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CANADA / JUDGMENT

## R. v. Charlie

2008 BCCA 44

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COURT

British Columbia Court of Appeal

DECIDED

31 January 2008

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2008 BCCA 44 R. v. Charlie

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Charlie,

2008 BCCA 44

Date: 20080131

Docket: CA035344

Between:

Regina

Appellant

And

Martin Patrick Charlie

Respondent

Before:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Frankel

P.A. Eccles

Counsel for the Appellant

L.K. Mirsky

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

15 January 2008

Place and Date of Judgment:

Vancouver, British Columbia

31 January 2008

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Mr. Justice Frankel:

## Introduction

- [1] The Crown seeks leave to appeal, and if leave is granted, appeals an 18-month conditional sentence order imposed on Mr. Charlie by Judge Gulbransen, of the Provincial Court of British Columbia, following a plea of guilty to a charge of possession of cocaine for the purpose of trafficking. The sentencing judge's reasons are indexed as 2007 BCPC 296.
- [2] When Mr. Charlie committed this offence, he was serving a first conditional sentence imposed as a result of his conviction on drug-related charges.
- [3] The Crown raises two grounds. First, it submits that the sentencing judge erred in treating the fact that the original conditional sentence was reinstated after the commission of the present offence as a matter "favourable" to Mr. Charlie. Second, it says that in considering the application of s. 718.2(e) of the Criminal Code, R.S.C. 1985, c. C-46, the sentencing judge placed undue weight on Mr. Charlie's aboriginal background. Section 718.2(e) provides:

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

- (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.

## Factual Background

[4] In the early morning hours of October 16, 2005, a member of the Royal Canadian Mounted Police stopped a vehicle being driven by Mr. Charlie for making a left turn without signalling. The officer saw a cellular telephone on the passenger seat. Upon checking Mr. Charlie's name by means of a police computer, the officer discovered that Mr. Charlie was serving a conditional sentence with a condition that he not possess a cellular telephone, or be in a vehicle with one. At this point, Mr. Charlie was detained for breaching the conditional sentence order. In searching Mr. Charlie's vehicle, the officer found 30 packages of rock cocaine (total weight - 6.65 grams); 16 packages of heroin (total weight - 3.55 grams); three packages of methamphetamine (total weight - 0.75 grams); and two cellular telephones. Mr. Charlie had \$760.00 in his pocket, and a further \$320.00 in his wallet. The drugs had a value of approximately \$1,200.00. Mr. Charlie was released by the police on a promise to appear. Sometime later, an information was sworn charging him with three counts of possession of a controlled substance for the purpose of trafficking; i.e., a separate count for each drug.

[5] As the sentencing judge noted in paragraph 1 of his reasons, the facts disclosed that Mr. Charlie:

[W]as part of an operation which is colloquially called a dial-a-dope operation; he was the driver who would go places and deliver the drugs to people who phoned for them. He was kind of a travelling salesman for drugs, certainly not the main operator of the business.

[6] On the day Mr. Charlie was stopped he was subject to a nine-month conditional sentence order imposed on April 8, 2005, in respect of his conviction on three drug charges arising out of his involvement in another dial-a-dope operation. He spent 14 weeks in custody before this sentence was imposed. That is his only previous conviction.

[7] The April 8, 2005 order contained a number of conditions in addition to the ones prohibiting Mr. Charlie from possessing a cellular telephone or being in a motor vehicle in which there is a cellular telephone. These included a house arrest provision requiring Mr. Charlie to remain inside his residence 24 hours a day except for work or school related purposes, medical appointments, etc. This curfew was in effect for five months. While subject to this curfew, Mr. Charlie was required to present himself at the front door of his residence at the request of a police or corrections officer. This curfew expired approximately five weeks before Mr. Charlie was again found trafficking drugs.

[8] After receiving the police report regarding the events of October 16, 2005, the Crown obtained a warrant for Mr. Charlie's arrest. Mr. Charlie turned himself in on December 8, 2005. He appeared that day before a judge of the Provincial Court who released him on \$2,000.00 cash bail, with conditions akin to those in the April 8, 2005 conditional sentence order, including a curfew.

- [9] On April 25, 2006, Mr. Charlie appeared before a judge of the Provincial Court pursuant to s. 742.6 of the Criminal Code on the breach allegation. Mr. Charlie admitted to the breach. The judge reinstated the conditional sentence order and extended it to May 30, 2006. The house arrest condition was varied so that it remained in effect throughout the term of the extended order.
- [10] The drug charges arising from the events of October 16, 2005, came before the Provincial Court on April 18, 2007. Mr. Charlie entered a plea of guilty to possession of cocaine for the purpose of trafficking. At the request of his counsel, sentencing was adjourned for the preparation of a pre-sentence report and a technical suitability report with respect to the use of electronic monitoring.
- [11] The sentencing hearing took place on July 26, 2007. The parties agreed that, although Mr. Charlie had pleaded guilty only to the cocaine-related charge, the other drugs seized from his vehicle were to be considered by the sentencing judge in deciding on the appropriate punishment.
- [12] At the time of sentencing, Mr. Charlie was 25 years old. He is a member of the Hesquiaht First Nation, located near Tofino, on Vancouver Island. As noted by the sentencing judge, Mr. Charlie's background is a "sad one." He was raised by a single mother who had a drinking problem, and was physically abused by his stepfather. He has never met his father.
- [13] Under the heading "Attitude / Understanding Regarding the Offence" the pre-sentence report states:
- Martin advised that a former associate introduced him into the drug trade. He advised that for a few years it became part of his lifestyle. He advised that the lure of easy money made it difficult to quit dealing drugs. Martin advised that he has made significant changes in his associates and priorities. He expressed a strong desire to refrain from further criminal activity.
- [14] The report further indicates that Mr. Charlie resides with his partner in Cloverdale, where they live in a basement suite with their two-year-old daughter. His partner describes their relationship as "positive and supportive", and Mr. Charlie as a "committed father."
- [15] Mr. Charlie has a Grade 12 education. At the time the report was prepared he had been employed for three months with a construction company. The owner of the company described Mr. Charlie as a "reliable worker." Letters provided to the sentencing judge confirm that Mr. Charlie is a member in good standing of a trade union, earning approximately \$20.00 per hour, plus benefits.
- [16] Under the heading "Summary and Proposed Intervention", the report states, in part:
- Martin advised he has made significant changes in his lifestyle and is confident he will not return to criminal activities. He is gainfully employed in the construction trade and has the opportunity to continue with a company that he enjoys working for.

Martin expressed a desire not to be away from his family. He added that being placed on a restrictive curfew for the period of his bail supervision has not been problematic for him. Family members support Martin's lifestyle changes and would like him to continue attending regular family gatherings and activities.

Although Martin has a history of alcohol abuse, significant others relate that he rarely consumes the substance and abstains from drug use. Should Martin receive a community disposition he may be directed to complete the CORE Substance Abuse Management program offered by community corrections. The next program offered at the Langley Office is scheduled for September, 2007.

The report notes that Mr. Charlie's residence meets the requirements for electronic monitoring, and recommends a number of conditions that would be suitable should a non-custodial sentence be imposed.

- [17] The Crown's position was that a period of actual incarceration in the range of 18 months to two years was appropriate. Crown counsel submitted that the fact that Mr. Charlie had become involved in a dial-a-dope operation for the second time while under a conditional sentencing order was an aggravating factor, and that deterrence should be given precedence over rehabilitation.
- [18] Mr. Charlie's counsel submitted that a conditional sentence in the range of 18 months to two years less one day was appropriate. She stressed that since October, 2005, Mr. Charlie's has been focused on providing for his family. She noted that he has the support of his family, friends, and employer.
- [19] While acknowledging that dial-a-dope operations involve serious criminal offences, the sentencing judge recognized that it was his responsibility to "craft a sentence which imposes a just sentence in these particular circumstances": para. 4. In choosing to give rehabilitation primacy, the sentencing judge stated:
- [10] I think society has, as a goal, that people raise families and raise children and form those units. It is something that is very important for rehabilitation. Those two factors, a job, a regular job, getting decent money, working hard and raising a family, having the support of a spouse are ways in which people live "normal" lives as opposed to the life that perhaps Mr. Charlie was living before. That is a very strong signal to me that this man is well on the way to rehabilitation, has a strong potential for rehabilitation. So I must, in these circumstances, give significant weight to that rehabilitation.
- [20] With respect to the fact that Mr. Charlie re-offended while subject to a conditional sentencing order, the sentencing judge stated:

- [11] Then I have to consider, though, the fact that he was on a conditional sentence. What can I do in relation to that? I have to consider that because my normal practice is, "One conditional sentence and that's it, I'm not going to give another one." Most judges are fairly strict when people violate their conditional sentences. I note that Mr. Charlie's conditional sentence wasn't terminated, that must mean something. It is something favourable to him.
- [12] One other thing that's quite important in this case in terms of deciding whether a conditional sentence should be imposed is that would it endanger the community to release him on a conditional sentence? Well, clearly, in my view, it would not. For a man for the last 20 months or so, 21 months, has been working hard, looking after his family, demonstrating to all who can see him that he can lead a normal life and not commit any crimes, despite the fact that he committed a crime while on a CSO, shows me that he's changed his ways considerably and there is little likelihood that he'll commit an offence in the future. I can't truly predict the future. I've made mistakes in the past, I'll make them again I'm sure. I don't know for sure he won't commit another offence, but my judgment is, my assessment is the probabilities are, given that he's got a family, he's got work, he's got the support of his friends, he's not in the drug lifestyle, it is unlikely he'll commit further offences. The only offences on his record are drug offences, so in those circumstances, those prerequisites are met.

[Emphasis added]

- [21] With respect to s. 718.2(e) of the Criminal Code and Mr. Charlie's aboriginal background, the sentencing judge said this:
- [16] It seems to me that in looking at the various issues that I have to give weight to and sentencing principles in this case, is that Mr. Charlie's aboriginal background, unfortunate as it is, has been addressed by him personally in many significant ways. He has a daughter that he wants to care for; he's not going to, in any way, make that daughter's life like his was. He has a spouse whom he cares for; he's not going to make his spouse's life like his mother's life was. He's got a job. He is not someone who is likely to go in and out of jail. I think it's important to point out, it's not as if aboriginal people are all oppressed people or problematic people, there are many excellent citizens who have aboriginal backgrounds, who've got good jobs and help people and work hard and never get in trouble. His background is similar to the kinds of backgrounds that come up in this court very often with aboriginal people. So it's a long way of saying that I think it's a very important factor in this sentence, despite his prior conviction, of his aboriginal background.

[Emphasis added]

- [22] In conclusion, the sentencing judge gave the following reason for not sentencing Mr. Charlie to a period of actual incarceration:

[17] Having said all that, in my view the principles of sentencing can be met by imposing a conditional sentence, despite the prior conviction, given my confidence that Mr. Charlie is pretty well on the way to rehabilitation. If I possibly can, I ought not to prevent that from continuing.

[18] Judges sometimes have to take chances. This is the kind of case where I'm comfortable taking a chance. As I said, I can't predict the future very well, I can't predict it, other than taking the probabilities into account, and the probabilities here look good. In my view it would be unjust not to impose a conditional sentence, given the fact that the prospect of rehabilitation is so great despite the other negative factors; so for all those reasons I will impose a conditional sentence.

[Emphasis added]

[23] In the result, the judge sentenced Mr. Charlie to a period of incarceration of 18 months to be served in the community. The order includes an 8:00 p.m. to 5:00 a.m. curfew that expired on January 26, 2008. While the curfew was in effect, Mr. Charlie was subject to electronic monitoring. He was required to present himself at the door of his residence when requested by a corrections officer, peace officer, or supervisor, to verify compliance with the electronic monitoring and curfew.

## Analysis

### Reinstatement of the Previous Conditional Sentencing Order

[24] The Crown submits that the sentencing judge gave undue weight to the fact that Mr. Charlie's previous conditional sentence had not been terminated. It says it was not afforded an opportunity to address why the previous order was reinstated and that there was nothing before the sentencing judge as to why this occurred.

[25] In my view, it cannot be said that the sentencing judge erred in the way he dealt with the reinstatement of the original conditional sentence. Having regard to the entirety of the reasons for sentence, I take the sentencing judge's comments as indicating only that he considered the fact that another judge had been prepared to permit Mr. Charlie to continue to serve his original sentence in the community. He found this to be an indication of Mr. Charlie's potential for rehabilitation. In the end, it was Mr. Charlie's actual positive efforts with respect to rehabilitation during the 21 months since his second apprehension that the sentencing judge considered to be a strong mitigating factor. He was clearly entitled to take those efforts into account.

### Mr. Charlie's Aboriginal Background

[26] The Crown submits that the circumstances here are such that rehabilitation should not have "trumped" the principles of deterrence and denunciation. While accepting that Mr. Charlie's aboriginal background warrants consideration, the Crown says that the sentencing judge

gave it undue emphasis. As Mr. Charlie chose to re-involve himself in serious criminal activity while serving a conditional sentence for similar offences, the Crown says this is a case in which both aboriginal and non-aboriginal offenders should be treated alike. In this regard, it points to the following passage from the judgment of Mr. Justice Iacobucci in *R. v. Wells*, [2000] 1 S.C.R. 207, 2000 SCC 10:

44 Let me emphasize that s. 718.2(e) requires a different methodology for assessing a fit sentence for an aboriginal offender; it does not mandate, necessarily, a different result. Section 718.2(e) does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. Furthermore, in *Gladue*, as mentioned the Court stressed that the application of s. 718.2(e) does not mean that aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation (at para. 78). As a result, it will generally be the case, as a practical matter, that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders (*Gladue*, at para. 33). Accordingly, I conclude that it was open to the trial judge to give primacy to the principles of denunciation and deterrence in this case on the basis that the crime involved was a serious one.

[Underlining in original]

[27] Dial-a-dope offences clearly fall on the "serious" end of the spectrum. Most recently, in *R. v. Tran*, 2007 BCCA 405, 245 B.C.A.C. 171, this Court, in allowing a Crown appeal, set aside a conditional sentence of two years less one day and substituted a sentence of two-years' incarceration. In so doing, Madam Justice Saunders stated:

[34] This case involves a "dial-a-dope" cocaine marketing scheme "for profit only". Mr. Tran is not an addict. He has a history of offences of similar nature. This Court has discussed "dial-a-dope" circumstances in the past and noted that it is a more aggravated form of the drug business. By its nature it has a degree of sophistication and marketing to sustain the business, indicating a significant level of committed endeavour, and it poses extra difficulty for police investigation. Mr. Tran was a part of this scheme, even if he was not its main player.

[35] Cocaine, as noted by courts repeatedly, is a highly addictive drug. On a daily basis courts see the negative toll it takes on people who use it. By engaging in the business of dispensing cocaine in an operation such as this, Mr. Tran has lent himself to misery in his community. And he has done so for profit when he has been earlier warned by the courts, through his prior conviction and incarceration, not to do so.

[36] In my view, notwithstanding his family circumstances, the sentence must speak to deterrence and denunciation. I do not consider that the sentence, in the circumstances, accomplishes that goal.

- [28] However, as each case must be decided on its own facts, it is also clear that not all those convicted of drug offences committed while serving a conditional sentence need to be incarcerated. *R. v. Bui*, 2001 BCCA 471, 158 B.C.A.C. 21, is such a case. Ms. Bui pleaded guilty to possession of four flaps (i.e., 1.6 grams) of cocaine for the purpose of trafficking. These drugs were found during a search of her residence. At the time, she was nearing the end of a 15-month conditional sentence for possession of heroin and cocaine for the purpose of trafficking. Having been given one-year's credit for time spent in pre-trial custody, she was sentenced to two years in jail.
- [29] On appeal, this Court substituted a conditional sentence of two years less one day. In so doing, Saunders J.A., having determined that the sentencing judge had misapprehended the facts with respect to the extent of Ms. Bui's involvement in trafficking, stated:
- [11] What then is a fit sentence? I agree with the sentencing judge that commission of an offence while on a conditional sentence is an aggravating factor. In all but the rarest of cases I would not expect a conditional sentence to be followed by another conditional sentence. This is, however, in my view, one of those rare cases.
- [12] Ms. Bui has already endured what the trial judge said was equivalent to a year's incarceration. The tripling of the time spent illustrates that it was, in other words, "hard time" indeed. This time undoubtedly would have specific deterrent effect upon Ms. Bui and general deterrent effect so far as the circumstances become known in the community. Recognizing that, the efforts made towards rehabilitation by Ms. Bui since August 1999 [when she was arrested] and the investment of the community in that process, in my view, a second and likely last conditional sentence may be countenanced, in accordance with the provisions in the Criminal Code that direct the Courts to sentence other than to jail if such can be done in accordance with the principles of sentencing.
- [30] Whether Mr. Charlie's sentence is "unfit" because too much emphasis was placed on his aboriginal background is an arguable point. However, it is not one that I need decide because, even if the sentencing judge erred as alleged by the Crown, I would not interfere with the sentence he imposed.
- [31] Before being sentenced, Mr. Charlie spent some 21 months in the community following the commission of the present offence. In light of the positive changes Mr. Charlie had made to his life, the sentencing judge was of the view that there was "little likelihood that he'll commit an offence in the future." Another six months has passed since Mr. Charlie was sentenced. There is no suggestion that Mr. Charlie has done other than continue to be a productive and law-abiding member of the community.
- [32] More than two years has passed since Mr. Charlie re-involved himself in drug trafficking. Why this case has taken this long to reach this point is not entirely clear, and I attribute no fault to either party. However, it is a fact that during this period Mr. Charlie has been subject to stringent conditions, and is a much different person today than he was in October, 2005.

[33] This Court has been reluctant to allow a Crown sentence appeal and substitute a custodial sentence for a non-custodial one when to do so would interfere with an offender's positive efforts at rehabilitation. Such was the situation in *R. v. Morphy* (1974), 21 C.C.C. (2d) 62 (B.C.C.A.). Mr. Morphy was convicted of possession of marihuana for the purpose of trafficking. Having spent three months in pre-trial custody, he was sentenced to pay a fine, and placed on probation for three years. The Crown's appeal came on for hearing six months later. Although of the view that a jail sentence should have been imposed, this Court declined to do so. In this regard, Mr. Justice McFarlane stated (at 64):

Having regard to the circumstances outlined and particularly the fact that this respondent, with a favourable pre-sentence report, continues in steady employment and is not likely to repeat his offence, I think the Court should be most reluctant to send him to prison now.

[34] *R. v. Nelson*, [1992] Y.J. No. 171 (C.A.) (QL), is also apposite. Mr. Nelson had been sentenced to three months in jail to be followed by three-years' probation. The Crown's sentence appeal was not heard until six months later. In dismissing the appeal, Mr. Justice Hinds said:

[37] Absent special circumstances, the court is often reluctant to reincarcerate a person, particularly if that person is satisfactorily performing terms of a probation order and is making progress towards rehabilitation. In this case there was an opportunity for the sentence appeal to have been brought on for hearing in June, 1992 when a division of this Court was sitting in Whitehorse, or in July or August when a division of this Court was sitting for one week in each of those months in Vancouver to deal with urgent matters during long vacation. Unfortunately the Crown, which had the responsibility for this appeal, did not apply for it to be heard during the foregoing months. It was not heard until October, 1992, several months after the respondent had been released from prison. In my opinion, it would not have been just in the circumstances of this case to reincarcerate the respondent.

[35] The concern expressed in *Morphy* and *Nelson* applies here. It would be unjust, and counterproductive not only to Mr. Charlie's interests, but those of society at large, to interfere with his successful efforts at rehabilitation by sentencing him a period of incarceration at this time. It is on this basis alone that I would dismiss this appeal.

## Conclusion

[36] I would grant leave to appeal and dismiss the appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Rowles"

I AGREE:

"The Honourable Madam Justice Saunders"

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