

CANADA / JUDGMENT

R. v. Edwardsen

2021 BCCA 338

COURT

British Columbia Court of Appeal

DECIDED

22 September 2021

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2021 BCCA 338 R. v. Edwardsen COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Edwardsen, 2021 BCCA 338 Date: 20210922 Docket: CA45123 Between: Regina Respondent And David Harry Edwardsen Appellant Before: The Honourable Chief Justice Bauman The Honourable Madam Justice MacKenzie The Honourable Mr. Justice Harris On appeal from: An order of the Supreme Court of British Columbia, dated February 13, 2018 (sentence) (R. v. Edwardsen, 2018 BCSC 1013, Terrace Docket 30870-2). The Appellant, appearing via videoconference: D.H. Edwardsen Counsel for the Respondent: R. Leong T.C. Johnson Place and Date of Hearing: Vancouver, British Columbia September 9, 2021 Place and Date of Judgment: Vancouver, British Columbia September 22, 2021 Written Reasons by: The Honourable Madam Justice MacKenzie Concluded in by: The Honourable Chief Justice Bauman The Honourable Mr. Justice Harris Summary: Mr. Edwardsen appeals his global sentence of eight years for numerous drug and firearms offences on the basis it was "unfit and disproportionate". He contended the judge erred by relying on distinguishable case law; imposing a consecutive sentence for possession of the loaded restricted firearm; imposing a jail sentence for unlawful possession of certain firearms; and ordering forfeiture of firearms. Held: Appeal dismissed. The judge made no error in principle and imposed a fit sentence in all the circumstances. Reasons for Judgment of the Honourable Madam Justice MacKenzie:

- [1] The appellant was convicted on 14 of 17 counts of drug and firearms offences involving substantial quantities of cocaine, marihuana, and 96 restricted and non-restricted firearms: R. v. Edwardsen, 2017 BCSC 2237. Based on the totality principle, Justice Punnnett reduced the total sentence of 11 ½ years imprisonment imposed for the individual offences to a global sentence of eight years (less 379 days credit for pre-sentence custody): R. v. Edwardsen, 2018 BCSC 1013.
- [2] This Court upheld the conviction in July 2019: R. v. Edwardsen, 2019 BCCA 259, leave to appeal ref'd, [2019] S.C.C.A No. 337. Mr. Edwardsen now appeals, with leave, from sentence.

- [3] On the sentence appeal, the appellant contends the judge erred in imposing a sentence that is "unfit and disproportionate" by (1) relying on distinguishable case law that did not account for or properly weigh relevant factors; (2) imposing a consecutive rather than a concurrent sentence for the unlawful possession of a loaded restricted firearm; (3) imposing a jail sentence for the unlawful possession of firearms; and (4) ordering the forfeiture of firearms.
- [4] I discern none of the errors alleged; for the reasons that follow, I would dismiss the appeal. Circumstances of the Appellant
- [5] The judge set out the appellant's personal circumstances as follows:
- [11] Neither the defence nor the Crown requested a pre-sentence report. All information respecting Mr. Edwardsen was provided by his counsel and from letters of reference. Mr. Edwardsen is 55 years of age. He was born in New Westminster, British Columbia. Both of his parents have addiction issues. His mother died when he was young and his father spent time in the B.C. Penitentiary. His maternal grandmother and various aunts and uncles raised him. His was not a stable upbringing.
- [12] He has a Grade 8 education. He started logging when he was 16. He became self-employed in the logging industry. In 1990, he was injured in a fall and was off work for two years and in a brace for a further year. He has had difficulty staying employed in that industry.
- [13] He had four sons, two of whom are employed in the construction industry. His son Duston was killed in a logging accident. His younger son Dillon is a steel fabricator in Terrace. Mr. Edwardsen has three grandchildren.
- [14] After his arrest in September 2012, he was remanded to the Prince George Regional Correctional Centre. He was released on bail June 4, 2014. Michael Hall and an aunt and uncle were his sureties. When released he worked for Mr. Hall but under his bail terms he could not return to Terrace for about a year. For the past three years he has worked as a longshoreman in Stewart, British Columbia.
- [6] The judge included a detailed chart of the appellant's criminal record: reasons for sentence at para. 15. The record is lengthy; it begins in 1980 and includes convictions for assault and uttering threats, four dated convictions for possession of a narcotic, and a conviction in 2000 for possession of a narcotic for the purpose of trafficking. Circumstances of the Offences
- [7] The judge summarized the details of the offences at paragraphs 3-10 of his reasons. The Crown succinctly summarized those circumstances in its written statement as follows:
2. Mr. Edwardsen was the subject of a lengthy undercover police investigation. He was the head of a group that was trafficking cocaine, ecstasy, and marihuana in Terrace. The investigation culminated with the execution of a number of search warrants at Mr. Edwardsen's residence, a property owned by his son, and a shop he rented. The search of his residence led to the seizure of approximately 1.5 kilograms of cocaine, 3.3 kilograms of marihuana, 24 tablets of ecstasy, 41 firearms, over 3,000 rounds of ammunition, and \$47,000

in cash. The value of the cocaine alone, if sold at the gram level, was approximately \$146,000. The search of the property owned by Mr. Edwardsen's son led to the discovery of a marihuana grow operation. The search of the shop resulted in the seizure of an additional 57 firearms. [Footnotes omitted.] Convictions and Sentence

- [8] Justice Willcock summarized the convictions and sentence as follows (R. v. Edwardsen, 2018 BCCA 494 (Chambers) at paras. 4-5):
- [4] On October 2, 2017, the appellant was convicted by Punnett J. ("Trial Judge") of 14 drug and firearms offences, falling into the four groups described below. Counts 1 to 4 relate to drug trafficking at 3324 River Drive in Terrace. Counts 5 to 11 relate to the possession of marihuana and cocaine for purposes of trafficking, and firearms offences at the appellant's residence. Counts 12 and 13 relate to the possession of marihuana at a grow operation at property owned by the appellant's son. Count 14 was a firearms offence at an address on Bohler Road, a shop rented by the accused.
- [5] The sentences imposed for each group of offences were consecutive to one another. Before reduction to account for the totality principle and time served, the sentences imposed amounted to 11.5 years. Taking the totality principle into account, the judge reduced the global sentence to eight years' imprisonment.
- [9] The Crown sought a total sentence of 12.5 years (reduced to ten to account for the totality principle). The appellant sought a total sentence of five to six years. The following chart summarizes the parties' positions at sentencing and the sentences imposed on each count:
- | Count | Nature of Charge | Crown Position | Defence Position | Sentence Imposed |
|-------|--|---|--------------------------------|---|
| 1 | Drugs Trafficking - May 18, 2012 to September 7, 2021 | 1 CDSA s. 5(1) - Trafficking cocaine (6 grams) | 12 months concurrent | 6 months to 2 years concurrent |
| 2 | Drugs Trafficking cocaine (1 ounce + 4.5 grams) | 18 months concurrent | 18 months concurrent | 3 CDSA s. 5(1) - Trafficking cocaine (1 ounce) |
| 3 | Drugs Trafficking cocaine (1 ounce) | 18 months concurrent | 18 months concurrent | 4 CDSA s. 5(1) - Trafficking marihuana (0.5 pound) |
| 4 | Drugs Trafficking marihuana (0.5 pound) | 12 months concurrent | 12 months concurrent | 5 CDSA s. 5(2) - PPT cocaine (1.5 kilograms) |
| 5 | Drugs PPT cocaine (1.5 kilograms) | 4 years | 3 to 5 years concurrent | 4 years concurrent |
| 6 | Drugs PPT marihuana (3.3 kilograms) | 2 years | 2 years concurrent | 7 Criminal Code s. 95(1) - Unlawful possession of a loaded restricted firearm (loaded .40 calibre revolver) |
| 7 | Firearms Unlawful possession of a loaded restricted firearm (loaded .40 calibre revolver) | 5 years consecutive | 3 to 4 years concurrent | 4 years consecutive |
| 8 | Firearms Unlawful possession of 40 firearms [.22 calibre revolver (Count 8); shotguns (Counts 9 and 10); 37 other firearms (Count 11)] | 2 years concurrent | 6 months to 2 years concurrent | 2 years concurrent |
| 9 | Drugs Marihuana Grow Operation | 12 CDSA s. 7(1) - Production of a controlled substance (marihuana grow operation) | 1 year concurrent | 6 months 1 year concurrent |
| 10 | Drugs PPT (marihuana) | 1 year concurrent | 1 year concurrent | 13 CDSA s. 5(2) - PPT (marihuana) |
| 11 | Firearms Firearms Seized from Bohler Road | 17 Criminal Code s. 91(1) - Unlawful possession of 55 firearms | 1 year 6 months | 1 year |
- Reasons for Sentence

[10] In his reasons for sentence, the judge recognized deterrence, denunciation, and protection of the public as the main sentencing objectives given the circumstances and gravity of the offences: at para. 85. He also emphasised the principles of parity, totality, and restraint in imposing a deprivation of liberty where other sanctions are appropriate: at para. 83. The judge reviewed the parties' submissions on sentence for each count, including a detailed review of the case law cited by each party: at paras. 32-70.

[11] The judge identified the following aggravating factors (at paras. 74, 85):

- a) the running of a trafficking operation out of two locations as established by the undercover officer's purchases;
- b) the offences were planned and deliberate and engaged in for profit;
- c) there were a large number of unauthorized firearms and ammunition possessed by Mr. Edwardsen;
- d) a loaded firearm was present at his residence where drugs were packaged and sold;
- e) he abused his medical marihuana licence;
- f) he was the principal and guiding mind behind the drug operation;
- g) he has a criminal record; and
- h) he has a previous conviction for a designated substance offence.

[12] In turn, the judge identified these mitigating factors (at para. 75):

- a) He sought and obtained employment; and
- b) He complied with bail conditions.

[13] The judge applied the principles of sentencing, reviewed the relevant jurisprudence, and considered the appellant's circumstances to arrive at a sentence for each offence: at paras. 86-108. As discussed above, the offences were divided into four categories; the sentences ran concurrently within each category, but the categories ran consecutively to one another. The one exception was count 7, for possession of a loaded restricted firearm, for which the judge imposed a consecutive sentence within the category.

[14] The judge considered whether the sentences should run consecutively or concurrently: at paras. 102-103. He applied the totality principle, reducing the initial sentence of 11.5 years to eight years (less time served): at paras. 110-112. Finally, the judge ordered DNA collection, a prohibition on the possession of firearms, and forfeiture of firearms: at paras. 116-121.

Issues on Appeal

- [15] The determinative question before us is whether the appellant has established a basis on which to vary his sentence. To do so, the appellant must identify an error in principle that affected the sentence or show that the sentence is demonstrably unfit: *R. v. Friesen*, 2020 SCC 9 at para. 26.
- [16] Accordingly, the concerns raised by the appellant are conveniently framed as follows:
- a) Did the judge err in principle in a manner that affected the sentence imposed?
 - b) Is the sentence demonstrably unfit?
- [17] These issues must be viewed in light of the standard of review. Appellate courts owe significant deference to sentencing decisions by trial judges who hear the evidence and submissions and have the experience to best reflect the circumstances of the affected community: *Friesen* at para. 25; *R. v. Somers*, 2021 BCCA 205 at paras. 4-5; *R. v. Dhillon*, 2021 BCCA 271 at para. 3. Where the judge has not erred in law or principle or imposed a demonstrably unfit sentence, this Court cannot interfere merely because it would have weighed the evidence differently or imposed a different sentence: *R. v. Nasogaluak*, 2010 SCC 6 at para. 46.
- [18] In my view, the appellant has not met the high standard of review. I would grant leave to appeal the sentence, but would dismiss the appeal. The appellant has not established an error in principle or that the sentence is demonstrably unfit. Discussion
- [19] I observe at the outset that the appellant misapprehends the task of a sentencing judge and the role of this Court on review of a sentencing decision.
- [20] Sentencing is an inherently individual exercise; judges are granted broad discretion because they must consider the unique circumstances of each case. While broad, this discretion is not unlimited. Judges are guided by the principles set out in the Criminal Code and case law establishing a range of appropriate sentences for similar offences: *Nasogaluak* at paras. 44-45. The judge must identify the relevant principles and jurisprudence and apply them to the specific facts of the case.
- [21] The fundamental principle requires a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender": Criminal Code, s. 718.1. Other objectives of sentencing include denunciation; deterrence; separation of offenders from society, where necessary; rehabilitation; reparation; and promotion of responsibility: Criminal Code: s. 718. No one objective is determinative, and the sentencing judge determines the weight of each objective in the particular case: *R. v. Coons*, 2021 BCCA 116 at para. 42.
- [22] In this case, the judge identified deterrence, denunciation, and protection of the public as significant objectives: at paras. 85-95; 103. This is consistent with the case law: see e.g., *R. v. Hiscock*, 2020 BCCA 355 at para. 9; *R. v. Holt*, 2015 BCCA 302 at para. 9. While these are important sentencing principles for offences involving weapons, the judge must also

consider the offender's personal circumstances to arrive at a proportionate sentence: *R. v. Bird*, 2021 ABCA 243 at para. 20. The judge did so in this case. Other principles central to the judge's reasoning were parity, totality, and restraint: at para. 83.

- [23] I agree with the judge's identification of the relevant sentencing principles.
- [24] I turn to address the specific issues raised by the appellant. Issue 1: Was there an Error in Principle?
- [25] A sentence may be varied on appeal if there has been an error in principle affecting the result: *R. v. Lacasse*, 2015 SCC 64 at para. 44; *Friesen* at para. 26. Such errors include errors of law and failing to consider relevant factors (including aggravating and mitigating factors). As the Supreme Court of Canada explains in *Friesen*, weighing and balancing of sentencing factors may give rise to an error of principle in limited circumstances:
- [26] [...] The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably". Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence. If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit. [Citations omitted; emphasis added.] Did the Judge Rely on Distinguishable Case Law and Fail to Consider Relevant Factors?
- [26] The appellant contends the judge relied on distinguishable case law and failed to consider relevant factors, including the rural location of his property; his assertion of his legitimate need to possess firearms; his attempt to obtain a licence to possess the firearms; and his history of compliance with strict bail conditions.
- [27] The appellant distinguishes the circumstances of his offences from those set out in two cases to which the judge referred on the firearms convictions, particularly count 7. He appears to be referring to *Holt* and *R. v. Kachuol*, 2017 BCCA 292. The appellant submits the circumstances in those cases, in which "people were driving around in a vehicle with handguns and kilos of cocaine in downtown Vancouver," were very different from the circumstances of his offences. He says the following: In my case the handgun was in my home under my bed for my personal protection. I live ten miles out of Terrace in the bush. I have no neighbors around me and run a trap line. I have previously showed pictures to the courts in trail which showed the back door of my log home where bears have tried to get in. I've have wolf problems in the past and an incident where the wolves have killed my dogs. I am the holder of a trap line licence and an open miner's licence. Those are the only two licences that it is legal to carry a handgun and I feel a five year sentence is unjust punishment for having a handgun that is a tool of the trade. The drugs were in a totally different room, which was my office. I realize that I did not have my Firearms Acquisition Certificate, as I had taken the course and was just waiting for it. The two reference cases were completely different than my situation.

- [28] However, the appellant misapprehends the purpose for which a judge refers to other sentencing cases. It is not typically for the similarity of the facts, which can vary widely from case to case. Instead, judges refer to other sentencing cases both to identify the range of an appropriate sentence, and to identify the principles of sentence governing the particular offence and the circumstances of its commission.
- [29] As observed in Friesen, "sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality": at para. 33.
- [30] Here, the judge relied on Holt and Kachuol to emphasize the serious risk the appellant's conduct created for those involved in the drug trade and the public at large: at paras. 101, 103.
- [31] The judge's reference to cases with different facts does not constitute an error in principle in this case.
- [32] The appellant's concerns that the judge failed to consider his circumstances are not supported by the record. The trial and sentencing transcripts are replete with submissions from both parties on these very issues. The judge explicitly considered these points in his reasons. In the exercise of his discretion, he gave these submissions the weight he considered appropriate.
- [33] The judge noted the appellant's property was in a rural area and that the handgun was purportedly for personal protection; he was aware of the appellant's concerns about wildlife: at para. 30. He also noted the appellant ran trafficking operations out of his home where "people were coming and going": at paras. 74, 94. Finally, the judge referred extensively to case law cited by both parties in his reasons; he noted analogous and distinguishing characteristics of the cases and did not rely exclusively on the two precedents about which the appellant complains: at paras. 32-70.
- [34] Further, the appellant notes he had attempted to obtain his firearms licence, implying the judge failed to give this sufficient consideration.
- [35] The judge was aware of the appellant's attempt to obtain a licence for the unrestricted firearms, but noted this demonstrated the appellant knew he required a licence to possess the firearms: at para. 95.
- [36] In addition, the appellant submits he was virtually under house arrest for five years while on bail as he was not allowed to leave Terrace and had to check in to the RCMP station every Friday. He says the judge failed to consider these circumstances.
- [37] I disagree. Instead, the judge referred to the bail conditions in his reasons for sentence and engaged in a detailed analysis of the weight they ought to receive: at paras. 14, 75-80.

- [38] This Court owes significant deference to the judge's weighing of the relevant factors and can only interfere if this amounted to an unreasonable exercise of discretion that had a material effect on the sentence imposed: Friesen at para. 26. The judge explicitly considered the relevant factors and reasonably exercised his discretion. Thus, he made no error in principle. Issue 2: Is the Sentence Demonstrably Unfit?
- [39] The appellant further submits the judge erred by imposing a consecutive rather than a concurrent sentence for the possession of a loaded restricted firearm; imposing a jail sentence for the unlawful possession of firearms; and ordering the forfeiture of firearms. Did the Judge Err in Imposing a Consecutive Sentence for Possession of a Loaded Restricted Firearm?
- [40] The appellant argues the judge should have imposed concurrent sentences for all firearm-related offences because they did not involve violence and the firearms were not used in any other offences.
- [41] Sentencing judges have discretion to determine whether sentences run consecutively and concurrently. The case law directs sentencing judges to consider whether consecutive or concurrent sentences are most consistent with the totality principle, but their conclusions are afforded deference: Somers at paras. 47-48; R. v. Li, 2009 BCCA 85 at paras. 46-47.
- [42] In this case, the judge explained that consecutive sentences are appropriate where the convictions are different in substance from one another or are particularly serious: at para. 102, citing R. v. Fusaji, 2005 BCSC 1944. He identified and applied the governing authority, imposing consecutive sentences for each category of offences and for the most serious offence.
- [43] The appellant has established neither an error in principle nor a result that is demonstrably unfit. This argument must fail. Did the Judge Err in Imposing a Jail Sentence for Unlawful Possession of Firearms?
- [44] The appellant further contends the judge should not have imposed jail time for the unlawful possession of firearms. The appellant refers to these firearms as an "antique gun collection" and "family heirlooms". At sentencing, the appellant characterized the offences as being "regulatory" and on appeal notes he "could not find anywhere in the Criminal Code where [he] should have received any jail time for not having [a licence to possess the firearms]".
- [45] While the appellant attempts to minimize this offence as merely failing to have a licence, the conviction is for possessing a firearm knowing its possession was unauthorized, contrary to s. 91(1) of the Criminal Code. Again, the judge specifically discussed the appellant's attempt to obtain a licence, noting this indicated the appellant knew his possession of the firearms without a licence was unlawful: at para. 95. Further, in his submissions at sentencing, the appellant himself cited case law in which an offender received a one-year sentence for contravening s. 91(1) of the Criminal Code: at para. 66. This is the same sentence the appellant received: at para. 107.

- [46] In my opinion, the sentence is not demonstrably unfit. Did the Judge Err in Ordering Forfeiture of Firearms?
- [47] The appellant says the judge should not have ordered forfeiture of the firearms in the antique gun collection. He says these guns belong to his sons and he was not aware they could be subject to forfeiture.
- [48] At sentencing, the judge informed the parties that he would order forfeiture of the firearms unless the appellant could demonstrate they belonged to someone else. He said there would be an opportunity to make such an application: at paras. 119-121. The Crown points out that no one brought an application. The judge had the authority, pursuant to the Criminal Code, to order forfeiture. Absent a successful application opposing forfeiture, the order was appropriate.

Disposition

- [49] The appellant has not established a basis on which this Court could vary the sentence. There was no error of principle that materially affected the sentence, nor was it demonstrably unfit.
- [50] In the result, I would grant leave to appeal, but dismiss the appeal. "The Honourable Madam Justice MacKenzie" I AGREE: "The Honourable Chief Justice Bauman" I AGREE: "The Honourable Mr. Justice Harris"

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Prepared on 29 October 2026 · Esheria