WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bourdon, 2024 ONCA 8
DATE: 20240105
DOCKET: C68019

van Rensburg, George and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Rene Bourdon

Appellant

Jessica Zita, for the appellant

Katie Beaudoin, for the respondent

Heard: December 21, 2023

On appeal from the sentence imposed on June 6, 2018 by Justice Gary W. Tranmer of the Superior Court of Justice, with reasons reported at 2018 ONSC 3431.

REASONS FOR DECISION

[1] The appellant was convicted of failing to comply with a long-term supervision order ("LTSO"), fraudulently personating with the intent to gain advantage, and two counts of sexual assault. The appellant, who identifies as Indigenous, was designated a dangerous offender and sentenced to an indeterminate period of imprisonment.

[2] The appellant initially appealed against both conviction and sentence, but advised that he was abandoning his conviction appeal. On his sentence appeal, the appellant argues that the trial judge erred by requiring a causal connection between his Indigenous ancestry and his offending behaviour. The appellant submits that the sentencing judge should not have imposed an indeterminate sentence but instead a ten-year sentence followed by a ten-year LTSO.

[3] The appellant also seeks to introduce fresh evidence that speaks to his post-sentencing rehabilitative efforts, namely handouts from the Sex Offender High Intensity Program of the Aboriginal Integrated Correctional Program Model ("AICPM").

[4] For the reasons that follow, the appellant's motion to admit fresh evidence is dismissed, and his sentence appeal is dismissed.

A. BACKGROUND

[5] The complainant, M.B., was 18 years old at the time of the predicate offences. She was recovering from a drug addiction and was attending Narcotics Anonymous ("NA"). The appellant attended the same NA meetings.

[6] Shortly after meeting M.B. at a NA meeting, the appellant launched an elaborate plan to deceive her. The Crown alleged, and the trial judge found, that the appellant represented himself in text messages to M.B. as a person by the name of Ali and that he did so with a view to convincing M.B. to have sex with him.

At one point, “Ali” proposed marriage to M.B. over text, which M.B. accepted. The appellant, as Ali, would schedule visits with M.B. only to cancel them and show up himself. M.B. made it clear that she had no romantic interest in the appellant and that she would not have sex with him.

[7] From July to August 2012, when these offences were committed, the appellant was subject to a LTSO. The LTSO required the appellant to remain at all times in Canada, within a territorial boundary fixed by his parole officer. The trial judge concluded that the plain meaning of “‘territorial boundaries’ fixed by his parole officer” included an identified residence, and found beyond a reasonable doubt that 1) the appellant’s parole officer had instructed him to not attend at M.B.’s residence, and 2) the appellant breached that instruction by attending at M.B.’s residence.

First Sexual Assault

[8] On August 5, 2012 “Ali” and M.B. made plans to meet at a motel to consummate their relationship. M.B. testified that she met with the appellant instead, who told her he was there to keep her company until Ali arrived. After drinking a beverage that the appellant had prepared for her, M.B. became lethargic. M.B. passed out but would awake intermittently. At various points she felt the appellant pressing up against her breasts, buttocks, and vaginal area. This progressed to the appellant tracing and rubbing her vagina and breasts with

his index finger. While there was some touching under the bra, most occurred over M.B.'s clothing.

[9] The trial judge found that the appellant administered a noxious substance to M.B. and that he sexually assaulted her.

Second Sexual Assault

[10] The appellant, again pretending to be Ali, convinced M.B. that Ali required lifesaving surgery, that he had to cover the cost, and that he would not do so unless M.B. had sex with him.

[11] On August 30, 2012 the appellant arranged to meet with M.B. so that she could satisfy him sexually as a "thank you" for funding Ali's surgery. The appellant attempted to touch M.B.'s vagina with his fingers and tried to perform oral sex on her, before ultimately penetrating her and having vaginal intercourse. The trial judge found the appellant guilty of sexual assault.

B. DANGEROUS OFFENDER HEARING

[12] In 2011, at the age of 34, the appellant learned that his mother has Indigenous ancestry. The appellant has since become a member of the Mattawa North Bay Algonquin First Nation – a part of the Algonquins of Ontario but not a federally recognized band under the *Indian Act*, R.S.C. 1985, c. I-5. A *Gladue* Report, referred to by its author as the appellant's Sacred Story, was filed. The report detailed how the appellant and his family traced their ancestry and

learned of their Indigenous roots. The author testified that “there are patterns that emerge among Indigenous people, whether they knew of their culture or not”. She further testified that *Gladue* factors impacted the appellant, including suicide in his family, childhood sexual abuse, physical abuse, poverty, substance abuse, and lower educational attainment.

[13] The appellant’s history of offending includes several instances of uncharged conduct. In 1992 or 1993, when the appellant was 15 or 16 years old, he videotaped several women in his neighbourhood without their knowledge. At around the same time, the appellant entered a woman’s apartment and hid behind a door. On another occasion, while spending the night at his uncle’s home, the appellant went into his female cousin’s bedroom and touched her. Then, in 2002, the appellant drilled holes into a neighbours’ apartment so that he could watch them in their bedroom.

[14] The appellant has a related criminal record.

[15] In June 2004, the appellant received a five year sentence and was designated a long-term offender with a seven-year LTSO. The predicate offences of sexual assault and administering a noxious substance occurred between 1999 and 2002. The appellant pleaded guilty to the offences after a two-week trial.

[16] One offence occurred after several people were at the appellant’s home playing cards, and the appellant served the victim wine and two drinks which were

referred to as “paralyzers”. After consuming these beverages the victim’s next memory was being on the couch with the appellant. She next recalled the appellant performing oral sex on her and, after lapsing in and out of consciousness, she awoke to find the appellant having sexual intercourse with her.

[17] Another offence occurred when the appellant interviewed a young woman for a secretarial position at his business. During the interview the appellant offered, and the victim drank, a cup of coffee. Her next memory was being in the hospital. The police, who searched the appellant’s residence, located the victim’s clothes as well as a pill bottle with benzodiazepines, which had been administered to the victim causing her to lose consciousness.

[18] On another occasion, while staying at a friend’s home, the appellant made his friend’s wife a cup of coffee. After drinking the coffee, the victim became disoriented. The appellant sexually assaulted the victim as she fell in and out of consciousness.

[19] The appellant breached his LTSO in 2005 (for accessing sex worker websites), in 2006 (after contacting women without prior authorization), in 2009 (after being found in possession of a laptop capable of accessing the internet), and in 2012 for committing the predicate offences.

[20] The court was told of the appellant's prior attempts at sex offender treatment and sex drive reducing therapy, and about his involvement in individual counselling.

[21] Dr. Gray, who conducted the appellant's risk assessment and prepared a s. 752.1 report, testified that the appellant meets the criteria for a dangerous offender designation. Dr. Gray observed that there is a clear pattern to the appellant's offences: preplanning, use of stupefying substances, elaborate deception, and blame-shifting. According to Dr. Gray, the appellant's "pattern of sexual offences is not due to the presence of a discrete paraphilia disorder". Nor is it linked to his history of childhood sexual abuse and substance abuse. Rather, his conduct in his past sexual offences was "opportunistic in order to satisfy his perceived need for sexual contact".

[22] In Dr. Gray's view, anything less than an indeterminate sentence would fail to adequately protect the public. Dr. Gray highlighted the absence of remorse by the appellant and the lack of rehabilitative potential, as evidenced in the appellant's repeated use of "careful planning … on victims he knows to be unwilling". Dr. Gray expressed his view that there was no reasonable possibility of eventual control of the appellant's risk in the community because of his poor record of supervision and his response to and attitude towards treatment, explaining that the appellant "has completed, or almost completed, several sex offender programs without any appreciable long-term change in his behaviour".

[23] The trial judge accepted Dr. Gray's evidence. He emphasized the appellant's unyielding recidivism despite being subject to strict conditions, supervision, incarceration for prior LTSO breaches, and high-intensity sex offender programming. According to the trial judge, the appellant "has experienced the consequences yet deliberately chose to reoffend". The trial judge concluded that a dangerous offender designation was warranted on account of the appellant's high recidivism risk and intractable conduct.

[24] The trial judge also agreed with Dr. Gray that, given the appellant's resistance to treatment and the high risk he posed to public safety, the only appropriate option was an indeterminate sentence. The trial judge considered imposing a determinate sentence followed by an LTSO, but accepted the Crown's submission that to do so would be based on "mere hope" and would not "not give rise to a reasonable expectation of adequate protection for the public". The trial judge pointed to the aggravating factors identified by Dr. Gray and concluded that there was an "absence of any demonstrated gains in risk reduction, remorse, insight, or acceptance of responsibility" by the appellant.

C. SENTENCE APPEAL

[25] When sentencing an Indigenous offender, a judge must consider the unique systemic or background factors that may have played a part in bringing that particular Indigenous offender before the court, and the types of sentencing

procedures and sanctions that may be appropriate in the circumstances. The judge must then go on to consider whether the systemic and background factors have impacted the offender's life experience in a way that diminishes their moral culpability: *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 66; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 73. These considerations are relevant even when the dangerous offender scheme is engaged: *R. v. Boutilier*, 2017 SCC 64, [2017] 2 S.C.R. 936, at para. 63, but are subordinate to the protection of the public, which is the paramount objective when sentencing a dangerous offender: *Boutiler*, at para. 56; *R. v. Radcliffe*, 2017 ONCA 176, 347 C.C.C. (3d) 3, at paras. 51, 63.

[26] While a sentencing judge would fall into error if, as a precondition to considering and applying *Gladue* principles, they required a causal link between an offender's Indigeneity and offending behaviour, that is not what the trial judge did here. He took judicial notice of the systemic and background factors affecting Indigenous people, conducted a thorough *Gladue* analysis, and in the end found that the appellant's circumstances had not been lifted from the "general to the specific", which was clearly his way of saying that the systemic and background factors were not "tied" to the appellant and the offences: *Ipeelee*, at para. 83; *R. v. Monckton*, 2017 ONCA 450, 349 C.C.C. (3d) 90, at para. 115; and *R. v. F.H.L*, 2018 ONCA 83, 360 C.C.C. (3d) 189, at paras. 38-39, 41. It is not enough, as the appellant did, to simply point to the systemic and background factors affecting Indigenous people in Canada or to make a bare assertion of Indigenous status.

As the Supreme Court directed in *Ipeelee*, at para. 73, the systemic and background factors must "shed light on [the offender's] level of moral blameworthiness", which the trial judge reasonably found did not in the appellant's case.

[27] The appellant submits that the trial judge did not conduct this inquiry generously enough. He points to this court's robust use of systemic and background factors to illuminate the offender's moral blameworthiness in *R. v. Kreko*, 2016 ONCA 367, 131 O.R. (3d) 685, asserting that a similarly broad view ought to be taken in assessing how his Indigeneity may have affected his moral culpability. However, a closer examination of *Kreko* reveals that Mr. Kreko's circumstances were markedly different from those of the appellant. Mr. Kreko's life was intimately affected by intergenerational systemic factors that caused him to be involuntarily displaced from his Indigenous heritage at a young age. He was left to reckon with his loss of identity in the turbulence of adolescence and against a long legacy of impoverishment, alcohol abuse, violence, and family desertion. As Pardu J.A. wrote for a unanimous court, these systemic factors were "unquestionably part of the context underlying the offences … [and] bore on [Mr. Kreko's] moral blameworthiness".

[28] Few parallels can be drawn between Mr. Kreko's circumstances and those of the appellant. As the trial judge noted, the appellant was raised in a relatively stable home and "grew up without any knowledge of or connection to Aboriginal

culture, teachings, or heritage". Although the appellant, along with his immediate family, discovered and began connecting with his Indigenous ancestry while in his mid-thirties, the trial judge accepted there was no evidence that the appellant's difficulties "were linked to systemic, background or intergenerational factors related to his Aboriginal heritage". In this respect, the appellant's circumstances are more analogous to those of the offender in *R. v. Bauer*, 2013 ONCA 691, 119 O.R. (3d) 11, who similarly grew up in a relatively stable home off-reserve with limited knowledge of or connection to his Indigenous heritage. As with Mr. Bauer, the systemic and background factors identified by the appellant are not "tied" to nor "illuminate" his moral blameworthiness. In any event, the trial judge correctly recognized that the paramount objective in sentencing the appellant was the protection of the public, and reasonably concluded that no measure short of an indeterminate sentence would adequately achieve this objective.

D. FRESH EVIDENCE

[29] The appellant seeks to introduce his handouts and worksheets from the AICPM on the basis that they demonstrate his reduced risk to the community. These materials are not attached to nor accompanied by an affidavit which would place them in their proper context.

[30] We dismiss the appellant's fresh evidence motion on the basis that the proposed evidence does not meet the criteria for admission in *Palmer v. The*

Queen, [1980] 1 S.C.R. 759, at p. 775 – it is neither credible or reliable, nor capable of undermining the sentencing judge's decision – but also because the impact of the AICPM was already thoroughly considered on sentencing. There was ample evidence to support the trial judge's conclusion that the AICPM would be insufficient to reduce the appellant's risk to an acceptable level.

[31] As the Supreme Court held in *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 43, an offender's post-sentencing rehabilitative efforts and prospects will only exceptionally meet the fresh evidence test, and will generally be a matter for correctional authorities who administer the sentence.

E. CONCLUSION

[32] The conviction appeal is dismissed as abandoned. The appellant's motion to introduce fresh evidence is dismissed. The sentence appeal is also dismissed.

"K. van Rensburg J.A."
"J. George J.A."
"L. Favreau J.A."