

CANADA / JUDGMENT

R. v. Clementi

2019 BCSC 2316

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 2316 R. v. Clementi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Clementi,

2019 BCSC 2316

Date: 20191011

Docket: 89032-2

89033-2

Registry: Kelowna

Regina

v.

Sahra Ann Clementi

Before: The Honourable Mr. Justice S. Wilson

Oral Reasons for Sentence

Counsel for the Crown:

A. Murray

M. Reinhart

Counsel for the Accused:

T. Zanatta

Place and Date of Trial/Hearing:

Kelowna, B.C.

September 25, 2019

Place and Date of Judgment:

Kelowna, B.C.

October 11, 2019

[1] THE COURT: This is my decision regarding Ms. Clementi's sentence, following her guilty plea.

Circumstances of the Offence

- [2] On May 25, 2018 an undercover police officer, Constable Fulton, approached a group of people in an alcove on Leon Avenue as she had been directed to do by the Downtown Enforcement Unit of the RCMP. Leon Avenue is an area of downtown Kelowna well known to the police for street-level drug trading. There was a female seated in the alcove, later identified as the accused.
- [3] Constable Fulton asked a male in the group where she could get some "down" or heroin/fentanyl. The male pointed to the accused and Constable Fulton then asked for two points of "down". She gave the accused two baggies who then put some pink rocks in the bag and tossed it on the ground adjacent to Constable Fulton. Constable Fulton then handed \$20 to the male who gave it to the accused. The contents of the baggie was subsequently analyzed and found to contain .2 grams of heroin/fentanyl mix.
- [4] The accused, Ms. Clementi, was charged with trafficking and she pleaded guilty on June 3, 2019. Ms. Clementi has an extensive criminal record that involves drug-related offences.

Circumstances of the Offender

- [5] By way of background, she was born in India and placed in an orphanage shortly thereafter. At age eight, she was adopted by a Canadian couple. She recalled, according to the pre-sentence report, a difficult time adapting to life in Canada and to her adoptive family. She reports abuse while in the adoptive home including sexual abuse, physical abuse, and emotional abuse. She was removed from the adoptive family at age 12 and placed with the Ministry of Children and Family Development and lived in three foster homes and two group homes between the ages of 12 and 16. She has lived independently since then.
- [6] Her adult life has been characterized by substance abuse and domestic violence. She has had seven children, but all were apprehended at various times. Her residential history has been highly unstable, often having no fixed address or temporarily staying with friends. Her social group has consisted primarily of abusive personalities involved in the drug subculture and criminal activity.

- [7] Ms. Clementi has an extensive criminal record. She had a number of convictions between 1987 and 1995 that included but were not limited to possession of narcotics and theft. There was then a 15-year break in her criminal record until 2010, at which time her involvement in the drug culture escalated and resulted in a significant number of convictions. She has had six previous convictions for possession for the purposes of trafficking or for trafficking itself and 18 possession convictions. Her most significant sentence was in 2016 when she received 322 days in prison.
- [8] Ms. Clementi was arrested on this charge on May 31, 2018. Since July 2018, she has been residing at the Night and Day Recovery Centre in the Lower Mainland. She has been attending weekly Alcoholics Anonymous and Narcotics Anonymous meetings and has completed numerous relapse prevention classes, anger management classes, and the 12-step program. She had a single relapse in November 2018, ironically when returning to Kelowna because she had to attend court. She immediately notified her counsellors of the relapse and was able to return to sobriety very quickly. According to the pre-sentence report, she has done extremely well with Night and Day Recovery Centre.
- [9] In 2018, she obtained employment for a traffic control company as a flagger. She maintains that employment until today and a letter of support from her employer was provided to the court. There is also a letter from the substance use counsellor from Fraser Health indicating that Ms. Clementi had attended 31 group counselling sessions and regularly scheduled one-on-one counselling sessions. She has been attending group day talk programs on a regular basis and attends 12-step meetings, has a sponsor, and has completed six cycles of the 12-step program. She has several reference letters from Night and Day Recovery Centre that indicate recent success. She has become involved with People's Church located in Surrey, not only attending regularly, but volunteering to assist where she can.

Aggravated Circumstances

- [10] In terms of aggravated circumstances, the Crown points to Ms. Clementi's extensive prior criminal record. She has 50 convictions dating back to 1987 and, as I indicated before, six previous convictions for possession of narcotics for the purpose of trafficking with the most recent being in 2016. The drug in issue which was fentanyl is also an aggravating factor given the well-documented opioid crisis in Canada and especially in British Columbia in which fentanyl has played a significant role in contributing to the deaths of hundreds of people in our communities.

Mitigating Circumstances

- [11] As a mitigating factor, Ms. Clementi pleaded guilty to the charge. Additionally, she has been residing at the Night and Day Recovery Centre since July 2018, shortly after her arrest.

Positions of the Parties

- [12] The Crown seeks a 30-month custodial sentence relying on the B.C. Court of Appeal's decision in *R. v. Smith*. In *Smith*, reported at 2017 BCCA 112, Justice Harris held that the range of sentences for trafficking in fentanyl for a first-time offender is a custodial sentence of between 18 and 36 months. Ms. Zanatta, on behalf of Ms. Clementi, argues that this is a situation of exceptional circumstances and points to Ms. Clementi's significant efforts and indeed her successes in obtaining sobriety.

Principles of Sentencing

- [13] The principles of sentencing require me to consider both deterrence and denunciation which are the primary principles that apply in drug trafficking cases. However, rehabilitation is also a principle that I must consider pursuant to the Criminal Code.

Discussion

- [14] The principal issue for the court to decide in this matter is relatively straight forward. The B.C. Court of Appeal in *Smith* set out the appropriate range for first-time offences for trafficking fentanyl. However, if the accused can show exceptional circumstances, the court may impose a sentence that falls outside of the normal range. As such, unless Ms. Clementi has established exceptional circumstances, I must impose a custodial sentence in accordance with the principles in *Smith*.
- [15] Justice Harris in *Smith* described the serious and often catastrophic consequences of fentanyl and described the clear distinction between the effects of fentanyl on the one hand and other street drugs. At para. 48, he said as follows:
- [48] As my colleague has clearly explained, fentanyl is a scourge. It poses intolerable risks of accidental overdosing because it is so much more powerful than morphine. Illegally manufactured fentanyl can be particularly and unpredictably potent, even tiny amounts of fentanyl mixed into other drugs such as cocaine or heroin may be fatal; often street drugs have fentanyl cut into them, and it is practically impossible for drug users to recognize whether the drugs they buy contain fentanyl. I endorse the sentencing range my colleague proposes [namely a range between 18 months and 26 months' imprisonment]
- [16] At para. 49, Justice Harris went on to describe the difference between fentanyl and other drugs that are found in our streets and why fentanyl must be considered a more serious risk:
- [49] In my opinion, these facts warrant recognizing a sentencing range for street-level dealing in fentanyl which is materially higher than the sentencing range applicable to other dangerous drugs such as heroin. The range for street-level dealing in those drugs seems to start in British Columbia at six-months' imprisonment. As matters stand today, other dangerous drugs do not kill as frequently, accidentally, or as unpredictably as fentanyl, but the risks posed by those drugs should not be minimized even by comparison with fentanyl. Heroin,

crystal meth and cocaine can have devastating consequences. They may not kill as often as fentanyl, but very large numbers of accidental deaths are associated with their consumption (indeed the majority of accidental overdose fatalities involve a mixture of illicit drugs) and they destroy lives and wreak social havoc.

- [17] The Court of Appeal in *R. v. Voong*, 2015 BCCA 285, held that a sentencing judge may deviate from the normal range, but only in exceptional circumstances. I will not read all of para. 59 of the *Voong* decision; however, Madam Justice Bennett said it will be rare where exceptional circumstances will be found to have been met.
- [18] In the Court of Appeal's recent decision in *R. v. Schneider*, 2019 BCCA 310, our Court of Appeal concluded that a sentence below the normal range is available in exceptional circumstances even when the accused was trafficking in fentanyl.
- [19] The object of the criminal justice system was described by the Court of Appeal in *R. v. Preston*, 47 B.C.L.R. (2d) 273 (C.A.), as being the protection of society. However, as the court identified, protection of society may involve incarceration of the offender, but in other instances, it may have the very opposite effect. On p. 5, Wood J.A. for the court said:

The object of the entire criminal justice system, of course, is the protection of society, and I say at once that if incarceration is the only way of protecting society from a particular offender, then transitory and expensive though it may be, that form of protection must be invoked. But where, as in this case, the danger to society results from the potential of the addict to commit offences to support her habit, and it appears to the court that there is a reasonable chance that she may succeed in an attempt to control her addiction, then it becomes necessary to consider the ultimate benefit to society if that chance becomes a reality.

- [20] In *Preston*, the accused was 41 years of age and had been a heroin addict for over 20 years. She had made numerous unsuccessful prior attempts to overcome her addiction. She had a lengthy criminal record including drug-related convictions including trafficking. The Court of Appeal pointed out that heroin addiction is very difficult to overcome.
- [21] I note that Ms. Clementi's addiction is not heroin. However, she has nonetheless been dependent on various substances with crack cocaine her primary addiction since 2010. In *Preston*, the accused had enrolled in a methadone treatment program and had been able to maintain sobriety for some period of time.
- [22] Ms. Clementi was one of hundreds of individuals in Kelowna who are addicted to street drugs that are readily available. The money required to pay for the drugs to which they are addicted, once all other sources of income have been exhausted, is generally sourced through criminal activity. Ms. Clementi, consistent with many others, funded her drug addiction with low-level drug trafficking, selling drugs to other addicts. Homelessness is both a consequence and a cause of the hopeless cycle of drug addiction and criminal behaviour.

[23] In Preston, the court touched upon that cycle and pointed out what is often the futility of a term of incarceration:

However, the protection which society derives from a sentence of imprisonment, imposed upon a heroin addict for the purpose just described, is transitory at best. There is no credible basis for expecting that a term of imprisonment will rehabilitate the addict. Drugs of all sorts are readily available in our prisons and penitentiaries. Only the price varies, in kind and amount, from that which is exacted on the street. When the sentence is served, the addict who re-emerges from custody poses the same threat to society as before, and the whole cycle is ready to be repeated.

[24] The court then went on to discuss both the need for deterrence, but also the possibility of rehabilitation and that in some cases the former should yield to the latter:

What then is the proper approach for the court to take when sentencing in a case such as this? When the benefit to be derived to society as a whole, as a result of the successful rehabilitation of a heroin addict, is balanced against the ultimate futility of the short-term protection which the community enjoys from a sentence of incarceration, I believe it is right to conclude that the principle of deterrence should yield to any reasonable chance of rehabilitation which may show itself to the court imposing sentence. To give the offender a chance to successfully overcome his or her addiction, in such circumstances, is to risk little more than the possibility of failure, with the result that the cycle of addiction leading to crime leading to incarceration will resume, something that is inevitable, in any event, if the chance is not taken. On the other hand, as has already been pointed out, if the effort succeeds the result is fundamentally worthwhile to society as a whole.

[25] Justice Bracken described the difficulty facing the courts in matters such as these in *R. v. Boone*, 2013 BCSC 1306, in which he recognized the conflicting principles of denunciation and deterrence on the one hand and rehabilitation on the other. At paras. 25 to 28, he said the following:

[25] Sentencing is often a difficult function for the courts. Clearly this offence is serious and caused the victim considerable and long-lasting harm. The nature of the offence, combined with the defendant's history of offending, result in a focus on the principles of denunciation and deterrence. However, his background, strong family and community support, the fact of his employment and the steps he has taken to rehabilitate himself result in a conflict between the principles of denunciation and deterrence and the principle of rehabilitation.

[26] The elimination of the availability of conditional sentence orders for offences of this nature perhaps reinforces the principles of denunciation and deterrence. Indeed, but for the evidence of now almost three years of sobriety and good conduct, the need for denunciation and specific deterrence would undoubtedly be the paramount factors in this sentencing.

[27] The defendant seems remorseful and demonstrated his remorse and regret in his comments to the court. He seems committed to the continuation of his current path.

- [28] The obvious difficult aspect in this case is which of the conflicting principles of sentencing should govern; those of denunciation and deterrence, or that of rehabilitation.
- [26] The Court of Appeal confirmed in Voong that Preston remains good law. The question is if Ms. Clementi's circumstances are exceptional such that she should be afforded the opportunity to continue with her attempts to maintain her sobriety and to live a prosocial life. If the answer is no, the answer would dictate that the fit sentence would fit squarely within Smith, aggravated somewhat by her prior criminal record.
- [27] Counsel for Ms. Clementi refers me to a number of cases where suspended sentences have been ordered. Each case turns on its particular circumstances. In many of the cases, the accused was much younger and, therefore, did not have numerous prior unsuccessful attempts to get clean and sober or the criminal record that goes with such a long period of difficulty.
- [28] In *R. v. Joon*, 2017 BCPC 301, *R. v. Olenik*, 2017 BCPC 390, and *R. v. Dewat*, 2019 BCPC 183, the offenders were all 25 years of age or under. However, in Preston and Voong, the accused was over 40 years of age, as is Ms. Clementi.
- [29] In my view, the fact that Ms. Clementi has tried but failed before is not in and of itself a reason to preclude a finding that exceptional circumstances exist or that she is certain to fail this time. As the court recognized in Preston, there is never any guarantee of success when attempting to maintain sobriety. However, the fact that Ms. Clementi has put substantial effort into her sobriety this time is likely why she has had more success on this occasion than failed prior attempts.
- [30] Moreover, I do not accept the fact she had a brief relapse to be sufficient reason to conclude that she cannot succeed. The relapse, which occurred in November 2018 and occurred when she returned to the Kelowna area, would appear to have been an isolated event.
- [31] The courts have recognized that a relapse may be a consequence of addiction. In *R. v. Schneider*, the court said the following:
- [31] We observe that the unfortunate nature of addiction is that it often involves relapses. That does not mean that all hope is lost for a successful rehabilitation and recovery. This new evidence would not change our analysis as to the error of the judge below and therefore the appropriate result of this appeal, as it does not contradict the evidence before the judge below that the appellant had made exceptional efforts to turn his life around and is committed to recovering from addiction.

- [32] The new evidence in the passage above was evidence that Mr. Schneider has relapsed pending the hearing of his appeal. An important consideration regarding Ms. Clementi's relapse in this case was that she immediately notified her counsellors so that she could re-establish her sobriety. In so doing, she acknowledged her misstep and took the appropriate action. But for her self-report of the relapse, it may be that the court would never have heard about it.
- [33] The Crown points out that Ms. Clementi's period of sobriety is much shorter than was the circumstances in some of the cases that were referred to me. Ms. Clementi has been clean for the 10 months since her relapse and about four months prior to it.
- [34] While I recognize that many of the cases which I was referred to include longer periods of sobriety, I have some difficulty in concluding that this is a factor sufficient to militate against a finding of exceptional circumstances. Ms. Clementi has pleaded guilty and the matter has been scheduled for hearing to determine her sentence. It would seem contrary to the overarching concerns regarding delay in criminal matters if I were to conclude that Ms. Clementi's argument should be considered weaker simply because she did not delay her plea and her sentence hearing in order to build up more of a track record of success.
- [35] In *R. v. Faraj*, 2019 BCSC 612, Justice Murray adjourned sentencing for five months in order to give the accused a chance to prove himself. In the result, she was satisfied that his progress continued and ordered a suspended sentence plus probation. The five-month adjournment followed only four weeks of abstention from drugs. Ms. Clementi has had a longer period of sobriety than was present in *Faraj*.
- [36] Mr. Allen Epp testified at the sentencing hearing on behalf of Ms. Clementi. Mr. Epp has been a friend of Ms. Clementi for over 10 years. He met her at a time when she had had her children taken away and was pregnant with twins that were subsequently apprehended. The evidence of Mr. Epp was interesting because he knew her throughout her times of greatest struggle and has seen what he described as an unbelievable change in her since she went to the Night and Day Recovery Program.
- [37] Mr. Epp is a local businessman not involved in the drug trade. He assisted Ms. Clementi by paying for her flagger training program and also paid her bail such that she could be released to go to the Night and Day Recovery Centre. He described her as a different person who has plans and goals and is committed to staying off drugs. He also described her as keen to work and that she wishes to be self-sufficient. Although he has not seen her as frequently since she moved to the Lower Mainland, they maintain regular telephone contact.

- [38] Ms. Clementi addressed the court at the conclusion of submissions. She expressed regret for her actions and says that she has been an addict for her whole life, but she is now sober and wants to live what she describes as a straight life. She acknowledges a hard habit to change, but she has a full-time job and expressed pride at receiving paycheques with her name on that she has earned, as opposed to government cheques.
- [39] I conclude that Ms. Clementi has established that her circumstances are exceptional and that a sentence below the range as set out in Smith is appropriate in her case. I am satisfied that no useful societal benefit would be gained by incarcerating Ms. Clementi who would lose access to the support services that she currently enjoys and have led to the significant changes that she has made in her life since July 2018. The protection of the public is better served by ensuring that she is provided with the ability to maintain sobriety as I have little doubt she would return to her previous antisocial life upon release if she were incarcerated at this point.
- [40] Ms. Clementi, if you could stand, please.
- [41] I am therefore going to order, Ms. Clementi, that your sentence will be suspended with a period of three years of probation. Okay.
- [42] The terms of your probation will be as follows. You must comply with the conditions of the probation order for 36 months.
- [43] You must keep the peace and be of good behaviour. You must appear before the court when required to do so. You must notify the court or your probation officer in advance of any change of your name or address, and promptly notify the court or your probation officer of any change in your employment status.
- [44] Within 72 hours, you are to report to the probation officer, and I need an address for that, presumably --
- [45] MS. ZANATTA: Yes, My Lord, before we do that, 72 hours with Monday being the holiday --
- [46] THE COURT: Oh --
- [47] MS. ZANATTA: -- may be an issue.
- [48] THE COURT: -- yes, it is Friday, is it not?
- [49] MS. ZANATTA: So if we could go Tuesday by three o'clock?
- [50] THE COURT: I am going to say three business days.
- [51] MS. ZANATTA: Okay, thank you.
- [52] THE COURT: Do you have an address?
- [53] THE ACCUSED: It is 14 --

- [54] THE COURT: This is the probation officer we are talking about. That can be provided, but it will be the probation office closest to where Ms. Clementi is currently residing.
- [55] You must reside at the address assigned to you by -- is it still Night and Day Recovery Centre, and inform your probation officer of the address assigned to you.
- [56] You must provide your probation officer with your phone number. You must not change your residence or phone number without written permission in advance from your probation officer.
- [57] You must obey all the rules of your residence so long as they do not conflict with the terms of the probation order. If there is a conflict, you must tell the probation officer about the conflict immediately.
- [58] You must not leave the Province of British Columbia unless you have the written permission of your probation officer, and you must carry the permission whenever you are outside the province.
- [59] For the first 12 months of your probation, you must obey a curfew by being inside your approved residence between the hours of 7 p.m. and 7 a.m. You must present yourself immediately at the door of your residence and answer the phone when a peace officer or probation officer attends or calls to check on compliance. You may be away from your residence during the curfew with written permission of your probation officer which will only be given for compelling reasons. You must carry the written permission with you when you are outside the residence during curfew hours. You may also be away from the residence during curfew hours for the purposes of commuting to and from or attending either NA meetings or AA meetings providing that you return no later than 7 p.m. You may be away from the residence during curfew hours in the event of a medical emergency. If requested, you must provide your probation officer with written confirmation that you went to the facility, signed by a representative of the healthcare facility where you went.
- [60] For the remaining 24 months of your probation, the curfew will be between 10 p.m. and 6 a.m. every day, except as permitted by the probation officer or a medical emergency. You must carry a copy of the probation order and any written permission from your probation officer with you at all times when outside of the residence and must provide a copy to a peace officer on demand.
- [61] You must not possess or consume drugs, alcohol, or any other intoxicating substance except in accordance with a medical prescription.
- [62] Finally, you must complete 100 hours of community work service under the direction of the probation officer, to be completed by December 31, 2021.

- [63] So, Ms. Clementi, I am giving you the benefit of the doubt. There is little doubt that if you were to breach this or be caught again that the court would not be as lenient with you, but I am giving you the opportunity to carry on with the progress that you have made and I wish you all the best.
- [64] MS. ZANATTA: My Lord, I am just wondering, because Ms. Clementi is employed in flagging --
- [65] THE COURT: Yes.
- [66] MS. ZANATTA: -- if we could have the written permission, compelling reasons including work --
- [67] THE COURT: Yes.
- [68] MS. ZANATTA: -- just so a probation officer can give her --
- [69] THE COURT: Yes.
- [70] MS. ZANATTA: -- the ability to work.
- [71] THE COURT: Yes, employment is a component, yes.
- [72] THE ACCUSED: Sometimes I will get night shifts.
- [73] THE COURT: All right. So that work will be always be an exception. We want you to --
- [74] MS. ZANATTA: Thank you.
- [75] THE COURT: -- we want to be able to work.
- [76] MS. ZANATTA: Thank you.
- [77] MS. REINHART: Thank you, My Lord, the Crown needs to direct a stay of proceedings on the remaining information, 89032 --
- [78] THE COURT: Yes, all right, that is noted.
- [79] MS. REINHART: -- and I wonder if ancillary orders were addressed in the initial submissions?
- [80] THE COURT: I do not believe they were --
- [81] MS. ZANATTA: I do not believe so, either.
- [82] THE COURT: -- but what was addressed was the terms and I took them straight from the end of the Schneider case.
- [83] MS. REINHART: Certainly.
- [84] THE COURT: What do you say about ancillary orders?

- [85] MS. REINHART: I believe that s. 109 requires a lifetime mandatory prohibition for this offence. I do not think that it will have any real effect.
- [86] MS. ZANATTA: No, as I believe Ms. Clementi is already on a lifetime prohibition --
- [87] MS. REINHART: Yes.
- [88] MS. ZANATTA: -- however, I believe it is mandatory under the Code.
- [89] THE COURT: All right, then I will make that ancillary order, then.
- [90] MS. REINHART: And I will leave aside a DNA order. I imagine that there has been previous orders in the past. It is a secondary designated offence.
- [91] THE COURT: I suspect that that is also true. All right, thank you.
- [92] MS. ZANATTA: Thank you.
- [93] THE COURT: All the best.
- [94] THE CLERK: My Lord, with regards to the reporting condition --
- [95] THE COURT: Yes.
- [96] THE CLERK: -- you had indicated nearest her residence?
- [97] THE COURT: Yes.
- [98] THE CLERK: Whereabouts does she live because we are going to have put something on the document in the registry.
- [DISCUSSION RE PROBATION REPORTING]
- [99] THE CLERK: So Surrey Probation, then, is that what you are saying?
- [100] THE COURT: Surrey North Probation?
- [101] MS. ZANATTA: I believe so and, if that is not the closest one, she can report initially to the Surrey North --
- [102] THE CLERK: Okay.
- [103] MS. ZANATTA: -- and have it moved to the one that is closest to her.
- [104] THE COURT: If that works for you, it works for me.
- [105] THE CLERK: Great.
- [106] THE COURT: Okay.
- [107] MS. ZANATTA: Thank you, My Lord.
- [108] THE COURT: Thank you.

"Wilson J."

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