
CANADA / JUDGMENT

R. v. Coffey

2020 BCCA 195

COURT

British Columbia Court of Appeal

DECIDED

22 June 2020

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2020 BCCA 195 R. v. Coffey

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Coffey,

2020 BCCA 195

Date: 20200622

Docket: CA45765

Between:

Regina

Respondent

And

Peter Gerard Coffey

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

On appeal from: An order of the Provincial Court of British Columbia, dated

December 3, 2018 (sentence) (R. v. Coffey, 2018 BCPC 386,

Abbotsford Docket 84711-1).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

C.R. Terepocki

Counsel for the Respondent

(via videoconference):

M. Loda

Place and Date of Hearing:

Vancouver, British Columbia

June 22, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 22, 2020

Summary:

Appeal from a sentence of 12 months' imprisonment for producing marihuana and possessing marihuana in an amount exceeding three kilograms for the purpose of trafficking. The appellant asserts the judge did not adequately consider Gladue principles and that the sentence he imposed was disproportionate to the gravity of the offences. Held: Appeal dismissed. The judge appropriately considered the unique historical, systemic and background factors that may have played a part in the appellant's offending conduct. Further, the judge did not err by imposing a sentence that fails to account for changing public attitudes towards marihuana cultivation. The conduct engaged in by the appellant continues to be serious criminal conduct. The sentence imposed was well within the appropriate range.

FITCH J.A. (via videoconference):

A. Introduction

- [1] The appellant, Peter Gerard Coffey, appeals from a sentence of 12 months' imprisonment imposed on December 3, 2018, following his convictions for: (1) unlawfully possessing a controlled substance, cannabis (marihuana), in an amount exceeding three kilograms, for the purpose of trafficking; and (2) producing a controlled substance, cannabis (marihuana), contrary to ss. 5(2) and 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.
- [2] The appellant's appeal from conviction was dismissed by this Court in reasons indexed as 2020 BCCA 75.

- [3] Leave to appeal was granted when the appellant was admitted to bail pending the hearing of this appeal.

B. Circumstances of the Offences

- [4] On January 13, 2016, the RCMP executed a search warrant on a seven-acre rural property in Deroche, British Columbia, that was occupied by the appellant and others. A large, well-established and sophisticated commercial marihuana grow operation was discovered on the property, including in four custom-built steel structures. Approximately 4,200 marihuana plants in various stages of growth were found on the property. Three individuals associated with the property held licences to grow marihuana for personal medical use. Together, those licences only covered about 530-550 plants. The appellant had been part of a group seeking to obtain a lawful production licence, but that application was rejected in 2014. The sentencing judge concluded the appellant used licences authorizing the production of a relatively small number of marihuana plants for personal medical use as a veil of legitimacy in order to avoid detection of the larger illegal enterprise with which he was involved. The sentencing judge concluded that the grow operation had the capacity to generate significant revenue. A document authored by the appellant and seized during the search reflected a harvest of 44.5 pounds of marihuana that was sold for \$93,600.

C. Circumstances of the Appellant

- [5] The appellant was 52 years of age at the time of sentencing. His antecedents and present circumstances were thoroughly canvassed in a Gladue report (R. v. Gladue, [1999] 1 S.C.R. 688) and pre-sentence report put before the sentencing judge.
- [6] The appellant is a permanent resident of Canada. He was born in Duluth, Minnesota, to a woman of non-Aboriginal lineage and a man of mixed Assiniboine (Fort Belknap) First Nation and Métis descent. The appellant identifies primarily as Métis. In 1971, the appellant's family relocated to Canada. The appellant's formative years were spent in rural Manitoba.
- [7] The appellant's paternal great-grandmother and grandmother were both survivors of the residential school system operated in Montana.
- [8] The appellant's father was an educator. His mother was a registered nurse and homemaker. The appellant told the author of the Gladue report that his work ethic and the close emotional bond he enjoys with members of his immediate and extended family is attributable to the pro-social values with which he was raised. He described an idyllic upbringing free from any form of abuse.

- [9] Despite the appellant's supportive upbringing, the author of the Gladue report noted that a number of adverse factors that affect Indigenous people generally are present in the appellant's life, including multi-generational familial fragmentation, and a loss of cultural identity and traditional family and community support mechanisms.
- [10] The appellant left school and home at the age of 17 to work in the oil fields. He married and had four children. In 1990, when the oil industry experienced a downturn, the appellant moved his family to British Columbia. He appears to have worked hard throughout this time, including by starting and selling a variety of different small businesses. Unfortunately, the appellant's marriage came to an end in 2002, an experience that left him emotionally, socially and financially devastated. Between 2005 and 2009, the appellant travelled between British Columbia and Manitoba working in the construction trade and in other odd jobs to generate income needed to meet his family maintenance obligations.
- [11] The appellant was reported to be in good physical and mental health at the time of sentencing. It was noted, however, that he does experience anxiety attacks and feelings of situational depression. He has long used marihuana to self-medicate and alleviate these symptoms.
- [12] In 2013, the appellant pleaded guilty to possessing property knowing it to have been obtained from the commission of an indictable offence, contrary to s. 354(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The circumstances of that offence are serious. In short, the appellant was found in possession of over \$400,000 of cash separated into vacuum-sealed bags. An additional \$60,000 was found in a suitcase seized from the appellant's vehicle. The money was the proceeds of a drug trafficking network operating in Manitoba. The appellant did not admit by the plea that he was involved in the drug trafficking enterprise, but agreed that the knowledge component of the offence was made out by wilful blindness as to the provenance of the funds he possessed. The appellant was sentenced to two years' imprisonment for this offence. As a result of this conviction and sentence, the appellant is inadmissible to Canada on grounds of serious criminality under s. 36(1)(a) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA]. Should removal proceedings be commenced, the appellant has no right of appeal to the Immigration Appeal Division: s. 64(2), IRPA.
- [13] The appellant sought an extension of time to appeal this conviction on grounds that he entered the guilty plea unaware of its collateral immigration consequences. The application to extend time was dismissed by this Court in reasons indexed as 2017 BCCA 359.
- [14] It was common ground in the sentencing court that the sentence imposed for these offences would not expose the appellant to immigration consequences he was not already exposed to as a result of the 2013 conviction.
- [15] The appellant was released on parole on terms requiring him to reside on the rural acreage where the marihuana grow operation was subsequently discovered.

- [16] Since his arrest on these offences, the appellant has been on bail for close to four and a half years. While the bail conditions do not appear to have been particularly onerous, it is noteworthy that the appellant has complied with these terms pending his trial and appeals.
- [17] At the time of sentencing, the appellant was in a loving relationship with his common-law partner. The appellant's partner suffers from a variety of health-related issues and relies on him for assistance with her daily needs and medical appointments. In reference letters received on sentencing, the appellant's partner and her mother described the appellant as a kind, generous, hard-working, and spiritual person who is proud of his Métis heritage and committed to his family.
- [18] The appellant advised the author of the pre-sentence report that his convictions for these two offences were the product of a "great misunderstanding", that he was only in lawful possession of limited quantities of marihuana he produced for personal use, and that he was not responsible for the other plants being grown on the property. In convicting the appellant, the judge rejected his evidence on this point.

D. The Sentencing Proceedings

- [19] The Crown sought the imposition of a custodial sentence in the range of three to four years' imprisonment. The appellant submitted that a sizable fine would meet the applicable sentencing objectives. In the alternative, he submitted that a sentence of less than six months' imprisonment should be imposed.
- [20] The judge set out the governing statutory principles of sentencing in ss. 718, 718.1 and 718.2 of the Code, noting that s. 718.2(e) applied in this case. Section 718.2(e) requires sentencing judges to consider available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community for all offenders, with particular attention to the circumstances of Aboriginal offenders.
- [21] The judge noted that the Cannabis Act, S.C. 2018, c. 16, has not significantly altered the penalty available for the offences committed by the appellant. Both offences are subject to maximum sentences of 14 years' imprisonment.
- [22] The judge concluded that the objectives of general deterrence and denunciation weighed heavily in the sentencing of non-addicted offenders engaged in the drug trade purely for profit.
- [23] The judge found that the appellant took advantage of the licencing system then in force for the production of marihuana for personal use and that this allowed him to evade detection until, by chance, his activities were discovered and a warrant was obtained.
- [24] The judge quoted extensively from the Gladue report. It is apparent that the judge considered the information contained in the Gladue report as providing necessary context to determine an appropriate sentence in this case.

- [25] The judge determined that the appellant's moral culpability was high. I take this to be a reference to the size and sophistication of the grow operation and the appellant's use of personal production licences as a means of evading detection. The judge emphasized that one of the purposes of the Cannabis Act is to provide for the licit production of cannabis to deter and reduce illicit activities in relation to cannabis production.
- [26] The judge weighed these considerations, including the appellant's prior criminal record, against the objectives underlying s. 718.2(e). He said this:
- [41] I also recognize the personal circumstances of this accused. He has a limited though serious criminal record. He is of Aboriginal heritage and Gladue factors apply and have been specifically identified in the Gladue report. Also, I take into consideration that Mr. Coffey is a permanent resident in Canada and this decision might impact whether Canada Immigration will move against him. I also take into consideration that he is a respected member of the community to some extent, and others are highly dependent upon him.
- [42] However, when I consider all of the circumstances of the offender and the offences, and take into consideration the principles of sentencing, I cannot accept the submission of the defence that a fine or a minor jail sentence is appropriate in this case. The offences are serious, the moral culpability is high and the sentence that must be imposed must be one greater than proposed by defence counsel.
- [27] In addition to imposing a 12-month period of incarceration, the judge made a number of ancillary sentencing orders that are not at issue on this appeal.

E. The Grounds of Appeal

- [28] The appellant advances two grounds of appeal which he frames as follows:
1. The judge erred in imposing a sentence which did not adequately consider Gladue principles; and
 2. The judge erred in imposing a sentence that was disproportionate to the gravity of the offences.
- [29] The appellant seeks an order allowing the appeal and substituting for the sentence imposed a 90-day intermittent sentence with a \$5,000 fine to be followed by two years' probation during which he would perform 120 hours of community work service.

F. Analysis

- (a) Standard of Review

- [30] It is well established that a deferential standard of review applies on appeals from sentence. Appellate intervention is only justified when a sentencing judge has committed an error in principle that had an impact on the sentence or imposed a demonstrably unfit sentence: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 90; *R. v. Lacasse*, 2015 SCC 64 at paras. 41, 44; *R. v. Friesen*, 2020 SCC 9 at paras. 25-29.
- (b) Did the Judge Fail to Give Adequate Consideration to Gladue Principles?
- [31] I cannot accept the position of the appellant that the judge erred by failing to explain how Gladue principles impacted his assessment of moral culpability. The judge understood that he was required to consider the unique historical, systemic and background factors that may have played a part in the appellant's offending conduct: *R. v. Ipeelee*, 2012 SCC 13 at paras. 72-73. That the judge understood his obligations in this regard is explicitly reflected in his reasons for sentence. In determining the appellant's moral culpability, the judge was also obliged to take into account the appellant's decision to engage in the offending conduct at issue on this appeal a relatively short time after being released on parole for another serious offence.
- [32] I see no error in principle in the judge's approach nor do I see any basis upon which this Court could interfere with the way in which he weighed potentially competing considerations in assessing the appellant's moral culpability.
- [33] I would not give effect to this ground of appeal.
- (c) Is the Sentence Disproportionate to the Gravity of the Offences?
- [34] I am unable to accept the argument that the judge erred by imposing a sentence that fails to reflect changing public attitudes towards marihuana cultivation. The judge addressed this issue in his reasons, noting that the penalties for possessing large quantities of marihuana for the purpose of trafficking and illicitly producing marihuana have not significantly changed since the enactment of the Cannabis Act. A similar point was made in *R. v. Strong*, 2019 ONCA 15 at paras. 2-4:
- [2] The appellant's main argument rests on the assertion that the changed societal attitude toward marijuana use warrants a reduction in the established range for this kind of offence. We cannot accept this submission.
- [3] While the societal perception of the seriousness or harmfulness of the offender's conduct has a role to play in considering factors such as denunciation and deterrence, we see no basis to conclude that the conduct involved in this case would be viewed as anything other than serious criminal misconduct.
- [4] Parliament has not significantly altered the applicable penalty. Nor, in our view, can one assume that a large scale, prolonged trafficking for profit in marijuana is somehow viewed as less serious because of the legislative changes in respect of personal possession and use.

- [35] I see no error in principle in the judge's conclusion that the type of conduct engaged in by the appellant in the case at bar continues to be serious criminal conduct that warrants the imposition of penalties within established ranges.
- [36] I am also unable to accede to the appellant's submission that the judge erred in fact in concluding that the appellant took advantage of licences granted for the production of marihuana for personal use to camouflage the existence of a fairly large-scale, sophisticated and illicit marihuana grow operation. The judge presided over a 10-day trial in this matter. The appellant testified. The judge rejected his evidence. The judge is best positioned to make this factual assessment and there was evidence upon which he could reasonably come to the conclusion he did.
- [37] The appellant's submission that the sentence imposed is demonstrably unfit having regard to sentences imposed in like cases is unsupported by those cases, including by those upon which the appellant relies. While it is possible to identify lesser penalties imposed for offences of this kind, particularly on first-time offenders, the weight of the authorities is to the effect that the sentence imposed in this case is towards the bottom end of the appropriate range: *R. v. McGee*, 2017 BCCA 457 at paras. 4, 30 (where this Court noted that "[a]t a very minimum a 12- to 15-month sentence should have been imposed" in the case of a commercial marihuana grow operation); *R. v. Kwan*, 2016 BCCA 208 (where a 15-month sentence was upheld for a first-time offender who was the caretaker of a commercial marihuana grow operation); *R. v. Kwiatkowski*, 2010 BCCA 238 (where a 12-month sentence was upheld for a first offender who was tending to 3,000 marihuana plants); see also *R. v. Bentley*, 2017 ONCA 982 (where it was noted that the appropriate sentence for an individual involved in a large, commercial marihuana grow operation was 18 months' imprisonment).
- [38] For these reasons, I cannot accept the appellant's position that the sentence was demonstrably unfit by reason of it being disproportionate to his moral culpability, or that it was otherwise a marked and substantial departure from sentences imposed in similar circumstances on similarly situated offenders.

G. Conclusion

- [39] For the foregoing reasons, and despite the able submissions of the appellant's counsel, I would grant the extension of time to appeal sentence but dismiss the appeal.
- [40] HARRIS J.A. (via videoconference): I agree.
- [41] BUTLER J.A. (via videoconference): I agree.
- [42] HARRIS J.A. (via videoconference): The appeal is dismissed.

"The Honourable Mr. Justice Fitch"

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