COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Fulton, 2012 ONCA 781
DATE: 20121116
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Juriansz, Watt and Hoy JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Christopher Fulton

Appellant

Catriona Verner, for the appellant

Michelle Campbell, for the respondent

Heard: May 28, 2012

On appeal from the sentence imposed on June 8, 2011 by Justice M.L.D. Roberts of the Ontario Court of Justice.

ENDORSEMENT

[1] This is an appeal against sentence. The appellant pleaded guilty to two counts of uttering threats and one count each of aggravated assault, possession of a weapon for a dangerous purpose, and mischief. The sentencing judge designated the appellant a long-term offender ("LTO"). She sentenced the appellant to nine years in custody for the predicate offences and imposed a ten-year supervision order.

[2] The appellant disputes the LTO designation, the length of the term of supervision, and the sentence for the predicate offences. We would allow the appeal against the LTO designation.

[3] On January 28, 2008, the appellant stabbed the complainant, his former girlfriend, who had recently broken up with him. The appellant entered her apartment surreptitiously to retrieve belongings and, after she confronted him and started to hit him with her fists, he stabbed her repeatedly with a scuba knife that he had strapped to his calf. He stabbed her three times in the chest and twice in the back. The complainant's wounds were life threatening and she suffered a collapsed lung. After the complainant escaped, the appellant barricaded himself in her apartment and engaged in a 12-hour standoff with police. He destroyed the complainant's belongings, threatened to set the building on fire, threatened to stab a police officer, and suggested to his friend over the phone that he might kill himself. When the Emergency Task Force entered the apartment, he was found to be groggy and was armed with several knives and a baseball bat. At the time, the appellant was dependent on, and had used, opioids.

[4] The appellant has a criminal record. He was convicted in 1999 of unrelated property offences. In 2002, the appellant took his former girlfriend's car without her permission, which led to a police chase. He was convicted of a series of offences arising from the incident, including conspiracy to commit an indictable

offence, taking a motor vehicle without consent, fleeing while being pursued by police, and theft over $5,000.

[5] The most significant offences for the purpose of this appeal occurred in 2003. In January 2003, the appellant's former girlfriend had broken up with him and she refused to return his belongings. The appellant purposefully damaged her vehicle, broke a window in her residence, and threw a flaming rag into the house while his former girlfriend and her mother were in the house at the window watching him. At the time, the appellant was on probation and subject to a condition that he not contact the former girlfriend. The appellant was convicted of arson with disregard for human life, uttering threats, mischief, and failure to comply with his probation order.

[6] In her detailed reasons, the sentencing judge found that the appellant satisfied the criteria for a dangerous offender ("DO") under s. 753(1)(a)(ii) of the *Criminal Code*, but went on to find there was a reasonable possibility of eventual control of the risk he posed to the community. Therefore, she designated him an LTO.

[7] The appellant submits that there are two errors in the sentencing judge's analysis. First, she erred in finding that the appellant met the DO criteria. Second, she failed to consider whether, in addition to meeting the DO criteria, the

appellant also met the requirement under the LTO provisions that the appellant posed a substantial risk to reoffend. We agree.

[8] In finding the appellant satisfied the DO criteria, the sentencing judge relied on two aggressive incidents. She considered the predicate offences, including the aggravated assault, and the appellant's behaviour with respect to the January 2003 offences.

[9] These two incidents satisfied the sentencing judge beyond a reasonable doubt that the appellant had exhibited a pattern of behaviour. She described the pattern carefully. In each case there was a domestic relationship in which there was a breakup in progress. Both cases involved a desire on the part of the appellant to assert his dominance or his will. Both cases also demonstrated a complete disregard for the safety of others and the potential for injury that may have occurred. In each case the appellant returned to get something that he perceived was his right to do. After both incidents, the appellant threatened to harm himself.

[10] Upon making a finding that the appellant had exhibited a pattern of behaviour, the sentencing judge stated:

> [T]he finding is that the defendant does meet the dangerous offender criteria in section 753(1). I must now look at the considerations with respect to the long-term offender provisions before I declare the defendant a Dangerous Offender.

[11] However, finding that the appellant had exhibited a pattern of behaviour was not enough. Under s. 753(1)(a)(ii) of the *Criminal Code*, to find the appellant met the DO criteria, the court had to be satisfied that the evidence established "a pattern of persistent aggressive behaviour by the offender" showing a "substantial degree of indifference" respecting reasonably foreseeable consequences to other persons. The sentencing judge did not make a finding that the pattern of behaviour that she identified was "persistent".

[12] The Crown submitted that the sentencing judge's analysis supports a finding of "persistence". Counsel for the Crown argued that the reasons of the sentencing judge, read as a whole, make apparent that she had in mind a "persistent pattern" in discussing the existence of a "pattern". We do not agree.

[13] In her detailed description of the appellant's behaviour in the 2003 and 2008 offences, the sentencing judge stressed the features that led her to conclude there was a "pattern". There is nothing to indicate that she separately considered whether that pattern was persistent. The circumstances of this case required an express discussion of that question.

[14] In this case, the two sets of offences that formed the pattern identified by the sentencing judge were separated by some five years. The appellant had not exhibited violent behaviour otherwise in his history. The complainant in the predicate offences indicated that the appellant had never been violent with her

before, and the appellant had not been violent while institutionalized. It is worth noting that the expert called by the Crown, though weakly suggesting one could say there was a pattern in the appellant's behaviour, did not address whether that pattern was "persistent".

[15] Likewise, perhaps because the sentencing judge focused her analysis on whether the appellant met the DO criteria, she made no finding that there was a substantial risk that he would reoffend. The Crown expert did offer the opinion that there was a substantial risk that the appellant would reoffend. That opinion is contained in a lengthy passage of his testimony quoted by the sentencing judge. However, the judge did not state she was adopting that opinion. We accept the appellant's argument that the sentencing judge failed to conduct a separate analysis of this issue.

[16] Accordingly, we would allow the appeal with respect to the LTO designation.

[17] We do not accept the appellant's submission that the nine-year term of imprisonment imposed was unfit. The nine-year sentence is within the range for the type of aggravated assault that occurred in this case. The appellant had been convicted of offences involving violence in the past. The aggravated assault took place in a domestic context. He had invaded the complainant's home and stabbed her repeatedly there. The complainant suffered life-threatening injuries.

[18] We would allow the appeal, set aside the LTO designation, and affirm the sentence of nine years imposed by the sentencing judge.

"R.G. Juriansz J.A."
"David Watt J.A."
"Alexandra Hoy J.A."