

CANADA / JUDGMENT

R. v. Lawson

2022 BCSC 2035

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Supreme Court of British Columbia

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2022 BCSC 2035 R. v. Lawson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lawson,

2022 BCSC 2035

Date: 20221020

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Registry: Victoria

Rex

v.

Kohl Robert Gordon Lawson

Before: The Honourable Madam Justice V. Jackson

Oral Reasons for Sentence

Counsel for the Crown:

M. Adams

Counsel for the Accused:

S. Roy

Place and Date of Hearing(s):

Victoria, B.C.

September 2 and October 20, 2022

Place and Date of Judgment:

Victoria, B.C.

October 20, 2022

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INTRODUCTION

- [1] This decision was delivered in the form of oral reasons. The reasons have since been edited for publication, without changing the substance.
- [2] On June 21, 2022, I convicted the defendant Kohl Robert Gordon Lawson of one count of unlawfully possessing cocaine, a controlled substance, for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].
- [3] My task today is to determine a just and proportionate sentence. Counsel agree that a period of imprisonment is required, but disagree on the length, and whether it should be served under supervision in the community. The Crown submits the appropriate sentence is six

months jail followed by 12 months probation, and the mandatory ten year firearm prohibition. Defence counsel submits a fit and proper sentence is a 12 month conditional sentence order ("CSO"), with conditions requiring house arrest for the first six months, a curfew for the next three months, and no curfew for the last three months, plus 50 hours of community service work to be completed in first nine months of the CSO.

- [4] The Crown submits that if a 12 month CSO is imposed, the curfew should remain in place for any period Mr. Lawson is not under house arrest.

LEGAL FRAMEWORK

Applicable legal principles

- [5] The Criminal Code, R.S.C. 1985, c. C-46 [Code] applies to sentencing under the CDSA as well. Section 10(1) of the CDSA provides:

Purpose of sentencing

10 (1) Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

- [6] The "Part" referenced in s. 10(1) is Part 1 of the CDSA, which includes the offence of possession for the purpose of trafficking under s. 5(2).
- [7] I am mindful of the legal framework applicable in sentencing, and in particular the purposes and principles of sentencing set out in ss. 718 to 718.201 of the Code. I am also mindful that sentencing is "an individualized process, in that a sentence must be fashioned to take into account the circumstances of the offence, the circumstances of the offender, the moral blameworthiness of the offender, the principles of sentencing, and proportionality to the offence and the offender": R. v. Voong, 2015 BCCA 285 at para. 6.

Limits on Sentence

- [8] Cocaine is a Schedule 1 substance under the CDSA: Schedule 1, s. 2(2). The maximum punishment for possession of a controlled Schedule 1 substance for the purposes of trafficking is imprisonment for life: CDSA, s. 5(3)(a).
- [9] The circumstances of this offence do not attract a mandatory minimum sentence.

CIRCUMSTANCES OF THE OFFENCE

- [10] The circumstances of the offence are set out in my reasons for judgment on the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter] voir dire and my entrapment ruling. I will not repeat them here but I am mindful of them. In brief, on June 19, 2020, Mr. Lawson was found in possession of 3.5 grams of cocaine as part of a dial-a-dope operation.
- [11] Dial-a-dope operations are more serious than general trafficking cases and are "particularly insidious" since they provide for easy dissemination of drugs and therefore a greater degree of infiltration of drugs into communities; as a result these types of offences call for greater weight to be placed on general deterrence: Voong at paras. 16, 18; R. v. Oates, 2015 BCCA 259 at paras. 16-19, citing R. v. Tran, 2007 BCCA 613 at para. 12 and R. v. Franklin, 2001 BCSC 706 at paras. 45-48.

CIRCUMSTANCES OF MR. LAWSON

- [12] Determining a fit and proper sentence requires consideration of the specific circumstances of the offender: R. v. Angelillo, 2006 SCC 55 at para. 18. In addition to the submissions of counsel, I have the benefit of several letters of support from several of Mr. Lawson's friends, several members of his family, and his girlfriend.
- [13] Mr. Lawson is a young man of 24. He is a high school graduate. He began experimenting with using drugs, including cocaine, at the age of 16. By 2019, he was no longer controlling his cocaine use.
- [14] Upon his arrest, Mr. Lawson was polite and respectful. After his arrest, he moved to Salt Spring Island, and it is reported that he quit using cocaine.
- [15] He is currently employed full-time with a drywall company and holds a supervisory position. They are happy with his work, and with him.
- [16] He has a supportive network of family and friends.

RANGE OF SENTENCES FOR POSSESSION OF COCAINE FOR THE PURPOSE OF TRAFFICKING IN DIAL-A-DOPE CASES

- [17] Our Court of Appeal has held that denunciation and deterrence are the primary objectives in imposing sentences in dial-a-dope cases: Oates at para. 20. This is the case even for first time drug offenders, since to do otherwise would be to encourage financially compromised individuals without drug records to be recruited into drug trafficking: Oates at para. 25.
- [18] The normal range for a sentence for a first-time drug offender in a dial-a-dope operation involving Schedule 1 drugs, with some exceptions such as a controlled substance like fentanyl, is a jail sentence starting somewhere around six months, with the range being six to nine months: Oates at para. 27; Voong at para. 44.

MITIGATING AND AGGRAVATING CIRCUMSTANCES

[19] In discerning what the fit and proper sentence is in this case, I am to consider all of the mitigating and aggravating circumstances relating to the offences or the offender: Code, s. 718.2(a).

Aggravating circumstances

[20] There are no statutorily-deemed aggravating circumstances in this case.

[21] The Crown has the burden to establish beyond a reasonable doubt any fact it seeks to rely on as an aggravating circumstance: *R. v. Matonovich*, 2007 BCCA 472 at para. 13, citing *R. v. Gardiner*, [1982] 2 S.C.R. 368, 1982 CanLII 30 (SCC).

[22] The Crown argues, and I find, the following facts have been proven beyond a reasonable doubt and are appropriately considered as aggravating circumstances in determining the appropriate sentence in this case:

- 1) The substance Mr. Lawson possessed is a Schedule 1 substance. Schedule 1 is reserved for the most addictive and dangerous substances.
- 2) The offence was part of a dial-a-dope operation.

[23] Defence counsel points out there is an absence of further aggravating factors; there is no evidence of weapons or involvement of a criminal organization, no substances other than cocaine, and in particular no fentanyl. I note those absences as facts that may distinguish this case from some others, but those absences do not constitute mitigating factors.

Mitigating circumstances

[24] I find the following facts have been proven on a balance of probabilities and constitute mitigating circumstances in this case:

- 1) Mr. Lawson has a supportive family and community network, which bodes well for his rehabilitation;
- 2) Mr. Lawson has no criminal record. In fact, the evidence at trial was that he had no negative police contact of any kind prior to the offence;
- 3) He is employed, and has a leadership position with his employer;
- 4) Defence counsel advises Mr. Lawson is no longer using drugs, although there is no evidence of any assessment or treatment. Therefore, there is no independent verification and no treatment that could offer the Court some additional confidence Mr. Lawson has developed skills and tools to prevent a relapse.

[25] Defence counsel noted Mr. Lawson has complied with his bail conditions since his arrest. However, adherence to bail conditions is a neutral factor: *R. v. Ravelo-Corvo*, 2020 BCSC 2130 at para. 31.

- [26] Similarly, I do not think it can be said that an absence of other controlled substances, or the fact that the controlled substance Mr. Lawson possessed was not fentanyl, can be classified as mitigating factors.
- [27] Mr. Lawson's exercise of his rights to plead not guilty and put the Crown to the test of proving his guilt beyond a reasonable doubt at trial does not constitute an aggravating circumstance: Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 159-160; see also *R. v. Crier*, 2020 ABQB 475 at para. 77. Crown counsel did not argue otherwise.
- [28] However, remorse can be a mitigating factor and is sometimes expressed by the accused pleading guilty. Mr. Lawson did not plead guilty, although he invited me to find him guilty following the dismissal of his s. 10(b) Charter application. I do not infer remorse from that invitation, and in my view it is, at best, a neutral factor.
- [29] The letters submitted on Mr. Lawson's behalf suggest that he has told others he is remorseful, although he has not expressed that remorse directly in these proceedings. Nonetheless, I find he probably feels some remorse for what he did.

Collateral Consequences

- [30] Collateral consequences are those that are secondary to the criminal process and include consequences arising from the commission of an offence, a conviction for an offence, or the sentence imposed for an offence, and that impact the offender: *R. v. Suter*, 2018 SCC 34 at para. 47; *R. v. Wong*, 2018 SCC 25 at para. 68. While collateral consequences on an offender may be considered in sentencing as personal circumstances of the offender, "they are not, strictly speaking, aggravating or mitigating factors, since [aggravating or mitigating factors] are by definition related only to the gravity of the offence or to the degree of responsibility of the offender": Code, s. 718.2(a); *R. v. Pham*, 2013 SCC 15 at para. 11; *Suter* at para. 48. Nonetheless, collateral circumstances may be relevant when applying the principles of individualization and parity: *Pham* at para. 11.
- [31] Defence counsel argues several collateral consequences should have a mitigating effect on the sentence to be imposed in this case.

Seizure of Mr. Lawson's vehicle

- [32] Mr. Lawson's car was seized with a consequent financial loss. However, I have no details that would enable me to place much weight on that circumstance.

Should the breaches of Mr. Lawson's rights under s. 10(b) of the Charter be given a mitigating effect in determining a proportionate sentence in this case?

- [33] A Charter breach, and potentially state misconduct falling short of a Charter breach, may, at times, be a mitigating factor that provides a basis to reduce a sentence where it constitutes a hardship or penalty suffered by the defendant: *R. v. Nasogaluak*, 2010 SCC 6 at paras. 47, 53, 55; *R. v. Massey*, 2012 BCSC 935 at para. 64, referring to Donald J.A.'s dissent in *R. v. Carpenter*, 2002 BCCA 301.
- [34] However, the jurisprudence to which I was taken does not support sentence reduction where Charter breaches were found but evidence was ruled admissible, as is the situation of the case before me, or where the offender suffered no indignity or penalty as a result of the breaches: *Massey* at paras. 63-64, citing *R. v. Glykis*, 24 O.R. (3d) 803, 1995 CanLII 1277 (ON CA), *R. v. Collins*, 172 Nfld. & P.E.I.R. 1, 1999 CanLII 13905 (NL CA), and *R. v. Carpenter*, 2002 BCCA 301 (majority judgment).
- [35] In this case, there is no connection between the breaches and the evidence gathered, nor did Mr. Lawson suffer any indignity as a result of the breaches. A Charter breach per se does not mitigate the seriousness of the offence nor in itself constitute a form of punishment, and is not a mitigating factor that reduces the appropriate sentence: *Glykis* at 807.

IS A CSO APPROPRIATE IN THIS CASE?

- [36] The Crown concedes a CSO is an available sentence for this offence, based on the judgment of Justice Schultes in *R. v. Chen*, 2021 BCSC 697, in which he declared s. 742.1(c) of the Code, which precluded the imposition of a CSO for an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life, to be constitutionally invalid, and the application of the principle of judicial comity described in *Hansard Spruce Mills Ltd. (Re)*, [1954] 4 D.L.R. 590 at 592, 1954 CanLII 253 (BC SC). I agree a CSO is a sentence that is available at law in this case.
- [37] However, the question remains whether a CSO is a just and proportionate sentence in the circumstances of this case. The Crown argues it is not.
- [38] The CSO was introduced to relieve the high incarceration rates in Canada and to permit those who are not a danger to the public and sentenced to less than two years to serve their sentence in the community under "tight controls": *Voong* at para. 34, citing *R. v. Proulx*, 2000 SCC 5 at para. 36. An offender who seeks a CSO has to present a plan that can be given effect through conditions: *R. v. Niederhumer*, 2022 BCCA 88 at para. 42.
- [39] As Justice Frankel summarized in *Niederhumer* at paras. 20-21:
- [20] The criteria a court must consider in deciding whether to impose a CSO are set out in s. 742.1 of the Criminal Code. They were summarized as follows by Chief Justice Lamer in *R. v. Proulx*, 2000 SCC 5 at para. 46, [2000] 1 S.C.R. 61:
- (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;

- (2) the court must impose a term of imprisonment of less than two years;
 - (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
 - (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in [Criminal Code] ss. 718 to 718.2.
- [21] With respect to evaluating whether the community would be endangered, the Chief Justice stated:
- [69] In my opinion, to assess the danger to the community posed by the offender while serving his or her sentence in the community, two factors must be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. If the judge finds that there is a real risk of re-offence, incarceration should be imposed. Of course, there is always some risk that an offender may re-offend. If the judge thinks this risk is minimal, the gravity of the damage that could follow were the offender to re-offend should also be taken into consideration. In certain cases, the minimal risk of re-offending will be offset by the possibility of a great prejudice, thereby precluding a conditional sentence.
- [40] A CSO is a sentence of imprisonment capable of providing both denunciatory and deterrent effect; it is both punitive and rehabilitative in nature: Voong at paras. 25, 34, citing Proulx at paras. 23, 40-41. If the court is satisfied that the serving of a sentence of less than two years in the community would not endanger the safety of the community, and would be consistent with the fundamental purpose and principles of sentencing set out in the Code, the court can order the offender to serve the sentence in the community: Code, s. 742.1(a). Given that denunciation and deterrence are the primary objectives in imposing sentences in dial-a-dope cases, in order to impose a CSO in this case I must be satisfied it can be crafted in such a way that can sufficiently achieve those goals. Where a CSO is imposed, house arrest or a strict curfew should be the norm: Voong at para. 32, citing Proulx at para. 36.
- [41] In this case, I am satisfied the risk of Mr. Lawson reoffending is low. However, the risk to the public if he does reoffend is real, and I have taken that into account.
- [42] The defence relies on R. v. Ellis, 2022 BCCA 278 where a 41-year-old offender who had trafficked in controlled substances, including fentanyl, and had a criminal record was given a three year suspended sentence. The offender's young daughter had been present during one of the offences.

- [43] The defence relies on several cases where suspended sentences were imposed for trafficking offences (before the Code provision that precluded CSOs for the offence of possession for the purpose of trafficking was declared invalid in *Chen*) to illustrate there have been circumstances where the court has imposed community-based sentences: *R. v. Joon*, 2017 BCPC 301; *R. v. Christianson*, 2018 BCSC 349. Defence counsel also relied on *R. v. Webber*, 2021 BCPC 296 (post-*Chen*) in which the Court imposed a CSO of 15 months.
- [44] Crown points out that *Oates* involved a dial-a-dope operation and possession of cocaine and in those ways is similar to the case before me. However, the offence in that case also involved heroin, and the offender fled from police and was on probation at the time of the offence, and so it is distinguishable on its facts in a material way.
- [45] I must bear in mind that denunciation and general deterrence remain primary considerations in this case.

IMPOSITION OF SENTENCE FOR THIS OFFENCE

[46] Mr. Lawson, please stand.

[47] Having considered the submissions of counsel, the governing legal principles and the case law, as well as your circumstances, and the circumstances of this offence, for the offence of possessing cocaine for the purpose of trafficking, count one (1) on the indictment, I sentence you to 12 months of imprisonment, to be served in the community (that is a conditional sentence of imprisonment under s. 742.1 of the Code) with the following conditions:

- 1) You must keep the peace and be of good behaviour.
- 2) You must appear before the Court when required to do so by the Court.
- 3) You must notify the Court or your conditional sentence supervisor in advance of any change of name or address and promptly notify the Court or supervisor of any change in employment or occupation.
- 4) You must remain in British Columbia unless you have prior written permission from the Court or your conditional sentence supervisor to leave the province.
- 5) You must report in person to a conditional sentence supervisor at 836 Courtney Street, Victoria, B.C. by 3:00 p.m. today, October 20, 2022, and after that, you must report as directed by your supervisor.
- 6) You must live at [REDACTED] and provide your conditional sentence supervisor with your phone number. You must not change your address or phone number without prior written permission from your supervisor.

- 7) If you are evicted or expelled from the place where you are living, you must tell your conditional sentence supervisor immediately. If the office is closed, you must contact your conditional sentence supervisor immediately when the office opens on the next business day.
- 8) For the first six months of this order, you must obey house arrest by being inside your residence at [REDACTED], (or on its lot), between 1:00 p.m. and 11:00 a.m., every day.
- 9) You must present yourself immediately at the door to your residence or answer the phone when any peace officer or conditional sentence supervisor attends or calls to check on you during the house arrest.
- 10) You may be away from your residence during the house arrest with the written permission of your conditional sentence supervisor. Such permission is to be given only for employment or other compelling reasons. You must carry the permission with you when you are outside your residence.
- 11) You may also be away from your residence during the house arrest hours:
 - a) While at, or going directly to, or returning directly from a healthcare facility because of a medical emergency. If asked, you must provide your conditional sentence supervisor with proof of your attendance at the facility.
- 12) After the end of the sixth month of this order, and continuing until the order expires, you must obey a curfew by being inside your residence at [REDACTED], (or on its lot), between 8:00 p.m. and 5:00 a.m., every day.
- 13) You must present yourself immediately at the door to your residence or answer the phone when any peace officer or conditional sentence supervisor attends or calls to check on you during the curfew.
- 14) You may be away from your residence during the curfew with the prior written permission of your conditional sentence supervisor. Such permission is to be given only for employment or other compelling reasons. You must carry the permission, which can be in electronic format, with you when you are outside your residence.
- 15) You may also be away from your residence during the curfew hours:
 - a) While at, or going directly to, or returning directly from a healthcare facility because of a medical emergency. If asked, you must provide your conditional supervisor with proof of your attendance at the facility.
- 16) You must not possess or consume alcohol, or controlled substances as defined in the Controlled Drugs and Substances Act, or any other intoxicating substance, except with a medical prescription.

- 17) You must not enter any liquor store, beer and wine store, bar, pub, lounge, nightclub, beer garden or any other business from which minors are prohibited at any time by the terms of a liquor license.
- 18) You must attend, participate in, and complete any intake, assessment, counselling or education program directed by your conditional sentence supervisor. This may include, but is not limited to, counselling or programming for alcohol or drug addiction.
- 19) You must not possess, directly or indirectly, any weapon as defined by the Criminal Code, including:
 - a) Firearms and ammunition;
 - b) Cross-bows, prohibited or restricted weapons or devices, or explosive substances;
 - c) Anything used, designed to be used, or intended for use in causing death or injury to any person, or to threaten or intimidate any person;
 - d) Any imitation of all of the above, including any compressed air guns or BB/pellet guns; or
 - e) Any related authorizations, licenses and registration certificates and you must not apply for any of these.
- 20) You must not be in any residence in which any other person keeps or stores any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance.
- 21) If you possess any of the items prohibited by this order, you must immediately go to the [REDACTED] RCMP detachment located at [REDACTED]., provide a peace officer with a copy of this order and arrange to go with the officer to the location(s) where all the items are and surrender them to the officer.
- 22) You must not possess any knife outside your residence, except for the immediate preparation or eating of food.

The exceptions are as follows:

- a) while on your property;
- b) while at work, or going directly to and from work. If asked, you must provide your conditional sentence supervisor with the details of your location and hours of employment;
- c) with the prior written permission of your conditional sentence supervisor. You must carry the permission, which may be in electronic format, when you possess any knives outside your residence.

[48] Your counsel suggested I include an order of community service work to be completed during the CSO. I am not going to make that a condition of the CSO because my intention is to minimize the time you are out of your residence. But I will address community service work when I turn to the next element of your sentence.

[49] In addition to the CSO, I direct you to comply with a 12 month probation order with the following conditions:

- 1) You must keep the peace and be of good behaviour.
- 2) You must appear before the Court when required to do so by the Court.
- 3) You must notify the Court or the probation officer in advance of any change of name or address, and promptly notify the Court or the officer of any change of employment or occupation.
- 4) You must report in person to a probation officer at [REDACTED], within two business days after your release from custody unless you have obtained, before your release from custody, written permission from the probation officer to report elsewhere or within a different time frame. After that, you must report as directed by your officer.
- 5) When first reporting to your probation officer, you must provide them with the address where you live and your phone number. You must not change your address or phone number without notifying your probation officer in writing at least five days in advance of any change.
- 6) You must not possess or consume controlled substances as defined in the Controlled Drugs and Substances Act except with a medical prescription.
- 7) You must not possess drug paraphernalia that is suitable for the sale or consumption of drugs that have not been prescribed for you.
- 8) You must attend, participate in and complete any intake, assessment, counselling, or education program as directed by your probation officer. This may include, but is not limited to, counselling or programming for alcohol or drug addiction.
- 9) You must perform 50 hours of community service work, to be completed within the first 12 months of the probation order.

[50] Mr. Lawson, you may sit down.

[51] I am now going to address the ancillary orders:

- 1) Given that you have been convicted of an offence relating to the contravention of s. 5(2) of the CDSA, and as this is your first conviction, under ss. 109(1)(c) and 109(2) of the Code I make an order:

a) prohibiting you from possessing any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance for a period of ten years; and

b) prohibiting you from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition, for life.

[52] An offender who is convicted of an offence under the Code shall pay a victim surcharge for each offence, in addition to any other punishment imposed on the offender: Code, s. 737(1). In this case, the victim surcharge for an offence punishable on indictment is \$200.00: Code, s. 737(2)(b)(ii). Imprisonment alone is not a reason to waive the victim surcharge, but where the Court is satisfied the victim surcharge would cause undue hardship to the offender, meaning the offender is unable to pay a victim surcharge on account of the offender's precarious financial circumstances, including because of their unemployment, homelessness, lack of assets or significant financial obligations towards their dependants, the Court can order an offender to pay no victim surcharge, or to pay a reduced amount, but must state its reasons for doing so: Code, s. 737(2.1), (2.2), (2.3), (2.4).

[53] There was no suggestion you were unable to pay the victim surcharge and so I order that victim surcharge be paid.

[54] Mr. Lawson, you came very close to receiving a jail sentence. If you come before the Court again, it will not be as a first offender. Don't let that happen.

[55] I wish to thank counsel for their very able submissions throughout the proceedings.

"V. Jackson, J."

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