
CANADA / JUDGMENT

R. v. Lawson

2012 BCCA 508

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 508 R. v. Lawson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lawson,

2012 BCCA 508

Date: 20121217

Docket: CA039953

Between:

Regina

Respondent

And

David Robert Marc Lawson

Appellant

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Garson

The Honourable Madam Justice MacKenzie

On appeal from: Provincial Court of British Columbia, April 27, 2012

(R. v. Lawson, Surrey Docket 189310-2C)

Counsel for the Appellant:

F. Arbabi

Counsel for the (Crown) Respondent:

S. J. Brown

Place and Date of Hearing:

Vancouver, British Columbia

November 8, 2012

Place and Date of Judgment:

Vancouver, British Columbia

December 17, 2012

Written Reasons by:

The Honourable Madam Justice MacKenzie

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

- [1] Mr. Lawson, then 33 years old, pleaded guilty on February 14, 2012, to Count 1 of a three-count Information, the indictable offence of theft of a motor vehicle, contrary to s. 333.1(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46. The sentencing was adjourned for the preparation of a Gladue report (R. v. Gladue, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385).
- [2] On April 27, 2012, Gulbransen P.C.J. sentenced Mr. Lawson on Count 1 to 29 months in jail, after credit for seven months of pre-sentence custody. Count 2, possession of property obtained by an offence punishable by indictment, was subsumed in Count 1. Count 3, dangerous driving, was stayed by the Crown, but the facts were before the court as aggravating circumstances.
- [3] If leave to appeal is granted, Mr. Lawson seeks to appeal his sentence on the basis the sentencing judge erred by failing to give adequate weight to the Gladue report and failing to adequately consider the Gladue factors under s. 718.2(e) of the Code. Mr. Lawson also contends the sentence is unfit as outside the range for similarly situated offenders and similar offences.

- [4] The Crown submits the judge properly considered Mr. Lawson's Aboriginal status, and his decision to give little weight to the Gladue report fell within his discretion as sentencing judge to find the facts. The Crown says the sentence was entirely fit, given Mr. Lawson's substantial criminal record for related offences and the aggravating feature of the dangerous driving.
- [5] I conclude there is no basis upon which to interfere with the sentence. For the reasons that follow, I would grant leave to appeal, but would dismiss the appeal.

Background

- [6] On October 6, 2011, at approximately 2:20 a.m., Mr. Lawson stole a "bait car" in Surrey, B.C. As set out in the pre-sentence report (and as described on the Bait Car website of the Integrated Municipal Provincial Auto Crime Team), "A bait car is a vehicle owned by the police and is intended to be stolen. After a bait car is stolen, the location, speed, and direction of travel of the vehicle are monitored by police dispatchers at E-Comm [Emergency Communications for Southwest British Columbia Incorporated] through GPS tracking." This bait car was equipped with a GPS, camera and audio recording.
- [7] Mr. Lawson drove off with a passenger. A recording of his statements in the car reveals that he suspected he was in a bait car. Eventually the police caught up to Mr. Lawson and saw him drive through two controlled intersections without stopping before the car was disabled.
- [8] Mr. Lawson got out of the car and ran. The police tracked him and arrested him. He denied being in the car, but the police identified him from the car's video.
- [9] Mr. Lawson pleaded guilty to theft of a motor vehicle. At the sentencing hearing, the Crown sought a sentence of three years, less credit for time served. Mr. Lawson sought a conditional sentence.

The Reasons for Sentence

- [10] The sentencing judge said he had to consider Mr. Lawson's Aboriginal background. He first considered the Gladue report and found it unsatisfactory for three reasons: it did not set out the background, training and experience of the author; it was more of an "advocacy piece" as opposed to an objective report; and it did not go deeply enough into the Aboriginal aspect of Mr. Lawson's life. The judge concluded he could not give much weight to the Gladue report.
- [11] The judge went on to consider Mr. Lawson's background and took note of Mr. Lawson's separation from his family, his history of severe mistreatment and neglect in a foster home, his resort to drugs, and addiction. The judge observed at para. 9 that these factors led to "an 'unending' series of offences".

- [12] The judge commented that until 2001, Mr. Lawson was imprisoned every time he committed an offence. In his view, it was when "the Gladue issue finally came to light" that Mr. Lawson started receiving conditional sentence orders (para. 12), the first in 2001, then in 2007, and again in 2010. The judge considered this to be an indication the courts had taken into account his Aboriginal background, observing that repeated conditional sentences are rare and showed the courts recognized the need "to break the cycle". He also noted Mr. Lawson did not successfully complete any of the conditional sentences.
- [13] Based on Mr. Lawson's own submissions, the judge found he had a strong positive attitude and was sincere about his desire to change his life (para. 14).
- [14] As to the nature of the offence, the judge noted that stealing a car and driving dangerously is a serious offence and someone could have been killed. The judge considered that driving dangerously in a stolen car deserved consideration in terms of Mr. Lawson's attitude towards the law (para. 15).
- [15] Considering all these circumstances, the judge concluded it would endanger society to release Mr. Lawson on another conditional sentence, given his long criminal record and inability to complete such sentences. The judge also observed there are programs in the federal system that can help Mr. Lawson and he may benefit from parole. The judge imposed a sentence of three years, less credit for seven months in pre-trial custody.

Discussion

Did the judge err by failing to give adequate weight to the Gladue report?

- [16] At the request of defence counsel, the judge ordered the Gladue report on February 14, 2012. It contains the following information about Mr. Lawson:
1. his history, and in particular, his experiences of mistreatment, abuse and instability in foster care, his family relationships, his education, his employment history, and his struggles with substance abuse;
 2. his Aboriginal background, his disconnection with the Aboriginal community as a result of his apprehension by the Ministry, and the intergenerational effects of residential schools on his family; and
 3. his understanding of the seriousness of the offence and his commitment to overcome his addiction.
- [17] The writer of the Gladue report strongly recommended, after credit for time served, a conditional sentence order for two years or less with specific conditions, including a court-ordered treatment plan.
- [18] At the sentencing hearing, Crown counsel applied, pursuant to s. 657.3 of the Code, to cross-examine the writer of the Gladue report. The Crown took the position the report was "a so-called independent Gladue report" and was "highly biased, misleading". In particular, Crown

counsel took issue with the writer's opinion at page 12 of the report that Mr. Lawson was committed to overcome his addiction, as evidenced by his "remarkable healing journey" and "positive steps taken in recent months", and the writer's express recommendation as to what the sentence ought to be. The Crown also noted there was no information provided about the writer. The Crown submitted the Gladue report should be disregarded entirely.

- [19] The Crown also argued information provided in the report was inconsistent with information the Crown possessed from having prosecuted a friend of Mr. Lawson's, as part of a "prolific offender" category, and with information in the pre-sentencing report, particularly the information regarding Mr. Lawson's family relationships and alleged support system.
- [20] The judge reserved his decision on whether to permit the Crown to cross-examine the writer of the Gladue report until he had heard submissions from both counsel. In particular, the judge wanted to hear from defence counsel as to the weight to give the Gladue report. Defence counsel said, "whether or not you accept the information in the Gladue report or whether you prefer the information in the PSR [pre-sentence report], I think it's indisputable that there are very serious issues that he's had to deal with." In the end, the Crown did not pursue its application to cross-examine the Gladue report writer and the judge decided to give the Gladue report little weight.
- [21] In finding the Gladue report unsatisfactory and deciding to give it little weight, the judge said:
- [8] The Gladue report that I received is particularly unsatisfactory, in my view. It does not set out who the person is who drew it up, in the sense of the person's background, training and experience. I do not know anything about her. Secondly, it is, frankly, far too much of an advocacy piece as opposed to a more objective report. Thirdly, in my view, it does not go deeply enough into the aboriginal aspect of this man's life and of aboriginal life in general; rather, it more expresses a strong-felt belief, and I do not doubt this man is sincere, but a strong-felt belief that he really is going to change and wants to change and has the tools to do it. I do not give much weight to that report.
- [22] Mr. Lawson submits the judge erred in giving insufficient weight to the Gladue report and takes issue with the three reasons the judge cites. First, Mr. Lawson says the judge erred in finding the Gladue report unsatisfactory on the basis the report does not set out the author's background, training, and experience. Mr. Lawson says this case is being cited for the proposition that Gladue reports must meet the standard of expert reports, and therefore must set out the background of the writer; however, Mr. Lawson contends Gladue reports are not expert reports, but are instead a form of pre-sentence report that simply provides the court with detailed information about the Aboriginal offender's background and childhood.

- [23] Second, Mr. Lawson submits the judge erred in failing to give the Gladue report sufficient weight on the basis it was an advocacy piece. At the hearing of this appeal, Mr. Lawson appeared to agree that to the extent the Gladue report makes recommendations as to sentence, the report is an advocacy piece, but the judge said he would ignore that aspect. Mr. Lawson says the Gladue report contains ample information about his Aboriginal background and the judge failed to consider it.
- [24] Finally, Mr. Lawson says the judge erred in saying the Gladue report did not go deeply enough into Mr. Lawson's Aboriginal background and Aboriginal life in general. Mr. Lawson submits his Aboriginal background was sufficiently developed in the Gladue report. He maintains the Gladue report discusses the inter-generational effect of residential schools of which Mr. Lawson's grandmother was a survivor, and clearly shows the link between his grandmother's placement in the residential school system and his mother's substance abuse, which in turn resulted in Mr. Lawson's placement in foster homes and the subsequent neglect and abuse. Mr. Lawson further says the Gladue report provides details about Mr. Lawson's Aboriginal background and the severance of his ties to his Aboriginal community. He submits his drug addiction and repeated offending were the effects of these systemic factors.
- [25] Before addressing these arguments, I will comment on the nature and purpose of Gladue reports.
- [26] In *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 at para. 60, the Court described Gladue reports as "a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders." Thus, Gladue reports are specific pre-sentence reports. Their purpose is to provide the court with individualized information about how intergenerational and systemic effects of colonialism, displacement, residential schools, poverty, unemployment and substance abuse have affected the Aboriginal offender. They should also include information about realistic restorative or rehabilitative programs suitable to the particular Aboriginal offender. The Court in *Ipeelee*, at para. 60, confirmed that this type of information is "indispensable" to a sentencing judge in fulfilling his or her duties under s. 718.2(e) of the Criminal Code.
- [27] A Gladue report may be provided by a variety of people of diverse experience and background who have access to, or can obtain, information that is reliable and relevant. A formal Gladue report is not necessary to provide the court with Gladue information; Gladue information may also be provided to the Court through a pre-sentence report. This was well articulated in *R. v. Corbiere*, 2012 ONSC 2405, where the sentencing judge observed:
- [23] There is no magic in a label. A "Gladue Report" by any other name is just as important to the court. Its value does not depend on it being prepared by a particular agency. Its value does hinge on the content of the document and the extent to which it has captured the historical, cultural, social, spiritual and other influences at play in this context.

...

- [26] If a pre-sentence report is lacking in its richness of detail or historical/systemic background, it is incumbent upon the sentencing judge to make further inquiries. The court may direct that the report be supplemented in writing or it may direct the attendance of witnesses that can offer the information and perspective that is needed.

I also agree with the following comments of Chief Judge Cozens of the Yukon Territorial Court in *R. v. Blanchard*, 2011 YKTC 86 at para. 25:

In the absence of a true Gladue Report, it is critical that pre-sentence reports contain some details about an offender's aboriginal status and circumstances. Where the pre-sentence report does not contain sufficient relevant information, defence and Crown should be prepared to make submissions and, if necessary, call relevant evidence.

- [28] Finally, as a form of pre-sentence report, Gladue reports should be subject to the same general requirements of balance and objectivity as conventional pre-sentence reports. Thus, the writer should attempt to remain detached rather than advancing personal opinions. While Gladue reports may offer suggestions or proposals about potential restorative or rehabilitative programs or sentences, and particularly those tailored to Aboriginal offenders, they should not strongly recommend specific sentences. The sentencing function belongs to the judge.
- [29] In colloquy, the Crown argued that Gladue reports should be held to the same standard as expert reports, as the Legal Services Society ("LSS") was viewing the writers of "independent" Gladue reports as experts. At the hearing of this appeal, this Court asked how the Gladue report was produced. Mr. Lawson's counsel said it is part of an LSS pilot project on Gladue reports, and the LSS appoints a writer.
- [30] This Court was not provided with any information about this LSS pilot project. In any event, Gladue reports are not expert reports and the law does not require them to meet the threshold of expert reports. However, Gladue reports should provide information about the writer, including relevant background and experience. This basic information is an obvious factor in assessing the reliability of the report.
- [31] Mr. Lawson submitted that the judge held the Gladue report to the standard of an expert report by requiring background information about the writer, but I would not interpret the judge's observations to mean a Gladue report is, or must be, an expert report. The judge does not say this; all he said was, "It does not set out who the person is who drew it up, in the sense of the person's background, training and experience. I do not know anything about her." (para. 8).
- [32] Given the Crown's extensive submissions about the lack of reliability of the Gladue report, the judge was understandably concerned about the lack of any information about the writer of the report. This basic information is not restricted to expert reports. As a matter of logic and common sense, such information is relevant to the reliability of the report and is one

factor used to assign it weight. Accordingly, the sentencing judge was entitled to consider the lack of information about the writer when deciding how much weight should be given to the report.

- [33] Furthermore, as discussed above, Gladue reports are a form of pre-sentence report and are subject to the same requirement of objectivity. In this case, the judge found the Gladue report was "far too much of an advocacy piece as opposed to a more objective report" and that it "more expresses a strong-felt belief that [Mr. Lawson] really is going to change and wants to change and has the tools to do it" (para. 8). On a review of the record of the sentencing proceedings and the Gladue report, particularly its strong recommendation of a conditional sentence, it was open to the judge to find the Gladue report was not objective.
- [34] The sentencing judge's final reason for assigning little weight to the Gladue report (that the report "does not go deeply enough into the aboriginal aspect of this man's life and of aboriginal life in general" (para. 8)) is somewhat puzzling. As counsel submitted, almost all the systemic, intergenerational effects of Aboriginal life were present and described in the Gladue report. Mr. Lawson was exposed to or affected by them.
- [35] Mr. Lawson's grandmother had been sexually abused in a residential school and developed drug problems. His mother is an alcoholic. Mr. Lawson himself was placed in a terrible foster home, living in unspeakable misery, and later developing a serious addiction to crack cocaine. Any connection Mr. Lawson might have had with his family and community had been severed when he was very young. He never had the opportunity to build a relationship with his family or his Aboriginal community.
- [36] In my view, the Gladue report went into sufficient detail about the Aboriginal aspect of Mr. Lawson's life. I would also observe that Ipeelee, at para. 60, is clear that judges must take judicial notice of certain systemic factors that affect Aboriginal offenders. However, even if the judge erred in finding the Gladue report did not go deeply enough into the Aboriginal aspect of Mr. Lawson's life or Aboriginal life in general, this error did not, in my view, affect the result, as there were other sources of Gladue information before the judge in any event. For example, the judge considered what he described as thorough and careful submissions from defence counsel, letters of support for Mr. Lawson, several letters Mr. Lawson had written to the Crown and to defence counsel, and a pre-sentence report.
- [37] The pre-sentence report was prepared by a probation officer who had worked with Mr. Lawson for about nine months. It included a section entitled "Sentencing Considerations for Aboriginal Offenders", which contained information about Mr. Lawson's Aboriginal heritage, the severance of Mr. Lawson's ties to his community, and sentencing alternatives within the Lower Mainland. This information was similar to that in the Gladue report, although it was less detailed and did not mention that Mr. Lawson's grandmother had been sexually abused in a residential school.

[38] As I noted above, it does not matter what label is put on the report; rather, it is the content that is important. The Gladue information may be brought before the court in various ways by a variety of people, as it was here. Furthermore, the judge reviewed in significant detail the major features of Mr. Lawson's background which included classic systemic and intergenerational effects of the treatment of Aboriginal people.

[39] In conclusion, it was open to the judge, in all the circumstances, to accept the Crown's submissions and not to give much weight to the Gladue report.

Did the judge err by failing to give adequate weight to s. 718.2(e) of the Code?

[40] Relying on Gladue, Mr. Lawson submits the judge erred in principle by giving insufficient weight to s. 718.2(e) of the Code, and failing to consider the unique circumstances of an Aboriginal offender.

[41] Section 718.2(e) of the Code provides:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[42] In Ipeelee, the Court summarized the principles set out in Gladue as follows:

[59] The Court held, therefore, that s. 718.2(e) of the Code is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (Gladue, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (Gladue, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (Gladue, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (Gladue, at paras. 83-84).

[43] The Court in Ipeelee affirmed Gladue and held judges have a statutory duty to consider the unique circumstances of Aboriginal offenders in sentencing. The Court noted numerous courts have erroneously held the Gladue principles do not apply to serious offences and clarified that sentencing judges have a duty to apply s. 718.2(e) to all Aboriginal offenders.

The Court further clarified that it is not necessary to establish a causal link between the systemic and background factors and the commission of the offence. The Court also confirmed that judges may take judicial notice of the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Aboriginal peoples.

- [44] The Court was also clear these matters on their own do not necessarily justify a different sentence for Aboriginal offenders, but provide the necessary context for evaluating the case-specific information presented by counsel. Section 718.2(e) requires judges to craft remedial sentences for Aboriginal people, which are appropriate in the circumstances.
- [45] Although the judge gave little weight to the Gladue report, there were other sources of Gladue information before the judge, as discussed above. The judge also expressly recognized, at para. 7, that he had to take into account Mr. Lawson's Aboriginal background.
- [46] The judge described Mr. Lawson's background as follows:
- [9] What is his background? I think I have to consider this very carefully before I consider what a fit sentence is. It is a terrible background. It is unfair. He was taken from his parents, his mother, when he was young. His mother was not in his life after that, and neither was his dad. He did not grow up in a family, in a neighbourhood, in a stable school, et cetera. He went from foster home to foster home. He was badly mistreated as a child in a foster home, very badly mistreated. I know that the Ministry of Family and Child Services really has a huge workload and really cannot cope with some of its workload, but it seems that he really was neglected by everybody, he and his family, to the point where he was not even brought up in a stable family, he was not even with his siblings all the time, not growing up going to school with his friends and hanging out with his friends and playing sports and going to birthday parties and things like that. He is going from foster home to foster home; he was not adopted. There is no question that by the time he is a teenager, he is a bitter, lost young man, and through no fault of his own. There is nothing he did, nothing, to put himself in that situation. So he ends up living the drug lifestyle. He turns to drugs and he associates with people who are doing drugs. But what happens is an "unending" series of offences, over and over and over again until now.
- [10] What I might question, and what we all might question, is this; that the first reaction to his offending as an adult is that he goes to jail. The first reaction to him as a youth; he goes to jail. He is 16 years old in 1995 and he gets four months for a break and enter. There is no consideration of his background there, no consideration of what is going on.
- [Emphasis added.]
- [47] The judge further lamented, at para. 11, that no one encouraged Mr. Lawson as a child or kept him in school, although he is very intelligent.

- [48] The judge also noted that until 2001, Mr. Lawson was sentenced to jail almost every time he committed an offence. However, the judge went on to observe, at para. 12, that after 2001, when the Gladue issue finally came to light, he started receiving conditional sentence orders, indicating "courts have taken into account his aboriginal background and the need to sort of break the cycle that people talk about."
- [49] The judge stated:
- [17] In my view, the Crown has taken a very moderate position in terms of sentence. Frankly, a person with this kind of record, had he not been an aboriginal or not had the clear intelligence and ability that this man has, he would have gotten longer sentences a long time ago.
- [50] Having considered Mr. Lawson's background, the judge concluded an effective sentence of three years was fit, given Mr. Lawson's lengthy criminal record and inability to complete a conditional sentence. The judge held:
- [20] I am afraid I have to say that it is almost certain that if he is released on a conditional sentence, this man will commit another crime. It is just a matter of time. I know he is well motivated, and I believe he is well motivated, but his record over the last 17 years is that he is unable to stop criminal activity, and he has been unable to complete a conditional sentence. I would conclude, I am afraid, that it would endanger society to release him on a conditional sentence if two years less a day was a fit sentence.
- [24] Having considered all these circumstances, and having listened very carefully to your lawyer's excellent submission, Mr. Lawson, I think you are a person of really great potential, but I have no choice in this case. I owe it to society to protect society and to apply the law. I say a fit sentence would have been three years. I will give you credit for having served seven months in prison.
- [51] Although the judge did not expressly say he considered the unique systemic factors that played a significant part in bringing Mr. Lawson before the court or the types of sentencing procedures that may be appropriate for Mr. Lawson in light of his Aboriginal connection, it is clear from the reasons that the judge implicitly linked Mr. Lawson's Aboriginal background to his drug addiction and repeated offending, as required by s. 718.2(e) of the Code.
- [52] The judge set out Mr. Lawson's background in detail and expressed great concern about the misery and abuse Mr. Lawson suffered as a child. This background reflected almost all the systemic and intergenerational effects discussed in Gladue. The judge further expressed concern about the fact Mr. Lawson was sent to jail so many times before courts tried to "break the cycle" on the instruction of Gladue. The judge noted Mr. Lawson repeatedly received conditional sentences after the Gladue decision, indicating Mr. Lawson's Aboriginal background was finally being taken into account.

- [53] The judge carefully considered what constituted a fit sentence in light of Mr. Lawson's background and ultimately felt bound by law to protect the public. The judge explained why an effective three-year custodial sentence was fit in the circumstances, despite Mr. Lawson's background.
- [54] Mr. Lawson submits the judge assumed, without evidence, that Mr. Lawson received conditional sentences in the past because he was intelligent and Aboriginal. I disagree with that submission. In my view, the judge drew a reasonable inference based on the timing of the Gladue decision and Mr. Lawson's conditional sentences, and the fact he repeatedly received such sentences which is a rare occurrence. In particular, the Crown advised the judge that the court permitted Mr. Lawson three breaches of his third conditional sentence, ordered in June 2010, before it was finally revoked. In my view, the judge reasonably inferred that the courts took into account his Aboriginal background and tried to support his rehabilitation by imposing conditional sentences involving residential treatment for his drug addiction.
- [55] In view of the mandatory nature of s. 718.2(e) and the decisions in Ipeelee and Gladue, it may have been preferable had the sentencing judge explicitly articulated the effect of the Gladue factors on this particular offender and why this sentence is appropriate for Mr. Lawson in light of his Aboriginal heritage. Ipeelee, at paras. 71-75, confirms that s. 718.2(e) does not require an automatic reduction of a sentence simply because the offender is Aboriginal, nor does it mandate better treatment for Aboriginal offenders than non-Aboriginal offenders; however, the sentence should reflect Gladue considerations. The result may be a finding that the structured environment of incarceration is the most restorative or rehabilitative option.
- [56] In this case, the judge implicitly found a custodial sentence met the rehabilitative imperative of addressing Mr. Lawson's drug addiction. The judge noted, at para. 23, the programs in the federal system can help Mr. Lawson and Mr. Lawson might benefit from parole. This indicates the judge accepted the Crown's submission that Mr. Lawson does better, at this time, in a structured setting where programs are available. It is to be hoped that Corrections will place Mr. Lawson in a treatment program appropriate for Aboriginal offenders.
- [57] Given the Gladue information before the judge, his extensive review of Mr. Lawson's background, and his careful consideration of the appropriate sentence, I find the judge gave sufficient weight to s. 718.2(e) of the Code.

Fitness of the Sentence

- [58] Finally, Mr. Lawson argues the judge erred by imposing a sentence outside the range for similarly situated offenders and similar offences. He asks this Court to reduce the sentence to two years plus a day in jail.

[59] Mr. Lawson concedes the determination of a fit sentence in this case is entitled to deference, but says it should be varied as suggested to correct the asserted errors.

[60] The cases Mr. Lawson relies upon include the following:

- R. v. Sanderson, 2005 BCCA 423, 215 B.C.A.C. 262 (sentence reduced from 7 months' imprisonment to five months of time served for theft of a motor vehicle);
- R. v. C.A.E., 2002 BCCA 372, 173 B.C.A.C. 190 (6 months' imprisonment for theft of a motor vehicle and 12 months' imprisonment for impaired driving causing bodily harm, to be served concurrently); and
- R. v. Dick, 2000 BCCA 470, 142 B.C.A.C. 222 (2 years less a day for theft of a vehicle under \$5,000).

[61] In response, the Crown refers to:

- R. v. Fuller, 2007 BCCA 353, 244 B.C.A.C. 158 (43 months' imprisonment for theft over \$5,000 (truck), 5 months' imprisonment for possession of stolen property over \$5,000, and 5 months' imprisonment for possession of instruments suitable for breaking into a motor vehicle, to be served concurrently);
- R. v. Aiken (1998), 109 B.C.A.C. 161 (3 years' imprisonment for possession of a stolen vehicle, 6 months' imprisonment for possession of a stolen camper, and 3 months' imprisonment for the remaining counts of possession of a stolen licence plate, obstruction of a peace officer, taking a motor vehicle without the consent of the owner, and possession of a narcotic, all to be served concurrently);
- R. v. Jeff (1997), 87 B.C.A.C. 166 (2 years' imprisonment for attempted theft of a truck); and
- R. v. Ericson (1991), 7 B.C.A.C. 250 (5 years' imprisonment for two counts of possession of stolen property, to be served concurrently).

[62] The Crown's cases all support a sentence of at least three years. They all involve property offences and offenders with lengthy criminal records. However, Fuller, Aiken, and Ericson involve offenders who were convicted of multiple offences, rather than one, as here. Only Jeff involved an Aboriginal offender and he was sentenced to two years' imprisonment. However, the offence was attempted theft, rather than theft of a motor vehicle.

[63] As to Mr. Lawson's authorities, the offence in Sanderson was less serious because the accused was not "out on the prowl"; instead, he stole a bait car because he needed a means of transportation after spending a night in jail on a false charge. The other two cases are similar to Mr. Lawson's case, involving property offences committed by Aboriginal offenders with lengthy criminal records of property crimes.

[64] The cases provide a broad range of sentence, from about 5 months to 5 years' imprisonment. Each case is dependent on its facts.

- [65] In this case, Mr. Lawson's criminal record has over 70 convictions for property-related offences alone, including theft, robbery, possession of stolen property, break and enter, and taking a motor vehicle without consent. His record, at the age of 33, lists over 80 offences in total, and many are for breaches of court orders.
- [66] Mr. Lawson received three conditional sentences in 2001, 2007 and 2010. He was unable to fulfill the terms of these conditional sentences; all three orders were terminated and converted to jail sentences. On the last of these orders, the court permitted two breaches and only on the third was the conditional sentence terminated.
- [67] I cannot accede to Mr. Lawson's argument that 29 months in jail after credit for 7 months was unfit. In my view, this sentence is not outside the range and was entirely fit in all the circumstances.

Conclusion

- [68] The judge carefully considered all the relevant factors, including the Gladue report, which, based on the record, he was entitled to find unsatisfactory. He properly addressed Mr. Lawson's Aboriginal background and considered s. 718.2(e) of the Code, but ultimately found he had no choice but to protect society from Mr. Lawson's repeated offending.
- [69] The judge decided a fit sentence in all the circumstances was an effective sentence of three years. After credit for the 7 months' pre-sentence time in custody, he imposed a sentence of 29 months. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code: *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at para. 90, 105 C.C.C. (3d) 327. This sentence is entitled to deference in this Court.
- [70] In my view, Mr. Lawson has not identified an error in principle, a failure to consider relevant factors, or an overemphasis of the appropriate factors. The sentence is not demonstrably unfit; it results from a proper exercise of discretion that produced a fit sentence in light of Gladue and Ipeelee.
- [71] I would grant leave to appeal, but would dismiss this appeal.

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Chief Justice Finch "

I agree:

"The Honourable Madam Justice Garson"

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