
CANADA / JUDGMENT

R. v. Farewell

2007 BCSC 160

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 160 R. v. Farewell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Farewell,

2007 BCSC 160

Date: 20070110

Docket: 16915

Registry: Rossland

Regina

v.

Robert Kelly Farewell and Tamara Lynne Farewell

Before: The Honourable Madam Justice Humphries

Oral Reasons for Sentence

January 10, 2007

Counsel for the Federal Crown:

F. Polak

Counsel for the Accused, R.K. Farewell:

T.L. Napora

Counsel for the Accused, T.L. Farewell:

T. Underwood

Date and Place of Trial:

January 8-10, 2007

Rossland, B.C.

- [1] THE COURT: Robert Kelly Farewell and Tamara Lynne Farewell have been convicted of producing marihuana and unlawfully possessing a controlled substance, that is, marihuana, in an amount exceeding three kilograms, for the purpose of trafficking, contrary to s. 7(1) and s. 5(2) of the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19. The matter first came before me in February of 2006, on a voir dire in which the accused challenged the search warrant as a violation of their rights under s. 8 of the Charter. I held that there was a violation, but the evidence was admissible under s. 24(2). A further argument under s. 11(b) of the Charter followed in October of 2006, and the trial on the merits has now been completed in January of 2007.
- [2] On this occasion, the accused admitted identity, location, jurisdiction; that they were producing marihuana in a grow operation on their premises on the outskirts of Fruitvale, B.C.; and that there was a sufficient amount of marihuana, an amount greater than three kilograms, as set out in Schedule VII to the Controlled Drugs and Substances Act, to support a conviction for possession for the purpose of trafficking. The only issue canvassed at trial was whether a large number of clones or clippings should actually be considered plants, an issue that is relevant to sentence but not to conviction, and convictions were entered on both counts.
- [3] The police executed the search warrant on an outbuilding near their residence on February 11, 2004. The officer with the warrant went to the door of the residence and spoke to a teenage boy. The other officers went to the outbuilding. The outbuilding was a converted garage in which several rooms had been partitioned off. One contained 633 four-inch plants, described as clones. One room contained 50 two-foot plants in a developing state of maturity, and one contained 24 two-foot plants in a bud state. There was no hydro bypass, but there were many lights, timers, blowers, fans, a humidifier, a dehumidifier, charcoal filters, barrels of nutrients, and various fertilizers and sprays. There were three hockey bags filled with loose marihuana in an attic in the outbuilding. There was a calendar for the previous year, 2003, with various notations in it respecting cutting clones, transplanting and turning various rooms and trimming bud.
- [4] The police officers walked through the various rooms and located Mr. Farewell in the clone room, involved in cutting clippings and planting them in little squares of grow material. Ms. Farewell was seated nearby, watering plants. The officer with the warrant was notified by radio that the parents had been located, and she went to the outbuilding, advised them they were under arrest and read the appropriate warnings to them. Both accused were cooperative upon arrest.

- [5] Back at the detachment, Mr. Farewell had a conversation with one of the officers which was admitted to be voluntary. Mr. Farewell asked who had "ratted" him out and suggested he could provide information to the police himself, if his equipment were returned. His offer was not taken up, and he asked the police if they were impressed by the cleanliness of his operation and the quality of the marihuana. The officer told him it was a nice set-up, with very large bud. She described Mr. Farewell's demeanour as friendly and cooperative. Both accused were released on promises to appear, without conditions.
- [6] The exhibit officer inspected the clones and noticed that they were in different stages of developing roots. The expert witness called by the Crown said that not all clones could be expected to develop to mature plants. Taking the total number of plants as 707, and assuming one ounce of bud per plant, the expert postulated a range of values based on sale by ounces at \$250 to \$300 per ounce at \$176,750 to \$212,000, and based on sale by pounds of \$96,800 to \$123,200. The exhibit person sampled two plants and obtained five ounces of bud from each plant.
- [7] I will now go into the background of the offenders. According to her counsel's submissions on sentence, Ms. Farewell is 41 years old. She has two children: a daughter, 19, with whom she lives; and a son, 16, who lives with Mr. Farewell and whom she sees every day. The couple separated last year, apparently because of the stress over the matter before the court. Their jointly owned home was sold and they have moved from Fruitvale to Trail, where each lives in rental accommodation. At the time of the arrest, Ms. Farewell was running her own flagging business, but it was not lucrative. In May of 2005, she started a housekeeping job at a local care centre and continued to upgrade her first aid training and transportation endorsement. She now works full-time as a first aid attendant on a project basis and is currently employed at the Waneta power station. According to her counsel, this event has destroyed her family and has affected her self-esteem, her reputation in the community and her finances. Ms. Farewell has no criminal record.
- [8] Mr. Farewell is 44 years old. He dropped out of school in Grade 8 and worked as a logger in Sechelt until about 10 years ago. He developed severe tendonitis and is on a permanent disability pension, receiving \$1,500 per month from WCB and CPP. According to his counsel, the delay while his disability pension was sorted out caused severe financial hardship for him and the family, and he resorted to criminal activity to avoid being put in that position again. He currently lives in Trail with his son and takes care of Ms. Farewell's father, who lives in his own residence but requires assistance with his medical appointments, et cetera. Mr. Farewell has no savings and lives in rental premises. Obviously, he too has gone through the breakdown of the marriage and the loss of his house, which counsel suggests centres around the events before the court. Mr. Farewell has a record for assault and obstructing a police officer in November of 2006, mischief in 1995, and convictions for assault, careless storage of a firearm, and a driving offence in the 1980s. There are no drug convictions. He has never received a prison sentence.

- [9] The Crown says the range of sentences for this offence is 12 months to two years less a day, and submits that an appropriate sentence for Mr. Farewell is 18 months, and for Ms. Farewell, 12 months. Crown opposes a conditional sentence order, submitting that specific and general deterrence as well as denunciation are of paramount importance in these circumstances. He referred to a series of cases which have set out the concerns the courts have had in addressing this problem. He submits that while producing marihuana itself is not a violent offence, the marihuana industry itself is a magnet for violence. Drug rip-offs are common. It attracts the criminal element with its high profit margin and the ability to launder money through the community, tax-free.
- [10] The Crown says it is relevant that the offence before the court now was premeditated, planned, organized and well-executed. The garage was organized into a three-stage grow operation, and whether or not the 633 clones had rooted, the clear intention was for them to be nurtured into productive plants. Crown characterizes this as a sophisticated operation, producing high quantities of bud. The potential value, based on a conservative calculation, was in the range of just under \$100,000 to \$200,000, depending on how the marihuana was sold. Both offenders were caught red handed, tending the plants. Their son, 13 years old at the time, was in the house nearby. The Crown points out that other than referring to Mr. Farewell's financial difficulties, neither offender has given any information as to why they embarked on this grow operation, thus making it difficult for the court to determine if they are capable of rehabilitation.
- [11] As for the defence position, both counsel acknowledge that a prison term is appropriate, but both say their respective clients should serve their sentences in the community.
- [12] Counsel for Ms. Farewell says specific deterrence has already been achieved because of the devastating effect these events have had on her client. As for general deterrence, it can be met through a severe restriction on her liberty brought about by appropriate terms and conditions. Counsel submits that the amount of plants that this operation had or could produce has not been proven with any certainty. There were only 74 mature plants with the 633 clippings or clones, which were still to develop with unknown success. As well, the grow operation was not in a residential area. It was in a garage on the outskirts of a small town. There was no hydro bypass or theft, and no weapons. Both offenders were cooperative throughout, and Ms. Farewell has no record. Her counsel says she is adamant she will never become involved in such a thing again, and she submits a conditional sentence order of 12 months would be appropriate.
- [13] Counsel for Mr. Farewell makes the same submissions in support of a conditional sentence for his client, acknowledging the main difference is Mr. Farewell's record. He says this operation, although commercial, is on the small side. He, too, says there is no risk of his client reoffending, although this seemed to be more because there is no chance he will get the money or facilities to do so, rather than through remorse. Counsel submits the loss of his client's property, savings and assets is a sufficient deterrent.

[14] The Criminal Code sets out the principles of sentence in ss. 718 and 718.2. Generally, those principles are denunciation, specific and general deterrence, and rehabilitation; the sections also include the necessity to recognize aggravating and mitigating factors. Section 718.2(d) requires the court not to deprive the offender of liberty if less restrictive sanctions are appropriate in the circumstances. Section 742.1 provides that where a court imposes a sentence of imprisonment of less than two years and is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentence as set out in 718 and 718.2, the court may order that the offender serve the sentence in the community on conditions.

[15] Two cases in our court have set out a thorough summary of sentencing cases on grow operations over the last six years - R. v. Shokar, 2006 BCSC 1088, and R. v. Koenders, 2006 BCSC 1045 - so, I will touch on only some of them.

[16] Each of those cases starts with a mention of R. v. Su, 2000 BCCA 480, a case of the Court of Appeal in which a sentence of two years less a day was reduced to one year for a first time offender with 300 plants in the basement of a home. The court there said at para. 13:

It is important to understand that the appellant was a first offender. In my opinion, in spite of that, a period of incarceration is the only fit sentence in this case. This is not a case for a conditional sentence. [The trial judge] said that there is a need for denunciation and deterrence for this kind of crime and I agree.

[17] Then a few months later in R. v. McLennan, 2001 BCCA 299, where there were 2,400 plants involved, and without referring to Su, another panel of the Court of Appeal substituted a conditional sentence order of two years less a day for a term of actual jail of the same length, holding that the trial judge placed too much weight on general deterrence.

[18] The next year, in R. v. Whyte, 2002 BCCA 293, the Court of Appeal, the same judge writing, with one dissent, said at paras. 5 and 6:

For many years it has been an important consideration in sentencing in this province to avoid, if possible, incarcerating first offenders for non-violent crimes and this is such a case. I think one of the aspects of conditional sentences is to continue that approach which the law has taken in recent years, I would say since the Second World War.

I do not consider that the learned trial judge here gave enough weight to that underlying philosophy of sentencing. On the other hand, the judge was right to consider the importance of deterrence. He perhaps might be said to have overlooked that a conditional sentence of imprisonment if the conditions are severe will very much restrict, and is intended to restrict, an offender's liberty.

- [19] Over the next several years, the Court of Appeal has made references to the approaches in Su and/or McLennan and Whyte, depending on the particular circumstances before them, including the size of the operation, the record of the offender and the potential to reoffend. Obviously, conditional sentences are not excluded from consideration for these offences, even with a large scale operation, and equally obviously, general deterrence, while important, cannot be the only consideration.
- [20] In *R. v. Innes*, 2001 BCCA 478, Madam Justice Ryan analyzed the approaches in Su and McLennan and said, given the difference in the factual situations, the two cases were of insufficient similarity to be compared. As I read those Reasons, the focus of the analysis for each trial judge must be whether, given all the circumstances of the offence and the offender, a conditional sentence will fulfil the objectives of denunciation and deterrence.
- [21] Two cases from the Provincial Court were put before me (*R. v. Teleske*, 2005 BCPC 33, and *R. v. Black*, 2005 BCPC 115), in which each judge said that while his own view was that "real jail" was the appropriate presumptive sentence for a first-time marihuana producer, the Court of Appeal consistently disagreed. In both cases, the judges had before them joint submissions for conditional sentences, and based on the repeated comments of the Court of Appeal, they went along with the submission. Whether they would have done so if the Crown had taken a contrary position is not clear.
- [22] The judges in *Shokar* and *Koenders*, in this court, did not have joint submissions before them, and in neither case did they impose a conditional sentence. In *Shokar*, the accused had no criminal record, but had a weapon on the property and was stealing electricity. The number of plants was over 2,000. The judge noted the factors weighing in favour of a conditional sentence but said this at paras. 48 and 49:

The difficult issue in this case is whether a conditional sentence would serve adequately to denounce the unlawful conduct and to deter others from engaging in like activities, in order to earn what they may perceive to be an easy dollar.

...a conditional sentence may be inappropriate if the risk of being caught and having such a sentence imposed is viewed by others as a justifiable cost of conducting this highly lucrative illegal activity.

- [23] He noted the escalation of grow-ops in his community, which was Chilliwack, and said that conditional sentence orders did not appear to be viewed there as harsh penalties. Recognizing the need for greater deterrence, he imposed a 12-month custodial sentence.
- [24] The facts in *Koenders* were even more serious, in that each accused had a lengthy involvement in the drug world and a criminal record relating to drugs, and each received a custodial sentence of two years less a day.

- [25] The real tension in the cases appears to be over whether a conditional sentence would ever be properly perceived by the public as a sufficient indication of society's denunciation and the need for general deterrence. The Court of Appeal insists that it can: the public just has to be properly informed about the nature of conditional sentences. The trial courts, by and large, seeing these cases in their communities, are not convinced that anything other than actual jail will serve the purpose of bringing the appropriate message to the community.
- [26] My task is to look at the circumstances of the present offence, look at the offenders, and impose a just and fit sentence. In neither case has the Crown suggested a sentence over the provincial range is appropriate, and the case law supports that position. Therefore, the option of a conditional sentence is available. Can the principles of sentence realistically accommodate such a sentence for this offence?
- [27] I agree with the Crown that there is a troubling lack of information before the court, on this occasion, as to the circumstances surrounding how and why this grow-op was set up. Neither offender sought to appropriate or to avoid the greater share of responsibility. They appear to accept it equally.
- [28] Counsel for the Farewells argue that this is not a large operation, and point to the evidence regarding the survival of the clippings. However, the important point is not whether all 633 plants would survive but that the obvious intent was to nurture as many as possible to maturity. The operation, though not as big as those found in some of the other cases, was well run and productive. I note it was in a rural area, on the outskirts of town, and did not involve theft of electricity. The destination of the hockey bags of marihuana is unknown.
- [29] First, for Ms. Farewell, this is a first offence. She has upgraded her education and is gainfully employed. Insofar as rehabilitation is an issue, it appears that she has made an effort. On the other hand, she has expressed no remorse for her conduct, while greatly regretting the consequences. However, there is no suggestion she is a danger to the community. In fact, she is working in a service occupation at present. In my view, considering all the principles of sentence, it is appropriate to order that Ms. Farewell serve her sentence under house arrest, with restrictive terms. There is no reduction to a conditional sentence, no parole or remission. The entire sentence must be served. I impose on Ms. Farewell a sentence of nine months on each of Counts 1 and 2, to be served concurrently in the community, on conditions which I will go through in a minute.
- [30] As for Mr. Farewell, his previous record is a serious aggravating factor. Most of it is very old, although it does include two convictions for assault. The last convictions for assault and obstructing a police officer were very recent. His role in the care of his son and his father-in-law is very troubling in the context of considering a custodial sentence, but in my view I cannot be satisfied that he does not pose a danger to the public in view of his record, and as well I cannot be satisfied that the principles of denunciation and deterrence can be adequately addressed in his circumstances without a real custodial sentence.

- [31] Sentences of actual imprisonment are subject to the considerations of parole and remission. I am mindful of what might turn out to be a disparity in the supervision of Ms. Farewell and Mr. Farewell as a result of his potential release on parole while she is still under house arrest, and that is why I have sentenced her to a period even less than her counsel suggested, while recognizing that the decision as to whether and when Mr. Farewell will be released is for the Parole Board.
- [32] It is difficult, in the circumstances of this case, where one offender has a record and the other does not, to ensure that the sentences are respectively and comparatively appropriate. The Court of Appeal has not made clear the significance, in time, between a conditional sentence and a term of actual imprisonment. In McLennan, they simply converted the non-conditional sentence to a conditional sentence, and in Whyte, they substituted a conditional sentence of two years less a day for a one-year term of imprisonment. It is a matter of common sense, however, that serving a term of imprisonment in an institution is considerably different than serving it in the community.
- [33] Considering all of the circumstances of this offence and comparing it to the sentences imposed in similar situations, Shokar being the most similar, and that involved a weapon and a hydro bypass, I sentence Mr. Farewell to a period of nine months' incarceration, followed by a period of probation for one year. Therefore, there is a nine-month conditional sentence for Ms. Farewell and a nine-month period of incarceration for Mr. Farewell.
- [34] The terms for Ms. Farewell are to keep the peace and be of good behaviour; appear before the court when required to do so by the court; report to the supervisor within two working days, and thereafter as directed by the supervisor; remain within the jurisdiction of the court, unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and notify the court or supervisor in advance of any change of employment or occupation. You are not to be outside your residence, except for purposes of work and medical emergencies, without the written permission of your supervisor. You must carry the written permission slip with you when out of the house, as well as a copy of these conditions, and produce either upon request. You must immediately present yourself to the front door, at the request of any police officer or the supervisor who attends at your residence and announces that he or she is checking on house arrest. You must not possess any equipment suitable for growing marihuana indoors. I direct that you be given a copy of this order and an explanation of s. 742.4 and 742.6, that is, for a proposed change of conditions by the supervisor and the procedure upon breach of conditions, and s. 742.4, the procedure for applying to change the optional conditions.
- [35] As for Mr. Farewell's terms of probation, which follow upon his release from his period of incarceration, the terms of probation are to keep the peace and be of good behaviour; appear before the court when required to do so by the court; 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; report to a probation officer within two days of your release, and thereafter as directed; and you must

not possess any equipment suitable for growing marihuana indoors. I direct that you be given a copy of the probation order and an explanation of s-ss. 732.2(3) and 732.2(5), that is, changes to the conditions, and s. 733.1, which deals with failing to comply with the order.

- [36] As for all of the marihuana and the equipment that was collected following the arrest, the Crown applies for an order forfeiting it to the Crown, and a form of draft order has been prepared. In accordance with the forfeiture order, all of that material is forfeited to Her Majesty to be disposed of as the Attorney General of Canada directs.
- [37] As well, there will be an order under s. 109, prohibiting the possession of any prohibited firearm or restricted firearm and any crossbow, restricted weapon, ammunition and explosive substance for 10 years, unless Mr. Farewell already has a prohibition, in which case, it is for life -- I do not know what followed upon his previous conviction -- and any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life. In the case of Mr. Farewell, this is 10 years from release. In the case of Ms. Farewell, it is 10 years from the date of conviction.
- [38] Victim of crime surcharge was not addressed. Ms. Farewell is working, so she should pay the victim of crime surcharge. Mr. Farewell is not working and will be in custody, so I will waive the victim of crime surcharge for him.
- [39] Is there any clarification or anything else counsel wish to address?
- [40] MS. UNDERWOOD: Yes, My Lady, if I could. I believe it was the sixth term of Tamara Farewell's conditional sentence.
- [41] THE COURT: Yes?
- [42] MS. UNDERWOOD: Is that intended to be a catch-all term, that Ms. Farewell can be out of the residence at any other time, with the written permission of her conditional --
- [43] THE COURT: Yes, I expect her and her supervisor to work out a shopping schedule or whatever is required, rather than go into it here when I do not know her hours of work, store hours, et cetera, but --
- [44] MS. UNDERWOOD: That is absolutely -- that's fine. I just wanted to clarify that, My Lady. Thank you.
- [45] THE COURT: Yes.
- [46] THE CLERK: My Lady, are the firearms provisional on both counts?
- [47] THE COURT: Yes. And I believe I did say that the sentences were on each of Counts 1 and 2, concurrent. If I did not say that, that is what I am saying.
- [48] MS. UNDERWOOD: My Lady, may Ms. Farewell have two months to pay the victim fine surcharge?

[49] MR. POLAK: No position.

[50] THE COURT: No position?

[51] MR. POLAK: No position.

[52] THE COURT: Two months to pay, yes.

[53] MS. UNDERWOOD: Thank you.

[54] MR. POLAK: Nothing further.

[55] THE COURT: All right. Thank you.

"M.A. Humphries, J."

The Honourable Madam Justice M.A. Humphries

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