

File No: 244069-8-B
Registry: Vancouver

In the Provincial Court of British Columbia

REGINA

v.

PATRICK HENRY FOX

**ORAL REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE DENHOFF**

COPY

BAN ON PUBLICATION 486.5(1) CCC

Crown Counsel: **C. Johnson**

Appearing on his own behalf: **P. Fox**

Place of Hearing: **Vancouver, B.C.**

Date of Judgment: **February 25, 2022**

[1] THE COURT: Mr. Fox is charged with a breach of probation on or about August 15, 2021. Mr. Fox admitted at trial that on August 12, 13, 14, 15 and 16, 2021, he was bound by a probation order made by Judge Rideout on April 12, 2021 which included the following condition number 6:

Within 48 hours of your release from custody, you shall take all necessary steps to ensure that any website, social media page, or any 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 Desiree Capuano, or any of her friends, relatives, employers or co-workers, including the websites published under the domain www.desireecapuano.com and www.desicapuano.com are no longer available via the internet or any other means.

[2] The allegation is that contrary to s. 733.1 of the *Criminal Code* Mr. Fox breached that probation order made by Judge Rideout on April 12, 2021 by failing to comply with condition 6 on or about August 15, 2021.

[3] Mr. Fox did not dispute at trial that on August 12, 13, 14, 15 and 16, 2021, the website www.desicapuano.com was operational and could be viewed by anyone capable of accessing the internet.

[4] The Crown called a civilian analyst with the Vancouver Police Department who testified that she checked the website www.desicapuano.com on August 12, 13, 14 and 15, 2021 and it was accessible and active on each of those days. On August 15, 2021, the analyst accessed the website at 6:10 p.m. and it was still active and accessible, which was more than 48 hours after Mr. Fox's release from custody.

[5] Constable Tanino testified that she interviewed Mr. Fox on August 17, 2021 for an hour and 10 minutes regarding his involvement with the website. Mr. Fox admitted at trial that the statement was voluntary.

[6] According to Constable Tanino, Mr. Fox told her, on August 17, 2021, that prior to the probation order taking effect, he transferred ownership and control of the website www.desicapuano.com to a third party. He indicated that he could not identify the third party and he offered no proof of the transfer of the ownership of the website. Mr. Fox further stated that he transferred ownership and control of the website so that he would not be obligated to take it down in accordance with the probation order. Mr. Fox also told Constable Tanino that when his probation term ended, he would take back control of the website.

[7] When Mr. Fox was asked if he had access to the website, he stated that he would not answer the question. He also stated that within 48 hours of his release from custody, he had sent an email to the editor of the website, as listed on the website, and asked for the website to be taken down. Although Mr. Fox said he would provide a copy of that email at a later date, he did not ever do so, even though his laptop was made available in the courtroom during the trial and he could have accessed the email. Mr. Fox claims that he did not access the email in the courtroom because he did not want the police to have access to all of his computer content in the courtroom. However, by that time, the police had already searched the computer. Furthermore, Mr. Fox could have asked for the court permission to access the email on his laptop himself in order to show it to the court without the police seeing the other content. He did not do so.

[8] At the trial, Constable Dent testified about his investigation of Mr. Fox in August 2021. He was aware that Mr. Fox was released from custody on the morning of August 12, 2021 and Constable Dent was responsible for assigning an

analyst to see if the website was still accessible after Mr. Fox's release. When Constable Dent received confirmation that the website was operational on August 12, 13, 14 and 15, 2021, he arrested Mr. Fox for an alleged breach of his probation. He then asked Constable Tanino to interview Mr. Fox on August 17, 2021.

[9] During cross-examination, Mr. Fox asked Constable Dent a number of questions relating to his investigation and interview of Mr. Fox in 2020. Constable Dent testified that Mr. Fox told him in the 2020 interview that he had transferred ownership of the website to a third person and that he would regain control of the website at a later time.

[10] Both Constable Tanino and Constable Dent acknowledged that they could not say whether the website had been taken down at any point on August 12, 13, 14 or 15. They could only say that when Constable Tanino checked the website at one point on each of those days, the website was operational.

[11] During his testimony, Mr. Fox contradicted his earlier statements about transferring the ownership and control of the website www.desicapuano.com. Instead, he claimed that the original website, www.desireecapuano.com, had expired because he stopped making monthly payments to the server. His friend, Liz Munoz, who resides in California, was responsible for making payments while Mr. Fox was in Canada and she apparently forgot to make the payments while Mr. Fox was in jail in Canada in 2018.

[12] According to Mr. Fox, Ms. Munoz then launched a new website, www.desicapuano.com with the same content as www.desireecapuano.com and she was the owner of that website and was responsible for monitoring it. She did have a

friend assist her in launching the website, however, as she apparently is not very technically savvy.

[13] It was in November or December of 2018 that Ms. Munoz told Mr. Fox about the new website. Knowing that he was going to be released from custody at the end of December and would be bound by a probation order to ensure that the website was not accessible, Mr. Fox apparently instructed Ms. Munoz not to tell him anything about the website until his probation period was complete, so that he would not have to take it down.

[14] He knew the website was online when he was released from custody because he checked online. He was also able to say that there had been updates to the website in the last year and a half, which means that he must have been accessing it during that time.

[15] Mr. Fox claimed that he told Constable Dent in 2020 and Constable Tanino in 2021 that he transferred ownership and control of the website because it was "simpler" than telling them that Ms. Munoz launched the new website of her own volition. That explanation is not compelling.

[16] It is in no way simpler to say that he transferred ownership and control. It is, however, more incriminating, which Mr. Fox obviously realized before testifying in court.

[17] In addition, the new website, www.desicapuano.com not only has all of the old information from the former website he used to harass his former spouse, but it includes updates about his ongoing court processes in Canada.

[18] It is notable that according to Mr. Fox, he and Ms. Munoz have drifted apart and are no longer in frequent contact. It is simply absurd to suggest that Ms. Munoz, who is not in regular contact with Mr. Fox, would pay for a website that is entirely related to Mr. Fox's harassment of Ms. Capuano and to Mr. Fox's criticisms of his legal processes. Moreover, in a letter written to Detective Fontana on June 6, 2019, Mr. Fox was encouraging the police to charge him with criminal harassment of Ms. Capuano. His apparent purpose was to force Ms. Capuano to testify and for him to be able to cross-examine her on what he claimed were her lies in a previous trial before Justice Holmes.

[19] In that letter, Mr. Fox stated:

Particularly since by publishing the new website, I have engaged in exactly the same conduct which Justice Heather Holmes declared founded 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.

[20] In that letter, Mr. Fox was making a clear admission that he launched, owned and controlled the website www.desicapuano.com. I do not accept his current explanation that he was lying to the police about publishing the website so that they would charge him with criminal harassment. It is apparent from Mr. Fox's frequent statements that he will never remove the website, and that Mr. Fox launched the website in order to continue to harass Ms. Capuano and to encourage the police to charge him so as to be able to cross-examine Ms. Capuano.

[21] In his final submissions at trial, Mr. Fox argued that the Crown has not proven its case of a breach. First he argued that there is no evidence that he owns or has

control over the website. As noted, Mr. Fox admitted to Constable Fontana, in a letter dated June 6, 2019 that he published the new website and engaged in criminal harassment. In addition, Mr. Fox told both Constable Tanino and Constable Dent that he would take the website back when his probation ended, indicating he has retained control over the website.

[22] Mr. Fox also argues that the Crown has not proven that the website was not taken down by him within 48 hours of his release and then reposted by someone else. That argument also fails because, as already discussed, Mr. Fox retained control over the website and could have taken back the management of it at any time.

[23] Mr. Fox rhetorically asked the prosecutor what further steps, other than sending a supposed email to the editor of the website, he could have taken to ensure that the website was no longer available. To begin, I do not believe that Mr. Fox sent an email to the editor of the website. Mr. Fox refused to produce the email to the police when asked and also failed to offer to produce the email when his laptop was available in court during the trial.

[24] In terms of steps he could have taken, he could not have launched the website as he has admitted to doing.

[25] Even if I were to believe that Mr. Fox only told the police he launched the website so he would be charged with harassment, which I do not accept, Mr. Fox clearly maintained control over the website. Therefore, he could have contacted Ms. Munoz to regain control of it upon his release from custody and ensured it was no longer available.

[26] If he was not successful in persuading Ms. Munoz to take down the website, he could have provided her name and contact information to the police so the police could have made a request to Ms. Munoz. He did not do so, either because he actually owns the website, not Ms. Munoz, or because he did not want the website to be taken down. In either case, Mr. Fox did not take all necessary steps to ensure that the website is no longer available.

[27] Finally, Mr. Fox argues that he was not obligated to do anything with respect to the website after 48 hours after his release from custody and there is no proof that he did not take it down during that 48 hours. He claims that if he published the website again, after the 48-hour time period, it would not be a prohibition of condition 6 of his probation order.

[28] However, the probation order placed Mr. Fox under a positive obligation to take all necessary steps, within 48 hours of his release from custody, to ensure that the website www.desireecapuano.com and www.desicapuano.com are no longer available via the internet or any other means. The term "no longer available" has the ordinary meaning of being available in the past but not continuing to be available.

[29] Mr. Fox had control of the website www.desicapuano.com within 48 hours of his release and continuing past that time, as he repeatedly boasted to the police. As such, he was obligated to ensure that the website did not continue to be available via the internet. He failed to do so and he is guilty of breach of condition 6 of the 12-month probation order issued by Judge Rideout on April 12, 2021.

(REASONS CONCLUDED)