

CANADA / JUDGMENT

R. v. Fergusson

2014 BCCA 347

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 347 R. v. Fergusson COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Fergusson, 2014 BCCA 347 Date:20140905 Docket: CA041775 Between: Regina Appellant And Michael James Fergusson Respondent Before: The Honourable Madam Justice Levine The Honourable Mr. Justice Chiasson The Honourable Mr. Justice Frankel On appeal from: An order of the Provincial Court of British Columbia, dated April 8, 2014 (R. v. Fergusson, Surrey Docket 198968-1). Oral Reasons for Judgment Counsel for the Appellant: R.A. Prior Counsel for the Respondent: E. Warren Place and Date of Hearing: Vancouver, British Columbia September 5, 2014 Place and Date of Judgment: Vancouver, British Columbia September 5, 2014 Summary: Appeal by the Crown for the purpose of correcting an illegal sentence. F pleaded guilty to trafficking in cocaine. The sentencing judge imposed a six-month conditional sentence to be followed by 12 months' probation. However, as life imprisonment is the maximum sentence for the offence, a conditional sentence was not available. Held: Appeal allowed; sentence varied to a suspended sentence and 18 months' probation.

- [1] FRANKEL J.A.: This is a sentence appeal brought by the Crown to correct an illegal sentence. The appeal is not opposed by the respondent, Michael James Fergusson.
- [2] On May 22, 2013, Mr. Fergusson sold .2 grams of crack cocaine to an undercover police officer for \$20.00. He was arrested immediately. The matter was scheduled to go to trial on February 28, 2014. However, at a trial confirmation hearing on January 31, 2014, Mr. Fergusson pleaded guilty to trafficking in cocaine and the matter was adjourned to April 8, 2014, for a sentencing hearing.
- [3] Mr. Fergusson, who was 33 years old at the time of sentencing, has a lengthy criminal record that includes convictions in 2004 for trafficking and possession for the purpose of trafficking. At the time of the present offence he was on bail on a robbery charge. On January 20, 2014, Mr. Fergusson was sentenced to three years' probation on the robbery charge. That probation order contains some 20 conditions and was designed to assist in his rehabilitation, particularly with respect to his use of alcohol and drugs.

- [4] At the sentencing hearing on the drug charge, Crown counsel sought a sentence of three months' imprisonment. Mr. Fergusson's counsel sought a conditional sentence. In advancing that position, defence counsel referred to recent steps Mr. Fergusson had taken with respect to rehabilitation.
- [5] The sentencing judge imposed a six-month conditional sentence to be followed by 12 months' probation. She tailored the terms of those orders to be consistent with the conditions of the probation order on the robbery charge.
- [6] Subsequent to the sentencing, the Crown realized an illegal sentence had been imposed. This is because: (a) under s. 5(3)(a) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, the maximum punishment for trafficking in cocaine is life imprisonment; and (b) by virtue of s. 742.1(c) of the Criminal Code, R.S.C. 1985, c. C-46, a conditional sentence is not available for an indictable offence punishable by life imprisonment. Section 742.1 was amended by s. 34 of the Safe Streets and Communities Act, S.C. 2012, c. 1; it came into force on November 20, 2012 (SI/2012-48).
- [7] As already mentioned, the Crown's sole purpose in bringing this appeal is to correct the illegal sentence. It acknowledges Mr. Fergusson was bound by the conditional sentence order for approximately six weeks, after which the Crown obtained an order suspending that order pending the hearing of its appeal. There is no suggestion Mr. Fergusson failed to abide by the terms of the conditional sentence order while it was in force.
- [8] The judge who suspended the conditional sentence order placed Mr. Fergusson on an undertaking containing certain conditions. There is no suggestion Mr. Fergusson breached the terms of that undertaking.
- [9] In the circumstances, the Crown submits that so as not to disrupt Mr. Fergusson's rehabilitation it would be appropriate to vary the sentence imposed to one of 18 months' probation. Mr. Fergusson agrees with that submission, as do I.
- [10] As Mr. Fergusson is already bound by the conditions contained in the probation order imposed on the robbery charge, I see no need to repeat those conditions in a second probation order.
- [11] I would grant leave to appeal and vary the sentence imposed on the trafficking charge by setting aside the six-month conditional sentence order and the 12-month probation order and substituting a suspended sentence and 18 months' probation on the following conditions:
- (a) You shall keep the peace and be of good behaviour;
 - (b) You shall appear before the court when required to do so, by the court;

- (c) You shall report in person to a probation officer at 202 - 1855 Burrard Street, Vancouver, British Columbia, within one week and thereafter as and when directed by your probation officer;
- (d) You shall notify your probation officer of your present residential address and telephone number and not change your residential address or telephone number without prior notice to your probation officer;
- (e) You shall notify the court or your probation officer in advance of any change of name or address, and promptly notify the court or your probation officer of any change of employment or occupation;
- (f) You shall remain within British Columbia unless prior written permission is obtained from your probation officer or the court; and
- (g) You shall not attend within the area bounded by 108th Avenue to the north, 104th Avenue to the south, 132nd Street to the east, and King George Boulevard to the west, Surrey, British Columbia, except if passing through by means of public transportation, taxi, or in a private motor vehicle.

[12] LEVINE J.A.: I agree.

[13] CHIASSON J.A.: I agree.

[14] LEVINE J.A.: The appeal is allowed. The sentence varied as stated Mr. Justice Frankel, and the terms of the probation order as outlined by Mr. Justice Frankel in his reasons for judgment. "The Honourable Mr. Justice Frankel"

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