

CANADA / JUDGMENT

R. v. Figueredo

2020 BCSC 502

COURT

Supreme Court of British Columbia

DECIDED

10 March 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Figueredo,

2020 BCSC 502

Date: 20200310

Docket: 82010-2

Registry: New Westminster

Regina

v.

Gopal Figueredo

Before: The Honourable Mr. Justice Edelman

Oral Reasons for Sentence

Counsel for the Crown:

R. Flannigan

Counsel for the Accused:

M. Dillon

(as Agent for W. Jessop)

Place and Date of Trial/Hearing:

New Westminster, B.C.

February 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 10, 2020

- [1] THE COURT: Mr. Figueredo is before me for sentencing following a plea of guilty to an offence of aggravated assault of a corrections officer, Cody Fenske, under s. 270.02 of the Criminal Code RSC 1985. C. 46.
- [2] The basic facts are not in dispute and are largely set out in the agreed statement of facts. I do not intend to repeat them in detail, but in summary, on January 2, 2018, Mr. Figueredo was a prisoner at the Surrey Pretrial Services Centre awaiting trial on another matter. He physically attacked Mr. Fenske, who had come to deliver a meal to his cell. He struck the officer multiple times in the face and head and the officer went to the ground. The bruising from the blows lasted two to three weeks after the incident.
- [3] As the officer was getting up, Mr. Figueredo backed out of the cell and slammed the cell door, which caused the officer to be locked inside. Mr. Figueredo then proceeded to engage in what the Crown has quite fairly described as a celebratory dance. I have viewed the video from outside the cell showing the conduct in question.
- [4] Although the Crown accepts it would likely not have been discernable from outside the cell, where Mr. Figueredo was located, the consequences of the assault were in fact much more serious. Two of Mr. Fenske's fingers were caught in the cell door when Mr. Figueredo slammed it shut, splitting the officer's middle finger and severing approximately half an inch of his ring finger.
- [5] Mr. Fenske was hospitalized, and despite surgery and rehabilitative therapy he still does not have a pad on his ring finger, and has ongoing discomfort as the tip of the finger consists only of skin and bone. A victim impact statement outlines the serious physical and psychological consequences of the assault.
- [6] Mr. Figueredo was 24 years old at the time of the offence and is now 27 years old. Subsequent to this offence, on August 18, 2019, he was sentenced by Justice Silverman to 18 years imprisonment for various offences which he committed prior to this offence, including kidnapping, extortion, manslaughter and aggravated assault.
- [7] The reasons of Silverman J., are set out in R. v. Cox. 2019 BCSC 1707.
- [8] After credit for presentence custody that left 14 years, seven months and one day to be served in relation to those offences; he is currently serving that sentence.
- [9] Mr. Figueredo's criminal record was summarized by Silverman J.:

MR. FIGUEREDO

- [39] Now 26, the Crown argues that his criminal record should lead me to the conclusion that he has a flagrant disregard for the system of justice and really no interest in rehabilitation. He has a youth record consisting of nine offences committed on three different days. In November of 2009, a robbery, possession of stolen property under \$5,000, and possession of a restricted or prohibited weapon. In addition to being sentenced to open custody, a two-year mandatory firearms prohibition was imposed that I recognize was no longer in force at the time of the offences at bar.
- [40] Still as a youth, in August of 2010, dangerous operation of a motor vehicle, a high-speed chase, and flight from a police officer.
- [41] On September 22, 2010, criminal negligence causing bodily harm, a further police chase involving motor vehicles, police officers having arrived to arrest Mr. Figueredo with respect to the August offences. On the same date, assaulting a police officer, failure to stop a motor vehicle where required to do so, dangerous operation of a motor vehicle, he rammed a police car. One of the officers in the car fractured a hip, and as a result of all that, you were sentenced to jail and a three-year driving prohibition.
- [42] As an adult, you have five convictions for offences committed on five separate days. January 25, 2011, you had just turned 18 and were before the adult court with respect to having failed to comply with an earlier provided youth probation order. March 24, 2011, a further similar incident to the one I just related. July 11, 2011, possession of restricted firearms, loaded with ammunition, you were sentenced on September 13, 2012. In addition to a custodial sentence, you were placed on a mandatory firearms prohibition for ten years. That was still in force at the time of the offences at bar.
- [43] July 3, 2014, a conviction for breaking and entering to steal a firearm. You were on parole. This was an offence committed together with perhaps more than one, but one of your co-accused was Mr. Bradbury, who I will deal with later. Six long-barrelled firearms and ammunition were stolen, a handgun was thrown out the window of the vehicle during the chase. Another gun was found when the hotel room was later searched. In addition to jail time, you were placed on a mandatory lifetime firearms prohibition, which was still in force at the time of this matter.
- [44] On November 4, 2015, a charge of assault causing bodily harm while in jail.
- [45] You were therefore subject to two mandatory firearms prohibitions when the offences at bar were committed. You were released from jail on July 21, 2016, approximately two months before the commission of the offences at bar. I have inmate offence reports that suggest eight transgressions between June 20, 2017 to November 18, 2018, almost exclusively dealing with not following directions at the institution.

[10] I do not intend to review the record again, but suffice to say that it is an unenviable record consistent with what Mr. Figueredo himself and other sources describe as an entrenched, gang-related lifestyle, which continued at least until the time of the offence being considered today.

[11] The purpose and principles of sentencing are set out in s. 718 to 718.2 of the Criminal Code, the relevant portions of which include that:

718 The fundamental purposes of sentencing is to protect society and to contribute, along with crime-prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[12] Section 718.1 sets out that:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[13] Both Crown and defence agree that in the circumstances of this case a consecutive sentence is warranted and that is consistent with the jurisprudence to which I have been referred. Any sentence imposed today would therefore be added to the approximately 14 years remaining to be served of the sentence imposed by Silverman J., in August 2019.

[14] While it is not clear that s. 718.2(c) of the Criminal Code, dealing with consecutive sentences, applies to circumstances where a consecutive sentence is being imposed on an offender who is already serving a sentence, both Crown and defence are in agreement that the context of the sentence already being served is an appropriate consideration in assessing an appropriate sentence for the offence before me.

[15] The Crown took me to a decision of the Newfoundland and Labrador Court of Appeal in *R. v. Barrett*, 2012 NLCA 46 which set out this principle at para. 36:

[36] Although the Code provisions and jurisprudence do not expressly address a sentencing judge considering past offences and sentences in a totality analysis respecting multiple offences before him or her, this cannot be the end of the matter, for there may be cases which cry out for consideration of the total period of incarceration an offender is facing

when part of the total period of incarceration is the sentence an offender is already serving. The principle that sentencing is an inherently individualized process was recognized in *M. (C.A.)*, and in *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, and recently confirmed in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 wherein the Court stated at para. 43:

The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender.

- [16] I agree that the overall context of the sentence being served is an appropriate consideration in exercising my discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of Mr. Figueredo.
- [17] Section 718.02 requires that when a court imposes a sentence for an offence under various subsections, including the offence under s. 270.02 before me, the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.
- [18] I would note that this is consistent with longstanding direction from our Court of Appeal in *R. v. Flett*, [1984] B.C.W.L.D. 2584 (B.C.C.A.) at para. 5:

In my opinion, deterrence is the paramount consideration in cases of assault on prison guards. The other sentencing factors must all be considered, but they must be considered in the light of the necessity to protect the staffs of prisons. . . .

- [19] The Crown submits that an appropriate sentence is one of four years and relies on the cases of *R. v. Sesay*, 2020 BCCA 41; *R. v. Beaulieu*, 2015 BCSC 354 [Beaulieu]; *R. v. Flett*, [1984] B.C.J. No. 1791; J.F.S., 2005 BCPC 73; *R. v. Littlelent*, 1985 ABCA 22; and *R. v. Bernard*, 1989 CarswellNB 210 (QB).
- [20] The defence submits that a more appropriate sentence is one of 18 to 24 months and refers to *R. v. Craig*, 2005 BCCA 484 [Craig]; *R. v. Gellatly*, 2015 BCSC 2139 [Gellatly]; *R. v. Crothers*, 2007 NBQB 237, and *R. v. Meilleur*, 2006 BCPC 168.
- [21] I do not intend to discuss each of the cases, and although they are helpful both counsel recognize that the facts of this case are somewhat unique. The only decisions I was taken to from our court arising in a prison context were Gellatly and Beaulieu.
- [22] Gellatly involved an attack with a razor on a fellow inmate and a separate assault in which a guard was punched in the forehead, leaving a deep cut that apparently required stitches. Justice Kelleher accepted a joint submission for nine-month sentences on each of these offences to be served concurrently with unrelated offences for which Mr. Gellatly was being sentenced at the time and for which seven years was ultimately imposed.

- [23] In Beaulieu, a sentence of seven years was imposed for a vicious attack on a female guard with a razor blade, slicing her face and severing an artery. Justice Blok referred to a number of aggravating factors at paragraph 37 of that decision, including premeditation, the exultant attitude following the assault and a serious life-threatening injury.
- [24] I note that in the present case, although the assault appears to have been planned, I accept that the severing of the officer's fingers was not part of the plan. This is in contrast not only to Beaulieu, who clearly intended grievous bodily harm, but to similar situations in Craig, involving a deliberate stabbing, or the slashing described in Gellatly.
- [25] Mr. Figueredo's apparent celebratory conduct following the assault can also be contrasted with that in Beaulieu and Gellatly. It is clear from the facts as described by Blok J., that Beaulieu was exultant about his assault, knowing full well the nature of the wounds he had inflicted. Gellatly was also celebratory, going so far as to send a note to the officer, celebrating the fact that the officer needed stitches.
- [26] While Mr. Figueredo's celebratory dance shows someone who enthusiastically engaged in an unprovoked assault on a correctional officer, I accept that he was not aware of the extent of the officer's injuries at the time and he was not celebrating the severing of the officer's finger.
- [27] I have reviewed a number of other documents, including correctional records and various letters to the court from references and family members. To his credit, Mr. Figueredo appears to have made some substantial changes, notably in the last six months or so that he has been in the federal penitentiary.
- [28] Upon review, his correctional records confirm his previous history of gang affiliation and institutional violence. However, the records note that he has denounced his affiliation with the group in question and this affiliation is considered inactive by the institution.
- [29] It is also notable that despite the current institution being fully informed of the history of violence, including the allegations in the case before me, Mr. Figueredo's potential for violent behaviour towards staff and other inmates is currently assessed as low.
- [30] He appears engaged with his correctional program officers and is described as consistently demonstrating positive institutional behaviour, including making use of his free time in his cell to practice yoga, meditation and prayer. This is consistent with the letters and his statement to the court, which indicate a renewed connection to his spiritual practice.
- [31] Mr. Figueredo says he did not know the officer's fingers were in the door when he slammed it and that he did not even find out until sometime later how serious the injuries had been. He has written a letter to the court and to the officer expressing remorse for his conduct and the consequences that resulted. He also expressed remorse in person before the court.

- [32] While I accept that he is remorseful and did not intentionally sever the officer's fingers, Mr. Figueredo remains responsible for the consequence of an unprovoked and violent assault, a fact that is underlined by the guilty plea to aggravated assault before me.
- [33] Having reviewed the relevant authorities presented to me and considered the factors set out above, I am of the view that an appropriate sentence in all of the circumstances is one of 24 months, to be served consecutively to any sentence already being served.
- [34] Mr. Figueredo, I am sentencing you to 24 months consecutive to the sentence that you are already serving.

"Edelmann J."

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Prepared on 25 October 2026 · Esheria