
CANADA / JUDGMENT

R. v. Dickey

2015 BCSC 1210

COURT

Supreme Court of British Columbia

DECIDED

15 June 2015

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2015 BCSC 1210 R. v. Dickey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dickey,

2015 BCSC 1210

Date: 20150615

Docket: 24890-3

Registry: Quesnel

Regina

v.

Chad William Dickey

Before: The Honourable Mr. Justice Greyell

Oral Reasons for Sentence

Counsel for the Crown:

W.P. Riley, Q.C.

Counsel for the Accused:

A.H. Zipp

Place and Date of Trial/Hearing:

Quesnel, B.C.

June 15, 2015

Place and Date of Judgment:

Quesnel, B.C.

June 15, 2015

- [1] THE COURT: On April 3, 2014, I found Mr. Dickey guilty of unlawfully trafficking in cocaine and unlawfully possessing cocaine for the purpose of trafficking, contrary to ss. 5(1) and 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c.19 (the "CDSA"). My reasons for conviction are set out in *R. v. Dickey*, 2014 BCSC 1341.
- [2] The Crown at that time sought a sentence of two years and four months' incarceration, based on the mandatory minimum sentence of two years' incarceration mandated by Parliament in s. 5(3)(a)(ii)(A) of the CDSA. The Crown asserted Mr. Dickey's offences occurred in or near a public place usually frequented by persons under the age of 18 years.
- [3] On February 12, 2015, in reasons indexed as *R. v. Dickey*, 2015 BCSC 191, which I will refer to as my Charter reasons, I found the Crown had not proven the aggravating factors set out in s. 5(3)(a)(ii)(A) beyond a reasonable doubt, as the location of the offences could not be said to have been "usually frequented by persons under the age of 18", as that term was intended by Parliament.
- [4] Despite my finding that s. 5(3)(a)(ii)(A) did not apply to Mr. Dickey, I proceeded to consider the s. 12 Charter challenge brought by Mr. Dickey. After a thorough consideration of similar fact authorities, I found that had the aggravating factors set out in s. 5(3)(a)(ii)(A) been proven by the Crown, I would have sentenced Mr. Dickey to six months' imprisonment on each offence, the sentences to run concurrently. After further analysis, I found that the mandatory minimum sentence prescribed in the section of two years' incarceration would constitute cruel and unusual punishment contrary to s. 12 of the Charter, both in Mr. Dickey's particular circumstances and based on a reasonable hypothetical.
- [5] I subsequently concluded in *R. v. Dickey*, 2015 BCSC 625, the impugned section was not saved by s. 1 of the Charter.
- [6] Accordingly, with that background, the matter is now before me for sentencing Mr. Dickey.
- [7] The facts are set out in detail in both my conviction decision and in the Charter decision, but I will review them briefly here for the purpose of these proceedings.
- [8] On April 15, 2013, Mr. Dickey responded to a cellphone call from Corporal Anderson of the Quesnel RCMP, in which he agreed to sell him \$100 worth of cocaine. Mr. Dickey suggested the two meet at the old Maple Drive School, a building which was formerly used as a middle school. Mr. Dickey was watched by Corporal Anderson and two other undercover officers as he walked from his father's house, which he had just left, to the school, a distance of some three blocks. There were several cellphone calls between Mr. Dickey and Corporal Anderson as Mr. Dickey made his way to the former school grounds.

- [9] Mr. Dickey was arrested as he made his way along a sidewalk adjacent to the former school building. In the course of a search incidental to arrest, the officers found on Mr. Dickey's person a cellphone, \$198 in cash, and seven small zip-lock baggies, four of which each weighed .6 of a gram, one weighed .5 of a gram, and another, one gram. Another bag was empty but contained a residue of cocaine. In total, the cocaine found in Mr. Dickey's possession at the time of arrest totalled approximately 3.9 grams.
- [10] Corporal Anderson took possession of the objects seized, as well as Mr. Dickey's cellphone. The cellphone rang once at the scene of the arrest and had a notable ringtone that included the words "it's your drug dealer".
- [11] Corporal Anderson testified he kept possession of the cellphone to keep track of its use. He testified that evening he had a call from a person who identified himself as Tony, who complained about the quality of "the stuff" he had bought on a previous occasion. Corporal Anderson made arrangements to meet Tony at the old Maple Drive School in 10 minutes, and whereby Tony would take "another 80". That transaction was not consummated, as Corporal Anderson did not attend the meeting.
- [12] Mr. Dickey testified at the trial. While I did not accept his explanation for his activity the day of his arrest including his explanation he had lost his cell phone, and found his guilty of the offences after an R. v. W.(D.), [1991] 1 S.C.R. 742 analysis I accepted that he had become addicted to cocaine to assist him in pain management following a workplace injury to his knee. Mr. Dickey testified he stopped using cocaine the day of his arrest and he had not used it since that time.
- [13] I turn to the parties' position on sentencing.
- [14] The Crown says the appropriate range of sentence for an offender convicted of trafficking and possession for the purpose of trafficking in a dial-a-dope operation is between six and 12 months. The Crown in this case seeks a jail term in the mid- range or nine months' incarceration.
- [15] The Crown submits the primary principles of sentencing the court must take into account in the circumstances of this case are denunciation and deterrence. The Crown points to what it says are a number of aggravating circumstances: that is, that cocaine is a dangerous and highly-addictive prohibited substance, scheduled under Schedule I of the CDSA; that the offence involved dial-a-dope trafficking, an offence which involves a measure of sophistication as it entails what the Crown described as a structured business modality. It is a challenge to the police to detect and it is a challenge to apprehend offenders. The Crown relied on the many authorities of this court, of the B.C. Court of Appeal and other courts across Canada denouncing the devastating social impact dial-a-dope operations have on society.

- [16] The Crown also pointed to the fact that Mr. Dickey has a previous criminal record, while recognizing that record does not involve drug offences. The Crown says Mr. Dickey is or was not a youth in his early twenties at the time the offences occurred, and hence those cases which deal with younger persons are not particularly applicable to the facts of this case.
- [17] The Crown relied on many of the authorities cited during the Charter argument which contain the courts approach to sentencing persons convicted of trafficking in dial-a-dope operations and particularly dial-a-dope operations involving Schedule I drugs. The Crown relies on the following authorities: *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982; *R. v. Tran*, 2007 BCCA 613; *R. v. Lloyd*, 2014 BCCA 224; *R. v. Ash*, 2010 BCCA 604; *R. v. Ladret*, 2012 BCCA 401; *R. v. Ali*, 2010 BCCA 4; and *R. v. Cisneros*, 2014 BCCA 154. I have provided summaries of those cases in my Charter reasons.
- [18] In addition, for the purpose of these proceedings, the Crown has filed a supplementary book of authorities containing the following: *R. v. Ban*, 2014 BCCA 68; *R. v. Carrillo*, 2015 BCCA 192; *R. v. Charlton*, 2014 BCPC 292; *R. v. Datt*, 2014 BCCA 484; *R. v. Fargo*, 2015 BCCA 187; *R. v. Galang*, 2014 BCPC 240; *R. v. Hendy*, 2014 BCCA 485; *R v Scott*, 2015 ABCA 99; *R. v. Smith*, 2013 BCCA 173; *R. v. Taylor*, Victoria Registry No. 160892, B.C. Provincial Court decision, November 21, 2014; and *R. v. Voong*, 2014 BCPC 211; and a recent decision of the British Columbia Court of Appeal in *R. v. Oates*, 2015 BCCA 259. *Charlton*, *Galang*, *Taylor*, and *Voong* are under appeal.
- [19] Mr. Dickey's counsel submits that while denunciation and deterrence are appropriate principles which must guide this court in sentencing Mr. Dickey, the court must not lose sight of the principle of deterrence. Much of counsel's submission was premised on the latter principle.
- [20] Counsel for the defence relies on: *R. v. Ali*, 2010 BCCA 4; *R. v. Sidhu*, 2007 BCSC 876; *R. v. McKay*, 2012 BCCA 477; *R. v. Ahmaz*, 2013 BCCA 348; *R. v. Bier*, 2013 BCSC 2438; *R. v. Kumar*, 2013 BCSC 2171; *R. v. Van Dam*, 2013 BCSC 1121; *R. v. Heidari*, 2013 BCSC 252; *R. v. Olson*, 2013 BCSC 2238; *R. v. Cisneros*, 2014 BCCA 154; *R. v. Stinson*, 2014 BCSC 441; and *R. v. Voong*, 2014 BCPC 211.
- [21] In addition, for the specific purposes of these proceedings, Counsel relies on *R. v. Lui*, 2014 BCSC 1929; *R. v. Carrillo*, previously cited; *R. v. Fergusson*, 2014 BCCA 347; *R. v. MacDonald*, 2015 BCSC 400; *R. v. Oates*, 2015 BCSC 584; *R. v. Owens*, 2014 BCSC 32; and *R. v. Tucker*, 2011 BCCA 429.
- [22] Counsel for Mr. Dickey submits the court should take into account a number of factors in sentencing Mr. Dickey which distinguish this case from a number of the authorities cited by the Crown, and indeed authorities cited by the defence.
- [23] Firstly, the amount of cocaine involved was a quite small amount, indicating a small, unsophisticated dial-a-dope operation. Counsel pointed out Mr. Dickey did not use a vehicle, but rather walked to meet the arresting officers.

- [24] Second, at the time of the offence, Mr. Dickey was unemployed, that he had sustained a knee injury, had had an operation, was in pain, and as a result of that pain, became addicted to cocaine and was selling cocaine to support his own addiction.
- [25] Counsel submitted Mr. Dickey was of a relatively young age, being 27 years old at the date of the offence and that since his arrest, Mr. Dickey had turned his life around. Immediately upon his arrest, he had overcome his addiction to cocaine, had not used it since, had subsequently obtained a steady job which he had maintained with a local major employer for the last two years, and has many friends and family who support him and who attested to his general good character at this sentencing hearing by filing letters in Mr. Dickey's support.
- [26] The defence submits that an appropriate sentence in this case is a suspended sentence, perhaps with intermittent incarceration on weekends for a period of time or with a curfew for a portion of that suspended sentence.

Disposition

- [27] I have reviewed the cases referred to by counsel in support of their respective positions as to the appropriate range of sentence in this case. As will be judged by the number of cases cited there is a broad range of sentencing available to a trial judge, depending upon the circumstances of the offence and the circumstances of the offender.
- [28] That broad range is circumscribed by a range of sentences that are appropriate for the offences for which Mr. Dickey is charged. Ultimately the circumstances and background of each offender vary greatly. Sentencing is very much an individualized process ultimately involving an assessment of the circumstances of the offence and the individual offender.
- [29] The general sentencing principles applicable to the offences Mr. Dickey committed are clear.
- [30] In the Charter decision, I reviewed the importance of the principles of denunciation and deterrence in sentencing those who traffic in a Schedule I drug in a dial-a-dope operation at paragraphs 86 to 98. I referred to the cost to society, the disastrous social consequences to those who are users and to their families, and to the immense social cost that is involved including the cost of law enforcement. I do not intend to repeat those comments again in these reasons, except to reinforce the significance of the factors of denunciation and deterrence as underlying and being the primary sentencing factors in this case.
- [31] I have found this a most difficult sentencing decision.
- [32] Mr. Dickey was 27 years old at the time of the offence. He has no prior record for drug-related offences nor does he have a drug history with the police. He has two prior unrelated convictions: one for common assault in 2004, and one for refusing to provide a breath sample in 2008.

- [33] As stated, Mr. Dickey became addicted to cocaine after sustaining a knee injury and undergoing surgery. He said he commenced using cocaine to control his pain. Following his arrest, he was able to stop his addiction.
- [34] He has now been employed full-time at a local mill for the last two years with a major employer in the Quesnel area.
- [35] While there is clear evidence Mr. Dickey was operating a dial-a-dope operation at the time of his arrest, I conclude from the evidence it was a small-scale, unsophisticated operation, likely for the purpose of supporting his own addiction. The amount of cocaine involved was small. He did not possess other drugs, scales, score sheets, folded bills, or other paraphernalia often associated with higher-level dial-a-dope operations. As noted, he was not operating from a motor vehicle.
- [36] In Barrick, Mr. Justice Tysoe addressed the question of the range of sentences for dial-a-dope operations. He confirmed (referring to R. v. Martinez, 2001 BCCA 712) the range of sentences of incarceration for drug trafficking offences was as low as six months and as high as 12 months.
- [37] That range was again reiterated recently in Cisneros at para. 9, where the court referred to R. v. Gill, 2013 BCCA 320 at para. 23

Nevertheless, as the problems and tragedies associated with narcotic use have multiplied, this court has repeatedly indicated that a fit sentence for a dial-a-dope trafficker will generally be a custodial term of 6 to 12 months.

- [38] In Tran (also referred to in Gill), the court at para. 6 said "absent an out of the ordinary circumstance", a custodial sentence was a fit sentence for trafficking in cocaine in a dial-a-dope scheme where the offender was not an addict and participating solely for profit.
- [39] While denunciation and deterrence are important sentencing objectives, the Court of Appeal has also recently reiterated in Carrillo that the sentencing court may also consider a suspended sentence, primarily a rehabilitative sentence, where there are circumstances which are "out of the ordinary" or "exceptional". What is an "out of the ordinary" or "exceptional" circumstance must be decided on a case-by-case basis.
- [40] In my view, Mr. Dickey fits those circumstances. He became addicted as a result of an injury. He sold cocaine to support his addiction. He gave up drugs and his addiction immediately following his arrest. He found a steady job at which he is said to be doing well, and he has been employed in that position for some two years now. He has not been in breach of the terms of his release during the two years since the charges were laid. He is, from all accounts, from the words of MacKenzie J.A. in Carrillo at paragraph 33:

He was, and is, a changed man, based on the entire record, including defence counsel's submissions at sentencing, from the time he committed the offence. This characterization justified the judge's departure from the typical or usual range of sentence.

[41] Justice MacKenzie also said at paragraph 32:

Thus, sentencing is a "profoundly contextual" process particularly suited to the sentencing judge. The sentencing judge hears the submissions at first instance, gauges the relevant factors, and assimilates impressions that can be difficult to articulate such as the sincerity of expressions of remorse, and whether there is a real possibility of rehabilitation and genuine motivation for it. These factors may support "a justifiable case-specific basis" for imposing a sentence outside the identifiable range

[42] Some eight letters have been filed on behalf of Mr. Dickey by friends and family who support him. He is described as hard working; as having a great work ethic; as not being the same person he was; as having turned his life around; that he now leads a "clean and sober life"; that he is kind hearted; that he is helpful, insightful, and kind; and by several that he has expressed remorse for what he did wrong. All say it would be regrettable if he were to lose the progress he has made by going to prison.

[43] As noted at paragraph 35 in Carrillo, suspended sentences, while primarily rehabilitative, also address the issue of deterrence, as the offender can be brought back before the court for sentencing should he repeat his criminal conduct during the period he is on probation.

[44] The court may also take into account any adverse effects a denunciatory punishment would have on the rehabilitation of the offender, which can be justified in the overall interests in the protection and advancement of society. Here I refer to R. v. Pettigrew (1990), 56 C.C.C. (3d) 390, a decision of the B.C. Court of Appeal, at paragraph 10, which was cited in R. v. Datt at paragraphs 70 to 72.

[45] This case, in my view, is different from the circumstances before the Court of Appeal in Oates. In Oates, the accused was convicted of trafficking in crack cocaine. The sentencing judge sentenced him to a suspended sentence. The Court of Appeal found the judge erred, noting that Mr. Oates was "some years from his youth", being 31 years of age; that Mr. Oates, to use the words of Saunders J.A. "did not have the excuse of addiction, if addiction can be an excuse in such [offenders], as to which I make no comment in these reasons"; that more importantly, Mr. Oates was on probation at the time he was arrested for the offence; and that, as I read the decision, the only reference to rehabilitation referred to by the sentencing judge was at paragraph 9 of the Court of Appeal decision, a reference to "the rehabilitation he is undergoing".

[46] In this case, Mr. Dickey is not undergoing rehabilitation; he has taken steps to rehabilitate himself, is now rehabilitated, and is pursuing his career with his current employer. I consider the facts of this case as being significantly different from those under consideration by the Court of Appeal in Oates.

[47] Mr. Dickey, would you stand, sir.

- [48] Having considered the submissions of counsel and the authorities provided to me, balancing the sentencing principles of deterrence, denunciation, and rehabilitation, I sentence you to a suspended sentence for a period of 20 months and place you on probation for that period of time.
- [49] You must keep the peace and be of good behaviour. You must appear before the court when ordered to do so by the court. You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.
- [50] You must report within two working days to a probation officer, and thereafter as directed by your probation officer.
- [51] You must, in addition, perform 50 hours of community service work under the supervision of and to the satisfaction of your probation officer. These community service hours must be completed by the end of the sixth month of your term of probation.
- [52] Pursuant to s. 109 of the Criminal Code, I impose a 10-year firearm prohibition.
- [53] THE CLERK: Is that discretionary or mandatory?
- [54] MR. ZIPP: I think it's mandatory.
- [55] THE COURT: Yes.
- [56] MR. ZIPP: Is that right, Mr. Riley?
- [57] MR. RILEY: Yes.
- [58] THE CLERK: Thank you.
- [59] THE COURT: I do not impose a DNA order. That is a discretionary order.
- [60] I order forfeiture of the \$198 seized from you as proceeds of crime. Mr. Riley, that was s. 462.37 of the Criminal Code?
- [61] MR. RILEY: Correct, yes, My Lord.
- [62] THE COURT: Thank you. I order forfeiture of the cellphone that was seized from you under s. 16 of the Controlled Drugs and Substances Act.
- [63] You may be seated, sir.
- [64] Counsel, are there further submissions?
- [65] MR. ZIPP: Victim fine surcharge, My Lord, if he could have the statutory maximum for that, please?
- [66] THE COURT: Yes.
- [67] MR. ZIPP: Thank you. I think that's two months.

[68] THE COURT: Do you have any submission, Mr. Riley, on that?

[69] MR. RILEY: No, My Lord, thank you.

[70] THE COURT: Thank you.

"Greyell J."

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