COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Doherty, 2012 ONCA 855
DATE: 20121205
DOCKET: C55608

O'Connor A.C.J.O., MacPherson and Cronk JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Patrick James Doherty

Appellant

J. Sickinger for Jeffery Goldglass, for the appellant

Kim Crosbie, for the respondent

Heard: November 6, 2012

On appeal from the conviction entered on March 6, 2012 by Justice M.F. Woolcott of the Ontario Court of Justice and the sentences imposed on March 8, 2012.

O'Connor A.C.J.O.:

[1] The appellant was convicted of five offences: criminal harassment; two counts of attempting to obstruct justice; and two counts of breaching a court order. He pleaded guilty to the latter two charges, and was convicted of the first

three. Justice Woolcott, of the Ontario Court of Justice in Kitchener, sentenced the appellant to five and one half years in custody less two months credit for pretrial custody. She broke the sentence down as follows: four years for criminal harassment; one year each on the two counts of attempting to obstruct justice, consecutive to the four years, but concurrent to each other; and six months on each breach, consecutive to the other sentences, but concurrent to each other. The appellant appeals these sentences.

[2] In November 2011, the appellant met the victim, Agnieszka Mikulska, when he responded to an advertisement she had placed on an internet site seeking a roommate. Ms. Mikulska and the appellant had some contact over a brief period of time. However, Ms. Mikulska decided to accept someone else, a woman, as her new roommate. The appellant, whose demeanour had previously been kind and polite, changed. He became verbally abusive, called Ms. Mikulska repeatedly, insulted her, dropped in on her and slipped notes under her door. He also made threats against her about what may happen to her when she was walking her dog. He said he knew the vice-president of Hell's Angels and she might be killed.

[3] Ms. Mikulska told the appellant, on more than one occasion, to stop calling her and not to come and see her. On December 11, 2011, Ms. Mikulska spoke with the police who indicated they would contact the appellant and advise him not to have further contact with her. On December 13th, Ms. Mikulska called the

police to complain of further telephone calls. Officers spoke to the appellant and told him not to contact her anymore.

[4] On December 14th, Ms. Mikulska contacted police at 3:00 a.m. A police officer attended at her apartment, and she indicated the appellant had called her at 2:15 and again at 2:19 a.m. She testified that the calls involved some heavy breathing and she knew they were coming from the appellant because of the call display.

[5] The police arrested the appellant and charged him with criminal harassment. On December 14th, a justice made an order pursuant to s. 516(2) of the *Criminal Code* that the appellant abstain from communicating directly or indirectly with Ms. Mikulska. This order was continued on December 21, 2011, in the form of a s. 515(12) non-communication order.

[6] Notwithstanding this court order, while detained in custody, the appellant wrote a letter to Ms. Mikulska. The letter was threatening. In the letter, the appellant also tried to convince her to change her statements about the events leading up to the charges against him on December 14. The appellant sent a second letter – this one addressed using Ms. Mikulska's first name and his last name – "Angie Doherty". The suggestion that they were married frightened Ms. Mikulska as did the fact that despite a court order and being in jail, the appellant continued to contact her. The appellant also wrote a letter to a friend of his

suggesting that his friend should give certain evidence – set out in the letter – in the appellant's defence.

[7] Ms. Mikulska suffered greatly as a result of the harassment. She was terrified of the appellant.

[8] The appellant argues that the sentence of four years imprisonment for the charge of criminal harassment is outside the appropriate range and, therefore, unfit. He also argues that the cumulative effect of the sentences of five and one half years imprisonment is excessive. He contends that the trial judge overemphasized the principle of separating the offender from society and attached undue weight to his criminal record.

[9] I do not accept these arguments. While the sentence is certainly significant for these offences, in my view, it is not unjustifiably so, nor is it unfit.

[10] There are a number of factors relating to the appellant and his offences that call for the imposition of a lengthy sentence. The appellant, who was 53 years old at the time of sentencing, has a lengthy criminal record. As the trial judge put it, his record is the "defining feature of his adult life." He has over 70 convictions from 1976 to the present. Of those, 27 are for breaches of court orders, breaches of probation or failing to appear. Frequently, he breached his probation orders shortly after they were imposed.

[11] The appellant also has a record for related offences. He has 18 convictions for uttering threats, 10 convictions for weapon offences and offences of violence, and three for criminal harassment. Ms. Mikulska is the fourth woman he has subjected to abuse and harassment. His record shows, as the trial judge put it, that he "… is incapable of functioning appropriately in terms of his relationships with others."

[12] The appellant persisted in his harassment of Ms. Mikulska after she, the police, and even the court ordered him to stop. Indeed, he not only persisted in his behaviour, he escalated it. He lacks insight into the wrongfulness of his actions and the impact those actions have had on Ms. Mikulska. The trial judge said:

> … [T]he offender has no respect for the personal contact he had established with the victim. He had no respect for the police who were attempting to assist the victim and he had an absolute disregard and contempt for the court's orders or for the system of justice whatsoever.

[13] Ms. Mikulska suffered mentally and physically as a result of the appellant's harassment. She lost weight, lost sleep and was anxious and worried about what he may do to her. The impact on her was magnified each time he ignored her pleas to stop, the police warnings and the court orders.

[14] The trial judge had an opportunity to hear Ms. Mikulska's evidence and to observe her directly. She described Ms. Mikulska as follows:

> The victim was an identifiably fragile woman when she came into contact with the offender, and I have no doubt whatsoever that Mr. Doherty identified her as fragile.
>
> Based on what I was able [to] observe from what I heard in her evidence in court she was a devastated person by the time this matter came to court on these charges and that was in large part because of the behaviour of Mr. Doherty. In my view, she fell within that category of witness who was re-victimized by having to come to court and give evidence.

[15] I agree with the respondent that the appellant is not entitled to mitigation on the basis that there were no physical assaults. As the trial judge noted, submissions suggesting that the lack of physical violence makes this offence less serious, "reflect a failure to appreciate that the primary impact of harassment is very often psychological … there is no requirement that there be physical harm to make out a very serious case of criminal harassment."

[16] The sentences imposed by the trial judge are entitled to deference in this court. It is worth noting that the trial judge conducted a four-day trial on the harassment and obstruction charges. She heard from Ms. Mikulska firsthand about the fear and trauma she had experienced. She was also able to observe the appellant throughout the proceedings and engaged him in discussion during the sentencing hearing. She was in a good position to assess his attitude, demeanour and potential for rehabilitation.

[17] As this court explained in *R. v Ramage*, 2010 ONCA 488, at para. 71:

> A deferential standard of review on sentence appeals also recognizes that a trial judge has an advantage over the appellate court when it comes to balancing the competing interests that play in sentencing. The trial judge gains an appreciation of the relevant events and an insight into the participants in those events – particularly the accused – that cannot be revealed by appellate review of a transcript.

[18] The sentencing proceedings were comprehensive. The trial judge's reasons covered 30 pages. She considered the relevant factors, including the appellant's circumstances and his addictions, and the impact of his offences on Ms. Mikulska. The trial judge recognized, properly, that the primary principles at play in sentencing this offender for these offences were deterrence and denunciation: see *R. v. Bates* (2000), 146 C.C.C. (3d) 321 (Ont. C.A.).

[19] It was also appropriate for the trial judge to consider the need to separate this offender from society in order to protect society from his criminal behaviour. The appellant is an incorrigible offender. As I have said, he has related convictions against three other women, as well as convictions for offences of violence and the use of weapons. He repeatedly disregards court orders. The trial judge quite correctly determined that it was important to ensure that the appellant was prevented, as far as possible, from continuing to harass Ms. Mikulska. The trial judge was concerned that the appellant had been sentenced to two years imprisonment on three prior occasions and those sentences clearly did not deter him.

[20] The appellant does not take serious issue with the sentences imposed for the two charges of obstruction of justice and the two charges of breaching a court order. He argues, however, that the totality of the sentences – five and one half years imprisonment – is excessive.

[21] In my view, given the factors outlined above, the sentences, while lengthy, do not fall outside what should be considered as an appropriate range for these offences and this offender.

[22] Finally, I do not agree with the appellant's argument that the trial judge imposed a sentence that was longer than what was, in effect, a joint submission at trial. I do not agree that there was a joint submission. Counsel submitted different ranges for these offences. The trial judge informed both counsel that she was considering imposing a sentence above the ranges suggested by counsel, and she provided both counsel with an opportunity to respond with further submissions. After hearing those submissions, the trial judge explained, in considerable detail, why she chose to impose the sentences she did.

[23] The trial judge was entitled to impose a sentence above that which was originally suggested by Crown counsel. She found that the range counsel submitted did not "reflect the seriousness of the offences … committed by this particular offender." While judges must consider the submissions of counsel,

they must in the end impose sentences that they consider fit and just in the circumstances.

[24] In the result, I would dismiss the appeal against these sentences.

RELEASED: “DOC” “DEC 05 2012”

“Dennis O’Connor A.C.J.O.”
“I agree J.C. MacPherson J.A.”
“I agree E.A. Cronk J.A.”