
CANADA / JUDGMENT

R. v. Farrell

2015 BCCA 477

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 477 R. v. Farrell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Farrell,

2015 BCCA 477

Date: 20151124

Docket: CA42853

Between:

Regina

Respondent

And

Jacobi Blu Farrell

Appellant

Before:

The Honourable Madam Justice Neilson

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated

August 6, 2013 (R. v. Farrell, 2013 BCSC 1537, Prince George Docket No. 33052).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

G. Parson

Place and Date of Hearing:

Vancouver, British Columbia

September 25, 2015

Place and Date of Judgment:

Vancouver, British Columbia

November 24, 2015

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Madam Justice Neilson

The Honourable Mr. Justice Groberman

Summary:

The appellant seeks leave for an extension of time to appeal against his sentence and if granted, appeals a three-year custodial sentence for three firearms offences under ss. 95(1) and 91(1) of the Criminal Code. The appellant argues that in light of the decision in *R. v. Nur* which struck down the three-year mandatory minimum sentence under s. 95(2), a lower sentence of two to two and one-half years' imprisonment is a fit sentence. Held: Application dismissed. The exceptional circumstances required to justify an extension of the time for appeal from sentence have not been established.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

- [1] The appellant Jacobi Blu Farrell applies for an extension of time to appeal from a sentence of three years imposed for three firearms offences. That sentence was imposed before the Supreme Court of Canada in *R. v. Nur*, 2015 SCC 15, struck down the three-year mandatory minimum under s. 95(2) of the Criminal Code, R.S.C. 1985, c. C-46.

Issues on Appeal

- [2] The first issue on appeal is whether Mr. Farrell should be granted an extension of time to apply for leave to appeal his sentence. If that extension is granted, the second issue is whether the three-year mandatory minimum sentence imposed remains a fit sentence in the absence of the mandatory minimum.
- [3] For the reasons that follow, I would dismiss the application for an extension of time to apply for leave to appeal. It is therefore unnecessary to address the second issue.

Analysis

- [4] Under Rule 3 of the Criminal Appeal Rules, SI/93-169, a notice of appeal from sentence must be filed within 30 days. Pursuant to s. 678 of the Criminal Code, that time to file can be extended by a division or single judge of this Court.
- [5] The leading authority on extension of time to file a notice of appeal based on a change in the law is *R. v. Thomas*, [1990] 1 S.C.R. 713. An appellant who has missed the time for filing an appeal and is therefore "out of the system" will not be granted an extension of time to appeal solely on the basis of a change in the law. As stated in *R. v. Wilson*, 2015 BCCA 270:
- [11] Thus, it is clear from *Thomas* that an applicant who is "out of the system" will not be granted an extension of time to appeal solely on the basis of a change in the law. The same approach was taken by this court in *R. v. Rojas* (1991), 2 B.C.A.C. 182, [1991] B.C.J. No. 2367, also an application to extend time based upon *Vaillancourt*. In denying the application, made six years after conviction of second degree murder, Mr. Justice Wood said:

But the law has clearly established that any merit that might reside in such an argument [based on a change of the law of constructive murder] today cannot by itself be a basis upon which an application to extend time can be granted in a case such as this.

- [6] An application for an extension of time is granted based on the criteria that normally apply in such cases: *Thomas* at 716. The criteria that normally apply in exercising the court's discretion to extend time for filing a notice of appeal are stated by Macfarlane J.A. for the Court in *R. v. Smith*, [1990] B.C.J. No. 2933 (QL) (C.A.):

4 The appellant in order to obtain an extension of time must satisfy certain rules. The governing principle on which this Court acts on applications to extend time for doing an act is that the applicant must establish special circumstances.

5 In considering whether there are special circumstances this Court has always taken into account such factors as whether: (1) the applicant had a bona fide intention to appeal before the expiration date of the appeal date; (2) informed the respondent either expressly or impliedly of his intention; (3) the respondent would not be unduly prejudiced by an extension of time; (4) there is merit in the appeal in the sense that there is a reasonably arguable ground; (5) it is in the interest of justice, that is the interest of the parties, that an extension be granted. How much

weight will be given to any of these factors in determining whether there are special circumstances will depend on the circumstances of each case.

- [7] In *R. v. M.A.G.*, 2002 BCCA 413, Esson J.A. explained that these factors are not conclusive:
- [28] My first observation is that the list of five factors are points which the court takes into account in deciding whether there are "special circumstances" which justify granting an extension. The five factors should not, although they sometimes are, be treated as an exhaustive checklist of conditions, all of which the applicant must meet in order to succeed on the application. The governing principle is that the applicant must establish special circumstances. In making that determination, the matter must be approached on the basis that the weight to be given to any factor will depend on the circumstances of each case. In my view, it must follow that in some cases the weight to be given to one or more criteria will be negligible because it is so heavily outweighed by the weight which must be given to others. [Emphasis added.]
- [8] The length of time between expiration of the right to appeal and the application to extend is always a matter to be considered: *Wilson* at para. 16, citing *M.A.G.* at para. 13.
- [9] It follows that the question to be addressed on this application is whether special circumstances exist to justify bringing this case into the system. I consider the factors identified in *Smith*. As to the second factor, Mr. Farrell did not inform the Crown of his intention to appeal. However, as noted by Saunders J.A. in *Wilson* at para. 15, this is really an aspect of Mr. Farrell's failure to file the notice of appeal within the time provided in the rules.
- [10] As to the third factor, the Crown acknowledges that it would not be unduly prejudiced by an extension of time. The real issues on this application are whether Mr. Farrell had a bona fide intention to appeal and whether there is merit in the appeal.
1. Did the appellant have a bona fide intention to appeal?
- [11] In order to address this question, some background is required. Mr. Farrell was convicted on two counts under s. 95 of the Criminal Code for illegally possessing a loaded Beretta semi-automatic pistol and a loaded sawed-off Mossberg shotgun. He was also convicted under s. 91 of illegally possessing a sawed-off Winchester shotgun.
- [12] At his sentencing hearing in June 2013, the appellant brought a constitutional challenge to the mandatory minimum sentence in s. 95(2) of the Criminal Code on the basis that it breached ss. 7 and 12 of the Charter. Both appellant's counsel and counsel for the Attorney General of British Columbia filed written argument on the issue. However, after a full day of oral argument the appellant abandoned his constitutional challenge. Counsel for Mr. Farrell stated:

I've had a change of instructions on the application for a constitutional remedy and that is that Mr. Farrell and his family have discussed the matter and my instructions are for Mr. Farrell to withdraw the application.

- [13] The Crown sought a sentence of five years for the possession of the three firearms. Since the constitutional challenge had been abandoned, the appellant sought the minimum sentence of three years. The trial judge imposed the mandatory minimum.
- [14] The appellant took no steps to appeal this sentence until approximately 20 months later, when the Supreme Court of Canada's decision in *R. v. Nur* was released on April 14, 2015. Crown agrees that the appellant moved expeditiously thereafter, applying for legal aid on April 21, 2015 and filing a notice of application to extend and a notice of appeal on June 10, 2015.
- [15] An appellant bears the burden of establishing special circumstances justifying an extension: *Smith* at para. 4; *M.A.G.* at para. 11; *R. v. Cooke*, 2013 BCCA 536, at paras. 16-17. In my view, the appellant has not established that he had a bona fide intention to appeal before the time for filing expired.
- [16] First, he formally withdrew his application to challenge the mandatory minimum during his sentencing hearing. He did so after his counsel acknowledged that he would not be able to succeed on the first part of the s. 12 argument, the "particularized inquiry" based on the offender's personal circumstances and the circumstances of the offence. Counsel for the appellant acknowledged that even without a mandatory minimum, i.e., prior to 2008, the range of sentence would have been one to three years for an offender in Mr. Farrell's circumstances, and could not be considered grossly disproportionate.
- [17] After abandoning his argument on the particularized inquiry, the appellant planned to pursue his challenge to the mandatory minimum sentence based on hypotheticals with respect to which a three-year minimum would be grossly disproportionate. As noted above, however, the appellant withdrew his constitutional challenge entirely on the second day of the sentencing hearing. In this court he explained his reason for doing so as follows:
6. I knew that even if the mandatory minimum sentence were to be struck down, I was still going to jail for some time. During [the] course of his submissions, Mr. Duncan told me that if I were to abandon the constitutional challenge, then it would be likely that the judge would reserve her decision for longer, which would then give me a longer time on bail before the sentence was imposed. This would mean that I would get some more time in the community to get my affairs in order before being sent to jail. This would allow me to go back to Squamish before sentencing. Even though I wanted to challenge the mandatory minimum, this was an attractive option for me and I was prepared to abandon the constitutional [challenge] if getting more time before sentencing was possible.

7. Mr. Duncan subsequently told me that he had approached the Crown and she would be content with agreeing to delay the sentencing decision. Based on that, I was comfortable with abandoning the challenge and instructed Mr. Duncan to that effect.
- [18] The appellant's explanation for abandoning his constitutional challenge at the sentencing hearing is not logical. It is apparent from the transcript that counsel and the Court anticipated a reserved decision on sentencing to deal with the constitutional issue which would have afforded the appellant time in the community. The withdrawal of the constitutional challenge made it more likely that the Court would render a decision quickly; the judge indeed stated that she would be in a position to impose sentence that day.
- [19] Second, the appellant was aware of the Nur case (2013 ONCA 677) and referred to it during the sentencing hearing; his counsel referred to the decision of the Ontario Court of Appeal being on reserve since February 2013. The Court of Appeal released its decision on November 12, 2013.
- [20] The appellant described the steps he took after being sentenced on August 6, 2013:
8. On August 6, 2013, I was sentenced to the mandatory minimum three-year term. Shortly after my admission to federal custody, I still wanted to challenge the mandatory minimum sentence. The fact that Justice Kloegman imposed the minimum sentence and generally had positive things to say about me when she delivered her reasons for sentence only made me think that there was something to this challenge in the circumstances of my case and that I could have benefitted from it.
9. Within a week or so of being sentenced, my mother and me discussed filing an appeal of my sentence by challenging the mandatory minimum. I contacted Prisoners' Legal Services and inquired about appealing. My mother contacted a lawyer to see if they would appeal my sentence. The advice that we got back was that there would be no point in appealing the mandatory minimum sentence at this point, in part, because the Ontario Court of Appeal's decision in *R. v. Nur* would likely be appealed to the Supreme Court of Canada and that the state of the law was up in the air. If the Supreme Court of Canada were to find that there was no constitutional violation, I would have no case. In addition, I knew I had to serve a prison sentence for at least a couple of years anyways.
10. For those reasons, I decided that I would wait to see what the Supreme Court of Canada would decide and whether the mandatory minimum sentence would stand. I did not communicate with the Crown at any point.
- [21] If the appellant had formed an intention to appeal, in my opinion he would have acted on that intention by filing a notice of appeal at the latest when the Ontario Court of Appeal struck down the mandatory minimum in November 2013. It seems improbable that he would be advised to wait before pursuing an appeal on the basis of a further appeal to the Supreme Court of Canada.

[22] In my view, the appellant deliberately abandoned a constitutional challenge and then chose not to pursue an appeal. Instead, he took a "wait and see" approach for approximately 20 months since he knew he would have to "serve a prison sentence for at least a couple of years anyway".

[23] As Saunders J.A. stated in Wilson at para. 17:

a person may form an intention to appeal but not act for such a long time that, absent a compelling explanation, one fairly may infer the intention to appeal has been so inconstant or has lapsed altogether such that one may say it was abandoned and that the diligence criteria is not established.

2. Is there merit in the appeal?

[24] The appellant submits that when the mandatory minimum sentence of three years is factored out of the equation, a fit sentence is in the range of two to two and one-half years' imprisonment. He submits that this strikes the appropriate balance between recognizing the seriousness of firearm offences while at the same time giving effect to the significant mitigating circumstances found by the trial judge.

[25] In order to assess the merits of the appeal, it is necessary to consider in more detail the circumstances of the offence and the offender.

[26] The appellant was found inside an apartment where he was staying at least temporarily. The front door of the apartment was barricaded and a futon blocked the front window. Surveillance cameras monitored outside activity. At the time of the offence he was dealing drugs as a mid-level gang member. The trial judge found the appellant possessed the firearms in connection with drug trafficking. She also noted the "accessibility of firearms for use" by the appellant:

The Mossberg and Beretta were loaded and ready to use. The Winchester and Mossberg were strategically placed under the mattress for easy grabbing by Mr. Farrell.

[27] Drugs were found in the residence which the trial judge described as "fortress like". The Beretta handgun had been illegally imported and one of the loaded sawed-off shotguns lacked a serial number. The judge considered the nature of the firearms to be an aggravating factor:

The nature of the firearms. The Beretta is a handgun considered more dangerous to public safety because of the ease with which it can be concealed and transported. It also appears from the lack of history of importation on the Beretta, and the lack of a serial number on the Mossberg, that these firearms were obtained illegally for criminal purposes only.

[28] The appellant was found to be aware of a "plethora" of other weapons strewn about the residence in plain sight, including ammunition cartridges, swords and knives.

[29] The trial judge found "significant mitigating factors" that distinguished the appellant's case from other cases involving firearms:

- Mr. Farrell was relatively young when he committed the offence. Due to his age and the fact that he made a "real effort to turn his life around", the principle of rehabilitation remained an "important consideration" in this case;
- Mr. Farrell had no adult criminal record;
- He had stable employment with promising prospects;
- Mr. Farrell was no longer involved in the gang lifestyle and no longer used drugs;
- He had extensive family support;
- While Mr. Farrell had a very troubled childhood and youth, which consisted of sexual abuse and neglect, he had now gained maturity and insight into his criminal activity;
- He was cooperative with police when arrested; and
- He spoke earnestly at his sentencing hearing about his happiness in light of his recent positive life choices.

[30] The appellant submits that in light of these favourable circumstances, the former mandatory minimum of three years is not a fit sentence.

[31] I begin by noting that, in order for the sentence appeal to succeed, this court would have to find that a three-year sentence falls outside of the range that could be considered fit. In other words, it will not be enough for Mr. Farrell to establish that a sentence of three years is at the high end of the range. In my view, the sentence appeal has little prospect of success in particular because the sentencing landscape post Nur has changed.

[32] Mr. Nur was a 19-year-old "exceptional student and athlete" who volunteered in the community and held part-time jobs. He had no criminal record and had pleaded guilty to possession of a loaded .22 calibre handgun for a brief period while outside a community centre. The trial judge had imposed a 40-month sentence. Doherty J.A., speaking for the Ontario Court of Appeal, struck down the minimum three-year sentence on the basis of a reasonable hypothetical offender, but he stated:

[206] Nor do my reasons have any significant impact on the determination of the appropriate sentence for those s. 95 offences at what I have described as the true crime end of the s. 95 spectrum. Individuals who have loaded restricted or prohibited firearms that they have no business possessing anywhere or at any time, and who are engaged in criminal conduct or conduct that poses a danger to others should continue to receive exemplary sentences that will emphasize deterrence and denunciation. Thus, as outlined earlier, and regardless of the three-year minimum penalty, this appellant, despite the mitigating factors, could well have received a sentence of three years. [Emphasis added.]

- [33] The Supreme Court of Canada also declined to interfere with the 40-month sentence. McLachlin C.J.C. speaking for the majority said:
- [82] Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At one end of the range, as Doherty J.A. observed, "stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. [T]his person is engaged in truly criminal conduct and poses a real and immediate danger to the public": para. 51. At this end of the range - indeed for the vast majority of offences - a three-year sentence may be appropriate. A little further along the spectrum stands the person whose conduct is less serious and poses less danger; for these offenders three years' imprisonment may be disproportionate, but not grossly so. At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the Criminal Code. [Emphasis added.]
- [34] Of particular significance to an assessment of the merits of Mr. Farrell's sentence appeal is the decision of this Court in *R. v. Holt*, 2015 BCCA 302. The offender in that case was 66 years old, had no criminal record, and was convicted of possession of a loaded handgun. The handgun and ammunition were found in a backpack in the appellant's vehicle. The trial judge had imposed a sentence of 18 months which was increased to 30 months on appeal. Newbury J.A. speaking for the Court observed that a re-alignment of the s. 95 sentencing range post-Nur was in order:
- [18] In my view, the possession of a loaded firearm does pose a serious threat, and a growing one, to communities across Canada. There is no reason why British Columbia courts should take this threat less seriously than other Canadian courts now do.
- [19] In my view, the fact a 40-month sentence was upheld almost without challenge in the Nur appeals, the comments of courts in other recent appellate decisions, but most especially the proliferation of guns in the Lower Mainland generally, indicate that a re-alignment of the "range" is in order in British Columbia. I would say that Mr. Holt falls at the bottom end of the "criminal" range, and that a sentence of close to three years is called for. I am also persuaded that the sentence of 18 months' imprisonment was unfit given the seriousness of the offence. [Emphasis added]
- [35] I note as well that in Nur, McLachlin C.J.C. in upholding the sentence of 40 months underscored the primacy of the principles of denunciation and deterrence for offences of this kind: at paras. 5, 25.
- [36] In summary on this factor, I do not consider that the proposed appeal has the degree of merit that would justify the extension sought.

[37] The fifth factor to be considered is the interests of justice. Given the magnitude of the delay and the lack of merit in the appeal, in my opinion the interests of justice in this case do not favour the application.

[38] In conclusion, in my view the exceptional circumstances required to justify an extension of the time for appeal from sentence have not been established. I would accordingly dismiss the application.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Groberman"

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