

CANADA / JUDGMENT

R. v. Desmond

2023 BCCA 442

COURT

British Columbia Court of Appeal

DECIDED

24 November 2023

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2023 BCCA 442 R. v. Desmond

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Desmond,

2023 BCCA 442

Date: 20231124

Docket: CA49190

Between:

Rex

Respondent

And

Terrel Desmond

Appellant

Before:

The Honourable Mr. Justice Groberman

The Honourable Justice Griffin

The Honourable Justice Skolrood

On appeal from: An order of the Provincial Court of British Columbia, dated
June 26, 2023 (sentence) (R. v. Desmond, Surrey Docket 238122-1).

Oral Reasons for Judgment

Counsel for the Appellant:

J. Singh

H. Patey

Counsel for the Respondent:

R. Leong

Place and Date of Hearing:

Vancouver, British Columbia

November 23, 2023

Place and Date of Judgment:

Vancouver, British Columbia

November 24, 2023

Summary:

Mr. Desmond appeals from a sentence imposed of two years' incarceration and 18 months' probation, following his guilty plea and conviction for two counts of trafficking, and two counts of possession for the purposes of trafficking, of controlled substances including fentanyl. Held: Appeal dismissed. The judge did not make errors of fact or principle that had an impact on sentence. The judge's proportionality analysis considered the seriousness of the offence, and Mr. Desmond's moral blameworthiness, in determining an appropriate sentence.

GRIFFIN J.A.:

Introduction

- [1] Mr. Desmond appeals from his sentence of two years' custody followed by 18 months' probation.
- [2] The sentence was imposed after he pleaded guilty and was convicted of two counts of trafficking in controlled substances, including fentanyl, and two counts of possession of controlled substances, including fentanyl, for the purpose of trafficking.
- [3] Leave to appeal his sentence was granted on July 27, 2023.
- [4] Mr. Desmond argues on appeal that the sentencing judge erred in four ways:
 - a) in questioning whether Mr. Desmond accepted responsibility for the offences;
 - b) in concluding that Mr. Desmond was involved in "price negotiation and deal-making" as part of his offending;

- c) in placing too much emphasis on his criminal record, which predated the offences at bar by a decade or more; and
 - d) in considering Mr. Desmond's degree of moral blameworthiness, giving insufficient weight to a report that assessed the impact of race and culture (the "IRCA"), in light of Mr. Desmond's heritage as a Black Nova Scotian.
- [5] Mr. Desmond submits that these are errors in principle.

Standard of Review

- [6] A number of Supreme Court of Canada cases have set out the legal limits of an appeal court's ability to interfere in a trial court's imposition of a sentence, as often summarized in other decisions of this Court: see *R. v. Friesen*, 2020 SCC 9; *R. v. Lacasse*, 2015 SCC 64, *R. v. Parranto*, 2021 SCC 46; *R. v. L.S.N.*, 2020 BCCA 109; and *R. v. Nystrom*, 2023 BCCA 232.
- [7] These cases emphasize that a trial court has the best ability to exercise the discretion to impose a fit sentence on offenders due to its closer connection to the circumstances of the offence, offender and the affected local community. This Court must therefore defer to the sentencing judge in most circumstances.
- [8] This Court is only justified in interfering with a sentence imposed by a trial judge in two categories of error: where the sentencing judge has committed an error in principle that had an impact on the sentence; or where the sentence imposed is demonstrably unfit: *R. v. M (C.A.)*, [1996] 2 S.C.R. 500 at para. 90, 1996 CanLII 230; *Lacasse* at paras. 41, 44.
- [9] Here, the sentence imposed for the trafficking and possession for the purpose of trafficking is within the range of sentences that have been imposed on other offenders for like crimes. The range for first time street level trafficking in fentanyl is 18-36 months' custody: *R. v. Smith*, 2017 BCCA 112 at para. 45. Trafficking in fentanyl is an especially serious offence because of the lethal nature of the drug. Thousands of people have died in BC due to drug overdoses. Often people who use drugs are marginalized to begin with, and so continuation of the illegal drug trade harms particularly vulnerable groups.
- [10] The proportionality principle is a fundamental principle of sentencing that requires the sentencing judge to consider both the gravity of the offence and the offender's degree of responsibility, also referred to as moral blameworthiness: s. 718.1, Criminal Code; *Friesen* at para. 30. The sentencing judge's reasons and the record must demonstrate why the sentence is proportionate to the moral blameworthiness of the offender and the gravity of the offence: *Parranto* at para. 40.
- [11] A range of sentences reflects the objective seriousness of the crime, not the type of offender: *R. v. Ellis*, 2022 BCCA 278 at para. 128. A range is a guideline only, and not a hard and fast rule: *Parranto* at para. 36.

- [12] Considering the gravity of the offence itself, it cannot be said that the sentence imposed is clearly excessive and therefore demonstrably unfit in the sense understood in the cases: see Lacasse at para. 52.
- [13] In my view the real questions on this appeal are whether the sentencing judge made an error in principle as it relates to appreciating the circumstances of Mr. Desmond and his moral blameworthiness, and if so, whether that error had an impact on the sentence. If we find that there was such an error, we must perform our own analysis to determine a fit sentence, although we must defer to the trial court's findings of fact that are not in error.

Analysis of Grounds of Appeal

Did the Judge Err Factually?

- [14] I will address the two grounds of appeal which together, in my view, challenge the judge's findings of fact. The appellant says that the judge erred in questioning whether Mr. Desmond accepted responsibility for the offences; and in concluding that Mr. Desmond was involved in price negotiation and deal-making as part of his offending.
- [15] Regarding Mr. Desmond accepting responsibility, the judge stated that:
- [45] Mr. Desmond is remorseful for committing these offences. According to his counsel, he understands the harm that his choices had on the community. The Impact of Race and Culture Assessment also speaks to Mr. Desmond's remorse but does not say very much, at least directly, about his acceptance of responsibility, other than that which may be to some degree implied by his expressing of remorse, his acknowledgment of the harm associated to his crimes, and by way of his guilty plea.
- [16] In the above passage the judge noted that Mr. Desmond expressed remorse, acknowledged harm, and pleaded guilty. These are clearly indicators that Mr. Desmond was accepting responsibility for the offences.
- [17] The IRCA did state that Mr. Desmond took responsibility for the offence. While the judge felt that the IRCA did not say "very much" about Mr. Desmond's acceptance of responsibility, this remark has to be read in the context of the whole of the reasons to mean that the report did not add any further details.
- [18] It cannot be said that the judge erred by overlooking Mr. Desmond's acceptance of responsibility. The judge expressly took Mr. Desmond's guilty plea and remorse into account as mitigating factors in sentencing: at para. 88(a) and (b).
- [19] As for the judge's finding that Mr. Desmond was involved in price negotiation and deal-making as part of his offending, this was mentioned as an aggravating factor at para. 87(e) and as a part of the judge's reasoning as to why a conditional sentence order would not be appropriate for Mr. Desmond: at para. 93.

- [20] The judge's conclusion appears to be an inference drawn from reading the Crown statement of facts. That statement of facts set out that an unknown male received calls on a cell phone for the first drug order, and adjusted the price for two drug purchases from \$60 to \$50. Mr. Desmond had been seen in a car with the cell phone, which was being tracked. He was alone in the vehicle when he delivered the drugs shortly thereafter.
- [21] It was not a far inferential leap for the judge to conclude that Mr. Desmond was the person responding to the phone requests as part of his drug delivery service. Nevertheless, I accept that the Crown did not make that submission directly.
- [22] Importantly, it is my view that the judge's reasons for imposing the sentence make it clear that this additional detail did not affect the sentence. This detail went to Mr. Desmond's precise role in drug trafficking which the judge was considering to compare or contrast to other offenders who have been sentenced for like offences, in accordance with the parity principle. The judge found it significant that Mr. Desmond was not offending to sustain a personal drug addiction, but for profit; and he was not simply a street level dealer, he was someone involved in a dial-a-dope drug dealing operation. The judge did not put him high up the chain of drug distribution, but instead recognized that he was "clearly at the end of the distribution chain": at para. 87(e). The judge was not wrong to consider these factors.
- [23] In my view, the judge's inference that Mr. Desmond also had a role in negotiating and pricing the one drug purchase did not overwhelm his views of Mr. Desmond's relative place in the chain of drug distribution and therefore did not affect his view of Mr. Desmond's moral blameworthiness or the sentence.
- [24] I therefore do not accede to these two grounds of appeal.

Did the Judge Err in Principle?

- [25] The other two grounds of appeal question whether the judge erred in principle:
- a) in placing too much emphasis on Mr. Desmond's criminal record, which predated the offences at bar by a decade or more; and
 - b) in considering Mr. Desmond's degree of moral blameworthiness, in light of Mr. Desmond's heritage as a Black Nova Scotian, giving insufficient weight to the IRCA report.
- [26] The judge found Mr. Desmond's criminal record "highly relevant". Nevertheless, he also expressly recognized that there was almost a ten-year gap in offending, and considered this gap to be a relevant mitigating factor: at para. 88(d).
- [27] It cannot be said that the fact Mr. Desmond had a prior record for trafficking and violent offences is entirely irrelevant. The relevance is apparent from the judge's review of other sentencing decisions. In many of them where conditional sentences were imposed, the offence in question was the offender's first drug trafficking offence and the offence was driven by the offender's own drug addiction.

- [28] The judge did not say as a matter of principle that a conditional sentence order would be necessarily precluded because of the prior offences, but found such a sentence inappropriate here after considering other sentencing decisions and comparing the circumstances of Mr. Desmond to other offenders. While another judge might have given it less weight, the fact that the sentencing judge gave the prior criminal record weight cannot be said to be an error in principle.
- [29] As for the consideration of the social context of Mr. Desmond's heritage, the IRCA report was admitted into evidence. It set out the background history of people with African ancestry in Nova Scotia, Mr. Desmond's connection with that history and his own challenges coming out of that history and in his immediate family. Mr. Desmond identifies racially, politically, socially and culturally as a Black Nova Scotian, with both biological parents having roots as African Nova Scotians (the report used the terms ANS and Black Nova Scotian interchangeably and I have therefore adopted that terminology). The judge referred extensively to the IRCA report. He relied on *R. v. Morris*, 2021 ONCA 680, in which this type of evidence was found relevant: at para. 13.
- [30] In considering the degree of responsibility of Mr. Desmond, the judge referred to the background provided by the IRCA and held:
- [40] In terms of the degree of responsibility of the offender, there are a number of factors requiring careful consideration. As already noted, the defence has put forward the Impact of Race and Culture Assessment, outlining the circumstances of the offender as a strong mitigating factor that would include reduce his moral culpability. This was endorsed by the earlier cited case of *R. v. Morris*, where at paragraph 91, the court stated as follows:

There can be no doubt that evidence on sentencing, describing the existence and effect of anti-Black racism in the offender's community and the impact of that racism on the offender's circumstances and life choices is part of the offender's background and circumstances. The evidence is not only admissible, it is, in many cases, essential to the obtaining of an accurate picture of the offender as a person and a part of society.

- [31] The judge noted the Crown's agreement that Mr. Desmond's moral blameworthiness may be to a degree reduced because of this social context: at para. 45.

- [32] The judge referred to this background as a mitigating factor at para. 88(c):

Mr. Desmond is a Black male of Nova Scotian descent, has experienced the consequences of overt intergenerational and systemic racism, as well as other life events that have limited his educational and employment opportunities and helped to drive him toward criminal conduct, thereby attenuating to some degree his moral blameworthiness for that offending

- [33] This Court agrees that social context evidence is relevant in assessing an offender's moral blameworthiness: see *Ellis* at para. 78.

- [34] The social context evidence in this case included the history of ANS, anti-Black racism and family economic challenges. This affected Mr. Desmond's moral blameworthiness and contributed to bringing him before the court, however, the judge still had to weigh the social context evidence with the seriousness of the offence in order to determine a proportionate sentence.
- [35] The sentencing judge stated that in addition to social context information, he must consider the community context: at para. 47. The judge referred to evidence of the number of deaths in the province suspected to be due to illegal drug toxicity, in the range of over 2,000 per year with steadily rising numbers over the last decade, many related to fentanyl which is often mixed with other drugs to increase potency and profit. The judge stated that this public health emergency would have been known to Mr. Desmond at the time of committing the offences, and was a highly aggravating factor: at para. 50.
- [36] I disagree with Mr. Desmond that the judge conflated the seriousness of the crime with Mr. Desmond's moral blameworthiness. Rather, given the notoriety of drug overdose deaths in this province, the judge inferred that Mr. Desmond would have known of the crisis of drug overdose deaths at the time he was offending, which goes to his moral blameworthiness.
- [37] In the sentencing judge's analysis, the seriousness of the offence would have justified a greater sentence than he imposed, but he reduced the sentence by taking into account the mitigating factors affecting Mr. Desmond, including his heritage as a Black male of Nova Scotian descent: see paras. 89-90.
- [38] Another sentencing judge may have balanced the factors differently in arriving at a proportionate sentence. However, this Court is not free to engage in this process unless an error in principle has been shown. In my respectful view, Mr. Desmond has not shown an error in principle.
- [39] I am therefore unable to accede to these grounds of appeal.

Disposition

- [40] For these reasons, I would dismiss the appeal from sentence.
- [41] GROBERMAN J.A.: I agree.
- [42] SKOLROOD J.A.: I agree.
- [43] GROBERMAN J.A.: The appeal is dismissed.

"The Honourable Justice Griffin"

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Prepared on 26 October 2026 · Esheria