
CANADA / JUDGMENT

R. v. Aabedi

2011 BCSC 761

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Aabedi,

2011 BCSC 761

Date: 20110512

Docket: X072393-11

Registry: New Westminster

Regina

v.

Rami Ghaleb Aabedi

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Judgment

May 12, 2011

Counsel for the Crown:

E. Laurie

Counsel for the Accused:

D. Lawrence

Place and Date of Hearing:

New Westminster, B.C.

May 12, 2011

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New Westminster, B.C.

May 12, 2011

- [1] THE COURT: This is a hearing dealing with the consequences of a conditional sentence breach by Mr. Aabedi. I sentenced him on June 29th, 2010 for offences of trafficking in cocaine, contrary to s. 5(1) of the Controlled Drugs and Substances Act, and possession of cocaine and heroin for purposes of trafficking, contrary to s. 5(2) of that legislation. My reasons can be found at 2010 BCSC 1095.
- [2] Briefly, there was a significant drug trafficking operation in Surrey that was the subject of an investigation by the RCMP. Mr. Aabedi sought out the opportunity from Ontario to become employed with the organization. He was able to obtain employment with it. He was at first an entry-level trainee driver and then, at least for a short period of time, a functioning delivery driver on his own. The actual offences dealt with two sales to an undercover officer on September 28th and October 6th, 2006. It was a somewhat dated offence at the time it came to court.
- [3] He has a criminal record containing convictions from 2007 and 2009. First, assaulting a police officer and theft under \$5,000, which resulted in a suspended sentence. They occurred while he was intoxicated. He was also convicted of possession of house-breaking instruments and theft under \$5,000, for which he received two months in pre-sentence custody and then time served. He was apparently breaking into mail boxes to obtain credit cards to sell, because he was a heroin addict. Then he was convicted of breach of undertaking. He was in a relationship with a woman, they went out to Ontario together but did not vary the terms of undertaking that prohibited him from contacting her, arising from an allegation of assault against her in B.C., which resulted in him being found in breach out there.
- [4] His life story, as related to me at the sentencing, was that he had become a heroin addict but had an epiphany, when he was residing in the notorious Don Jail on the housebreaking instruments case, that he did not wish to live the life of an addict anymore. I was told he had been free of using illicit substances since the summer of 2008 - coming on to two years.
- [5] He had employment with Pacific Coast Circulation. Mr. Crezier, his employer, was in court and the idea was that shortly after the sentence was imposed he was to be off to Winnipeg to work there. That did not happen unfortunately. Perhaps it would have been the link he needed to a steady working existence.

- [6] The Crown's position was that a sentence of 18 months of actual incarceration should be imposed. Mr. Aabedi sought a conditional sentence of whatever length was deemed appropriate.
- [7] I emphasized the seriousness of dial-a-dope operations and the harm they cause in the community. The mitigating factors I found were that at the time he was an entry level trainee and only briefly an actual stand-alone driver and that the total duration of his involvement in the organization was less than a month. I think the most important factors for me were his significant efforts at rehabilitation in dealing with his addiction and obtaining ongoing employment.
- [8] The way that I balanced the considerations for and against a conditional sentence were that, while deterrence and denunciation were important in these cases, the viable prospect of rehabilitation should not be extinguished. Mr. Aabedi had done some good work to put himself in a position where I could have confidence that he would remain a positive force in the community, as opposed to committing these kinds of offences.
- [9] Based on that, I concluded that the principles of sentencing could be met within a conditional sentence structure and I imposed such a sentence, for a period of 18 months.
- [10] What I have heard today is that there were difficulties in his compliance. It started when the Winnipeg job did not come off. It appears from the conditional sentence breach report, which has been admitted, that there was a gap of time in the summer of last year where it was not clear whether he was going to Winnipeg or not. On August 16th he did not report as required here. In September, Winnipeg Probation confirmed that he had not reported there. Also in September, the supervisor here left a message at the parents' number requesting that he report on October 4th. He did not do that.
- [11] The supervisor called again on November 10th and left a message that he should come in. Mr. Aabedi called on November 15th and said he would come in the next day. He reported in person with his sponsor and said he had relapsed into heroin use but had entered a recovery house and planned to stay there.
- [12] He was to phone in on December 9th and then report on December 20th. He did not report on December 20th. The supervisor called the recovery house, spoke with its director and learned that Mr. Aabedi had not been there for some time. Mr. Aabedi left a message saying that he would be in the next day. His supervisor spoke to him and re-scheduled the appointment for January 10th. He did not show up for that appointment.
- [13] The supervisor sent a letter to Mr. Aabedi directing him to report on February 8th. He left the supervisor a voice mail on January 31st saying he had missed his previous appointment due to a death in the family. The supervisor left him a phone message to report on February 8th but he did not do that.

- [14] A breach report was submitted but it was not approved until February 28th. A warrant issued on March 3rd and Mr. Aabedi was arrested on April 17th.
- [15] Perhaps because the Winnipeg job did not come off, this conditional sentence really did not "take" from the outset, in terms of Mr. Aabedi's diligence with his reporting.
- [16] He has been in custody now for 26 days and has not sought his release.
- [17] I will just review my authority under s. 742.6(9):
- (9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may
- (a) take no action;
 - (b) change the optional conditions;
 - (c) suspend the conditional sentence order and direct
 - (i) that the offender serve in custody a portion of the unexpired sentence, and
 - (ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or
 - (d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.
- [18] We start from the rebuttable presumption of revocation from the Supreme Court of Canada in *R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 39:
- [39] More importantly, where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail. This constant threat of incarceration will help to ensure that the offender complies with the conditions imposed .
- [Emphasis added]
- [19] In *R. v. Langley*, 2005 BCCA 478, the Court of Appeal canvassed the subsequent decisions to identify a set of factors that courts should consider on a breach in deciding what to do with the offender pursuant to s. 742.6(9):
- [13] This brief review of the appellate authorities following *Proulx*, suggests the task of the court at a disposition hearing is to consider the nature of the offence; the nature, circumstances, and timing of the breach; any subsequent criminal conduct and sentences for that conduct; changes in the plan for community supervision; the effect of termination on the appropriateness of the sentence for the original offence; and the offender's previous criminal record, in determining whether the presumption of termination for breach is to be applied. If the presumption is rebutted, the court then is to ask itself which of the other

three options is appropriate, having regard to those same factors. I do not understand the list of factors to be closed.

- [20] The specific breach that is admitted for the purposes of this hearing is the one that led to the submission of the breach report - the failure to report on February 8th. I think the other circumstances are relevant to my understanding of the level of compliance with the order, but what I am dealing with ultimately is the failure to report on February 8th and any time onwards until his arrest.
- [21] Mr. Aabedi's counsel has spoken effectively on his behalf. There was an intention to follow through with the employment in Winnipeg, he submits, but that dried up; the company lost the contract that required him to be there. Mr. Aabedi, although he has not always reported as effectively or appropriately as required, has not committed other offences and has sought proactively to deal with his addiction by seeking recovery assistance. He is a person who has become aware, through 26 days in custody, of his responsibilities. His commitment to carrying out this conditional sentence in a more meaningful way has been renewed. He is an intelligent, articulate person who has a lot of potential and could be doing a lot more with his life than collecting social assistance and using heroin. In short, the Court should not throw away the key on him at this stage by revoking the conditional sentence.
- [22] The Crown submits that I should terminate the conditional sentence and require that Mr. Aabedi serve the balance of it in custody.
- [23] Taking into account first of all the circumstances of the original offence and its nature, it was a serious offence. Had I imposed a conventional jail sentence, I am not sure I would have necessarily incarcerated him for 18 months, though I think a period in the 12 to 15 month range might have been considered. The courts in cases before Langley have warned judges to be wary, when terminating a sentence, of the possibility that, because a conditional sentence can be longer than a conventional one, terminating it could result in a sentence that is longer than the offender would have received in a conventional jail sentence.
- [24] The nature and circumstances of the timing of the breach: the breach is a fairly significant one. Nothing else happens on conditional sentences unless reporting takes place, because that is how the supervisors keep tabs on offenders and decide if they are abiding by the conditions and what assistance they need to stay in the community in a positive way. The context is serious because this breach was really the culmination of a fundamental lack of commitment to this conditional sentence. I think that is a fair characterization of Mr. Aabedi's performance. Whatever his intentions were, he did not show serious attention to his responsibilities under this order.
- [25] To his credit, there are no subsequent criminal charges and that it is a significant mitigating factor.

- [26] In terms of the changes in the plan for community supervision, there really are not any. I think the idea is that Mr. Aabedi will renew his commitment to the plan that exists, as opposed to there being changes in it.
- [27] As to the effect of termination, Mr. Aabedi has served now 26 days in custody. If I terminate the balance of his sentence I am told that that would result in a period of incarceration of about ten months. I have to consider whether that is an appropriate outcome, having regard to the type of sentence I would have imposed originally. It is around the same total sentence that he would have received in a sentence of actual incarceration, so I do not think there is any manifest injustice there were I to terminate the sentence. It is just one factor.
- [28] Balancing all these factors, I think it is necessary that something occur that brings home to Mr. Aabedi the absolute core importance of complying with the conditional sentence order that he has been placed on.
- [29] If he had committed further criminal offences, other than the use of illicit drugs (which is admitted to), I would have no hesitation in terminating the conditional sentence and directing him to serve the remainder in custody.
- [30] There are factors here that encourage me to do something less than that, although I am going to direct that some further time in custody be served.
- [31] Addiction is - I think I can take judicial notice of this - a lifetime struggle. Mr. Aabedi will always be an addict. The question is: is he an addict who uses or an addict who stays clean? One of the things that happens to addicts is, when things in their life do not go the way they want, it's often easy to say "Well, I'm just going to start using drugs again" and that appears to be what happened here. I do not suggest that he is not responsible for his conduct. He is, but I treat this as a situation that occurred because he allowed himself to relapse and thereby not fulfill his reporting responsibilities. I still think that what was said about him last year had substance to it. His efforts to that point showed that he can work, he can do meaningful things with his life. But he has to deal with his addiction as an absolute priority and take his responsibilities under this order seriously.
- [32] I take into account that he has had some time in custody to think about this. I accept his representations as sincere, but I think it is important, if conditional sentences are to be meaningful, for offenders to understand that there will be uncomfortable consequences to a breach.
- [33] What I am going to do is proceed under s. 742.6(9)(c). I am going to suspend the conditional sentence order and direct that Mr. Aabedi serve three additional months of the remaining unexpired sentence in custody. At that point, the conditional sentence order will resume with the following changes:

- [34] Condition 8 will now read: "You will actively seek and maintain employment and you will advise your supervisor on an ongoing basis of any employment that you do receive or any changes in that employment."
- [35] In addition, Condition 3 will read: "You will report to a conditional sentence supervisor within 48 hours of your release from custody and thereafter as and when required by the supervisor, except that such reporting will be not less than once per week in person."
- [36] I will add Condition 12 that: "You will attend for, participate fully in and complete to the satisfaction of your supervisor, any course of counselling or other programs directed by the supervisor including but not limited to counselling for substance abuse."
- [37] What I am envisioning here is that he does the three months, gets out, and completes the conditional sentence properly. If he breaches again in any way he is going to do the rest of the time in custody, if he comes before me.
- [38] I wish you luck Mr. Aabedi, I am sorry I cannot let you out today but I would not be doing my job properly if I did.

"The Honourable Mr. Justice Schultes"

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