

CANADA / JUDGMENT

R. v. Lawson

2019 BCCA 290

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 290 R. v. Lawson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lawson,

2019 BCCA 290

Date: 20190904

Docket: CA44027

Between:

Regina

Respondent

And

Keith David Lawson

Appellant

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated October 31, 2016 (R. v. Lawson, 2016 BCSC 2446, Vancouver Docket No. S26576).

The Appellant, appearing in person:

K.D. Lawson

Counsel for the Respondent:

R. Leong

M.A. Erina

Place and Date of Hearing:

Vancouver, British Columbia

May 27, 2019

Place and Date of Judgment:

Vancouver, British Columbia

September 4, 2019

Written Reasons by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Mr. Justice Groberman

Summary:

The appellant, who was convicted of several tax-related offences as well as counselling fraud, appeals an 18-month sentence and a DNA order. He alleges a number of errors in judgment, including that the sentencing judge erred in her approach to aggravating and mitigating factors and by finding that a DNA order would be in the best interests of the administration of justice. Held: Appeal dismissed. The appellant did not establish that the judge committed any material error or that the sentence was demonstrably unfit.

Reasons for Judgment of the Honourable Madam Justice Fenlon and the Honourable Mr. Justice Abrioux:

Introduction

- [1] On May 4, 2016, the appellant, Keith David Lawson, was convicted by a jury of income tax and GST evasion, making false statements in income tax returns and counselling fraud. He was sentenced to 18 months' imprisonment on October 31, 2016, and made subject to a DNA order.

- [2] This is an appeal from the custodial sentence and the DNA order. Mr. Lawson challenges the sentence and order on various grounds, including that the sentencing judge erred in not imposing a conditional sentence and by ordering that he provide a DNA sample. In the alternative, he seeks to reduce his sentence to six months.

Background

- [3] The charges against Mr. Lawson arose from his involvement as an "educator" with the Paradigm Educational Group ("Paradigm"), an organization that essentially instructed individuals on how to commit tax evasion. The appellant was involved with Paradigm from 2001 to 2010. During that time, he taught the Paradigm scheme to approximately 33 students for a fee and sold Paradigm products for a profit.
- [4] In the 2004–2008 taxation years, Mr. Lawson earned a net income of \$159,629.88 from his work as an educator. He did not report this income on his tax returns, resulting in an evasion of federal income tax in the amount of \$18,036.45. In addition, he did not collect or remit \$12,681.15 of GST payable pursuant to the Excise Tax Act, R.S.C. 1985, c. E-15.
- [5] The appellant's conviction appeal was dismissed by this Court on March 26, 2019, with reasons for judgment indexed at 2019 BCCA 109.

The Appellant's Personal Circumstances

- [6] At the time of sentencing, Mr. Lawson was 46 years old and acting as a stay-at-home father to his two sons. His wife had become the sole income earner for the family once he ceased his work with Paradigm. Prior to his involvement with the organization, Mr. Lawson had worked in the automotive industry for ten years. He does not have a prior criminal record.
- [7] Mr. Lawson has ongoing health problems that originated from a motorcycle accident in 1987. Since August 2016, he has suffered recurring infections and other related ailments, some of which have required hospitalization.

Sentencing Position of the Parties

- [8] The Crown sought an overall custodial sentence of two years, consisting of concurrent six-month sentences on each of the income tax and GST evasion offences to be served consecutively with 18 months for the counselling offence, as well as the minimum fine of 100% of the tax evaded and a DNA order.
- [9] Mr. Lawson sought a conditional sentence order of two years less a day and the minimum fine of 100% of the tax evaded. He opposed the DNA order.

The Sentencing Reasons

- [10] In reasons indexed at 2016 BCSC 2446, the sentencing judge reviewed the circumstances of the offences, noting:

- [28] The Paradigm scheme was elaborate in that it involved the implementation of a complex paper trail to lend legitimacy to the claims of students that they were filing honestly. Relying on sophistry and mis-statement of statutes and case law including the Magna Carta and the Supreme Court of Canada tax case of *Stewart v. Canada*, 2002 SCC 46, Paradigm and Mr. Lawson taught that individuals can educate themselves in a fundamentally flawed interpretation of the law with the goals of tax evasion and frustration of the ability of the Crown to prove the requisite mens rea. The latter goal is stated in the teaching phrase: "Living Free and Audit Ready."
- [11] The judge made a number of key findings, including the fact that Mr. Lawson's offences were planned, deliberate and profit-driven. She also found that he had actual knowledge of the illegality of the scheme he taught and followed personally to evade taxes.
- [12] The judge considered the appellant's health problems and child care situation, noting that both were relevant in sentencing: *R. v. Vo*, 2009 BCCA 471, and *R. v. Bi*, 2011 BCCA 204. She assigned minimal weight to Mr. Lawson's expression of remorse, finding that he had a mindset of defiance towards the Canada Revenue Agency and the court throughout the proceedings. She also rejected his submission that the offences lacked concealment and did not involve deceit. With respect to deceit, she noted that Mr. Lawson was convicted of counselling fraud, an offence whose elements include the use of "deceit, falsehood or other fraudulent means". She found that Mr. Lawson himself acted deceitfully in respect to his own tax affairs.
- [13] The reasons for sentence indicate that the judge appreciated that she was bound to consider the options of both a custodial and a conditional sentence, given that conditional sentences can satisfy the sentencing principles of denunciation and deterrence. She then considered whether a conditional sentence would be appropriate in Mr. Lawson's case, in light of the circumstances of the offences and the offender. After a comprehensive analysis, the judge held that a conditional sentence was not appropriate because it would not adequately address the sentencing principles of denunciation and general deterrence. In doing so, she noted that in other cases involving Paradigm educators, conditional sentences had not been imposed in the absence of both a guilty plea and a joint submission by the Crown and the defence on the appropriate sentence.
- [14] The judge imposed the sentence to which we have referred, together with the minimum fine, and made an order for the taking of a DNA sample pursuant to s. 487.051(3) of the Criminal Code, R.S.C. 1985, c. C-46.

On Appeal

- [15] In his written statement, the appellant raises numerous grounds of appeal, including:
- (a) the judge made various errors in her findings of aggravating factors on sentence, including that his acts were planned and deliberate, he was recalcitrant in his views, and that his actions had a negative effect on the community;

- (b) the judge made various errors in failing to properly consider mitigating factors, such as his health and the fact that he had properly expressed remorse;
- (c) the judge erred in finding that a conditional sentence would essentially leave him in the same position as he was previously--that is, a stay-at-home father; and
- (d) the judge erred in finding that a DNA order would be in the best interests of the administration of justice, for which proposition the appellant relies on a decision of the Supreme Court of British Columbia rendered after the decision in this case, being *R. v. Millar*, 2017 BCSC 402 ("Millar").

Standard of Review

- [16] The applicable standard of review for a sentence appeal was succinctly summarized by Justice Fisher in *R. v. Atzenberger*, 2018 BCCA 476:
- [18] Trial judges are uniquely situated to determine an appropriate sentence, and appellate courts must accord deference to such decisions. An appellate court may interfere with a sentence imposed by a lower court only where there has been a material error that has impacted the sentence or where the sentence is demonstrably unfit. A material error includes an error in principle, a failure to consider a relevant factor, or an erroneous consideration of aggravating or mitigating factors: *R. v. Lacasse*, 2015 SCC 64 at paras. 11, 39, 43–44; *R. v. Agin*, 2018 BCCA 133 at paras. 56–57.

Analysis and Decision

- [17] We are of the opinion that the sentencing reasons were thorough and that the judge correctly instructed herself on the relevant sentencing provisions of the Criminal Code. In sentencing the appellant, she was bound by the express and implied implications of the jury's verdict.
- [18] We are also of the view that in determining whether the sentence was fit and the DNA order appropriate, the judge was faced with only two issues that required analysis.
- [19] The first relates to the appellant's serious health issues and the question of whether they were properly considered by the judge in reaching her conclusion that a conditional sentence was not appropriate in this case.
- [20] During the sentencing hearing, Mr. Lawson related what he had allegedly been told by a nurse when he was in custody pending his bail hearing:

And I'm concerned about going to jail because of this. I was arrested in March of 2013, mainly because by that time, January right up until March, I was in bed, in the hospital many times, in and out, too sick to walk, fevers, vomiting, and things related to these infections. It didn't come up at the trial because I didn't feel it to be relevant to the trial proceedings that - - that- - in this year.

But I think it's - - it's a concern for sentencing, because while I was arrested I was taken to [the hospital]. It was a bail hearing scheduled and it had to be cancelled because of my - - of my condition. I was unable to - - they rushed me to the hospital and a nurse there was very concerned about me. They stabilized me and I was sent to the holding facility in jail over the weekend in Coquitlam. At that point the nurse in there saw me several times and I was asking for medication, and she told me - - her - - her words - - I recall them very clearly, because it scared me. She said we can't deal with your sort of condition in here. We're not equipped for this. She said you need to get out of here at all costs. And I took that to mean, given the things I'd been through, that I was - - if I got - - if I got this sort of thing, or if they weren't - - if I wasn't taken to the hospital immediately that I may not survive in there because these infections can lead to sepsis.

[21] There was also medical evidence before the court, including a report dated August 16, 2018 from Dr. John Warner--a specialist in urology--referring to reconstructive surgery being performed on the appellant in 2013 to repair a severe urethral stricture. The report describes the surgery as being only partially successful, with ongoing intermittent catheterization several times a week. It was Dr. Warner's opinion that there was no definite treatment to correct this condition and that further infections and hospitalizations would inevitably occur in the future. Further, in a report dated August 18, 2016, Dr. Rapoport--the specialist who had performed the operation--referred to the appellant's need to self-catheterize on a regular basis and stated that the appellant required "regular monitoring including endoscopy about every 6 months or so".

[22] It is evident that the appellant has a significant health issue. But absent those factors where conditional sentences have been imposed in like cases, we are not of the view that Mr. Lawson's health concerns amounted to an overriding consideration which would warrant a conditional sentence and that the judge made a reviewable error in concluding otherwise. We note that the circumstances detailed by the appellant, to which we refer above, were in the context of a temporary holding facility in which he was in custody pending his bail hearing. The appellant will serve his sentence in a Provincial Institution and we are prepared to take judicial notice of the fact that healthcare professionals are available in such institutions to monitor, treat and refer inmates if necessary. It is also the case that administrative review avenues are available to inmates in the event that they are concerned with the level of treatment that they are receiving.

[23] In that regard, we note Justice Groberman's conclusion in *R. v. Swope*, 2015 BCCA 167 at para. 39, that:

any deficiencies in the accommodation of [the appellant's] medical condition in prison is best dealt with directly through appropriate administrative or legal channels rather than indirectly through sentence modifications.

[24] The second issue relates to the DNA order. As noted by the judge, the offence of indictable fraud is a secondary designated offence pursuant to s. 487.04 of the Criminal Code, which means that the court may consider whether it is in the best interests of the administration of justice to order the taking of a DNA sample.

[25] Section 487.051(3) provides in part:

In deciding whether to make the order, the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

[26] While a DNA order is one which is "ancillary" in nature, it is clear, in our view, that its purpose goes further than being purely an investigatory tool to prevent future offences.

[27] This Court addressed the taking of DNA samples in *R. v. Awasis*, 2009 BCCA 134 ("Awasis"). The sentencing judge in that case had declined to order that a DNA sample be taken from an accused who had been convicted of certain controlled substance offences. Chief Justice Finch, writing for the Court, allowed the Crown's appeal. In doing so, he reviewed the considerations that apply with respect to that provision:

[48] In considering "the nature of the offence", the judge held that its investigation was unlikely to benefit from DNA evidence. It was a theme of his reasons that ordinarily DNA evidence is of little utility in investigating street-level drug trafficking. He recognized that whether there was evidence at the scene of the crime that would yield a DNA profile was not necessarily relevant. He observed that he had never seen DNA evidence used in cases of trafficking cocaine.

[49] However, the reasons for judgment appear to express doubt as to whether it would ever be in the best interests of the administration of justice to order DNA sampling with respect to offences of this nature, unless there were other reasons to make such an order.

[50] With respect, in the absence of a constitutional challenge, the learned sentencing judge was bound to accept Parliament's determination that an order authorizing the forensic analysis of the DNA of a person convicted of offences contrary to s. 5 of the CDSA is capable of furthering the purposes of the DNA data bank in advancing related state interests. In *R. v. Hendry et al* [(2001), 161 C.C.C. (3d) 275 (Ont. C.A.)] the Ontario Court of Appeal put it this way: "the fact that the offence of which the accused was convicted is not ordinarily one where DNA evidence might be found is not necessarily relevant. The legislation has already struck a balance by limiting the reach of the DNA data bank orders to persons convicted of serious offenses, being those designated as primary or secondary offenses" (para. 23).

- [51] Parliament has seen fit to include possession for the purpose of trafficking as a designated offence. So far as the nature of the offence is concerned, nothing in the judge's reasons appears to acknowledge that fact.
- [52] In addition, as explained above, the purposes of the DNA legislation are broader than simply identifying the offender should she reoffend. In *R. v. Jordan* 2002 NSCA 11, Cromwell J.A. (as he then was) said (at para. 70):

The fact that DNA identification was not, or is not, likely to be useful with respect to the offender, may tend to show that obtaining the samples will not further the legislation's identification purpose. However, such evidence does not negate the testing of the offender in relation to the legislation's other purposes.

- [53] The judge also considered the nature of the offence in relation to the other state interests outlined in *Briggs*. He held, first, that a DNA order would have no deterrent effect (para. 18). With respect, the judge took too narrow a view of this issue. In *R. v. Jordan* (supra) Cromwell J.A. said:

- [35] The DNA provisions may be seen as furthering the objective of deterrence -- both general and specific. The fact that reliable identification may result from DNA analysis and, therefore, that the risk of apprehension and conviction is increased may, itself, deter criminal activity. In other words, the increased effectiveness of criminal investigation as a result of DNA technology will, as LaForest, J. put it in *Thomson Newspapers v. Canada* (Director of Investigation and Research), "...enhance the law's potency as a deterrent to potential wrong doers." It has been noted that the retention of samples in a DNA data bank furthers the objective of specific deterrence of those whose samples are placed in the bank

[Emphasis added; original emphasis omitted.]

- [28] We note that Mr. Lawson is not the first Paradigm-affiliated offender with respect to whom a DNA order has been requested. Between 2016 and 2018, the Supreme Court of British Columbia considered the appropriateness of such an order on two other occasions, being *Millar* and *R. v. Anderson*, 2018 BCSC 651 ("Anderson"). These decisions all refer to *Awasis*. DNA orders were made in both *Anderson* and the present matter, but not in *Millar*. All three accused received global custodial sentences, consisting of two-and-a-half years in *Millar*, four-and-a-half years in *Anderson* and 18 months in the case of Mr. Lawson.
- [29] While we are mindful that attempts should be made to achieve parity in sentencing, the exercise of judicial discretion will inevitably lead to some situations where reconciliation of sentences in similar cases is not possible, particularly in light of the well-known principle that sentencing is an individualized process. As Justice Wagner explained in *R. v. Lacasse*, 2015 SCC 64:
- [58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be

disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.

- [30] In *Awasis*, Chief Justice Finch touched upon the question of whether the privacy interests of the accused would be significantly engaged by a DNA order:
- [58] The judge accepted that a convicted offender had a reduced expectation of privacy with respect to her identity and that the sampling process is minimally invasive. The privacy interests of the accused were "not a major consideration here" .
- [31] The Crown submits that the heightened interest that Paradigm offenders have in the preservation of their privacy, as asserted by the appellant in his oral submissions, may legitimately inform the court's determination as to whether a DNA order should be made. Accordingly, the Crown argues that a DNA order is justified as part of Mr. Lawson's punishment.
- [32] This submission, in our view, conflates the concepts of deterrence on the one hand and punishment on the other, although, as we explain below, a DNA order clearly has a deterrent effect. While an offender's particular sensitivity to the impact of a DNA order on his privacy interest may be a factor weighing against the making of such an order, it cannot be a factor weighing in favour of the making of that order.
- [33] We reach this conclusion for two reasons. First, it is apparent from the wording of s. 485.051(3) of the Criminal Code that the intent of the DNA provisions is to balance the individual's rights to privacy and security of the person with the requirements of effective law enforcement: *R. v. Jordan*, 2002 NSCA 11 at para. 27. The section reads:

Order -- persons found not criminally responsible and secondary designated offences

- (3) The court may, on application by the prosecutor and if it is satisfied that it is in the best interests of the administration of justice to do so, make [a DNA order] in Form 5.04 in relation to
- ...
- (b) a person who is convicted, discharged under section 730 or found guilty under the Youth Criminal Justice Act or the Young Offenders Act, of an offence committed at any time, including before June 30, 2000, if that offence is a secondary designated offence when the person is sentenced or discharged.

In deciding whether to make the order, the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

- [34] Section 487.051(3) requires a judge to consider whether, in a given case, the impact of a DNA order on the offender's privacy interest is justified. This requirement reflects the Charter-protected status of privacy and security of the person. As Justice Cromwell, writing for the Nova Scotia Court of Appeal, stated in *Jordan*:
- [30] An individual's reasonable expectation of privacy is protected by the constitutional prohibition of unreasonable searches and seizures; a person cannot be deprived of life, liberty and security of the person other than in accordance with the principles of fundamental justice. It follows that the scope and content of the rights to be free from unreasonable searches and seizure and to security of the person are relevant to the interpretation of s. 487.051 which refers to these same rights. The section directs that an order should not be made where its impact on these rights would be disproportionate. It is apparent that Parliament intended a constitutional balancing of interests which would be appropriate in the "usual" case or over the run of cases. The interpretation and application of the section therefore requires an assessment of the privacy and security of the person rights of the offender as referred to in s. 487.051 and the manner in which Parliament sought to balance these with the legislation's law enforcement objectives.

[Emphasis added; footnotes omitted.]

- [35] The state-sanctioned taking of a bodily substance without consent is indisputably a search or seizure, although the taking of a DNA sample by way of a hair follicle or cheek swab involves minimal intrusion on the physical integrity of the offender: *R. v. Rodgers*, 2006 SCC 15 at paras. 13, 25, 39. It is the potential impact of a DNA order on the informational component of privacy that is far more significant: *Rodgers* at para. 40; see also *R. v. S.A.B.*, 2003 SCC 60 at para. 48.
- [36] Seeing as an individual's reasonable expectation of privacy is constitutionally protected, it cannot properly be construed, in our view, as being in the best interests of the administration of justice to count the severity of the infringement or deprivation flowing from the making of a DNA order as a factor weighing in favour of making such an order. To the contrary, if a class of offenders experiences a heightened loss of privacy in response to the making of a DNA order--due to religious or cultural reasons, for example--that should properly be a factor weighing against the making of such an order.
- [37] Secondly, unlike some ancillary orders, a DNA order is not a punishment and should not be used as such. In *R. v. Ku*, 2002 BCCA 559, leave to appeal ref'd [2002] S.C.C.A. No. 541, Justice Donald writing for this Court said:

[34] I do not agree that [a DNA order] has any of the characteristics of a punishment. [R. v. Murrins, 2002 NSCA 12] decided the point at para. 107 as follows:

[107] I am not persuaded that the ordering of a DNA sample is "punishment" within the meaning of s. 11(i) of the Charter. Its impact on the offender is not comparable to the control central to imprisonment, house arrest or even reporting. It does not constitute a deprivation or hardship such as that which accompanies a restitution order, a fine or even a firearms prohibition. In no direct way does the order put limits upon the future behaviour of the offender. I do not agree that it constitutes "severe handling" or "harsh treatment". Nor is it a direct consequence of the conviction. The court cannot order a DNA sample on its own motion - there must be an application by the Crown. It is not within the range of tools from which the judge may craft the sentence.

[35] Thus, case law makes it clear that the DNA data bank order is not a punishment and should not be treated as such: see also [R. v. Briggs (2001), 157 C.C.C. (3d) 38] at para. 71 [Ont. C.A.]. As the order is not a punishment, s. 11(i) is not available to the appellant.

[Emphasis added.]

[38] The making of a DNA order clearly does have a deterrent effect. But this arises not from the act of taking the sample, but from the fact that the compilation of DNA information enhances the state's law enforcement capabilities: R. v. Murrins, 2002 NSCA 12 at para. 102; see also R. v. K.R.J., 2016 SCC 31 at para. 53.

[39] In the present case, the trial judge made the DNA order without addressing Mr. Lawson's particular concern for informational privacy. However, before privacy interests can outweigh the state's interest in the making of such an order, there must be something in the circumstances of the case that take it out of the ordinary. This Court in Ku at para. 45 agreed with the following reasoning of the Ontario Court of Appeal in R. v. Hendry (2001), 161 C.C.C. (3d) 275 (Ont. C.A.):

[18] In balancing the offender's right to privacy and security of the person against the state interests in obtaining the offender's DNA profile, the court must consider the following. The legislation offers significant protections against misuse of the DNA profile information, thus minimizing an improper intrusion into the offender's privacy. Having been convicted of a designated offence, the offender already has a reduced expectation of privacy. In the ordinary case of an adult offender the procedures for taking the sample have no, or at worst, a minimal impact on the security of the person. Thus, in the case of an ordinary adult offender there are important state interests served by the DNA data bank and few reasons based on privacy and security of the person for refusing to make the order.

[40] In our view, Mr. Lawson's particular preference for keeping the state at arm's length does not take his case out of the ordinary. As was stated in para. 25 of Hendry, it will be in the best interests of the administration of justice in the vast majority of cases to make a DNA order:

[25] On balance, I would expect that in the vast majority of cases it would be in the best interests of the administration of justice to make the order under s. 487.051(1)(b) and s. 487.052, as the case may be. This follows simply from the nature of the privacy and security of the person interests involved, the important purposes served by the legislation and, in general, the usefulness of DNA evidence in exonerating the innocent and solving crimes in a myriad of situations.

[Emphasis added.]

[41] Accordingly, while Mr. Lawson's aversion to the loss of his informational privacy interests cannot be used to justify the making of a DNA order, the real question on appeal with respect to this issue in this case is whether the judge committed a reviewable error in exercising her discretion in making the order in question. We are of the view she did not and would in fact go further and find that her decision on this issue was correct.

Disposition

[42] Accordingly, we would dismiss the appeal.

"The Honourable Madam Justice Fenlon"

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Groberman"

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