Court of Queen's Bench of Alberta

Citation: R v Bieleny, 2021 ABQB 293

Date: 20210416
Docket: 190340729Q1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Patrick Stephen Bieleny

Accused

Reasons for Decision on Sentencing
of the
Honourable Mr. Justice T.D. Clackson

I. Facts and Circumstances

[1] Mr. Bieleny's jury convicted him of nine counts of Fraud, contrary to s 380(1)(A) of the *Criminal Code*.

[2] While specific corporate victims were identified in the course of the trial, all parties used the terms NBI or NBI Group as a way to describe the victimized corporations. I will continue that practice in these reasons.

[3] On Count #1, Mr. Bieleny used an NBI account to pay Lake Ram Construction for a portion of the work done on the Accused's lake property. The amount was $76,354.97. The cheque was drawn on July 30, 2009 and cashed August 4, 2009.

[4] On Counts #2, #3 and #5, Mr. Bieleny established a US account for the purpose of paying bonuses to US employees of the NBI Group. The account was in the names of the Accused and Paul Slater and was used in February of 2008 for the stated purpose. Later that year, the address for the account was changed from the corporate offices of NBI to Mr. Bieleny's home address. Then from April 2009 until 2011, Mr. Bieleny transferred funds from an NBI Group company to the joint account in three lump sums of $150,000 US; $500,000; and $510,000 US. He transferred all of those funds to his personal account, to his use and benefit. All of that was done without the knowledge of Mr. Slater.

[5] On Count #4, Mr. Bieleny, in 2010, through a convoluted series of transfers between NBI Group companies, used NBI Group funds to pay for a home entertainment system in the amount of $21,000.

[6] On Count#7 and #10, Mr. Bieleny caused the NBI Group to pay for three additional weeks of a luxury vacation time share. That was done by payment of $260,340 US in 2011 and $59,292 US in July 2015.

[7] On Count #8, in 2013, Mr. Bieleny caused the NBI Group to expend $100,000 as a prepayment for chartered flights with SunWest Aviation. He used that facility to pay for family travel. The expenditure to his personal, unauthorized benefit was $88,512.33.

[8] On Count #11 in 2015, Mr. Bieleny caused the NBI Group to make a remittance to Canada Revenue Agency in the sum of $457,349.79 on his behalf. That was not authorized.

II. Aggravating and Mitigating Circumstances

A. Generally

[9] Mr. Bieleny perpetrated his crime while he was Chief Financial Officer, Chief Executive Officer and a shareholder of the corporate conglomerate, NBI, created by Brian and Lee Nilsson. The Nilsson brothers put their complete faith and trust in the Accused to perform his responsibilities in the best interests of their many corporate vehicles. The Accused abused that trust. There was no explanation for Mr. Bieleny's actions. There was no health issue, addiction or any other reason offered by the Accused for his criminal behavior. The only inference possible on these facts is that the Accused was greedy.

[10] The Crown suggested that Mr. Bieleny lived a lavish lifestyle and that lifestyle was supported by his criminal behavior. $2.1 million is a lot of money but I can't say it supported Mr. Bieleny's lifestyle nor can I make the value judgment that he lived lavishly. In any event, I cannot see how attaching this label advances the determination of a fit sentence.

B. Aggravating Circumstances

[11] The Crown has pointed to a number of aggravating factors in Mr. Bieleny's crimes which the Accused concedes to have been present. Firstly, Mr. Bieleny concedes that these crimes were committed while Mr. Bieleny was in a position of trust. In fact, I am satisfied that the trust the Nilsson brothers reposed in Mr. Bieleny was total. As a result, they were very vulnerable to Mr. Bieleny's perfidy. The fact that these frauds did not turn up or were not noted by the Nilsson brothers may be a comment on the review systems or the steps taken to hide his activities. However, I have no evidence of the former and, despite, the Crown's arguments as to sophistication, examinations of bank balances and cheques likely would have disclosed the

crimes. In any event, I prefer to rely upon the evidence which was uncontradicted. Brian and Lee Nilsson had complete faith in Mr. Bieleny. They plainly didn't think to worry about his trustworthiness.

[12] Secondly, Mr. Bieleny acknowledges there was a substantial amount of money involved.

[13] Thirdly, Mr. Bieleny acknowledges the frauds were perpetrated over a substantial period.

[14] The Crown also argues that there are additional aggravating factors as follows:

1. The Number of Fraudulent Transactions is Substantial

[15] The counts upon which Mr. Bieleny was convicted involved separate transactions. There were, therefore, nine transactions. However, the Crown argues that each time Mr. Bieleny transferred money from the joint US account to his personal account he was engaged in a fraudulent transaction. There were a number of $50,000 transfers utilized to empty the joint account into Mr. Bieleny's personal account. The Defence argues that the Crown charged the fraudulent deposits into the account and not the individual transfers out. Therefore, there were only three fraudulent transactions.

[16] In my view, the frauds were the three charged. The steps taken by Mr. Bieleny to remove the funds were essential to establish the *actus reas* and intent on each count. Accordingly, while there were nine frauds, which is aggravating, there were not the hundreds one sees in some of the authorities presented.

2. Licensing Standards

[17] Section 380.1(e) provides that it is an aggravating factor where: "the offender did not comply with a licensing requirement or professional standard that is normally applicable to the activity or conduct that forms the subject matter of the offence". The Crown argues that is the case here. I agree with the Crown. Mr. Bieleny breached a number of professional standards in committing these crimes. I also agree with the Crown that at least in part, Mr. Bieleny's professional association provided him with the opportunity to occupy the positions he ultimately abused.

3. Additional Crimes

[18] The Crown argues that Mr. Bieleny must have been found by the jury to have forged Mr. Slater's endorsement on one of the three cheques paid into the joint US account. Therefore, though not charged, he must be seen to have been effectively found guilty of so doing. Similarly, the Crown argues that Mr. Bieleny laundered money, and uttered forged documents, all of which additional crimes should be considered aggravating.

[19] In my view, absent a charge, and a conviction, or a finding that the claimed offences were necessarily included in the findings of guilt on those counts where the Accused was found guilty, I cannot conclude the additional offences were proved. None of those alternatives were established here. In my view, the steps taken by Mr. Bieleny to perpetrate his crimes encompass subsidiary illegalities. Those actions are best addressed when considering the level of sophistication in the planning and execution of Mr. Bieleny's criminal activities. As well, I find that I am not satisfied beyond a reasonable doubt that Mr. Bieleny forged any signature or document.

4. Concealment of Records

[20] Section 380.1(1)(f) provides that destroying or concealing records related to the fraud or to the disbursement of the proceeds of the fraud is an aggravating factor. In my view, changing the mailing address for the joint US account to his home address was an act of concealment by Mr. Bieleny. The CRA remittance fraud and the home stereo transactions demonstrate additional efforts to conceal.

5. Sophistication and Complexity

[21] In addition to duration and magnitude, both of which exist here, S 380.1(1)(a) lists complexity and planning as aggravating factors. I agree that there was evidence of planning and complexity, especially when considering the counts related to SunWest Aviation and the home entertainment system.

C. Mitigating Circumstances

1. Character

[22] Mr. Bieleny has no prior record. He also argues that he is someone of good character and reputation. The many letters of support filed on his behalf attest to that opinion. Mr. Bieleny argues that there is every reason to believe that he will return to being a fully contributing member of society once his sentence is completed.

[23] The Crown argued that prior good character should not be considered to be mitigating. The Crown points to S 380.1(2) of the *Criminal Code* which provides: "When a court imposes a sentence… , it shall not consider as mitigating circumstances the offenders' employment, employment skills or status or reputation in the community if those circumstances were relevant to or contributed to, or were used in the commission of the offence".

[24] There is no evidence that the Accused's status or reputation contributed to or were relevant to the offences committed but as I have said, Mr. Bieleny accepts that his employment or employment skills put him in the position of trust which he abused.

[25] In any event, I did not understand the Accused to have suggested that his status or reputation be treated as mitigating. Rather, I took the Accused's position to be that his status and reputation warranted the conclusion that the goal of individual rehabilitation and individual deterrence had been met, without further need of judicial action. That position is buttressed by his loss of his license, his fall from grace, and the shame that he has brought upon himself by his actions.

[26] As well, I interpreted the Accused's argument on the subject to have been offered to support the conclusion that Mr. Bieleny is not a danger to society if he were allowed to serve his sentence in the community.

2. *The Impact of COVID-19*

[27] Before we commenced the sentencing phase of this matter, I offered to adjourn the proceedings for approximately eight months to allow the Nation and the Justice System to get a better grip on the virus. Mr. Bieleny declined, preferring to rely upon the present pandemic as a factor which should be mitigating in any sentence I might craft for him.

[28] I take judicial notice that those on remand status, in Alberta, housed in remand centres, are at significant risk of contracting the illness. I have no evidence about provincial correctional

institutions and the prevalence of the virus. As for federal institutions, the information provided to me by the Crown, uncontested, suggests that federal authorities are doing very well in containing the virus. Apparently, that is being done without compromising inmate rights and opportunities, or, at least, not to a greater degree than the restrictions we all must endure. In fact, in Alberta, the risk of contracting the virus in one of the federal institutions is far less than the risk faced by the general public. Finally, indications are that federal inmates may be in line to receive a vaccination before most of our citizens.

[29] In result, I find myself persuaded by the Ontario Court of Appeal opinions in ***R v Morgan***, 2020 ONCA 279 and ***R v Lariviere***, 2020 ONCA 324: in the absence of personal circumstances which would make the Accused more susceptible or at greater risk of fatal or permanent injury, it is wisest to let the Parole Board do its job in determining whether release because of the virus is appropriate.

3. Restitution

[30] Crucially, Mr. Bieleny, when confronted with a demand for repayment, a few months after his termination, made full and complete restitution of all amounts claimed by NBI Group to have been taken by him. Mr. Bieleny paid the restitution two years prior to any criminal charges being brought against him. His evidence was that he made restitution to protect his reputation. He did not suggest that he had done so out of remorse or guilt or because he accepted responsibility for his criminal behaviors.

[31] Mr. Bieleny argues that making full and complete restitution when demanded, well before any prosecution was apparently contemplated, is a unique circumstance which must be treated as substantial mitigation. The Crown argued that, although mitigating, restitution in this circumstance is less mitigating because the restitution was made in the face of civil suit and the restitution was not motivated by remorse.

[32] From such authorities as ***R v Zenari***, 2012 ABCA 279; ***R v Evanson***, 2019 ABCA 122; ***R v Stergiou***, 2015 ABCA 35; ***R v Fulcher***, 2007 ABCA 381; ***R v Sterling***, 2010 ABCA 338; one can glean that the impact of restitution upon the crafting of a fit and proper sentence will depend upon the following:

i. Was full or partial restitution made?

ii. Was restitution paid or merely a promise made?

iii. Was action taken for recompense by the victims?

iv. How voluntary was the payment or promise?

v. Was the payment, judgment or promise given as an expression of remorse?

[33] The foregoing questions are designed to get at the three ways in which restitution can be relevant. Firstly, as an expression of remorse. Secondly, as a reduction of the harm suffered by the victims and by extension, society. Thirdly, by rewarding restitution, the Courts encourage disgorgement of ill gotten gains.

[34] In my view, the Accused is right. His payment, in full, years before being charged and reasonably quickly after demand, is rare. I have been provided with no other case in which that has occurred. One could say that civil suit would have led to judgment, if restitution had not been

made. However, there is a vast difference between judgment and payment. I don't think the prospect of suit and judgment undermines the mitigating nature of the restitution, in this case.

[35] On the other hand, the restitution made here was not made as a gesture of remorse. Mr. Bieleny does not claim to be remorseful. While absence of remorse cannot be aggravating, neither can it be mitigating. Therefore, while the mitigating impact of making full, early restitution is significant, it is not as significant as it might have been had it been accompanied by remorse.

[36] As a result, in this case, restitution must be treated as mitigating in two of the three ways I have itemized.

III. Sentence

[37] The Crown seeks a sentence of seven years, globally. That position is based on the argument that this case is analogous to a lawyer stealing from his trust account.

[38] Mr. Bieleny seeks a conditional sentence. In doing so, Mr. Bieleny argues that while cases of this sort habitually result in real jail, this case is exceptional because of the restitution. As such, it falls within the category of exceptional circumstances justifying departure from the norm of a sentence of real jail. He acknowledges that the circumstances must be exceptional to justify departing from the imposition of real jail in the service of denunciation and deterrence. The Court of Appeal of Alberta has made crystal clear in ***R v Zenari*** *(supra)* and the ***R v Fulcher*** *(supra)* and the cases referred to therein that denunciation and deterrence are paramount, and real jail is necessary to achieve those ends.

[39] A synopsis of the authorities provided to me which bear upon the issue of an appropriate length of sentence follow:

> ***R v Zenari*** *(supra):*
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> A police officer filed numerous false overtime and court time claims over 37 months to a value of $225,000 which he paid in full by liquidating assets and borrowing from friends and family. He pleaded guilty. At trial, he received a conditional sentence. The Court of Appeal imposed a sentence of 18 months real jail.
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> ***R v Fong***, 2014 ONCJ 492:
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> The Accused used her senior management position at a bank to breach its trust over 14 years, purloining over $1.8 million. She tried to cover up the thefts after her retirement. Two months after she was charged, she made full restitution, waived preliminary inquiry, expressed remorse and pleaded guilty. She suffered from underlying psychiatric depression. The learned trial judge rejected a conditional sentence and imposed a global sentence of 18 months.
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> ***R v Ross and Dawson,*** 2020 NSSC 70:
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> Ross was an employee with the Department of National Defence. He funneled contracts at inflated prices to Dawson. The loss suffered by D.N.D. is difficult to determine but appears to have been in the hundreds of thousands of dollars. The fraud went on over four years. Neither accused pleaded guilty, but having been

found guilty, both expressed remorse. Restitution was not made nor was it ordered. Both received conditional sentences.

R v Evanson *(supra):*

Mr. Evanson defrauded his employer of over $500, 000 over a period of nine years. He concealed his crimes. The majority concluded that he had made on partial restitution, after he was charged. Evanson had admitted his fraud and pleaded guilty. The majority imposed a sentence of two years less a day, real jail. Martin JA, in dissent, concluded that full restitution had been made and he would have imposed 18 months real jail.

R v Stergiou *(supra)*

A certified management accountant defrauded his employer of $500,000 over 26 months by transfers to himself from the company and making false entries to cover it up. He had pleaded guilty, paid partial restitution and consented to judgment for the balance. He was sentenced to 12 months real jail for the offence.

[40] The foregoing represent the decisions which are closest to the circumstances of this case. I was also provided with a number of cases, none from the Province of Alberta, where the circumstances were thought to justify the imposition of a conditional sentence. However, the circumstances in those cases are not comparable to these. Additionally, I think I must accept that our Court of Appeal has consistently concluded that fraud cases such as this require jail sentences, absent extraordinary circumstances. ***Evanson*** is the latest example.

[41] I was also provided with a number of cases at the other end of the scale involving multiple vulnerable victims, ponzi schemes and a lack of restitution. The sentences in those cases were varied, raging from 4 to 10 years. None are comparable to this case.

[42] As I said, the Crown urged me to treat this case as one would a lawyer's theft from trust. I'm not persuaded that that would be appropriate. Lawyers hold a special place in our system of justice and as such, their fraudulent behavior warrants a very stern response. Lawyer frauds are treated severely because they involve not only the breach of trust but also undermine respect for the administration of justice. That latter very significant factor is not present here.

[43] In this case, the number of very significant aggravating features, both statutorily identified and identified at common law compel a serious jail sentence. On these circumstances, before considering mitigating factors a sentence in the 5 to 7 year range would be perfectly appropriate. However, even without remorse or guilty plea, the fact of restitution requires me to significantly reduce the sentence. While a mathematical approach to sentencing is usually unwise, I think that it is reasonable to allow a reduction of 40% to reflect the significance of the amount and timing of the restitution made in this case. In my view, therefore, a sentence of five years is appropriately reduced to a sentence of three years.

IV. Prohibition Order

[44] The Crown seeks an order of prohibition pursuant to S 380.2(1). The order would prevent Mr. Bieleny from: "seeking, obtaining, or continuing any employment, or becoming or being a volunteer in any capacity, that involves having authority over the real property, money or

valuable security for another person". Section 380.2(2) grants a discretion to the Court both as to imposing the prohibition and the length of the prohibition.

[45] Neither party was able to provide me with any compelling authority which itemizes the criteria one ought to apply in determining whether such an order should be made and if so, for how long.

[46] The Crown suggests the following prohibition: "Mr. Bieleny is prohibited from seeking, obtaining or continuing any employment or becoming or being a volunteer in any capacity that involves having authority over the real property, money or valuable security of another person unless Mr. Bieleny provides that person with a copy of the written sentencing decision in this case in advance of that employment or volunteering opportunity."

[47] The Ontario Court of Appeal has concluded that an order under this section is punishment despite the fact that it embraces an element of public protection: ***R v Hooyer***, 2016 ONCA 44. I agree.

[48] It follows that if a prohibition is to be part of the sentence imposed, the whole must still be proportionate.

[49] Because such a prohibition would be part of the sentence imposed, it follows that the same criteria one applies to crafting a fit and proper sentence would govern. Seen in that way, a prohibition is simply one of the ways in which the offender may be punished. The resulting sentence, in totality, must be proportionate. In my view, there is a significant deterrent aspect to a prohibition. As well, there is a public protection element in a prohibition. Both are plainly in the public interest and, therefore, consistent with the goals of denunciation and deterrence. Additionally, using a prohibition as opposed to incarceration is also consistent with the sentencing principles itemized in S 718 and 718.2 of the *Criminal Code*.

[50] In this case, it is my view that a prohibition in the form I will order in a moment, is the equivalent of 10 months of the otherwise appropriate sentence of incarceration.

[51] Therefore, I sentence Mr. Bieleny to a global sentence of 26 months allocated amongst the counts as follows:

Count #2 – 26 months

Count #3 – 24 months concurrent

Count #5 – 24 months concurrent

Count #11 – 26 months concurrent

Counts #1, #4, #7, #8 and #10 – each one year concurrent and concurrent.

[52] As well, there will be a prohibition order under s 380.2 in the following terms:

> Mr. Bieleny shall not personally nor indirectly through a corporation which he controls or in which he has an interest nor through an unincorporated entity or partnership seek nor maintain any employment or position that involves having direct or indirect authority over the real property, money, credit or valuable security of another person, corporation, partnership or other entity without immediately disclosing to each such person, corporation, partnership and/or entity the following statement in writing:

> "In 2020, in the City of Edmonton, in the Province of Alberta, I was convicted of defrauding my employer of over two million dollars. I was sentenced to jail for my crimes. I was also prohibited from having direct or indirect authority over any property of another without first disclosing my conviction."

[53] It is further ordered that this prohibition will continue in full force and effect until January 1, 2040, subject only to a variation as provided for by s 380.2(3) of the *Criminal Code of Canada*.

Heard on the 12th day of February, 2021.
Dated at the City of Edmonton, Alberta this 16th day of April, 2021.

T.D. Clackson
J.C.Q.B.A.

Appearances:

Leah J. Boyd/Megan Rosborough, Alberta Justice
for the Crown

Simon Renouf QC/Amanda Goodwin
for the Accused