
CANADA / JUDGMENT

R. v. Georgiev

2014 BCCA 246

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 246 R. v. Georgiev

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Georgiev,

2014 BCCA 246

Date: 20140619

Docket: CA039781

Between:

Regina

Respondent

And

Ivan Georgiev

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated
February 20, 2012 (R. v. Georgiev, Kamloops Docket 91737).

Oral Reasons for Judgment

Counsel for the Appellant:

L.J. Helps

Counsel for the Respondent:

P. LaPrairie

Place and Date of Hearing:

Vancouver, British Columbia

June 16, 2014

Place and Date of Judgment:

Vancouver, British Columbia

June 19, 2014

Summary:

The appellant was sentenced to five years total on five drug offences, four for production of methamphetamine and four for possession of methamphetamine for the purposes of trafficking, to be served concurrently, and one year consecutive on three counts of possession of Class A precursors. This sentence was to run consecutive to a sentence of three years eight months for firearms offences involving 29 firearms and several thousand rounds of ammunition, for a total of eight years eight months. The offences were committed in the rural community of Pritchard, British Columbia, and were all discovered the same day. The judge found there was a "pattern of ongoing criminality". Held: The finding of a pattern was not supported by the record. The question for the court was whether, correcting for that factor, whether the totality of the sentence for firearms offences and drug offences was unfit. Held: Adjusting for this factor, the cumulative sentence should be reduced to seven years eight months, to be accomplished by making the sentence for possession of the precursors concurrent with the other sentences. Held, further, the observation that the rural setting of the offences may be a mitigating factor is in error. The rural setting did not reduce the seriousness of the criminal behaviour, which has a lowering effect on a community.

- [1] SAUNDERS J.A.: Mr. Georgiev applies for leave to appeal sentence and if leave be granted appeals from a sentence imposed by Mr. Justice Blair on conviction of five drug offences: production of methamphetamine; possession of methamphetamine for the purpose of trafficking; and three counts of possession of Class A precursors for the purpose of producing a controlled substance. On February 20, 2012, he was sentenced to a term of imprisonment of five years. He had previously been sentenced by Mr. Justice Powers to a term of imprisonment of three years and eight months for firearms offences arising from the same investigation that caused his methamphetamine drug lab to be discovered. Mr. Justice Powers stated that he was not taking into account the discovery of drugs on the premises. In front of Mr. Justice Powers, Mr. Georgiev took the position that possession of

the firearms was not linked to drugs and that he had the firearms in part for protection from wildlife.

- [2] The five-year sentence derived from a sentence of four years concurrent on each of the production and possession of methamphetamine for the purpose of trafficking counts, and one year on each of the other three counts of possession of a precursor, those to be served concurrent to each other but consecutive to the sentences for production and possession for the purpose of trafficking. The judge held that the sentence imposed on the drug offences should be consecutive to the sentence of three years and eight months on the firearms offences. He held further that the overall sentence of eight years and eight months did not offend the principle of totality, considering the gravity of the offences and the culpability of the offender, and so imposed the sentence of five years that is sought to be appealed.
- [3] The question for us on any sentence appeal is whether the sentence is the product of an error in principle or is demonstrably unfit in the sense that it is clearly unreasonable or involves a marked departure from the range of sentences normally imposed. Even where an error in principle is established, however, the question still remains whether the sentence is unfit: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, applied for example in *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 at 37, 84 B.C.A.C. 261.
- [4] Mr. Georgiev contends that, viewed on this standard, his sentence cannot be sustained because the judge erred in failing to give proper effect to the principle of totality in light of the imposition of the sentences for the firearms offences, with the result that the cumulative sentence is unduly harsh. He says that the error on the totality issue is twofold; first the judge erred in his appreciation of Mr. Georgiev's prior criminal record and so found his culpability was greater than it otherwise is; and second, in any event, eight years and eight months is just too long for these firearms and drug offences which were discovered at the same time.
- [5] The principle of totality has long been recognized in sentencing jurisprudence, well before the codification of the principles of sentencing in the Criminal Code, R.S.C. 1985, c. C-46. The principle now finds its voice in s. 718.2(c) of the Code which provides "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh".
- [6] Always the question for the sentencing judge is whether the cumulative sentence fits the gravity of the offences and the culpability of the offender. Mr. Justice Donald described the totality principle in *R. v. Strickland*, 2012 BCCA 276:
- [8] The totality principle operates as a check against harsh and excessive penalties. Where consecutive sentences are appropriate, the sentencing judge determines a sentence for each offence and then steps back to see whether the aggregate is fit. The process was described by Madam Justice D. Smith in *R. v. Li*, 2009 BCCA 85, 267 B.C.A.C. 77:

- [28] Thus, there is a two-stage approach to sentencing an offender convicted of multiple offences. The first stage is to determine the appropriate sentence for each offence, and decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, then the second stage is to determine whether the sentences, in the aggregate, offend the totality principle. If the sentence, as a whole, is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence. See *R. v. P.P.H.*, 2003 BCCA 591.
- [7] In my respectful view, there is some force to the appellant's submission that the judge, in considering Mr. Georgiev's culpability, drew too much from the material before him in attributing to Mr. Georgiev a pattern of ongoing criminality and consequently, and in any event, imposing a sentence that, in combination with the sentence for firearms offences discovered the same day, offends the principle of totality.
- [8] In saying this, I recognize that the sentence imposed for these five drug offences, taken alone, is well within the range for such offences, and could even have supported a somewhat higher sentence. The production of methamphetamine has been repeatedly recognized by this court as a serious matter, both as to the character of the drug itself, and as to the danger presented by the precursors to it and the manufacturing process. For example, Mr. Justice Donald said in *R. v. Cote*, 2002 BCCA 29:
- [10] I also wish to record my agreement with Mr. Yule's position for the Crown that methamphetamine should be understood as a dangerous drug having highly addictive properties and the potential for inducing aggressiveness and violent behaviour. It is said that methamphetamine poses a much greater risk to the user's health than does cocaine by causing brain damage. For sentencing purposes possession of methamphetamine may be treated as comparable to possession of cocaine, allowing for the difference that cocaine is a Schedule 1 drug and methamphetamine is a Schedule 3 drug under the Controlled Drugs and Substances Act.
- [9] In *R. v. Francis*, 2008 BCCA 309, Madam Justice Ryan observed:
- [22] I agree with counsel for the Crown. The sentencing judge in this case catalogued the evils of methamphetamine which are becoming more apparent to the courts with its increased use. The sentencing judge referred to the highly addictive qualities of the drug, the physical damage it causes to the user including brain damage, psychological damage and associated violent behaviours. She noted that its use was on the increase in her community. In my view, the sentencing judge was right to address this sentencing in the way she did.
- [10] And, in *R. v. Bamdad*, 2013 BCCA 87, Mr. Justice Hinkson (now Chief Justice Hinkson) said:

- [32] The sentencing judge heard evidence of the dangers associated with the manufacture and use of MDMA. She heard evidence that methamphetamine production labs create serious health and safety risks, that red phosphorus is flammable, explosive and toxic to humans, and that the production of MDMA and ecstasy creates danger from the handling of the bases and acids used in their production.
- [34] Methamphetamine was described by the toxicologist as having powerful addictive potential, and being more likely to cause psychosis than cocaine. It was described as having extreme consequences and being potentially lethal in dosages as low as 120 milligrams.
- [11] With those general comments, I turn to the circumstances before us. The charges arose from events in June 2010. Upon execution of a search warrant at the Mr. Georgiev's home and property in Pritchard, British Columbia, a rural area 40 km from Kamloops, searching for firearms, the police located not only firearms but a clandestine methamphetamine laboratory in the garage on the property. Twenty-nine firearms, some of them loaded, of which only six were stored in a gun safe, several thousand rounds of ammunition, silencers, and a bullet-proof vest were found in the search. Mr. Georgiev's wife was licensed to own ten firearms, meaning 19 were on the property without the cover of a licence. Mr. Georgiev pleaded guilty in respect to the firearms charges.
- [12] The RCMP subsequently investigated the laboratory that had been found, and as a result of that investigation the charges relating to production and possession of methamphetamine for the purpose of trafficking and possession of the precursors were laid. The police found 16 kg of ephedrine, 54 kg of red phosphorus, and 1.6 litres of hydriodic acid. These substances would produce 7 kg of methamphetamine. In addition, the police found two zip lock bags with 16 g and 10 g of methamphetamine respectively, one bag next to a digital scale. Those 26 g were found to have a street value of between \$1,300 and \$2,600. The value of the 7 kg of methamphetamine which could be produced from the precursors was estimated between \$119,000 and \$140,000. Thus, although the laboratory was physically small, it had the ability to produce a substantial quantity of methamphetamine.
- [13] Mr. Georgiev has a criminal record: convictions in 2003 for the production of a controlled substance, marihuana, and failure to store firearms in the manner required, for which he received a conditional sentence of six months, probation of 12 months and a 10-year firearms prohibition.
- [14] Mr. Georgiev was 41 years old at the time of sentencing. He was born in Bulgaria and settled in Canada with his parents and sister in 1995. He resided in Pritchard with his spouse and infant daughter.
- [15] The reports available to the sentencing judge from Matsqui Institution, where Mr. Georgiev was incarcerated on the firearms offences, indicated positive efforts to improve his work skills.

- [16] In sentencing Mr. Georgiev on the drug offences, Mr. Justice Blair found that the drug offences were of a completely different nature than the firearms offences, and consequently sentences on the drug counts should be consecutive to the sentence for the firearms offences.
- [17] Mr. Justice Blair considered the mitigating and aggravating factors involved in the commission of the offence. As to the aggravating factors, the judge noted that Mr. Georgiev had previously been convicted in 2003. He said:
- [24] As noted earlier in these reasons, Mr. Georgiev has a criminal record involving firearms and for which he was sentenced on February 7, 2011. He has, however, a further criminal record which involves convictions on March 4, 2003, of producing a scheduled substance contrary to s. 7(1) of the CDSA, and two counts of storing a firearm or restricted weapon contrary to regulations and that is contrary to s. 86(2) of the Code, for which he was sentenced to a six-month conditional sentence order and probation for one year, and a mandatory firearms prohibition order under s. 109 of the Code. The 2003 offences involve that mix of firearms and drugs found by the RCMP when they searched Mr. Georgiev's property in June of 2010. It is a dangerous mix and unfortunately it reflects a pattern of ongoing criminality on the part of Mr. Georgiev.
- [Emphasis added.]
- [18] The sentencing judge also said as to aggravating factors:
- [25] Also aggravating in the circumstances of the five drug-related offences before me is that Mr. Georgiev appears to have been the principal behind the methamphetamine production on his property and that he took on that role for the purpose of profit from the sale of the drug that he was producing.
- [26] A gathering of the sophisticated laboratory equipment, which was referred to by the members of the clandestine laboratory team, also indicates pre-meditation on the part of Mr. Georgiev, which is yet another aggravating factor in this case.
- [27] Mr. Georgiev's exposure of his family, his wife, and his infant daughter, to the chemicals involved in the production of methamphetamine is also an aggravating factor. Those individuals stand at risk in being in the presence of those chemicals, but also stand at risk from the potential of others involved in the drug trade attempting to access the product made by Mr. Georgiev.
- [28] Another aggravating factor is that methamphetamine, produced by Mr. Georgiev, is a hard drug and a powerful, addictive and extremely dangerous stimulant of the central nervous system and has long-term ramifications for the user, as well as the social upheaval when people become addicted to this drug: *R. v. Curcio*, January 5, 2011, Williams Lake Registry 28008-3, a decision of Mr. Justice Williamson of this court.
- [19] On the issue of mitigating factors he said:

- [31] As for mitigating factors, there are, quite frankly, a paucity of mitigating factors which might favour Mr. Georgiev. One that might be considered is that he conducted the production facility in an isolated area, unlike some of the accused in these clandestine lab operations who conduct their business in apartments or in houses, with neighbours threatened should that production process go awry as it has done in some of the cases cited to me by counsel.
- [32] Another mitigating factor appears in the records produced from the Matsqui Institution which I referred to earlier. Mr. Georgiev's conduct appears to be promising. He is working hard to expand his work skills, which will be coupled with those which he already possesses - particularly skills in the electrical field. I am somewhat loathe to commend him for his woodworking skills, considering that they were being used with respect to firearms that he possessed illegally. However, it is clear that he also has woodworking skills which he, like his other skills, can be put to good use in the future. That skills background, and the training that he is now taking at the Matsqui Institute, should provide him with the capacity, the ability to support his family through legal activity rather than the activity which he was conducting in Pritchard in 2010.
- [20] The judge observed that Mr. Georgiev was supported by his family and indicated that this would assist him when he is released back into the community.
- [21] Mr. Georgiev says that the judge erred in principle in the characterization of and treatment of his prior criminal record. He says the judge's description of the record as demonstrating "a pattern of ongoing criminality" is inaccurate. He says, further, that the gap in his criminal record between the convictions in 2003 and convictions in 2011 on the firearms charges (the drug convictions came in 2012) should have been considered as a mitigating factor on sentence and his demonstrated capacity to be conviction-free for a substantial period of time is a positive feature of his profile, not a negative feature. He refers to *R. v. Mulvahill* (1991), 69 C.C.C. (3d) 1 (B.C.C.A.), in which Madam Justice Southin, referring to sentencing concepts that have been applied by this court, referred as the "gap" principle to the proposition that "if a man with a criminal record has not had any convictions for a number of years, he is to be treated if not as a first offender, then almost as a first offender".
- [22] I do not consider the statement by Madam Justice Southin in *Mulvahill* as indicating that a gap in prior offences must be viewed as a mitigating factor, or in the least neutral, when sentencing for subsequent offences. It seems to me that the effect of a gap in a criminal record depends on the context. For example, the nature of the offences, the circumstances of the offender, and any intervening events that render the record more or less relevant will affect the weight given to a prior criminal record. While I acknowledge a significant gap in offending may have the effect recognized by Madam Justice Southin, it is not invariable and the effect of a "gap" on the appropriate sentence is fact intensive.
- [23] In this case, Mr. Georgiev's criminal record does demonstrate a gap, although recognizing that these charges arose from a search in mid-2010 and addressed discoveries that certainly had not sprung up overnight, I would not say it is as long as urged by Mr. Georgiev. I do not

agree, however, that in the circumstances of this case the gap either is a mitigating factor or required the judge to treat Mr. Georgiev as a first time or near-first time offender. By virtue of the 10-year firearms prohibition, Mr. Georgiev's earlier involvement with the criminal justice system still constrained his behaviour in June 2010, and the offences in 2003 concerned lesser but related charges to those arising from the 2010 search. In these circumstances, it was open to the judge to view the criminal record as aggravating, to some degree, that is, to place it on the side of the scale of factors weighing against him.

- [24] Having said that, it seems to me the reasons for sentencing demonstrate some misunderstanding in the judge's description of the material before him as showing "a pattern of ongoing criminality". While the record indicates prior criminality, it falls well short of a 'pattern' and there is no basis upon which to ascribe ongoing criminality to Mr. Georgiev in the gap. Thus it appears to me that the negative degree of aggravation attributed by the judge to this feature of the case cannot be supported.
- [25] As I have earlier discussed, the totality principle requires a judge to consider the degree of culpability of the offender. Given this misapprehension of Mr. Georgiev's ongoing criminality, I conclude that the judge took an overly strong view of his culpability for purposes of considering the principle of totality.
- [26] The question for us is whether the sentence imposed is unfit, given the error identified. It seems to me that it is. While I would not subscribe to Mr. Georgiev's view that a sentence roughly comparable to what would have applied had the sentences for the firearms offences and the sentences for the drug offences been concurrent is the appropriate range, it is my view, considering the standard in the Criminal Code and our jurisprudence, that a combined sentence of eight years eight months may be described as "unduly harsh".
- [27] In supporting the sentence imposed, the Crown in particular distinguishes this case from others in which there were both sentences for firearms offences and sentences for drug offences, as ones in which the firearms and drugs offences were related. He observes that the judge found that the drug offences and firearms offences did not constitute a linked series of acts within a single endeavour. While that is so, it remains that all offences were discovered on the same day, that some of the firearms were found in the garage where the laboratory was located, and the entire group of offences is the package of charges that was required to be considered when dealing with the totality principle.
- [28] In the case of a Crown appeal, *R. v. Borecky*, 2013 BCCA 163, Mr. Justice Hinkson reviewed jurisprudence from this court on the range of sentence in the context of a sentence imposed on three counts of possession for the purpose of trafficking, being of methamphetamine, cocaine and heroin, and 13 firearms offences, on an offender with a criminal record of 37 convictions including robbery, and as to which he had served sentences up to three years nine months. The sentences imposed in *Borecky* were all concurrent with the exception of a sentence of one year for possession of a firearm while prohibited. This court increased the sentence to an effective sentence of seven years on all counts except the one count as to

which the sentence of one year was to be served consecutively.

- [29] Considering Borecky and the cases to which Mr. Justice Hinkson referred, I conclude that although the sentence under appeal, by itself, is not unfit, when taken together with the sentences imposed on the firearms offences, an unfit sentence has resulted. Accepting the judge's view of the seriousness of these offences, individually and in combination with the firearms offences, but recognizing the principle of totality, I consider that a sentence of seven years eight months both recognizes the seriousness of both the drug and the firearms offences, yet gives proper credit to the principle of totality. That allows for a cumulative sentence of four years on the drug counts. I recognize that standing alone, without adjustment for the principle of totality, it was open to the judge to impose consecutive sentences on the three counts of possession of a precursor. However, in consideration of the principle of totality, in my view, the objectives of sentencing, and compliance with s. 718.2(c) of the Criminal Code are best met by having those sentences served concurrently with the sentences for production and possession of methamphetamine.
- [30] One further matter. The judge referred as a possible mitigating factor, to the rural setting of these drug offences. I consider that there is much validity to the view that the criminal behaviour founding these drug charges is more anti-social and has a disproportionately lowering effect in a rural community, as compared to similar behaviour in a more urban setting, that the potential for harm to others is more personal to the offender in a rural community, and that the seriousness of the criminal behaviour consequently is not reduced one iota by its rural locale. In my view, it would be an error to consider the rural setting a mitigating factor for purposes of imposing sentence. In my determination of the appropriate sentence, I have treated this factor as neutral.
- [31] I would grant leave to appeal sentence and allow the appeal to the extent of substituting for the sentence of one year on each of the counts of possession of a precursor to be served consecutively, a sentence of one year on each of those counts, to be served concurrent to the sentence imposed on the counts of production of a controlled substance, methamphetamine, and possession of methamphetamine for the purpose of trafficking.
- [32] FRANKEL J.A.: I agree.
- [33] GOEPEL J.A.: I agree.
- [34] SAUNDERS J.A.: Leave to appeal sentence is granted. The sentence appeal is allowed to the extent only that the sentences on the counts of possession of a precursor will be modified so that they are served concurrently with the sentences imposed on the counts of production and possession of methamphetamine.

"The Honourable Madam Justice Saunders"

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