

CANADA / JUDGMENT

R v. Esparza-Ochoa

2020 BCSC 861

COURT

Supreme Court of British Columbia

DECIDED

5 March 2020

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2020 BCSC 861 R v. Esparza-Ochoa

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R v. Esparza-Ochoa,

2020 BCSC 861

Date: 20200305

Docket: 45561-2

Registry: Penticton

Regina

v.

Armando Esparza-Ochoa

Before: The Honourable Mr. Justice G.P. Weatherill

Oral Reasons for Sentence

Counsel for the Crown:

D.A.S. Peltier

Counsel for the Accused:

M.A. Patterson

Place and Date of Trial/Hearing:

Penticton, B.C.

March 5, 2020

Place and Date of Judgment:

Penticton, B.C.

March 5, 2020

- [1] THE COURT: Mr. Esparza-Ochoa, you are 31 years of age and you are before me for sentencing, having pled guilty on November 4, 2019, to unlawfully importing methamphetamine into Canada on September 1, 2018, contrary to s. 6(1) of the Controlled Drugs and Substances Act.
- [2] The circumstances are not complex. You were caught crossing into Canada from the United States of America, approximately 300 metres west of the Osoyoos-Oroville port of entry, wearing a backpack, and were detected by a motion-activated camera that monitors the international boundary. The Royal Canadian Mounted Police were dispatched and located you hiding under some sagebrush some 30 metres away from where they had already found the backpack.
- [3] The backpack contained nine packages of methamphetamine weighing 12.8 kilograms, valued at \$230,400 if sold at the kilogram level; \$768,000 if sold at the gram level; \$365,712 if sold at the ounce level; and \$1.2 million if sold at the point level of .1 grams.
- [4] You have been held in pre-trial custody since your arrest on September 1, 2018, a period of 552 days.
- [5] I have had the benefit of reading a pre-sentence report dated December 10, 2019, prepared by Mr. Ron Allen, a probation officer, that summarizes your history and background. I have also had the benefit of reviewing the detailed circumstances of the offence that are set out in Exhibit 1. Those circumstances have been admitted on your behalf by Mr. Patterson.
- [6] Lastly, I have also had the benefit of hearing fulsome submissions from the Crown and from Mr. Patterson, setting out what each says your sentence should be. The Crown says your sentence should be eight years in prison less time served. Mr. Patterson says it should be four to five years in prison less time served.
- [7] Briefly, you were born in Mexico to Mexican parents. You are the second of four children. Your father was a field worker and your mother a seamstress and homemaker. Your parents separated when you were age 14, leaving you to raise your younger siblings with your older brother. You left school at age 14 to help support your family.
- [8] In 2009 at the age of 21, you left Mexico and moved to the United States seeking a better life. Initially you moved in with your father who was by then living in California, but later you moved to Oklahoma to live and work with your brother. After about 10 months, you moved back to California, and then to Chelan, Washington, where you worked as a fruit picker for three seasons. You have not returned to Mexico since 2009. You continued to work and send money to your mother in Mexico to help support her and your younger siblings.

- [9] You are not married, but you are in a relationship with a 50-year-old mother of four from a prior relationship. Her name is Ms. Espinoza, who is also a field worker with a green card. She currently lives in California.
- [10] At the time of your arrest, you were an illegal immigrant without any official status. You are planning to seek refugee status in Canada and hope to become a Canadian citizen. You also hope that Ms. Espinoza will eventually be able to join you. You are concerned that if you are deported to Mexico, your life would be in danger because you are now indebted to the persons who provided you with the seized methamphetamine that you imported into Canada.
- [11] You are described as a good man, a hard worker, and responsible. You have no history of drug or alcohol abuse. You have no criminal record, as far as I am aware. This is the first time you have been before the courts. It seems that what you did on September 1, 2018, was out of character for you. You are asking for a second chance and for the court not to punish you too harshly. You say that this offence occurred because you were pressured into it by a co-worker. You initially declined, but were eventually talked into it on the basis that you would be paid \$2,500 and the promise to help move your younger brothers into the United States.
- [12] It is on this background that I am to sentence you for what you did. I am obliged to take into account what are called aggravating circumstances and mitigating circumstances. By way of aggravating factors, the amount of methamphetamine involved was significant. The destructive and harmful potential effect 12.8 kilograms of that drug could have on this community or whatever community it was destined for and the lives it could negatively affect is a significant aggravating factor.
- [13] The law you broke is intended to protect the public from these types of illegal and life-ruining drugs. You also did not use a point of entry, which brings with it the chance of inspection. Here there was a deliberate attempt to evade and cross the unprotected border, and it is simply by pure luck that there was a motion-capture camera that detected your movement. That is an aggravating factor.
- [14] The entry into Canada with the drugs was a planned and deliberate act. That is an aggravating factor.
- [15] Your motivation to make a quick profit, although not a very high profit of \$2,500, importing drugs with a street value as high as \$1.2 million, is also an aggravating factor. As Mr. Patterson so aptly put it, for \$2,500 you sold your liberty.
- [16] By way of mitigating factors, you have no criminal record, you entered a guilty plea on the morning of the trial, you are a good family provider, you are not a drug user or an alcohol abuser, and you have accepted that what you have done is egregious.

- [17] Both the Crown and Mr. Patterson have suggested sentencing ranges for this offence. The Crown says it should be eight years. The Crown also asks for the mandatory 10-years firearms ban, forfeiture of the backpack and its contents, namely the 12.8 kilograms of methamphetamine, and a DNA order.
- [18] On your behalf, Mr. Patterson submits that your sentence should be four to five years in prison. He argues that your motivation for committing this offence was to make a quick \$2,500 and get some help with your younger brothers getting into the United States. He says that you stupidly agreed, without fully considering the risks of getting caught, the consequences of getting caught, the possible sentence you would get, and the consequences to you and your family once you have served your sentence from those who owned the methamphetamine seeking revenge. Mr. Patterson argues that your moral blameworthiness is low and that, combined with your circumstances, should result in a sentence at the lower end of the range.
- [19] Importing the volume of methamphetamine you did is obviously a very serious criminal offence. Methamphetamine is a Schedule I drug that carries with it a maximum penalty for importation of life in prison.
- [20] Your background is also an important factor. You are relatively young with no criminal record. You have had an unfortunate upbringing with your parents separating when you were 14, forcing you to leave school to support your mother and younger brothers. You are what is known in the trade as a courier or a mule. You were duped into carrying the backpack across the border on the promise of receiving \$2,500 and assistance getting your brothers into the United States. As unsophisticated as the process may have been, you are by no means innocent.
- [21] I have been referred to a number of cases by Crown and Mr. Patterson in support of their respective positions on what your sentence should be. The Crown relies on: *R. v. Grossman* (January 14, 1998), Vancouver Registry No. X048230 (S.C.); *R. v. Dyal*, 2007 BCSC 623; *R. v. Pocasangre*, 2013 BCSC 193; and *R. v. Francis*, 2008 BCCA 309.
- [22] Mr. Patterson relies on: *R. v. Legerton*, 2015 ABQB 268; *R. v. Chukwu*, 2011 ONSC 2216; and *R. v. Bassi*, [2011] CarswellAlta 1973 (Q.B.).
- [23] I have reviewed all of these cases. While helpful guidelines, they are only examples of what sentencing has been imposed in other cases involving similar offences and offenders with other backgrounds. I am particularly persuaded by the comments of Justice Romilly in *Grossman* at para. 24 in commenting on whether or not couriers should be treated more leniently than other drug importers. At para. 24, he states:
- [24] Couriers are generally recognized as sympathetic and vulnerable individuals. This is often why they are recruited.

[24] He cites *R. v. Cunningham* (1996), 104 C.C.C. (3d) 542, where the Ontario Court of Appeal stated at p. 547:

We are not insensitive to this concern, mindful as we must be that in many instances, couriers tend to be weak and vulnerable, thereby becoming easy prey to those who engage in drug trafficking on a commercial basis.

[25] He also quoted from *R. v. Aramah* (1983), 76 Cr. App. R. 190, where Chief Justice Lane stated at p. 193:

The good character of the courier (as he usually is) is of less importance than the good character of the defendant in other cases. The reason for this is, it is well known that the large scale operator looks for couriers of good character and for people of a sort which is likely to exercise the sympathy of the court if they were detected and arrested.

[26] I am also persuaded by Justice Melnick's comments in *Pocasangre* at para. 11 where he referenced the comments of Justice Lamer in *R. v. Smith*, [1987] S.C.J. No. 36, as follows:

Those who import and market hard drugs for lucre are responsible for the gradual but inexorable degeneration of many of their fellow human beings as a result of their becoming drug addicts. The direct cause of the hardship cast upon their victims and their families, these importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts in order to feed their demand for drugs. Such persons, with few exceptions, should, upon conviction, in my respectful view, be sentenced to and actually serve long periods of penal servitude.

[27] I agree that couriers of drugs such as methamphetamine should not be treated any differently from other importers. Sentencing is an individualized process and each sentence must fit not only the crime but the offender and his or her personal circumstances. For a first-time offender such as you, importing illegal drugs into Canada carries with it a range of six to 12 years. Ranges, of course, are just guidelines, they are not binding.

[28] Mr. Esparza-Ochoa, I have considered the submissions I have heard, the case law that I have been provided, the aggravating and mitigating circumstances, your clean criminal record, the fact that you have taken responsibility for what was a very poor decision.

[29] I am mindful of the principles of sentencing. Denunciation and general deterrence is the prime objective here. In the circumstances, the other sentencing principles set out, for example, in s. 718 of the Criminal Code, take a back seat.

[30] Once you have served your sentence, and subject to your stated intention to apply for refugee status, you will likely be deported from Canada. Accordingly, I consider that rehabilitation does not play a significant role in the sentence I intend to impose. I am also mindful of the principles of restraint and proportionality.

- [31] Taking into account all the principles of sentencing, but in particular the overriding principle in this case of general deterrence, the seriousness of the offence, the amount of methamphetamine involved, I agree with the Crown that a period of incarceration of eight years less time served of 552 days, with enhanced credit to 822 days --
- [32] THE INTERPRETER: Eight hundred and sixty-two days?
- [33] THE COURT: Twenty-two -- 28 days -- is the fit and proper sentence for you for this offence.
- [34] So Mr. Esparza-Ochoa, I sentence you on Count 1 to eight years' incarceration. With enhanced credit for the time you served, that means you will serve a further 2,092 days. I will tell you how I got to that number. Eight years times 365 days is 2,920 days -- 2,920 -- less the 828 days' enhanced credit is 2,092 days, divided by 365 is a further 5.73 years.
- [35] There will also be a mandatory 10 years weapons ban pursuant to s. 109 of the Criminal Code.
- [36] I am also ordering the forfeiture of the backpack you were carrying and its contents, namely the 12.8 kilograms of methamphetamine.
- [37] The Crown has requested a DNA order. Mr. Patterson on your behalf is not opposed, so I am going to make the order. So you will provide a sample of your DNA.
- [38] So Mr. Esparza-Ochoa, you are now age 31. You will be 36 when you have served your prison time. You were talked into a very risky venture of importing a very seriously harmful drug into Canada for profit. You were caught. At age 36, you will be young, still young, and will have the rest of your life ahead of you. Do not give into temptation to try and make a quick profit, no matter how tempting it may be or as easy as it may sound.
- [39] Mr. Esparza-Ochoa, I wish you well.
- [40] Now, Crown, what do you propose to do with the other two counts?
- [41] MR. PELTIER: Crown enters a stay of proceedings on the remaining counts. I can advise Your Honour I do have a forfeiture order prepared that you may sign, it is for the contents of the bag and the backpack.

"G.P. Weatherill J."

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