
CANADA / JUDGMENT

R. v. Davies

2019 BCCA 235

COURT

British Columbia Court of Appeal

DECIDED

12 June 2019

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2019 BCCA 235 R. v. Davies

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Davies,

2019 BCCA 235

Date: 20190612

Docket: CA46124

Between:

Regina

Respondent

And

Colton Davies

Appellant

Before:

The Honourable Madam Justice Bennett

(In Chambers)

On appeal from: An order of the Provincial Court of British Columbia, dated
May 30, 2019 (R. v. Davies, 2019 BCPC 107, North Vancouver Docket 64681-3-C).

Oral Reasons for Judgment

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

R. Leong

Place and Date of Hearing:

Vancouver, British Columbia

June 10, 2019

Place and Date of Judgment:

Vancouver, British Columbia

June 12, 2019

Summary:

Mr. Davies applies for bail pending his sentence appeal. He was convicted of offences relating to trafficking fentanyl. Held: application dismissed. The appeal has little merit and it is therefore unlikely that a fit sentence will be served by the time the appeal is heard in two months' time.

- [1] BENNETT J.A.: Colton Davies pleaded guilty to three charges involving the trafficking and possession for the purpose of trafficking drugs, including fentanyl. After receiving credit for remand time spent pre-sentence, he received an additional 16 months' incarceration, which was a total sentence of 32 months. He applies for leave to appeal the sentence, and for judicial interim release pending his appeal. The Crown consents to the application.
- [2] In my view, it is not appropriate to release Mr. Davies, but to set an early hearing date. Dates in June, July and August are available, and counsel have advised that the appeal is set for August 14, 2019.

Background

- [3] Mr. Davies was observed by police conducting himself in a manner consistent with someone who is selling drugs, commonly referred to as "dial-a-dope." A search of his residence resulted in the discovery of a significant quantity of drugs, which the sentencing judge considered placed him at the mid-level trafficking operation.
- [4] Mr. Davies knew that the drugs he was trafficking contained fentanyl, and was aware of the potential for deadly consequences. The Crown sought a term of 32 months. The defence position was for a sentence of time served on the basis that his case was one of "exceptional circumstances," which justified going outside the range of sentence for trafficking fentanyl, citing *R. v. Voong*, 2015 BCCA 285.

- [5] The sentencing judge accepted that Mr. Davies was no longer using drugs, had embraced Buddhism while in prison, and had the strong support of his family. She was aware that sentencing him to prison may interfere with his rehabilitation and cause him harm. She concluded, however, that the public interest would not be best served by imposing a sentence outside of the range.
- [6] Mr. Davies argues that these findings justified a conclusion that there were exceptional circumstances in his case, and that the sentencing judge erred in principle in failing to impose a sentence of time served.
- [7] Mr. Davies does not focus on the main principle in Voong, which is that not only must the offender turn their life around, but that the protection of the public must be better served by a non-custodial sentence. The sentencing judge concluded that it was not.
- [8] Judicial interim release is available pending an appeal against sentence, and the criteria are set out in s. 679(4) of the Criminal Code, R.S.C. 1985, c. C-46:
- 679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if, ...
- (b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or ...
- (4) In the case of an appeal referred to in paragraph (1)(b) [against sentence alone], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that
- (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
- (b) he will surrender himself into custody in accordance with the terms of the order; and
- (c) his detention is not necessary in the public interest.
- [9] Normally the first step is to determine whether leave to appeal should be granted. The refusal to grant leave effectively ends the appeal, and there is no review of that decision by a division of the Court.
- [10] I have concluded that I need not decide that issue, as I would not grant the application for release but do not wish to foreclose Mr. Davies from arguing his appeal.
- [11] In my view, the case turns on grounds (a) and (c). It is accepted that Mr. Davies will surrender himself into custody in accordance with the terms of the order.

- [12] In s. 679(4)(a), there are two issues to examine and weigh: whether the appeal has sufficient merit and whether hardship would be the result of failing to release an appellant. The two are inextricably linked. They are not decided as independent questions, but instead operate together.
- [13] The test for merit on a sentence appeal is more stringent than the test for judicial interim release pending a conviction appeal. The reason is simply stated, that at the sentence appeal stage, the conviction is no longer contested, and even the possibility of innocence is no longer an issue (see *R. v. Leis*, 2008 SKCA 103; Gary T. Trotter, *The Law of Bail in Canada*, loose leaf, 3rd ed. (Toronto: Carswell, 2010) at 10-36; *R. v. Wilder*, 2007 BCCA 344 at para. 14).
- [14] The question becomes whether there is sufficient merit in the appeal that a fit sentence will be served before the appeal can be heard and a decision rendered. If so, the hardship test has been met (see *Wilder*). If not, then it can hardly be said that there is unnecessary hardship serving an appropriate sentence.
- [15] The standard of review applicable to sentence appeals is relevant, as a sentencing judge is given considerable deference, absent an error in law or an error in principle (*R. v. Lacasse*, 2015 SCC 64 at para. 11). Unless there is an error that impacts the sentence, this Court will not consider reducing a sentence unless the sentence is demonstrably unfit. In addition, the effect of impacting the sentence means that deference is no longer as significant, and simply opens the door for review (*R. v. Agin*, 2018 BCCA 133 at para. 37).
- [16] The sentencing judge in this case reviewed the circumstances, considered the applicable law, including *Voong* and *R. v. Smith*, 2017 BCCA 112, and was alive to the issue facing her--a sentence within the range set by this Court or exceptional circumstances that would draw this case out of the range.
- [17] In my view, Mr. Davies has a difficult hill to climb with respect to convincing a division of this Court that the sentence is unfit to the extent that he would suffer hardship if he is not released on judicial interim release pending his appeal, particularly given that the appeal is set for hearing in August, and there are in fact earlier dates available if he wished to have his appeal heard more quickly.
- [18] In terms of the public interest, this criterion deals with the protection of the public and the public's confidence in the administration of justice. While Mr. Davies repeatedly committed offences while on previous judicial interim release, he has more recently been compliant with his judicial interim release terms, particularly since his release on judicial interim release in April 18, 2018.
- [19] The question, then, is whether an informed member of society would have their confidence in the administration of justice undermined by Mr. Davies's release. The answer is found in the fact that he would not suffer unnecessary hardship if he was not released. Releasing someone into the community pending an appeal with little merit, when there is no issue of guilt or innocence remaining, does, in my view, undermine the administration of justice and

society's interest in the reviewability of a judge's decisions is outweighed by the enforceability of those decisions (R. v. Oland, 2017 SCC 17 at paras. 47-48).

[20] Therefore, I would not decide the application for leave to appeal, dismiss the application for judicial interim release pending appeal and set the matter for hearing on August 14, 2019.

"The Honourable Madam Justice Bennett"

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