

R. v. Duyck, [2019] B.C.J. No. 2546

British Columbia Judgments

British Columbia Provincial Court
(Criminal Division)

Vancouver, British Columbia

R.P. Harris Prov. Ct. J.

Heard: October 28, November 7, 2019.

Judgment: December 19, 2019.

File No.: 254976-7-KBC

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[2019] B.C.J. No. 2546 | 2019 BCPC 330

Between Regina, and David Marcel Duyck

(29 paras.)

Counsel

Counsel for the Crown: D. Assonitis.

Counsel for the Defendant: L. Footman.

RULING ON APPLICATION FOR A PRE-SENTENCE REPORT WITH A PSYCHOLOGICAL COMPONENT

R.P. HARRIS PROV. CT. J.

INTRODUCTION

1 Mr. Duyck pled guilty to breaching his probation. Before commencing the sentencing hearing the Crown requested that the court order the preparation of a Pre-Sentence Report ("PSR") with a psychological component. Counsel for Mr. Duyck opposed the Crown's request arguing that a PSR was not necessary and if the court determined that a PSR was required, counsel argued that the court lacked the jurisdiction to order a psychological component.

2 The task for the court is to determine if a PSR is required and if so, whether the court has the jurisdiction to order a psychological component.

BACKGROUND

3 Mr. Duyck is 36 years old. His criminal record commences in 2013 with an assault conviction. Thereafter, he amassed convictions for assault, assault with a weapon, breach of probation and breaching a recognizance. In fact, his record contains three convictions for assault, two convictions for assault with a weapon, six convictions for breaching a recognizance and eight convictions for breaching his probation.

4 With respect to Mr. Duyck's convictions, all but one of the assault convictions involved K.E., who was Mr. Duyck's intimate partner. The Crown described some of the assaults and these include, Mr. Duyck placing his foot on K.E.'s throat, throwing cleaning fluid on K.E., spitting in K.E.'s face and hitting K.E. with objects. These assaults were committed while Mr. Duyck was bound by either a recognizance or a probation order prohibiting him from having contact with K.E.

5 Mr. Duyck's instant matters involve five counts of breaching his probation. Two counts involve failing to report to a probation officer and failing to reside where directed. The three other counts involve Mr. Duyck having contact with K.E. and attending at her residence contrary to his probation order.

6 Mr. Duyck's criminal history discloses escalating violence where he has displayed a shocking level of degrading behaviour. The record also shows that efforts to rehabilitate and deter Mr. Duyck have failed. Finally, and sadly, all efforts to protect K.E. have seemingly failed.

IS A PSR REQUIRED?

Position of the parties

The Crown

7 The Crown argues that the objectives of sentencing cannot be achieved without greater insight into Mr. Duyck's background and psychological framework. The Crown points out all interventions have failed to rehabilitate and deter Mr. Duyck, and in the result his violence is escalating and K.E. remains at risk. As such, the Crown asserts that greater insight into Mr. Duyck's character will best equip the court in fulfilling its obligation of crafting a sentence that rehabilitates and protects the community. The Crown relies on the following authorities: *R. v. Blackwell*, 2007 BCSC 1486, *R. v. Challes*, 2008 CanLII 13360 (ONSC), *R. v. Goldberg*, 2011 BCSC 1926, *R. v. MB.*, 2014 ABQB 683, *R. v. B.P.H.*, 2015 BCPC 271.

Counsel for Mr. Duyck

8 Counsel for Mr. Duyck argues that she is prepared to provide the court with the information necessary to impose a fit and appropriate sentence. Counsel points out she can provide information related to Mr. Duyck's background, education, substance use and future plans. As such, counsel argues that a PSR is unnecessary and that it would delay the sentencing

proceedings. In support, counsel relies on: *R. v. Shapely*, [1998] S.J. No. 790 (Q.B.), and *R. v. Kandola and Johal*, 2012 BCSC 1012.

Analysis

9 Section 721 of the *Criminal Code* grants a court the authority to order a PSR. The purpose of a PSR is to provide a sentencing judge with a picture of the offender as a person in society. This would include the offender's background, family, education, employment, physical and mental health and social activities: *R. v. Riley* (1996), 107 C.C.C. (3d) 278 (NSCA).

10 The information gathered in a PSR must be an accurate, independent and it must present a balanced assessment of the offender, as well as his background and his prospects for the future: *R. v. Junkert*, 2010 ONCA 549 at para. 59. The information in a PSR is to help the court impose a sentence that considers the circumstances of the offender and therefore complies with the principles and objectives of sentencing: *R. v. McPherson*, 2013 ONSC 1635 at para. 12.

11 The decision to order a PSR is in the discretion of the sentencing judge. Factors that can be considered in deciding to order a PSR include, the need for further information, any delay that maybe created in its preparation and any associated expense be it for the justice system or the accused: *Shapely* at para. 19.

12 In considering the matter, I instruct myself on the purpose and principles of sentencing and the attendant obligations of a sentencing judge. I also acknowledge that understanding an offender's background, family, employment, remorse and insight contributes to the imposition of a fit and appropriate sentence. Specifically, the information assists in a PSR in identifying an offender's level of remorse, previous responses to corrections, possible rehabilitative avenues, and the offender's level of insight.

13 In the instant case, I accept that counsel can provide some information regarding Mr. Duyck, however, I observe that the information provided at his other sentencing hearings appears deficient in that the resultant sentences have failed to rehabilitate or deter Mr. Duyck. This failure raises alarms about the independence and quality of the information that has been previously offered. In making these observations I do not fault counsel because the information forwarded to the court would likely have originated with Mr. Duyck.

14 Based on Mr. Duyck's lack of response to previous interventions, I am of a view that this court requires accurate, independent information beyond the information that Mr. Duyck provides to his counsel. As such, I am satisfied that a PSR is required to assist the court in imposing a sentence that reflects Mr. Duyck's circumstances.

15 Finally, I have reviewed the cases relied on by counsel for Mr. Duyck and I find his circumstances to be distinguishable. Specifically, unlike the instant matter, the judges in *Shapely*, and *Kandola and Johal* determined that a PSR was not required because the court already had the required information. In contrast, and for the reasons above, I am of the view that further independent information is required for sentencing purposes.

IS THERE JURISDICTION TO ORDER A PSYCHOLOGICAL COMPONENT?

Position of the parties

The Crown

16 The Crown argues that sections 721 (4) and 723 (3) of the *Criminal Code* permits the ordering of a PSR with a psychological component. In support, the Crown relies on: *R. v. Blackwell*, 2007 BCSC 1486, *R. v. Challes*, 2008 CanLII 13360 (ONSC), *R. v. Goldberg*, 2011 BCSC 1926, *R. v. MB.*, 2014 ABQB 683, *R. v. B.P.H.* , 2015 BCPC 271.

Counsel for Mr. Duyck

17 Counsel for Mr. Duyck argues the court does not have the jurisdiction to order a psychological component to a PSR. Counsel points out, the *Criminal Code* does not expressly authorize the ordering of a psychological report for sentencing purposes. Counsel argues the absence of express wording was intentional and a tacit recognition that the preparation of a psychological report invades an individual's privacy. Counsel relies on: *R. v. Gettliffe-Grant*, 2006 BCSC 1943 and *R. v. McCrea*, 2007 BCPC 0258.

Analysis

18 Section 721(1) of the *Criminal Code* provides authority for the ordering of a PSR. Section 721(1) reads:

[19] 721 (1) Subject to regulations made under subsection (2), where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged pursuant to section 730.

[The Court did not assign paragraph number 19.]

20 Subsection 4 directs that the report must also contain information on any other matter required by the court. Subsection 4 reads:

(4) The report must also contain information on any other matter required by the court, after hearing argument from the prosecutor and the offender, to be included in the report, subject to any contrary regulation made under subsection (2).

21 Section 723 (3) of the *Criminal Code* authorizes a court to require the production of further information that would assist in determining an appropriate sentence. The section reads:

(3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.

22 A review of the decisions, suggests a conflict of judicial thought on the issue of whether, sections 721 (4) and 723 (3) of the *Criminal Code* permits a sentencing judge to use their discretion and order a psychological component to a PSR in circumstances where the offender opposes such an order: *Blackwell*, *Challes*, *Goldberg*, *MB*, and *B.P.H.* In contrast, *Gettliffe-*

Grant, and *McCrea* suggests a sentencing judge lacks the jurisdiction to order a psychological component to a PSR when the offender opposes such an order.

23 In considering the authorities, I find the reasoning in *Blackwell* to be compelling. In *Blackwell*, Justice Smith declined to follow *Gettliffe-Grant*. In this regard, Justice Smith observed that the cases relied on by Justice Koenigsberg involved non-consensual psychiatric assessments pursuant to s. 672.11 of the *Code* and not whether non-consensual assessments may be ordered for sentencing purposes pursuant to ss. 721 (4) and 723 (3) of the *Code*. In this regard Justice Smith observed at paragraph 20:

[20] In her analysis, Koenigsberg J. relied on several Ontario decisions that were decided subsequent to the enactment of ss. 721(4) and 723(3) and after the *Saba* case. See *R. v. Lenart* (1998), 39 O.R. (3d) 55 (C.A.), 158 D.L.R. (4th) 508 (Ont. C.A.); *R. v. Simanek*, [2001] O.J. No. 4187 (C.A.) (QL), application for leave to appeal to the S.C.C. dismissed, June 20, 2002; and *R. v. Connors* (2001), 48 C.R. (5th) 301, [2001] O.J. NO. 4286 (On.Ct.Jus.) (QL). While at first blush those decisions appear to suggest there is no jurisdiction under the *Code* to order non-consensual assessments of offenders for sentencing purposes, a careful review of their reasons show their ratios were limited to the issue of whether assessments for sentencing purposes could be ordered pursuant to the s. 672.11 fitness or NCR provisions of the *Code* or the provisions of the provincial mental health legislation. The decisions concluded that assessment remands for sentencing purposes could be ordered in the latter instance, under the Ontario mental health legislation, but not under the *Code* provisions. None of the decisions, however, expressly addressed the scope of ss. 721(4) and 723(3) in light of the 1996 sentencing reforms.

24 Justice Smith then reviewed authorities from Alberta and concluded that court had the jurisdiction to order non-consensual assessments. At paragraph 39, Justice Smith stated:

[39] In the result, I find the court has jurisdiction to order a psychiatric assessment for sentencing purposes pursuant to ss. 721(4) and 723(3) of the *Code* in order to fulfill its obligation under ss. 718, 718.1 and 718.2 of the *Code*. I am also satisfied that in the circumstances of this case, such an assessment is warranted and would assist the Court in crafting an appropriate sentence.

25 Justice Gaul in *Goldberg* followed Justice Smith's reasoning and at a paras. 29 - 31 observed:

[29] In *Blackwell*, D. Smith J, as she then was, engaged in a detailed review and analysis of the conflicting decisions relating to the ordering of non-consensual psychiatric assessments for the purposes of sentencing. In concluding that a trial judge has the jurisdiction to order such an assessment, Madam Justice Smith observed at paragraph 37:

Unlike a fitness or NCRMD remand, a psychiatric assessment for the purpose of sentencing does not typically require an offender to attend a psychiatric institution and remain there for a fixed period of time while the assessment is completed. Instead, an offender is invited to participate in the assessment process, as he would be at the behest of a probation officer. If he declines to participate, the qualified professional conducting the assessment may still examine collateral material in order to produce a

report for the court. The purpose of the assessment is not to conscript evidence from Mr. Blackwell but to assist the Court in determining an appropriate sentence. Mr. Blackwell's participation in such an assessment could assist the Court in better understanding his conduct in these offences. In the absence of an assessment, the Court may only have the aggravating circumstances of the offen[der] to consider.

[30] I find the reasoning of Madam Justice Smith in *Blackwell* to be persuasive. I also note that it has been followed in other Canadian jurisdictions (See: *R. v. Challes*, 77 WCB (2d) 204, *R. v. Gibbons*, 2009 NUCJ 30, and *R. v. J.L.*, 2009 QCCQ 14013).

[31] My authority to make the order sought is, however, not unlimited. The law is quite clear that before making an order I must be satisfied there is a logical nexus or relevance between the information being sought and the matters under consideration in sentencing. With regard to this point, Madam Justice Smith explained at paragraph 32 in *Blackwell*:

However, a review of the circumstances in *Hunter* suggests that evidence required to meet the "logical nexus or relevance" test is not necessarily limited to "bizarre" or extreme conduct by an offender during his or her trial. The comments in *Hunter* were made in response to the trial judge's request for certain, very peripheral information to be included in the PSR [pre-sentence report]. The appellate court allowed most of the trial judge's requests but excluded those requests that were found to be unnecessary or extraneous. Accepting the basis on which the court in *Hunter* ordered a psychiatric assessment for sentencing purposes, the evidence required to support a "logical nexus or relevance" for such an assessment need not, in my view, rise to the level of *Saba*-like behaviour at trial. Concerns about the random, unprovoked, inherently dangerous and violent nature of an offender's actions could, in my view, also meet the criterion for logical nexus or relevance.

26 As for *McCrea*, Judge Brecknell at para. 26 expressed concern that he may have exceeded his jurisdiction by ordering a psychiatric assessment. Judge Brecknell's concern was based on his reading of *Gettliffe-Grant* and expressed shortly before *Blackwell* was decided. As such, his comments were made without the benefit of Justice Smith's comprehensive analysis. Accordingly, and with respect, I do not find his concern to be persuasive.

27 In summary, I conclude that a court has the jurisdiction to order a psychological component to a PSR, however, such an order can only be made if there is a logical nexus or relevance between the information being sought and the matters under consideration in sentencing: *Blackwell*.

SHOULD MR. DUYCK'S PSR INCLUDE PSYCHOLOGICAL COMPONENT

28 I conclude that Mr. Duyck's PSR should contain a psychological component. Mr. Duyck's continued lack of rehabilitation and deterrence, combined with his increasing level of violence and his inability to comply with court orders satisfies me that such an order is necessary so that the court can best fulfil its obligation under ss. 718, 718.1 and 71.8.2 of the *Code* in that all of the information gained will assist in the crafting of a sentence that achieves the purpose and principles of sentencing.

CONCLUSIONS

29 I conclude that a PSR is required. I also conclude that pursuant to ss. 721(4) and 723(3) of

the *Code* that the court has the jurisdiction to order a psychological component to the PSR. Finally, I conclude that there is logical nexus between Mr. Duyck's psychological makeup and the sentence to be imposed. As such, the PSR will have a psychological component.

R.P. HARRIS PROV. CT. J.

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