's applications to introduce new evidence on appeal in the form of affidavits and transcripts, as well as Crown disclosure. The *Palmer* criteria are applicable, and we have considered the most recent application by the Supreme Court of Canada in *Barendregt v. Grebliunas*, 2022 SCC 22. Some of the material Mr. Fox seeks to admit relates directly to the proceedings, in the form of transcripts of pre-trial proceedings. However, some relates to other or subsequent proceedings. To the extent the materials relate directly to the two appeals before this Court, only the material which includes the paper disclosure package sent to Mr. Fox on the Rideout matter, and the flash drives of the video and audio police interview and the transcription of the police interview will be admitted. The balance of the new evidence, in the form of affidavits and transcripts, will not be admitted as this is material that is not relevant to a decisive or potentially decisive issue, or that could have affected the result at trial.

[31] We would dismiss Mr. Fox's appeals from conviction on CA46979 and CA47391.

"The Honourable Madam Justice Stromberg-Stein"

"The Honourable Mr. Justice Hunter"

"The Honourable Madam Justice Horsman"