
CANADA / JUDGMENT

R. v. Bacon and Scott

2012 BCSC 1446

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bacon and Scott,

2012 BCSC 1446

Date: 20120917

Docket: 25227

Registry: Vancouver

Regina

v.

Jarrold Bacon

and Wayne Scott

Ban on Publication 486.5(1) C.C.C.

Before: Associate Chief Justice Cullen

Oral Reasons for Sentence

(Re: Accused Wayne Scott)

Counsel for the Crown:

P.R. LaPrairie

Counsel for the Accused, Scott:

J.S. Guild

Place and Date of Hearing:

Vancouver, B.C.

September 17, 2012

Place and Date of Sentencing:

Vancouver, B.C.

September 17, 2012

- [1] THE COURT: The offender Wayne Scott has been found guilty of conspiracy to traffic in cocaine between February 20, 2009, and August 28, 2009, with Jarrod Bacon and others unknown.
- [2] In oral Reasons for Sentence in relation to the offender Bacon indexed at 2012 BCSC 983, I described the circumstances of the offence as follows at paras. 2 to 7 inclusive:
- [2] The conspiracy was evidenced by a police investigation which featured a police agent, who himself had a significant history in the drug trade, who interested the offender --

Referring in this case to Bacon,

-- in the prospect of purchasing drugs from him. In fact, there were no such drugs and much of the evidence consisted of the police agent's dealings with the offender's co-accused, Wayne Scott, through whom he connected with the offender, and the offender himself in negotiations over the prospective but counterfeit transaction.

- [3] The transaction revolved around the purported importation of 100 kilograms of high quality cocaine from Mexico which the police agent represented to be part of a stable, ongoing source of supply to him. In the result, an agreement was reached between the police agent and the offender and the offender's funders to purchase the cocaine for \$30,000 a kilogram. The identity of the funders, although hinted at in the evidence, was never firmly established, although according to the offender they or he had a \$3 million dollar float and a ready distribution system.
- [4] It was anticipated by the offender Bacon and his funders that the cocaine would be sold for \$38,000, and \$5,000 would be split between the offender Bacon and his partner or funder, and \$3,000 would be paid to the co-accused Wayne Scott. The total value of 100 kilograms of cocaine was between \$3 million and \$4.2 million, depending on how, and in what quantities, it was sold.

- [5] The object of the conspiracy was not the notional transaction involving the police agent to acquire the cocaine. Rather, it was the agreement reached between Bacon, Scott, and others unknown, that is the funder or funders, to traffic the cocaine once acquired, in lots of 10 kilograms, and to finance and maintain the enterprise on an ongoing basis until all the cocaine was trafficked.
- [6] The profit to the conspirators was to come from the profits generated by the trafficking. The negotiations between Bacon and G.L., that is the police agent, directly and through Scott, was evidence in furtherance of the conspiracy which centred on an agreement to traffic the drugs once acquired, not on the acquisition of the drugs itself.
- [7] Bacon's role in the conspiracy to traffic was to negotiate with G.L., partly through Scott, to acquire the drugs and to arrange through his funder or funders to finance the acquisition and to distribute the drugs, once acquired, on an ongoing basis until all the drugs were disposed of.
- [3] In Reasons with respect to the Bacon sentencing, I held that the range of sentence for offences of this nature "drug trafficking primarily at the multi-kilo level" was from five to 13 years. I note, however, that in one of the decisions referred to in my Reasons, that is *R. v. Lising and Pires*, 2001 BCSC, a sentence of four-and-a-half years was imposed for what was described as a busy wholesale commercial business, ongoing over several months.
- [4] In connection with the offender Scott's co-accused Bacon, I imposed a sentence of 12 years, holding that a sentence at the high end of the range was appropriate and holding as follows at para. 49 of my Reasons:

I conclude, having regard for the circumstances of this case, including the fact that there was no actual seizure of cocaine being spread throughout the community as a result of this particular conspiracy, the fact that the offender Bacon was on bail at the time of the offence, albeit for offences that he was ultimately acquitted of, the notional size of the trafficking operation under consideration and its ongoing nature, the offender's lack of remorse and apparent commitment to a criminal lifestyle, and the presence of his criminal record all combines to warrant a sentence of 12 years' incarceration.

- [5] In the present case, the Crown seeks a sentence of eight to 10 years in relation to the offender Scott, while counsel for Mr. Scott seeks a conditional sentence of imprisonment or, in the alternative, a sentence outside the usual range of three to four years to reflect the unique circumstances of the offender and the nature of his participation in the offence.
- [6] In making his submissions, counsel for the offender submits that there are a number of factors that weigh in favour of imposing a sentence outside the range. He recites *R. v. Nasogaluak*, 2010 SCC 6, for the proposition that police misconduct falling short of a Charter breach (or in the present circumstances, entrapment) can reduce the sentence otherwise appropriate as a mitigating factor.

- [7] The offender cites the judgment of the Court at paras. 43 and 44 as follows:
- [43] The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton*, (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.
- [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.
- [8] In the offender's submission, this is such a case. He submits that while I did not find this to be the clearest of cases to be an abuse of process or an entrapment justifying a stay of proceedings, I did find some element of manipulation on the part of G.L. which amounts to misconduct of the sort referenced in *Nasogaluak* and mitigating the sentence to be imposed.
- [9] The offender also relied on the significant stigma attached to the prosecution and conviction of the offender, and the profound impact it has had on his life, both mentally, emotionally, physically, and financially. He references the considerable publicity which attended the trial and its aftermath, and references the real difficulty that the offender has already suffered as a consequence of these proceedings.
- [10] The offender also submits that his prior unblemished history and the lack of any likelihood that he will ever reoffend militates in favour of a reduced sentence. He points to the destructive effect a jail sentence would have on him and his family. He points to the consequences of the offence, noting that in the first place there was no actual cocaine involved, and hence there was no real risk to the community, and in the second place there were no actual profits from the offence as it was always under the control of the police. In

those circumstances, the offender submits that the offence has less gravity than if there was a real shipment of cocaine and real profit.

- [11] In support, he cites my ruling in sentencing the co-accused Bacon, where I held as follows at paras. 32 and 33:
- [32] Thus, to a great extent, the gravity of the offence of conspiracy lies in the willingness of people to combine together and in the propensity and attitude it betrays, rather than in the actual harm that it is capable of achieving. Thus, I do not think it could be said that the impossibility of achieving the substantive offence necessarily detracts from or reduces the gravity of a conspiracy to commit it in all cases.
- [33] In the circumstances at bar, where the evidence of the conspiracy also revealed the offender Bacon's propensity for and facility with the object of the conspiracy, the fact that it was impossible to commit has, in my view, less impact on the gravity of his offending than it would in a case involving a person without such a propensity or facility.
- [12] The offender submits that he has no propensity or facility for the offence and thus is in a very different position from that of his co-offender Bacon. He relies on cases which hold that a delay in sentencing "causing prolonged uncertainty" can be taken into consideration as a factor in mitigation of sentence. He submits that the role he played in the offence is a relevant factor and that the law draws a distinction between the instigator of an offence and those who are led into folly. He submits his role was secondary and the product of his accidental relationships with Bacon on the one hand and G.L. on the other. He submits he was not the instigator, the organizing force, or the directing mind of the offence.
- [13] He cites and relies on *R. v. Nesbitt*, 2012 BCCA 243. That case involved a 20-year-old man who allowed a trafficker to store some duffle bags containing cocaine in the basement suite which he occupied with his girlfriend. He made a drop on several occasions, and on one occasion was caught. He was charged with being in possession of 17 kilograms of cocaine for the purposes of trafficking. He was sentenced six years after the offence, after having pleaded guilty. The Court found that he had been fully rehabilitated by that time. He was given a conditional sentence order by the sentencing judge, and that sentence was upheld on appeal.
- [14] The Crown in that case took the position that the appropriate range of sentencing for trafficking in cocaine in such circumstances was four to 12 years. In its Reasons for upholding the conditional sentence order, the majority of the Court of Appeal held as follows:

- [30] This is a unique case. The offender committed a serious crime that usually would attract a significant period of incarceration, but by the time of sentencing the offender was rehabilitated. He had no previous criminal record and was involved in criminal activity associated with the crime for which he was charged for a relatively short time. He was incarcerated for 51 days before making bail, most of which time was spent in protective custody, that is, in isolation.
- [31] The sentencing judge was well aware of and considered the factors he was obliged to take into account in determining a fit sentence, as well as the usual range of sentences for the particular crime. In my view, he committed no error of principle.
- [32] The judge was satisfied that a sentence of less than two years was appropriate. He reached his conclusion considering the unique circumstances of this case.
- [33] While the usual range of sentences for this type of crime involves penitentiary time, ranges are not absolute. Absent a legislated minimum, sentences are to be judged solely on the basis of whether they are fit. Although heavily influenced by the usual range, the exercise is not circumscribed by this factor. In the unique circumstances of this case, I am not satisfied that the sentence imposed by the sentencing judge is unfit.
- [15] The Crown's position, on the contrary, is that eight to 10 years is appropriate in the circumstances of this case, relying on the decision of Madam Justice Ross in *R. v. Gingras*. In that case, Madam Justice Ross imposed a 10-year sentence on a 67-year-old man with no criminal record in a reverse sting operation involving 50 kilograms of cocaine. He had chronic health issues. The evidence was clear that Gingras was an instigator and prime mover in the transaction leading to the conspiracy charge in that case.
- [16] In imposing a sentence of 10 years in *Gingras* for the conspiracy, Madam Justice Ross held in part as follows at paras. 68 to 73:
- [68] I agree with the submissions of the Crown with respect to the aggravating factors in this case, which I find to be: the planning and deliberation involved; the nature of the substance, in relation to Count 1; and that Mr. Gingras believed that he was laundering the proceeds of the sale of cocaine, with respect to the laundering counts . . .
- [69] With respect to the mitigating circumstances, for Mr. Gingras I find that these are: the absence of a criminal record; his good performance while on interim release; and his strong support from family and members of the community. I acknowledge his years of sobriety and his exemplary work assisting others who are struggling with substance abuse. In addition, with respect to both Mr. Gingras and Mr. DiQuinzio, I acknowledge that the trial was conducted in an efficient fashion, with the focus on the key issues to be determined,

[70] I do not accept the defence submission that Mr. Gingras' moral culpability is reduced because he was apprehended as the result of a reverse sting operation, which was initiated in circumstances in which the police had no prior knowledge that he was involved in either money laundering or drug trafficking.

...

[72] In the present case, Mr. Gingras's words and deeds during the conspiracy demonstrated a propensity and attitude of very serious moral culpability. He initiated the transactions. He continued to press forward when offered the choice to break off negotiations without penalty. Moreover, it was clear from his statements throughout that it was his hope and intention to make the purchase of cocaine the first of many, and as well to continue to launder what he believed to be the proceeds of cocaine sales.

[17] The statutory regime for sentencing as set forth in s. 718, s. 718.1, and s. 718.2 read as follows [and here I will insert those provisions into the reasons. I will not read them in the interests of time, but they will be included if these reasons are reduced to writing]:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

...

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
- (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[18] Section 10 of the Controlled Drugs and Substances Act reads as follows:

10. (1) Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

Circumstances to take into consideration

(2) If a person is convicted of a designated substance offence, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person

(a) in relation to the commission of the offence,

(i) carried, used or threatened to use a weapon,

(ii) used or threatened to use violence,

- (iii) trafficked in a substance included in Schedule I, II, III or IV or possessed such a substance for the purpose of trafficking, in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of eighteen years, or
- (iv) trafficked in a substance included in Schedule I, II, III or IV, or possessed such a substance for the purpose of trafficking, to a person under the age of eighteen years;
- (b) was previously convicted of a designated substance offence; or
- (c) used the services of a person under the age of eighteen years to commit, or involved such a person in the commission of, a designated substance offence.

Reasons

- (3) If, under subsection (1), the court is satisfied of the existence of one or more of the aggravating factors enumerated in paragraphs (2)(a) to (c), but decides not to sentence the person to imprisonment, the court shall give reasons for that decision.

[19] The provisions respecting conditional sentences is s. 742.1 which reads as follows:

742.1 If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

[20] All the cases cited by counsel for the Crown and many cases cited by counsel for the defence emphasize, and I accept, that deterrence and denunciation are the primary principles under consideration for offences of this sort. As Justice Ross pointed out in *Gingras* at para. 66:

The evils in our [society] associated with the traffic in cocaine have been described at length by many of the authorities. As Madam Justice MacKenzie . . . noted in *Oliynyk*, trafficking drugs causes misery to addicts and their families and spawns further crimes of all sorts. Much serious crime in our society is drug-related.

[21] In this case, I accept that the offender Scott is of previously good character. I accept that he is genuinely remorseful for his conduct, and I accept that the stigma and pressure of facing criminal proceedings have had a significant impact in many areas of his life. I accept that his role was subservient to that of Bacon and those others unknown in the conspiracy, and that his involvement came about through the accidents of his relationship to Bacon and G.L., and not from his own ambition or initiative.

- [22] In that regard, I accept he is a naïve and unsophisticated man, with no clear individual propensity for wrongdoing, who became caught up in circumstances created by the crosscurrents of other's ambitions. I am satisfied, however, that his involvement was a product of his free will and was motivated to a significant degree by the hope of profit. I accept that he was, to some extent, used by G.L. to get close to Bacon for his own purposes, and it was that dynamic that infused the subsequent course of events.
- [23] In that regard, however, I note that the evidence before me is that Scott offered to introduce G.L. to Bacon upon learning of G.L.'s interest in resuming the drug trade, and at that time the offender Scott was well aware that Bacon was involved in a criminal organization, was involved in drug trafficking, and was on bail for weapons charges.
- [24] There is simply no clear evidence before me that anything done by G.L. before or after he became a police agent amounted to the sort of coercive behaviour characteristic of an abuse of process or entrapment. I accept the offender Scott was used and that there was some manipulation of him to effect G.L.'s purpose in relation to Bacon, but the evidence simply does not go further than that, given that Mr. Scott did not testify.
- [25] In all the circumstances, I conclude that this is not a case like Nesbitt in which a sentence of a length permitting a conditional sentence order can be justified. In Nesbitt, the offender was 20 years old, a young adult. He pleaded guilty and was sentenced six years post-offence. Mr. Scott, although naïve and unsophisticated, is 56 and was well aware of the antecedents of Mr. Bacon, his co-conspirator, at the time he became caught up in this enterprise.
- [26] On the other hand, I do not regard the offender Scott's role as equivalent to that of Gingras relied on by counsel for the Crown. In my view, his participation fixes him at the lower end of the scale in terms of his involvement. He was primarily the means by which Bacon communicated with the police agent, and he played no role in the potential financing or distribution of the notional drugs.
- [27] Having regard to all the circumstances, including his previous good character, genuine remorse, rehabilitation, the impact of the proceedings on his mental, physical, and financial well-being, the support he has from friends and family, and the fact that there was no real prospect of drugs proliferating into the community, I view an appropriate sentence as being three-and-a-half years.
- [28] I accept that sentence is either at or somewhat below the very lowest end of the range, but I conclude that the unique circumstances of this case and the offender Scott's situation merit such a sentence.
- [29] There will be a 10-year firearms prohibition.
- [30] I will waive the victim witness surcharge, and I am not inclined to make the order under s. 487.051, as I do regard it as a secondary and not a primary offence.
- [31] All right. Is there anything further, counsel?

[32] MR. GUILD: No, Your Honour, I'll say -- well, I think the only issue is, and it may be included in Your Honour's calculation, whether or not there is any specific credit for the time that he's spent in custody?

[33] THE COURT: No, I included that in coming to my conclusion of what was an appropriate sentence.

"A.F. Cullen ACJ."

Associate Chief Justice Cullen

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