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CANADA / JUDGMENT

## R. v. Cox

2020 BCSC 2189

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COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2189 R. v. Cox

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cox,

2020 BCSC 2189

Date: 20201202

Docket: 36388-2

Registry: Campbell River

Regina

v.

Jonathan Barrie Cox

Before: The Honourable Madam Justice J. A. Power

Oral Reasons for Sentence

Counsel for the Crown:

J. Rutherford

Counsel for the Defence:

E. Chesterley

Place and Date of Trial/Hearing:

Campbell River, B.C.

November 30 and December 1, 2020

Place and Date of Judgment:

Campbell River, B.C.

**December 2, 2020**

- [1] THE COURT: This is my decision on sentence as a result of the sentencing hearing that has proceeded in the past two days. I am giving an oral decision and I reserve the right to edit this decision for grammar and clarity in the event that a transcript is required, but the substance of my decision will not change and is as follows.

## INTRODUCTION

- [2] Jonathan Barrie Cox has pled guilty to possession of a controlled substance for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The events took place on October 23, 2018 in Campbell River, British Columbia. The substance Mr. Cox was trafficking in is identified as fentanyl. There were other illicit substances, including cocaine, crack cocaine, and methamphetamine seized at the time of the arrest.
- [3] The matter is before me for sentencing. The sentencing hearing has proceeded first by way of a Charter voir dire respecting Mr. Cox's allegation of excessive force. I have not found a Charter violation and found the force used proportionate to the circumstances since Mr. Cox was resisting arrest. The defence has allowed all of the evidence on the voir dire to become part of the sentencing hearing in a manner that has allowed for some efficiency for this sentencing hearing. I also heard from a Crown expert, Constable Jones on the sentencing hearing.
- [4] The Crown is seeking a sentence of two years less a day in a provincial institution. The Crown points to a number of aggravating factors, which I will discuss. The defence is seeking a suspended sentence and probation, based on exceptional circumstances which they say are present here. Alternately, the defence asks me to consider these circumstances, particularly the steps Mr. Cox has taken to turn his life around and rehabilitate himself, in imposing a fit sentence.
- [5] I will briefly set out the circumstances of this offence, then I will discuss Mr. Cox's personal circumstances before I commence my analysis of the sentencing principles I must apply.

## BACKGROUND

- [6] Briefly stated, the Drug Investigation Unit in Campbell River had been surveilling Mr. Cox's activities during the month of October of 2018. They had observed short duration meets with individuals, which occurred in Mr. Cox's vehicle on October 12, 18, and 22. These meets were, in the opinion of experienced officers, consistent with drug transactions. Two of the individuals that the police observed meeting with Mr. Cox were known drug users. They are also highly addicted, vulnerable individuals who are Aboriginal in heritage and members of the street community in Campbell River.

- [7] On October 23, 2018, during their morning team meeting, the police made the decision to arrest Mr. Cox. They did so early that afternoon, after observing another short duration meet with one of the known users I have described.
- [8] Mr. Cox's vehicle was pulled over and the police essentially blocked the vehicle. The arresting officer, Corporal Larsen, approached the vehicle and told Mr. Cox he was under arrest. Mr. Cox initially had his hands on the steering wheel, but then reached down with his right hand between the driver's console and did not comply with Corporal Larsen's direction to show his hands. When she tried to grab control of his arms he maintained rigidity and did not comply.
- [9] Constable Stewart, who was providing backup, observed this occurring as he approached the passenger side of the vehicle. He reached into the vehicle and pulled the keys out of the ignition and he described drug arrests such as the one that was occurring as very high risks. Both officers were concerned that Mr. Cox was reaching for a weapon such as a handgun, knife, bear spray, or a machete. Constable Stewart grabbed a hold of Mr. Cox's right arm and tried to pull his hand up and stated words to the effect of, "Give me your hand". Mr. Cox actively resisted, so Constable Stewart struck Mr. Cox in the side of the head with a flat, open palm, which he described as an open hand distraction technique usually employed as part of a physical takedown.
- [10] At that point Constable Stewart was able to gain control and the arrest proceeded normally with Corporal Larsen having Mr. Cox exit the vehicle. Corporal Larsen described Mr. Cox as cocky and he questioned the police evidence against him, including suggesting that the passenger would claim a spitball seen in the passenger area of the vehicle as his. He also stated that it was a lucky day for the police.
- [11] The events that I have just described surrounding the arrest were the subject of the voir dire. As I have stated, I have found the use of force proportionate to the circumstances of the arrest and not excessive. There was only one blow administered and Mr. Cox was not otherwise harmed.
- [12] The evidence seized at the time of the arrest included the following, 0.018 grams of heroin/fentanyl mixture and two spitballs, one on the driver's side seat of the car and one on top of the centre armrest. In addition, an LG cellphone was located in the vehicle. That phone received numerous calls during the arrest and was later analyzed to contain texts and other information consistent with a dial-a-dope operation. There was also a video of a drug transaction that seems to have inadvertently been on the phone that suggested that drug activities similar to what the police were surveilling were occurring as far back as September of 2018.
- [13] When Mr. Cox was returned to the police station, a strip search was conducted. Additional items were found in a plastic baggie that was secreted in Mr. Cox's underwear. They were discovered, as I have indicated, after that strip search, and they included 2.55 grams of a heroin/fentanyl mixture, consisting of 21 spitballs; .36 grams of a heroin/fentanyl mixture,

consisting of four spitballs. Other drug items were located in the plastic baggie, including 5.85 grams of crack cocaine, 42 spitballs; 11.77 grams of crack cocaine, 42 spitballs; and .75 grams of methamphetamine in three spitballs. In addition, at the time of the arrest, just over \$1,300 was found on Mr. Cox's person.

## PERSONAL CIRCUMSTANCES

- [14] I turn now to Mr. Cox's personal circumstances. A pre-sentence report dated November 19, 2020, Exhibit 6, was completed to assist the court in sentencing. Mr. Cox was born in Comox and he is 26 years of age. He has two brothers, one older and one younger. He describes a positive upbringing with loving and supportive parents. He has lived in Victoria, Comox, and Ottawa. His father joined the military when he was about 12, which occasioned some of the family moves. Mr. Cox's parents currently reside in Winnipeg, and Mr. Cox has lived in Courtenay, here on Vancouver Island, himself for the past six years. His parents are supportive of him and have submitted a letter on the sentencing hearing, which is Exhibit 4.
- [15] Mr. Cox was emotional during his pre-sentence report interview and was very concerned about the shame he has brought to his family and that he has potentially harmed his father's reputation in the military. Mr. Cox's mother has been present throughout the sentencing hearing, offering support to Mr. Cox. Mr. Cox recognized, in his interview with the probation officer, that his lifestyle choices leading up to his arrest were not in line with his upbringing. His relationship with his parents was very strained during the period he was selling drugs. He referred to his arrest as an intervention by the police.
- [16] Mr. Cox has completed some Grade 12 courses and a hospitality course. He had some difficulties during high school that led him to become a marihuana user during high school. He has never, however, been a user of illicit drugs such as the ones seized from him at the time of his arrest. He took the opportunity to sell drugs when the opportunity was offered to him.
- [17] Mr. Cox spoke eloquently and emotionally on his own behalf during the sentencing hearing. He acknowledged that at the time of the offence he was ignoring the danger of the illicit drug trade for the sake of making fast money and living a fast lifestyle. He recognizes that his actions crossed the line and put many lives at risk. He wants to make a positive contribution to society and he accepts responsibility for his offence. He stated to the probation officer that he recognizes that he will likely go to jail.
- [18] Mr. Cox seems sincere in his efforts to rehabilitate himself. He has obtained a position in a restaurant, the Atlas Café in Courtenay, as a member of the kitchen team. He is considered a punctual and trustworthy employee. His employer is aware of the charges, which has been confirmed by the Crown, and spoke highly of Mr. Cox to the Crown, as well as in a letter which is before me on sentencing. The employer states in the letter that Mr. Cox has had time to reflect on his bad decisions and has corrected his path. His employer is committed to having him as an employee and will rehire him if he is incarcerated.

[19] Mr. Cox has one prior unrelated conviction for assault in 2016. He received a suspended sentence and probation, and generally performed well on probation.

## SENTENCING PRINCIPLES

[20] I turn now to the sentencing principles that guide my sentencing decision. In *R. v. Lacasse*, 2015 SCC 64, Justice Wagner, now the Chief Justice of Canada, summarized the task before the court as one of the most delicate stages of the criminal justice process. The task is governed by s. 718 of the Criminal Code, and, although those objectives are clearly defined, it nevertheless involves the exercise of a broad discretion by the court in balancing all of the relevant factors.

[21] Section 718 of the Criminal Code reads as follows:

The fundamental purpose of sentencing is to protect society and 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 and the harm done to victims or to the community that is caused by 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 or to the community.

[22] In sentencing, the court must also keep in mind the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Achieving a proportionate sentence is a case specific determination that requires the court to do a multifactorial analysis tailored to the individual circumstances of the offence and the offender.

[23] On the sentencing hearing, counsel took me through a large number of sentencing decisions cited for sentence quantum or range purposes. Given the case specific nature of this process, I will not reference those cases in detail. I do wish to indicate that, as part of the deliberative process, I have considered those cases, and particularly the passages from those cases that I was specifically referred to by both counsel.

[24] The decision of *R. v. Smith*, 2017 BCCA 112, establishes a range of 18 months to 36 months, or higher, for a dial-a-dope operation where fentanyl is involved.

- [25] In *R. v. Schneider*, 2019 BCCA 310, the court suggested that a suspended sentence may still be available, but it is a rare exception which is appropriate in exceptional circumstances. There, the court substituted a suspended sentence in a case of a homeless addict who sold \$20 in fentanyl to an undercover officer and had made exceptional progress towards his own rehabilitation.
- [26] The case law repeatedly emphasizes the death and misery caused by drug trafficking operations such as these. Families are losing loved ones at an alarming rate. The problem is particularly acute during this pandemic. People are dying alone, in light of the social isolation caused by the pandemic, which has only magnified the problem. In stating that, I recognize that this offence took place prior to the pandemic, but the pandemic has illustrated the problem. Driving up to Campbell River, I noticed a large billboard warning users not to use alone. That is the extent to which this problem has become part of our everyday life. Constable Jones, in his evidence, provided expert opinion and spoke about the problem.

## AGGRAVATING AND MITIGATING FACTORS

- [27] I conclude, from the circumstances, that Mr. Cox would have been aware of this pressing social problem, but ignored it for the sake of living a fast lifestyle. He engaged in this behaviour solely for profit. He was not an addict himself. This is a highly aggravating factor on the sentencing.
- [28] Other aggravating factors include that Mr. Cox had been involved in this operation for at least a couple of months and that it was a dial-a-dope delivery type trafficking operation; that other drugs were present at the time of the arrest, suggesting a full service dial-a-dope operation; that the customers were vulnerable and highly addicted users and many were of Aboriginal heritage. The surveillance indicates Mr. Cox was dealing with these individuals as repeat customers and would have known their vulnerabilities and addiction. As noted in the materials provided by the Crown, Aboriginal users are suffering from the fentanyl crisis disproportionately to the rest of society and are dying at an alarming rate.
- [29] Another aggravating factor is that the analysis of the fentanyl in this case indicates that it was highly toxic and, in some cases, was three times what could be considered a lethal dose. As noted in the case of *Lloyd*, 2019 BCCA 128, Mr. Cox assumed the risk that what he was selling was fentanyl and that it was toxic, given the extent of the crisis.
- [30] In terms of mitigating factors, I must consider Mr. Cox's guilty plea, along with his relative youth and his lack of related criminal record. As noted in the case of *R. v. Kodimiyala*, 2020 BCCA 275, the fact that Mr. Cox has a loving and supportive family is not exceptional in and of itself, but I must consider it as I consider his prospects for rehabilitation. I must also consider Mr. Cox's willingness to accept responsibility for the harm caused by his behaviour. His words and actions have demonstrated insight. He genuinely seems to recognize the harm caused by his behaviour and seems determined never to find himself before the court

again.

## DECISION

- [31] As I have weighed the circumstances before me, both aggravating and mitigating, I have concluded, as guided by the case law, that denunciation and deterrence must be given primacy here. I am of the view that the circumstances before me are not truly exceptional in a manner that would allow me to impose a non-custodial suspended sentence. I am of the view that the position taken by the Crown is a fair and reasonable one and that it would have been open for the Crown to seek an even higher sentence of federal time. The sentence the Crown seeks is one that is available to me on these facts.
- [32] I have concluded, however, that I should give some credit to you, Mr. Cox, for the steps that you have taken towards your rehabilitation and for the degree of insight that you have displayed both to the probation officer and to myself. It seems to me that you are sincere and your insight is beyond what I see for the usual offender.
- [33] Mr. Cox, please stand.
- [34] I am sentencing you to a period in custody in a provincial institution for a period of 18 months.
- [35] Pursuant to the provisions of s. 487 of the Criminal Code, I order you to provide a sample of your DNA by means of the least intrusive method possible.
- [36] Pursuant to s. 109 of the Criminal Code, you are prohibited from possessing any firearm, other than a prohibited firearm or restricted weapon, and any crossbow, restricted weapon, ammunition and explosive substance for a period of 10 years; and any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.
- [37] Mr. Cox, you have demonstrated a real desire to turn your life around. It seems, from what you have told me and the probation officer, that you do have a real desire to make your reparation to society and to rehabilitate yourself. You have a loving and supportive family. Everybody makes mistakes. You have demonstrated that you are ashamed. The reality is, these things happen, but it is also incredibly dangerous behaviour; and, if you come before the court again, you can anticipate that you would likely be serving a federal sentence. So I do wish you luck in your rehabilitation and I hope you take the opportunities that will be available to you, in terms of programming, to rehabilitate yourself; and I wish you success as you move forward with your life.
- [38] Is there anything further?

[39] MS. RUTHERFORD: Yes, My Lady. Crown enters a stay of proceedings on the remaining counts. As well, I realize I neglected to address forfeiture. I have briefly consulted with my friend. I understand that a forfeiture of the money and the phones that were seized is not opposed.

[40] THE COURT: All right.

[41] MR. CHESTERLEY: Correct, My Lady.

[42] THE COURT: All right. So the forfeiture of the money seized and the phone --

[43] MS. RUTHERFORD: And the phones that were seized, My Lady. And I'll have a draft sent to Your Ladyship for signing.

[44] I apologize, I should've had it today, but it --

[45] THE COURT: All right. So I will --

[46] MS. RUTHERFORD: -- just escaped my notice.

[47] THE COURT: I will order then forfeiture of the funds seized at the time of the arrest, along with the phone.

[48] MS. RUTHERFORD: Yes. Thank you.

[49] THE COURT: Thank you very much.

[50] Thank you to counsel for your assistance.

[51] This sentencing is concluded.

[52] THE CLERK: Thank you.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power

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