
CANADA / JUDGMENT

R. v. Brawn

2020 BCSC 825

COURT

Supreme Court of British Columbia

DECIDED

19 February 2020

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2020 BCSC 825 R. v. Brawn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Brawn,

2020 BCSC 825

Date: 20200219

Docket: 36372-2

Registry: Campbell River

Regina

v.

Jesse Lee Brawn

Before: The Honourable Mr. Justice Milman

Oral Reasons for Judgment

Counsel for the Crown:

C. Gibson

Counsel for the Accused:

L. Stansfield

Place and Date of Hearing:

Courtenay, B.C.

February 19, 2020

Place and Date of Judgment:

Courtenay, B.C.

February 19, 2020

- [1] THE COURT: On July 17, 2019, when he was last before me, Mr. Brawn pleaded guilty to three counts on a four-count indictment.
- [2] The indictment alleges that on March 24, 2018, in Campbell River, BC, he was in possession of various controlled substances for the purposes of trafficking, including heroin, fentanyl and cocaine, and that he also had in his possession bear spray, a prohibited weapon, without a licence.
- [3] The fourth count on the indictment has since been stayed by the Crown.
- [4] The Crown's case at trial depended in large part on the admissibility of the items seized upon his arrest on the date in question. Mr. Brawn challenged the admissibility of that evidence at trial on the basis that the investigating officers had violated his right under s. 9 of the Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter], to be free from arbitrary detention. When I found that there had been no Charter breach as alleged, the guilty plea followed.
- [5] In passing sentence, I must begin with the statutory principles set out in s. 10 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and ss. 718 through 718.2 of the Criminal Code, R.S.C., 1985, c. C-46. The fundamental purpose set out in those provisions is to contribute for respect for the law and the maintenance of a just, peaceful and safe society, while encouraging rehabilitation of offenders and acknowledging the harm done to victims in the community. It is axiomatic that a fit sentence is one that is proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [6] I have been referred to a number of cases dealing with the issue of sentencing in drug cases. In *R. v. Voong*, 2015 BCCA 285, the Court of Appeal reiterated that deterrence and denunciation are the main principles to consider when sentencing for offences involving drug trafficking.
- [7] Where, as here, fentanyl is involved, the leading authority in this province is the decision of the Court of Appeal in *R. v. Smith*, 2017 BCCA 112. In that case, the court had occasion to address the terrible, often lethal, toll on society that fentanyl trafficking has been taking. One consequence of the decision was to increase the sentencing range for offences like this one, at least for those occurring after the date of the judgment, as this one did. That range now extends from a low of 18 months to 36 months or more. Neither party suggests that the appropriate sentence in this case ought to fall outside it.

- [8] As Crown counsel has pointed out, the fentanyl epidemic has only grown worse since Smith was decided. There was a spike in fentanyl-related deaths in 2018 when these particular offences were committed. In the northern part of Vancouver Island, according to a report by the Coroner Service, fentanyl caused between 20 and 25 drug overdose deaths per 100,000 people in 2018.
- [9] Crown counsel submits that there are a number of aggravating factors present here that take this case some distance from the bottom of the Smith range. These include the quantity of drugs that were found, the fact that this was a dial-a-dope operation, and the presence of a weapon in the vehicle.
- [10] With respect to the quantity of drugs, the Crown relies on a police report, the contents of which were not contested. It states that Mr. Brawn had in his possession 4.08 grams of fentanyl-laced heroin, packaged as 23 spitballs, with a street value of approximately \$710. The fentanyl content was just over 2%. That is slightly above the amount considered usual for street drugs, but not enough to make the proportion of fentanyl in the drugs an additional aggravating factor by itself.
- [11] Mr. Brawn also had in his possession 5.36 grams of cocaine, packaged as 36 spitballs, with an estimated street value of \$760. He had two cell phones and \$564 in cash. All of this suggests that Mr. Brawn was engaged in a dial-a-dope operation.
- [12] I turn next to the circumstances of the offender. Mr. Brawn is 36 years old. He grew up in a family that struggled with substance abuse. He attended secondary school until grade 11. He first began experimenting with lighter drugs while still in school. These included marihuana, then cocaine, psilocybin, MDMA and ecstasy. After separation from his ex-partner, his drug use became heavier. It began with crack cocaine but then escalated to fentanyl and heroin, which eventually became a daily need.
- [13] Since his arrest for the subject offences, he says he has been attempting to wean himself from drugs. He appears to have had at least some success in that regard, but he is not there yet. I am told he has reduced his consumption. Although he has weaned himself from opiates, he still relapses occasionally with cocaine.
- [14] He says that he moved away from Campbell River to get away from his former associates and make a fresh start. I am told that two months after his initial arrest for the subject offences, he enrolled in a rehabilitation program for a period of time in May 2018. According to the pre-sentence report, the program manager has said that he attended the program for only five days. Mr. Brawn insists that he was there longer than that. It is clear in any event that he was unable to comply with the rules of the program, and did not complete it.
- [15] Mr. Brawn has one other conviction. This was a theft under \$5,000 in February 2019. I understand that the circumstances involved the theft of a vacuum cleaner that he intended to sell to raise money to feed his addiction. He received a fine of \$300.

- [16] Mr. Brawn's troubles did not stop there. While released on bail for this matter, he frequently failed to report. He did not show up for interviews with the probation officer who was tasked with preparing the pre-sentence report. More seriously, he failed to attend his first sentencing hearing on October 24, 2019 because, he says, he was not aware that he was required to be there. He was subsequently taken into custody on November 19, 2019, and has remained in custody since then, without seeking interim release.
- [17] According to the pre-sentence report, Mr. Brawn is presently working on his grade 12 qualification. He wishes to start a landscaping business. To that end, he is studying while in custody.
- [18] Prior to his life being taken over by his addiction, he had work experience in logging, shake blocking, roofing and operating heavy equipment. His career ended due to his substance abuse issues.
- [19] That is not all he lost. He is no longer in contact with his father and one of his two brothers. He has two children from a previous partner of 15 years, a son aged 10 and daughter aged 8. That relationship ended five years ago due to his substance abuse.
- [20] He seems to be doing better in his current relationship with his partner of three years, Ms. Farrell, who has recently given birth to their first child.
- [21] There are, as defence counsel submits, a number of important mitigating factors in this case. There has been a guilty plea, although only after the completion of a preliminary inquiry and the Charter voir dire I described earlier. I accept, however, that Mr. Brawn is genuinely remorseful. He appears to be alive to the impact his offending has had on himself and others around him. The pre-sentence report suggests that he has demonstrated an impressive level of insight in that regard.
- [22] The pre-sentence report also notes that Mr. Brawn is willing to participate in rehabilitation and counselling programs. I heard this during the sentencing hearing from defence counsel and from Mr. Brawn himself. He appears to acknowledge the need to change his life, and he genuinely intends to do better.
- [23] He has an important new responsibility in his life. Ms. Farrell, her mother and their newborn daughter were all present in the court today to show their support for Mr. Brawn. Ms. Farrell too has had her own struggles with substance abuse, but appears to have overcome them for the sake of her new daughter. Hopefully she can help Mr. Brawn get there too.
- [24] Moving finally to the law, Crown counsel refers me to a number of cases, including R. v. Kirton, 2018 BCPC 11, R. v. Johnson, 2017 BCPC 251 and R. v. Lencucha, an unreported decision of Judge Boblin of the Provincial Court, dated April 18, 2018, suggesting that a fit sentence here would be a 24-month term of imprisonment. Taking into account the time that Mr. Brawn has served to date, this would translate into an additional 19 months.

- [25] Crown counsel also seeks a number of ancillary orders, including a forfeiture order, a firearms prohibition and a DNA order.
- [26] Defence counsel urges me to impose a comprehensive sentence of 18 months, made up of 18 months on Count 1 and six months on Counts 2 and 3, to be served concurrently.
- [27] Defence counsel emphasizes that, although this is a dial-a-dope case, Mr. Brawn did not have large bulk amounts of drugs in his possession. The police report suggests that it was only four days' worth of consumption. He was, it appears, at the lowest level on the trafficking totem pole. He has no assets. The circumstances suggest that he had been trafficking for one day only. No actual transactions were observed, although I note that the police did seize a score sheet tracking a number of transactions in which he appears to have engaged.
- [28] Defence counsel has also referred me to a number of cases. First, in Voong, to which I have already referred, the Court of Appeal held that the appropriate range for a first offence of trafficking by means of a dial-a-dope operation involving cocaine only would be six to 18 months.
- [29] In *R. v. Christie*, 2017 BCPC 264, an addicted offender with no record participated in a dial-a-dope operation. The offender in that case received a sentence of six months.
- [30] I was referred to *R. v. Shusterman*, 2012 BCSC 362, a decision of this court, for the proposition that deterrence should be emphasized less in a case like this one where the offender was trafficking to feed an addiction rather than for profit.
- [31] Defence counsel has also cited a number of trafficking cases involving fentanyl where the circumstances of the offences appear to have been more serious than those here, but the sentences imposed were similar to or even less than that which the Crown is seeking in this case. These included *R. v. Butler*, 2017 BCPC 315, *R. v. Johal*, 2018 BCSC 549, and *R. v. Nazarek*, 2018 BCSC 259.
- [32] Having considered the submissions made to me, the pre-sentencing report and the authorities cited, I accept the submission of Crown counsel that this is not a case that justifies a sentence at the very bottom of the range, as defence counsel urges, given the aggravating factors to which I have already referred.
- [33] On the other hand, I agree with defence counsel that a sentence at the lower end of the range is nevertheless appropriate in this case. In reaching that conclusion, I note that Mr. Brawn has clearly been struggling with addiction; his offending is, it appears, entirely attributable to that problem. This was not an offence of greed.

[34] I find that there is cause for optimism in Mr. Brawn's case. I am impressed by the support he has from his new family. He does not have a serious criminal record and none for trafficking. I also accept that he is genuinely remorseful. He is alive to the pain and suffering that offences of this kind cause to others in the community. He says that his current incarceration has been a wake-up call for him. I hope that is so, and I am prepared to take him at his word.

[35] Mr. Brawn, please rise.

[36] I am sentencing you to a term of 19 months' imprisonment, less the five months you have already served, for a total of 14 additional months. I am recommending that the balance of your custodial sentence be served partly at the Guthrie House Program in Nanaimo that your counsel mentioned.

[37] Thereafter I am placing you on a 12-month period of probation, during which you will be subject to the following conditions:

- (a) you are to report immediately upon your release, in person, to a probation officer, and after that, you must report as directed by the probation officer;
- (b) if you are arrested, detained or served a sentence for another offence, you must report to your probation officer within two business days of your release from custody or completion of the sentence;
- (c) when first reporting to the probation officer, you must inform him or her of your residential address and phone number;
- (d) you must not change your residence or phone number without written permission from your probation officer;
- (e) having consented in court, you must attend, participate in and complete any intake, assessment, program, treatment or full time live-in treatment program as directed by your probation officer. This may include programming for treatment of drug addiction;
- (f) having consented in court, you must sign any document that is necessary for your probation officer, counsellors or treatment providers to check your attendance and completion of any intake, assessment, counselling or treatment program.

[39] In addition, there will be a 10-year firearm ban under s. 109 of the Criminal Code. There will be an order pursuant to s. 487.051(1) of the Criminal Code requiring you to provide a sample suitable for DNA testing. There will be an order of forfeiture in respect of the items seized.

[38] Is there anything else I need to address, counsel?

[39] MR. GIBSON: My Lord, I think that the only thing that we need to address is whether there is --

[40] THE COURT: You can have a seat, Mr. Brawn.

[41] MR. GIBSON: -- going to be a different sentence for the different offences. I don't disagree with my friend that, if he was to get 19 months for the fentanyl-heroin charge, that six months concurrent on the cocaine charge would be appropriate, as well as perhaps two weeks on the bear spray charge, all concurrent to one another.

[42] THE COURT: All right. Ms. Stansfield?

[43] MS. STANSFIELD: That's fine, My Lord.

[44] THE COURT: All right. I will make that order then. All right. Is there anything else?

[45] MS. STANSFIELD: No, My Lord.

[46] THE COURT: All right. We are adjourned.

"Milman J."

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