
CANADA / JUDGMENT

R. v. Harrison

2016 BCSC 1131

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1131 R. v. Harrison

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Harrison,

2016 BCSC 1131

Date: 20160212

Docket: 62675-2

Registry: Chilliwack

Regina

v.

Derek Harrison and

Edward Douglas Luft

Before: The Honourable Mr. Justice N. Brown

Oral Reasons for Sentence

Counsel for the Crown:

F. Lépine

Counsel for the Accused Harrison:

D. Schultz

Counsel for the Accused Luft:

O.A. Snowdon

Place and Date of Hearing:

Chilliwack, B.C.

February 12, 2016

Place and Date of Judgment:

Chilliwack, B.C.

February 12, 2016

- [1] THE COURT: Mr. Edward Douglas Luft was convicted of two counts for an offence that occurred on August 8, 2013, at or near the City of Mission, in the Province of British Columbia. The first count was for possession of a controlled substance, cocaine, for the purposes of trafficking. The second count is identical, except that the controlled substance in question was heroin. Also before the court is Mr. Derek Harrison, who was convicted of the same offences. Mr. Harrison and Mr. Luft were arrested while engaged in a dial-a-dope operation. The drugs seized were valued at approximately \$440.
- [2] These reasons for sentence for Mr. Harrison and Mr. Luft are responding to a joint submission of counsel. Mr. Harrison and Mr. Luft each have their own counsel representing them today.
- [3] Considering the totality of the circumstances, Crown counsel is of the view that a suspended sentence is in order in this case. I have carefully reviewed the Pre-Sentence Reports ("PSRs") prepared for both Mr. Harrison and Mr. Luft; and considering that information and those reports, in conjunction with other available evidence before the court, I agree with counsel that a suspended sentence is suitable for both parties in this case.
- [4] As for principles, Crown counsel referred the court to R. v. Voong, 2015 BCCA 285 [Voong], the most recent decision on the availability of suspended sentences in cases such as this, and on how sentencing judges should approach the matter.
- [5] In Voong at para. 18, Bennett J.A., speaking for the Court, noted the court's repeated statements in various decisions that general deterrence and denunciation are the main principles to consider when sentencing drug traffickers.
- [6] Before a suspended sentence may be imposed, exceptional circumstances must be present. The court noted at para. 22 that:
- [22] Where a suspended sentence was imposed in drug trafficking offences prior to the availability of a CSO, there was always an indication of exceptional mitigating circumstances.

- [7] Referring to *R. v. Proulx*, 2000 SCC 5, Bennett J.A. noted (at para. 24) that the penalty for a breach of a probation order could be more severe than a breach of a conditional sentence order:
- [24] In the case of a breach of probation, the suspended sentence can be revoked and the offender may be sentenced for the original offence. By contrast, in the case of a breach of conditional sentence, the maximum punishment available is incarceration for the time remaining in the original sentence.
- [8] At para. 37, Bennett J.A. noted that:
- [37] A probation order has primarily a rehabilitative objective, however, as the statutory terms [referring to the terms in the Code] refer to the purposes of "protecting society" and "reintegration into the community", it is not limited to this objective.
- [9] She further noted at para. 38 that:
- [38] What is required for the imposition of an optional condition in a probation order is a "nexus between the offender, the protection of the community and his reintegration into the community" (*R. v. Shoker*, 2006 SCC 44 at para. 13).
- [10] At para. 39, Justice Bennett noted that "a suspended sentence has been found to have a deterrent effect in some cases"; and at para. 43, that "a condition need not be punitive in nature in order to achieve deterrence or denunciation."
- [11] At para. 44, she noted:
- [44] [T]he normal range of sentence for a first offence [with a] dial-a-dope drug trafficker is between six to nine month[s] incarceration, and upwards to eighteen months in some cases, absent exceptional circumstances.
- [12] At para. 45, she noted that:
- [45] The exceptional circumstances must engage principles of sentencing to a degree sufficient to overcome the application of the main principles of deterrence and denunciation by way of a prison sentence.
- [13] In *Voong*, the offender was 40 at the time of sentencing. He had a long history of drug use and attempts at treatment, but at the time of sentencing had consolidated a path of rehabilitation such that, in the sentencing judge's mind, it would not serve society or the public at all to take him off that consolidated path of rehabilitation. The judge placed Mr. Voong on probation for 30 months with strict terms, including house arrest for the first six months of the sentence, and 80 hours of community service.

- [14] At para. 73, Justice Bennett agreed that "th[e] offender present[ed] an exceptional circumstance by his commitment to rehabilitation and his apparent success to date", and said she would not interfere with the sentence imposed. That seems to be the primary exceptional circumstance in that case.
- [15] Counsel referred the court to a number of decisions, which I will not set out here, but which basically suggest a range of probation accompanying a suspended sentence from 18 months to three years. Most of the cases fall within the range of two to three years. The circumstances in the cases are quite variable.
- [16] Both Mr. Harrison and Mr. Luft have been on bail since September 2, 2014, but their conditions for release were not onerous.
- [17] Crown counsel suggested that three years of probation for both Mr. Harrison and Mr. Luft would fall within the appropriate range and that the court should consider a period of curfew ranging between 12 and 18 months, with the usual exceptions. He also suggested community service in the range of 80 to 100 hours. He qualified these suggestions however; pointing out that the court has considerable flexibility in setting the range of probation and curfew, if appropriate, considering all the circumstances, including the period of time in which the offenders have been on bail.
- [18] Crown counsel commented on his impressions of the two offenders during the trial which, in my view, were quite insightful and accurate. He noted Mr. Luft, despite his disabilities, which I will discuss shortly, still exhibited some potential and that he was apparently an intelligent man.
- [19] He noted that Mr. Harrison did not appreciate the incriminating nature of the statements he was giving to the police during his statement, when he seemed to want to be open and helpful to the officer. He suggested Mr. Harrison likes to please people and that neither he nor Mr. Luft demonstrated any ingrained criminal character. I agree with that impression.
- [20] As for ancillary relief, just to dispose of those matters now, there will be a 10-year prohibition weapons ban, pursuant to s. 109 of the Criminal Code, R.S.C. 1985, c. C-46.
- [21] With respect to forfeiture, Mr. Luft consents to the forfeiture of the phone and the \$250 seized, and so that order shall go. No forfeiture order is necessary in the case of Mr. Harrison.
- [22] With respect to the victim surcharge, Mr. Luft advised the court he is more than willing to pay the victim surcharge, but will require some time to pay it. I believe the victim surcharge is \$500; I may be mistaken. Mr. Luft will have six months to pay the set amount.
- [23] Considering Mr. Harrison's very straitened financial circumstances, payment of the victim surcharge would cause considerable hardship and I excuse him from payment of the victim surcharge.

- [24] As this is a secondary offence, an order requiring the provision of DNA samples is discretionary. However, considering the minimally-intrusive nature of a DNA sample and the circumstances of the offences the two offenders are involved in and their inherently serious nature, I find an order for a DNA sample is appropriate for both offenders, they are to report to the Kelowna detachment of the RCMP within 72 hours [Mr. Luft] and the Abbotsford Police station within 72 hours [Mr. Harrison].
- [25] I am now going to turn to briefly address the personal circumstances of Mr. Luft and Mr. Harrison, and from which arise the clearly exceptional circumstances in this case.
- [26] Broadly speaking, in my view, the personal circumstances of both Mr. Luft and Mr. Harrison more strongly warrant being characterized as exceptional than what we see in some of the cases counsel have presented; but which also ended in a suspended sentence.

MR. LUFT

- [27] Turning first to Mr. Luft's situation, he is currently 34. He was raised in what the PSR characterized as "a functional and nurturing home along with his younger sister". Unlike what we see in many cases, they were never subject to any abuse within the family. Their parents were and remain fully supportive of him. His parents describe Mr. Luft as a model child. He performed well in school and excelled in sports until his teen years. Apparently, this changed dramatically when Mr. Luft was age 15. He was confronted with an older male who pulled a gun on him. Mr. Luft described this event as a life-altering one because, as he stated to the probation officer, he "now felt the need to seek out protection for himself" which he found through involvement in a gang lifestyle. That lifestyle encompassed drugs and criminal activity into which Mr. Luft, in due course, fell.
- [28] I note that at age 15, a person is still a child in many respects. Such an experience could plausibly have a significant adverse effect. Another traumatic experience Mr. Luft had experienced was seeing a friend, addicted to drugs and in despair over it, kill himself in front of Mr. Luft.
- [29] A letter supplied by Mr. Luft's father, a retired police officer, describes the "hellish" experience he and his wife and son went through as he became addicted to heroin, their attempts to remove him from that lifestyle and to see him overcome his addiction, without success. Mr. Luft dropped out of school. When he was age 22, he was hospitalized with a type of encephalopathy, a disease of the brain that heroin usage had brought on, whether through tainted drugs or transfer from other users is not clear; but at the time it was a condition spreading throughout a cohort of heroin users.
- [30] Mr. Luft almost succumbed to the illness, left with 50 percent of his brain's grey matter. He could not, as a result, walk or talk for a considerable time. It took two years for him to relearn to walk and three years before he could speak.

- [31] Mr. Luft had difficulty articulating his thoughts during the trial, but he managed to do so with effort. His testimony was intelligible. It revealed sparks of verbal intelligence.
- [32] After Mr. Luft recovered well enough to find employment, he suffered a further misfortune. The roof of the building he was working in collapsed on him. This experience was traumatizing and caused him to become very depressed, somewhat distrustful of the world. In due course he returned to heroin usage, leading him in turn to a downward spiral, as stated in the PSR.
- [33] After his arrest, Mr. Luft returned to his parents' home in West Kelowna. I recall from his evidence at trial that he was being pestered by the managers of the dial-a-dope line he had been engaged in, pestered to return to selling drugs to pay off the debt, but he refused to do so and moved to his parents' home in the Interior.
- [34] There is no question that Mr. Luft's parents have throughout his life, and to the present, given him unwavering support. An offender who has the support of friends, family, or other positive influences in their life, have a more successful rehabilitation and lower rate of recidivism.
- [35] Mr. Luft's father expressed the hope that, once this matter is dealt with, he would be able to attend some sort of post-secondary schooling and program. His counsel confirmed that this is indeed in Mr. Luft's current thinking and that he has some specific career objectives in mind.
- [36] Despite the setbacks Mr. Luft has experienced, the poor choices he has made, and the consequences visited on him, he has managed to maintain a positive attitude. He wants to turn away from what he was, which was for him, obviously, a very low point in his life, particularly after the roof collapsed on him and he ran into those other bad experiences I mentioned.
- [37] He states he is not going to dwell on the things he cannot change, and as for his history of substance abuse, he advises he did not indulge in any other controlled substance except heroin. Since his arrest, he has abstained from any further use of heroin. His father corroborates this.
- [38] He is now participating in the methadone program. The medical report provided to the probation officer confirmed that since 2014, when he was arrested, he has continued to do well and to demonstrate stability.
- [39] The PSR noted that Mr. Luft took full responsibility for his actions, which is an important sentence consideration. He did not minimize his actions, another one. He, he stated his arrest ultimately turned out to be good for him because it allowed him to stabilize his personal life, have a stable residence, and to this point be "clean" for over two years.

- [40] Mr. Luft addressed the court at the conclusion of counsel's submissions and sincerely apologized for the activities that brought him to do so. He left a strong impression he has truly turned the corner, accepted full responsibility, abandoned his former lifestyle, and is now determined to move forward in his life and to pursue a career.
- [41] Considering the obstacles he has encountered, his attitude in and of itself is commendable. He is not blaming anyone for his circumstances, but rather is determined to set himself on a new path. In my view, that sincerely held outlook is indispensable to a complete rehabilitation.
- [42] Considering Mr. Luft does not have a prior criminal record, those traumatic experiences that initially set him on a path of drug use, his low-level involvement in the dial-a-dope operation, his addiction to heroin, and his having taken advantage of his dial-a-dope activities to obtain heroin and his participation to pay down debt; considering also his extensive disabilities, his supportive and loving family, and his rehabilitation progress, I agree with counsel's submissions that a suspended sentence is appropriate in this case and that these are truly exceptional circumstances as to justify it.
- [43] As for the period of probation, Mr. Luft's counsel asks the court to consider a period of probation less than the common range of two and one-half to three years. She submitted Mr. Luft's circumstances were "very exceptional", stressing that he is profoundly disabled and his challenge is much greater than persons without disabilities. She asked the court to consider his earlier traumatic experiences with the gun being pulled on him and then witnessing a friend commit suicide in front of him, that friend having fallen into despair from his own addiction to heroin.
- [44] She referred the court to *R. v. Madison*, 2015 BCPC 323, where the court imposed a suspended sentence with 18 months' probation, where the accused's exceptional personal circumstances were essentially submersion in a culture supportive of his continued recovery and employment within that environment.

MR. HARRISON

- [45] I now turn to Mr. Harrison's circumstances.
- [46] The circumstances of Mr. Harrison, now age 42, are in several aspects similar to those of Mr. Luft. He did not experience the supportive parenting and stable family life that Mr. Luft did. He had some special needs as a child and, after his mother left, he was left with his father, who was evidently overwhelmed by Mr. Harrison's special needs. He recalled being locked in his room and bullied in school. He did not have a stable residence.

- [47] Mr. Harrison has a son born of a teenage marriage, but he has little relationship with that son, now 21. However, from his marriage to the current spouse, Ms. Harrison, he shares parenting of a nine-year-old autistic son and an eight-year-old daughter. Unfortunately, both Mr. Harrison and Ms. Harrison abused OxyContin, cocaine, and alcohol. Their 2006 marriage was stressed by substance abuse and cancer treatments that Mr. Harrison has had to undergo, along with several surgeries, etc., involved.
- [48] However, I understand that cause for concern of his substance abuse is very much diminished, insofar as parenting is concerned. According to the PSR, Mr. and Mrs. Harrison have reached a point where they can co-parent the children, Mr. Harrison, described as "living for his kids", a theme that also surfaced in the statement he gave to the investigating police officer after his arrest.
- [49] Mr. Harrison has removed himself from his former negative associations and focuses now on employment and children. I note, however, that he is somewhat susceptible to the influence of negative forces, negative people, and some vigilance is required against such influence.
- [50] Mr. Harrison's counsel advised the court he no longer receives the \$1,000 Canada Pension disability. He inadvertently received a \$30,000 overpayment and had to pay it back; reduced however to \$19,000 for various reasons that are not relevant here. After paying support to his wife and for the children, he is left with no income from his disability payment. To his credit, he has managed to find employment working for a company that spreads shavings in a chicken barn. It is important to note that his hours range between 4:00 a.m. and 7:00 p.m. I note those hours are similar to chicken catchers, I recall, and they sound plausible.
- [51] He formerly held employment with a company called Sealtec, a paving company, and when employed for that company, would work between 4:00 p.m. and 5:00 a.m., reflecting the fact that most of the work for that company, and any paving operation like it, is carried out at night when there is less traffic. He is not working there now; as he is working for the shaving company, but that remains an option for him. Therefore, it is apparent the probation officer will require some discretion to vary curfew for employment purposes.
- [52] The PSR noted Mr. Harrison has a grade 10 education. He had to leave school because he could not contend with the bullying he was being subjected to. He has some prior employment and education, including work as a schooled tattooist, upgraded skills for culinary courses, attending a technician's course in Surrey, and obtaining a cable technician's licence for Shaw Cable in the 1990s.
- [53] Turning to his behaviour and emotional status, as discussed in the PSR, he had to deal with Attention Deficit Disorder as a child, and I think he still struggles with that. His difficulty in school contributed to his low self-esteem, not to psychologize, but that may be reflected in his apparent desire to please others. This could lead him into trouble, and his probation officer will need to be cognizant of that.

- [54] Perhaps most remarkable in Mr. Harrison's history is what occurred to him on September 10, 2004, when he was still employed with Shaw Cable. Several thugs severely beat him up in Surrey, British Columbia, leaving him unconscious for 1.5 days, which, medically-legally speaking, is a significant period. He had severe cranial swelling. The CT scan indicated he had suffered severe brain damage, and this caused seizures for four years. While not in evidence, such seizures are known to cause some additional brain damage in some circumstances.
- [55] He suffered from body shakes, fatigue, anxiety, flashbacks, tremendous memory loss, confusion, mood instability, fear of confrontation, and he exhibited isolating behaviours, acting out violently, not uncommon with significant head injuries. Statistically, there are a disproportionate number of incarcerated offenders who have head injuries.
- [56] He is currently being monitored for cancer that may have metastasized to his colon, originally diagnosed as testicular cancer. As for substance abuse, he consumes alcohol rarely now, on a social basis, and limits his consumption of illegal drugs to marihuana. He finds this helps with post-traumatic stress disorder by calming his mind.
- [57] He admitted he had lapsed, using cocaine, one week prior to the PSR interview because he was "pissed off and angry". That is perhaps emblematic of his openness and transparency. He is telling people what he is feeling, what he is doing and why, which should assist probationary supervision.
- [58] As noted by Crown counsel, who had the opportunity to watch Mr. Harrison's video deposition of his police statement, Mr. Harrison presented as an open and transparent person who almost seemed wanting to perform a duty, as he saw it, to help the police officer with his investigation, without saying too much, if he could, to avoid harm to his own situation. Nonetheless, he essentially admitted to the offence. Of course, his statement was not admitted as evidence against him, as he did not testify. Although he did not plead guilty at trial, but as Crown counsel put it, he effectively incriminated himself.
- [59] I should point out that Mr. Harrison was fit and able to give a statement. He clearly understood the questions and the implications. He does not lack for intelligence. He demonstrated some wit and a sense of humour at times. The point is he is a frank individual. Why do I mention and stress it? Because I think he would honestly report what is going on in his life to his probation officer, which is a positive consideration for a suspended sentence.
- [60] As noted at p. 5 of the PSR, Mr. Harrison continues to struggle with post-traumatic stress disorder, depression, anxiety, and so on. One has to view these matters in perspective, and considering what he has undergone and his experience as a child, he deserves some credit, if not commendation, trying to make his way forward in life against considerable obstacles and, at the current time, working to support his family and himself, absent his CPP disability, although his wife does receive a portion of that, but he is left then with none.

- [61] Counsel did not oppose the conditions suggested by the probation officer, but I have some concern about the proposed condition, "abstain absolutely from the consumption and/or possession of alcohol, non-prescription drugs, and/or prescription drugs not prescribed in writing to you by a qualified and licensed practitioner." Mr. Harrison uses marihuana, I understand, to treat his PTSD. If this is a medical use of medical marihuana, he should have a certificate and a letter from his physician. It seems to me a condition should be imposed that would be a prophylactic one to prevent him falling into breach of his probation order unwittingly, and in the course of taking a substance that helps minimize his PTSD symptoms. I have no medical evidence before me, of course, on that, but I am taking at face value he suffers from that. Given his history, it is quite plausible, without having a medical degree. The point is that matter needs to be addressed in the conditions.
- [62] I have no hesitation in finding that Mr. Harrison's circumstances are also exceptional and a suspended sentence is appropriate.
- [63] I should note this is Mr. Harrison's first appearance before the court for sentencing. Likewise, Mr. Luft has no record.
- [64] I agree with Crown counsel's suggestion that a number of factors need to be balanced when it comes to setting the length of probation and attached conditions.
- [65] The ideal balance is one that perfects the objectives of punishment, recognizes the nature of the offence, rehabilitation, considering the offender's personal circumstances, particularly the exceptional ones that justified a suspended sentence in the first place. Those exceptional circumstances may in turn shape conditions attached to the probation order.
- [66] A too long or restrictive probation order may inhibit rehabilitation. One too short may send the message that the offender did not really need to be punished.
- [67] As for Mr. Luft and Mr. Harrison being on bail since September 2014, a period of roughly 18 months, this deserves modest weight, as the conditions imposed were minimal. Nonetheless, they were under some restriction.

MR. LUFT

- [68] Turning now to Mr. Luft, this is my sentence for Mr. Luft. Mr. Luft's sentence is suspended. The period of probation shall be for two years.
- [69] You shall keep the peace and be of good behaviour.
- [70] You shall report, in Kelowna, to your probation officer within 72 hours of your release, and thereafter as they direct you.
- [71] You shall abstain from non-prescription drugs and any controlled substance, except Methadone.
- [72] If directed to do so by your probation officer, you shall report for drug testing.

- [73] For the first eight months of your sentence, you shall not leave your parents' residence between the hours of 10:00 p.m. and 7:00 a.m., except as authorized in writing by your probation officer. If exceptions are required for activities like attendance at classes, employment, an up-to-one-week family vacation or other beneficial reasons, these must be approved in writing by the probation officer in their discretion. After eight months, you shall no longer be subject to any curfew.
- [74] To the extent you are able to do so as directed and/or assisted by your probation officer, you shall seek and sustain post-secondary education such as is suitable to your aptitude and that will lead to suitable employment.
- [75] You shall not change your residence without the permission of your probation officer.
- [76] You shall provide current contact information to your probation officer.
- [77] You shall serve 32 hours of community service at the direction of your probation officer, and you shall participate or continue to participate in such counselling as your probation officer directs.
- [78] I shall be seized of any breach of this or any conditions in your conditions, should any such breach occur.

MR. HARRISON

- [79] Mr. Harrison, this is my sentence for you. Mr. Harrison, I am imposing a suspended sentence for you, also for a period of two years' probation. During your probation, you shall keep the peace and be of good behaviour. You shall report to your probation officer within 36 hours and report thereafter as directed.
- [80] At the direction and with the assistance of your probation officer, you shall seek a prescription from a medical doctor for the medical use of marihuana for the treatment of your PTSD. If you receive a certificate, you may use legally-obtained medical marihuana to the extent authorized by your prescription, assuming you receive one. You shall have this in your possession at all times that you use medical marihuana for PTSD, if that is what transpires, in accordance with the prescription. If your physician refuses to grant a prescription for such purposes, you shall abstain from alcohol and non-prescription drugs and any controlled substance.
- [81] You shall report as directed by your probation officer for drug and alcohol counselling. If directed to do so by your probation officer, you shall present yourself for drug testing.
- [82] I shall be seized of any breach of this or any conditions in your conditions, should any such breach occur.
- [83] You shall continue to be employed and to seek employment as necessary.

- [84] You shall advise your probation officer of your current address and contact information and not change it without advising the probation officer in writing.
- [85] You shall be on a curfew in your residence between the hours of 8:00 p.m. and 7:00 a.m., with the usual exceptions of a medical emergency or other necessitous circumstance, but otherwise with the written consent of your probation officer, which you shall have in your possession for those times.
- [86] During those times when you work for Sealtec or other paving companies between the hours of 4:00 p.m. and 5:00 a.m., you shall be on curfew in your residence between the hours of 6:00 a.m. and 11:00 a.m., otherwise with the written consent of your probation officer.
- [87] If you have parenting time with your children outside your residence during these curfew times, as authorized and directed by your probation officer, you may be absent from your residence specifically for the purposes of parenting time with your children.
- [88] You shall complete 32 hours of community service at the direction of your probation officer.

[DISCUSSIONS WITH COUNSEL.]

"N. Brown J."

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