
CANADA / JUDGMENT

R. v. Laflamme

2021 BCCA 401

COURT

British Columbia Court of Appeal

DECIDED

8 October 2021

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2021 BCCA 401 R. v. Laflamme

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Laflamme,

2021 BCCA 401

Date: 20211008

Docket: CA47353

Between:

Regina

Respondent

And

André Joseph Laflamme

Appellant

Before:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Voith

The Honourable Mr. Justice Marchand

On appeal from: An order of the Provincial Court of British Columbia, dated February 8, 2021 (sentence) (R. v. Laflamme, Victoria Dockets 179146-1-T; 179146-2-TA; 179146-3-TA).

Oral Reasons for Judgment

Counsel for the Appellant (appeared via teleconference October 8, 2021, only):

D.J. McKay

Counsel for the Respondent (appeared via teleconference October 8, 2021, only):

R. Leong

Place and Date of Hearing:

Victoria, British Columbia

October 5, 2021

Place and Date of Judgment:

Victoria, British Columbia

October 8, 2021

Summary:

The appellant pleaded guilty to one count of trafficking a small amount of methamphetamine. The offence took place in Calgary, but the appellant waived the charge to Victoria. At the sentencing hearing, the appellant submitted his circumstances were exceptional. He sought a suspended sentence and probation. Relying on sentencing authorities from Alberta and British Columbia, the sentencing judge imposed a six-month custodial sentence plus 12 months' probation. The judge also made ancillary orders. On appeal, the appellant submits the sentence imposed was demonstrably unfit and the judge erred in principle in failing to find his circumstances were exceptional. Held: Appeal dismissed. The judge's conclusions regarding the seriousness of the offence and the appellant's moral blameworthiness were supported by the record. The sentence was not demonstrably unfit. The judge did not commit an error in principle.

MARCHAND J.A.:

Introduction

- [1] On November 16, 2020, André Joseph Laflamme pleaded guilty to one count of trafficking a small amount of methamphetamine contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The offence took place in Calgary, but Mr. Laflamme waived the charge to Victoria. At Mr. Laflamme's request, the judge who took Mr. Laflamme's guilty plea ordered a pre-sentence report ("PSR").
- [2] The PSR was filed on January 7, 2021, and Mr. Laflamme's sentencing hearing proceeded on February 8, 2021. The Crown sought a six-month jail sentence to be followed by one year of probation and various ancillary orders. Mr. Laflamme submitted his circumstances were exceptional and sought a suspended sentence with probation.

- [3] The sentencing judge imposed the sentence sought by the Crown. In his reasons for sentence, he commented that he considered the sentence to be lenient by the sentencing standards of both Alberta and British Columbia.
- [4] Mr. Laflamme appeals against his sentence. He was granted leave to do so when he sought and was granted bail pending the outcome of his appeal. He submits the sentencing judge imposed a demonstrably unfit sentence and erred in principle in rejecting a suspended sentence and probation.
- [5] In my view, Mr. Laflamme has not established that his sentence is demonstrably unfit or that there was any error in principle. I would, therefore, dismiss the appeal.

Background

- [6] On April 5, 2019, Mr. Laflamme sold 0.2 grams of methamphetamine to an undercover police officer at a shopping mall in Calgary for \$20. A short time after the sale, Mr. Laflamme was arrested and searched incident to arrest. Police officers found the \$20 bill used by the undercover officer to buy the methamphetamine, an additional \$70, two empty drug baggies, and an unused meth pipe.
- [7] During the sentencing hearing, Mr. Laflamme explained that he received a call from a friend who was in a hospital emergency room. The friend was injured, in pain and experiencing withdrawal. Mr. Laflamme's friend asked Mr. Laflamme to bring him methamphetamine or he was going to leave the hospital. Mr. Laflamme did not want that to occur so he was taking the methamphetamine to his friend.
- [8] On the way, Mr. Laflamme was approached by a woman who appeared to be desperate and destitute. She had a black eye and torn clothes. She asked him for drugs. After initially explaining he could not help, Mr. Laflamme eventually decided to sell the methamphetamine to the woman. He says he planned to use the money he received to re-purchase the same amount of methamphetamine to take to his friend.
- [9] Mr. Laflamme did not dispute he committed the offence of trafficking but maintained he was not in the business of selling drugs.

Circumstances of Mr. Laflamme

- [10] Mr. Laflamme is 52 years old. He had a traumatic childhood. His father was an abusive alcoholic who took him from his mother. He was in and out of care from a young age. He began using substances when he was 14 years old and developed a significant alcohol problem. He stopped using alcohol several years ago but began taking opiates. At the time the PSR was prepared, Mr. Laflamme was drug-free and on opioid replacement therapy.

- [11] Mr. Laflamme has a prior criminal record consisting of eight convictions for property crimes, one conviction for failing to provide a breath sample, and one conviction for failing to comply with a recognizance. His convictions were entered between 1985 and 2013. Mr. Laflamme mostly received fines. He has never received a custodial sentence. He has no prior drug-related convictions.
- [12] Mr. Laflamme was unable to complete his high school education due to being incarcerated (presumably on remand). In the past, he has worked in construction and landscaping. He is currently receiving a Persons with Disability pension. He is unable to work due to psychological injuries from his childhood. He rents an apartment with his partner in a building owned by the City of Victoria to house homeless people. He is a respected and helpful member of his community.

Reasons for Sentence

- [13] The sentencing judge gave brief reasons for sentence.
- [14] The judge set out the circumstances and noted Mr. Laflamme's unrelated prior criminal record. He then commented:
- [4] As I understand the circumstances here, the impression the court is left with is that the offender, it would appear, has empathy for drug users who need their next fix. His response in this case was to provide them the drug for a fee, as opposed to perhaps having them seek help to alleviate their addiction.
- [15] The sentencing judge referenced the PSR and Mr. Laflamme's "trying upbringing." The judge indicated he had to be "mindful" of the sentencing jurisprudence in Alberta and British Columbia. He noted that the sentencing range in Alberta is higher than in British Columbia. He continued:
- [7] I am also mindful that the sentence being sought by Crown counsel is at the low end in British Columbia, which would obviously put it at the extreme low end in Alberta. I am also mindful that guideline ranges in sentencing are strictly guidelines and ultimately the court is required to address the matter before the court and be respectful that sentencing is an individualized exercise in taking into account the nature of the offence and the offender.
- [16] The judge determined that the sentence sought by the Crown was appropriate and "in fact, a lenient sentence by both British Columbia and Alberta standards." The judge accepted that Mr. Laflamme appeared to have addressed his issues and was participating in the community. Nevertheless, the judge was "extremely mindful of the principles of denunciation and deterrence". He added:
- [8] Individuals in our community absolutely have to know that trafficking in narcotics is not only prohibited but will be addressed in sentencing, likely with a jail term except in exceptional circumstances, which I do not believe apply in this case.

- [17] As noted, the judge imposed the sentence sought by the Crown, namely a six-month custodial sentence followed by one year of probation. The sentencing judge then made weapons prohibition and forfeiture orders. He waived the victim surcharge.

Standard of Review

- [18] Sentencing is a highly individualized process. Sentencing judges have "front-line" experience, see and hear all the evidence and submissions in person, and are generally familiar with the circumstances and needs of the local community. As a result, sentencing judges have broad discretion to impose a fit sentence. Sentencing decisions are entitled to considerable deference and will only be overturned for good reason: *R. v. Friesen*, 2020 SCC 9 at para. 25; *R. v. Sellars*, 2018 BCCA 195 at para. 22.
- [19] When weighing competing sentencing objectives, it falls to the sentencing judge to determine which deserve the greatest weight: *R. v. Voong*, 2015 BCCA 285 at para. 12, citing *R. v. Nasogaluak*, 2010 SCC 6 at para. 43. An appeal court may not vary a sentence simply because it would have imposed a different one: *Voong* at para. 11, citing *R. v. L.M.*, 2008 SCC 31 at para. 14.
- [20] An appeal court can intervene to vary a sentence only if the sentence is demonstrably unfit or if the sentencing judge made an error in principle that had an impact on the sentence: *Friesen* at para. 26; *Sellars* at para. 22; *R. v. Lacasse*, 2015 SCC 64 at para. 41.

Analysis

- [21] During submissions, the judge was referred to four authorities, namely *R. v. Bui*, 2013 BCCA 168, *R. v. Sumner*, 2019 ABCA 399, *R. v. Cisneros*, 2014 BCCA 154, and *Voong*.
- [22] In *Bui*, this Court recognized that where charges are waived from another jurisdiction to British Columbia, it is appropriate to consider the range of sentences in the other jurisdiction and important to recognize the sentencing values from that jurisdiction: at paras. 15, 20.
- [23] In *Sumner*, the Alberta Court of Appeal allowed a Crown appeal against a 12-month custodial sentence imposed on a repeat drug trafficker who had sold 0.4 grams of methamphetamine to an undercover police officer on two occasions. In imposing a thirty-month sentence, the Court confirmed that the starting point for trafficking offences in Alberta is three years' imprisonment, even in the case of sales of small quantities by offenders of good character: at para. 7.
- [24] In *Cisneros*, this Court allowed a Crown appeal against a \$2,000 fine and one year of probation imposed on a first-time offender involved in a dial-a-dope drug trafficking operation. On arrest, Mr. Cisneros was found in possession of 25 rocks of crack cocaine and 29 baggies of heroin. In imposing a six-month custodial sentence, the Court accepted that the ordinary range for first offenders involved in a crime of this nature is six to nine months'

imprisonment. The Court held that there were no exceptional circumstances to take Mr. Cisneros outside the usual sentencing range.

- [25] In Voong, this Court allowed two Crown appeals and dismissed two Crown appeals against suspended sentences with probation imposed on four offenders who pleaded guilty to dial-a-dope drug trafficking offences. The circumstances of the offences and offenders varied. Of relevance to this appeal, the Court reviewed a significant number of sentencing authorities, including Cisneros. The Court concluded that, absent exceptional circumstances, the usual range for a first-time offender, or an offender with a minimal criminal record, involved in a dial-a-dope operation is six to 18 months' imprisonment. In relation to exceptional circumstances, the Court held:
- [59] Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.
- [26] On appeal, Mr. Laflamme cites *R. v. Chen*, 2021 BCSC 697 and 2021 BCSC 882, which considered the constitutionality of provisions in the Criminal Code, R.S.C. 1985, c. C-46, that preclude conditional sentence orders in cases of drug trafficking. Justice Schultes found ss. 742.1(c) and (e)(ii) of the Code violated s. 7 of the Charter and were not saved by s. 1. While *Chen* is not binding on this Court, Mr. Laflamme submits the current availability of a conditional sentence order for drug trafficking in British Columbia is a mitigating factor.
- [27] Mr. Laflamme submits he was not involved in commercial drug trafficking, but rather sold a small amount of narcotics to a persistent and desperate person. While not raising the defence, he submits the circumstances approached entrapment. He argues the seriousness of his offence and his moral blameworthiness are reduced. Mr. Laflamme also highlights the significant changes he has made in his personal circumstances and his expression of remorse. In all the circumstances, he submits the six-month sentence imposed by the sentencing judge is demonstrably unfit and that the sentencing judge erred in principle in failing to find "exceptional circumstances".
- [28] While I understand Mr. Laflamme's position, the judge took a different view. Based on my review of the record, there was an evidentiary basis for him to do so.

[29] During submissions, the judge heard defence counsel's explanation of the circumstances. While the Crown did not contest the explanation offered on behalf of Mr. Laflamme, the judge commented as follows:

[T]he fact he was prepared to bring methamphetamine to the hospital to assist the friend, I'm not so sure he's really assisting his friend or that's particularly appropriate conduct in the situation. I appreciate that may not be the offence that brings him before the court but as--it concerns me he has this amount of drugs on him and he seems to be, I'll say, distributing it, not only to his friend but others.

[30] The judge subsequently gave Mr. Laflamme an opportunity to address the court. Mr. Laflamme explained his view of the circumstances, including how he relented and sold drugs to the undercover officer because he "felt so bad for her." The judge asked why, if Mr. Laflamme felt badly for the undercover officer, he took money from her rather than just giving her the drugs. Mr. Laflamme responded that he took the money to re-purchase drugs to take to his friend in the hospital. Mr. Laflamme also informed the judge how being incarcerated would adversely affect him and his partner by putting them "back on the street."

[31] Based on the circumstances and Mr. Laflamme's informed guilty plea, there was no basis for the judge to conclude Mr. Laflamme had been inappropriately enticed into selling drugs to the undercover officer.

[32] Based on his comments during the sentencing hearing and his reasons for sentence, it is apparent the judge was concerned about Mr. Laflamme's willingness to distribute narcotics beyond personal use for a fee. He was clearly not of the view Mr. Laflamme was involved in a socially redeeming activity.

[33] The judge appears to have accepted that Mr. Laflamme's moral culpability was somewhat reduced by his tragic upbringing. However, he was of the view that Mr. Laflamme's circumstances were not exceptional and that a jail sentence was required to address what he considered to be the pressing sentencing objectives of denunciation and deterrence.

[34] While the judge did not articulate why he concluded Mr. Laflamme's circumstances were not exceptional, his conclusion is supported by the record.

[35] Though Mr. Laflamme's criminal record was unrelated and somewhat dated, he did not come before the court as a first-time offender, and the judge was entitled to conclude he was not an offender with a minimal record. There was an indication in the PSR that Mr. Laflamme did not think he was in need of therapy, which raises some concern about his prospects for a lasting recovery. Finally, Mr. Laflamme did not express unconditional remorse for his actions. He acknowledged he had made a bad decision but otherwise downplayed the seriousness of his actions. He appears to have been more concerned about the impact of a custodial sentence on his improved circumstances than the impact of his offence on the community.

- [36] Given that Chen is under appeal, it is premature for this division of the Court to offer any comments on the impact Chen might have on sentencing ranges for drug trafficking offences. Nevertheless, in the absence of evidence to suggest Mr. Laflamme was engaged in the more aggravated business of drug trafficking by way of a dial-a-dope operation, I am not prepared to say Mr. Laflamme's sentence was "lenient" by British Columbia standards. What I can say is that Mr. Laflamme has not established his sentence was demonstrably unfit.
- [37] Further, I am unable to discern any error in principle committed by the sentencing judge. The judge took a defensible view of the seriousness of the offence and the moral culpability of Mr. Laflamme. He was obliged to pay heed to the sentencing authorities from Alberta and British Columbia. He was entitled to conclude there were no exceptional circumstances. It was well within his purview to emphasize denunciation and deterrence and to conclude the community would be best served by the custodial sentence he imposed.
- [38] In all of these circumstances, I would dismiss the appeal.
- [39] MACKENZIE J.A.: I agree.
- [40] VOITH J.A.: I agree.
- [41] MACKENZIE J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Marchand"

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