

VANCOUVER
JUN 05 2023
COURT OF APPEAL
REGISTRY

CA 49120

COURT OF APPEAL FOR BRITISH COLUMBIA

Between

REX

Respondent

v.

And

PATRICK HENRY FOX

Appellant

NOTICE OF APPEAL
Defense Appeal Against Conviction and Sentence

Particulars of Conviction, Sentence or Other Order:

1. Place of conviction, sentencing or other order and court file number:
Vancouver Provincial Court File 244069-10-BC
2. Name of judge: The Honorable Judge Oulton
3. Offense of which the appellant was convicted:
One count of failing to comply with a probation order
4. Section of the Criminal Code or other act under which defendant was convicted:
Section 733.1
5. Plea at trial: Not guilty
6. Length of trial: 7 days
7. Sentence: 15 months imprisonment and 3 years probation
8. Conviction date: 2023-05-15
9. Sentencing date: 2023-05-15
10. Place of incarceration: NA

TAKE NOTICE that the appellant:

- (a) Appeals against conviction, and
- (b) Appeals against sentence

The grounds for appeal are:

1. The execution of the search of appellant's mobile telephone was unauthorized.

The search warrant only authorized the search of the specified devices for the period from July 15, 2022 through July 28, 2022. However, the data was not extracted from the phone by the VPD Digital Forensics Unit (DFU) until August 18, 2022. And any actual search of the data did not occur until some point after that.

Appellant's mobile phone was seized from him, by the police, at the time of his arrest on 2022-05-16.

Prior to trial, Crown said they did not intend to use any information from the phone. For that reason appellant did not pay much attention to Det. McElroy's statement in one of her narratives (disclosed to appellant on 2022-12-15), that the DFU informed her the data was extracted on 2022-08-18. Then, on the first day of the trial, Crown announced they intended to call an expert witness to testify about what was found on the phone.

When appellant challenged the search/extraction, based on it being outside the time stated on the warrant, the trial judge ruled that the time stated on the warrant only applied to when the police were authorized to enter their own evidence locker to retrieve the phone and deliver it to the DFU. And since the police had removed the phone from their evidence locker and delivered it to the DFU within that specified time, it was valid – regardless of when the DFU actually extracted the data from the phone or searched that data. The judge ruled the warrant did not limit when the data could be extracted or searched, nor by when the phone would have to be returned to the evidence locker. The judge's ruling, literally, meant the phone could be extracted and searched at any time, as long as it was removed by the VPD, from the VPD's own evidence locker within the two week period stated on the warrant.

Appellant does not believe the dates stated on the warrant were intended to apply to when the police could enter their own evidence locker to remove the phone, which was already in their custody. A warrant would not be required to enter their own secure evidence locker, to obtain evidence which had already been seized and was already in their custody.

The judge relied extensively on Sgt. Shook's testimony regarding information purportedly found on the phone, in her guilty verdict.

2. Late disclosure/notice of intention to call an expert witness.

Crown did not provide notice of their intention to call an expert witness (Sgt. Shook), regarding information purportedly found on appellant's phone, until the first day of what was scheduled to be a three day trial.

Appellant objected to the calling of the expert witness based on the late notice, and on Crown's prior statements that they did not intend to rely on any information from the phone. The trial judge allowed Crown to add the witness, requiring them to provide notice at that time and thereby, delaying the end of the trial by at least the 30 days required for that notice.

Appellant was not provided a copy of the material which Sgt. Shook would be testify about until 2023-02-14. Had appellant been provided that disclosure, and notice of the intention to call Sgt. Shook as an expert witness, prior to the start of the trial that may have affected his trial plan.

3. Refusal to allow appellant to call a witness regarding network logs, Hunchly users' internet access.

Appellant requested a witness from the VPD, who would have knowledge of the network logs which had been disclosed, and of how the Hunchly users access the internet, be called to provide testimony on those matters. The judge denied the request.

Prior to the trial, the Crown had disclosed computer network logs from the VPD's internal network, which showed that there were no attempts from within the VPD's network to access the website on the day the VPD claimed they were able to access it. An IT Manager, Johnny Lam, had testified regarding the logs and the computer network policies, but he repeatedly contradicted himself, and after providing information on direct-examination by Crown, on cross-examination by the appellant, Mr. Lam then claimed to have no knowledge of those same matters he had testified to on direct.

Given Mr. Lam's claims, on cross, to have no knowledge of the relevant matters, appellant requested someone from within the VPD who does have that knowledge, be produced to testify. The judge denied the request.

4. Refusal to allow appellant to call a witness (Det. Yingling), regarding the "date modified" timestamp on the "accounts_ce.db" file from appellant's phone.

Sgt. Shook testified that he found particular information regarding particular "accounts" which appeared to be associated with the domain name "desicapuano.com" in a database file on appellant's phone. The judge relied on that testimony in coming to her guilty verdict. However, in the copy of the extracted data which was disclosed to appellant, the computer file containing the purported accounts information had a "date modified" timestamp of 2022-08-18, which was the date the data was extracted from the phone by the VPD. That strongly suggested that someone had modified the information in that file at that time.

Appellant asked Sgt. Shook about this during his cross-examination, however Sgt. Shook was unable to provide any information because he was not involved in the extraction of the data. His involvement began long after that point.

For those reasons, appellant requested the officer who performed the extraction, Det. Yingling, be called as a witness to explain why, and in which ways, the accounts database had been modified after the data had been extracted from the phone. The judge denied the request.

5. Crown refused to comply with an explicit order of Justice Wedge of the BCSC to expedite the trial date.

Following appellant's section 525 custody review hearing, Justice Wedge issued an order that the trial date in this matter be expedited. At a subsequent pre-trial conference before Judge Oulton, Crown mentioned this but stated that they have no intention of complying with the order.

This should constitute an abuse of process on the part of Crown Counsel, considering appellant was accused of, detained, and on trial for allegedly failing to comply with a court order, yet the Crown can get away with blatantly declaring in court that they have no intention of complying with a court order.

Regarding sentence:

- (a) The probation condition prohibiting appellant from publishing or disseminating any information about specified parties, should have been contingent on their being some clear, definitive proof that it was the appellant who published the material. Appellant expressed his concern that, as imposed, Ms. Capuano herself can put the website back online for the express purpose of causing the appellant's arrest, imprisonment, and prosecution. So far, in each of the four prosecutions and convictions against the appellant for either putting the website online, or failing to take the website down, the police have openly admitted they have no evidence that it was the appellant who had actually put it online.

And such further grounds as the appellant or his counsel may advise, and this Honorable Court may permit.

The relief sought is: An order allowing the appeal and ordering a new trial.

The appellant's address for service is:

555 Homer Street
Vancouver, BC
V6B 1K8

Dated this 26th day of May, 2023



Patrick Fox

TO THE REGISTRAR