

CANADA / JUDGMENT

R. v. Lee

2018 BCCA 428

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 428 R. v. Lee COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Lee, 2018 BCCA 428 Date: 20181010 Docket: CA45173 Between: Regina Respondent And Malachi Johnathan Lee Appellant Before: The Honourable Madam Justice Garson The Honourable Madam Justice Dickson The Honourable Mr. Justice Hunter On appeal from: An order of the Provincial Court of British Columbia, dated February 20, 2018 (R. v. Lee, 2018 BCPC 84, Nanaimo Docket 40108-2-C). Oral Reasons for Judgment Counsel for the Appellant: B. Movassaghi Counsel for the Respondent: J.N. Walker Place and Date of Hearing: Vancouver, British Columbia October 9, 2018 Place and Date of Judgment: Vancouver, British Columbia October 10, 2018 Summary: Mr. Lee seeks leave to appeal and, if leave is granted, appeals a global sentence of seven years' imprisonment following his guilty pleas to one count of possession for the purpose of trafficking and one count of possession of a prohibited firearm with readily accessible ammunition. He argues that the judge erred by imposing consecutive sentences for the two offences, failed to give weight to his guilty pleas, crafted an unfit sentence and punished him twice for the firearm offence by treating it as both an aggravating factor and imposing consecutive periods of imprisonment. Held: leave to appeal granted, appeal dismissed. The judge properly exercised her discretion in imposing consecutive sentences when she considered that the offences addressed different societal interests. She noted Mr. Lee's guilty pleas as a mitigating factor. The judge chose to impose consecutive sentences instead of treating the firearms offence as an aggravating circumstance in crafting her sentence on the drug offence. Considering the circumstances of this case and the societal risks associated with fentanyl, the sentence imposed is manifestly fit.

Introduction

- [1] DICKSON J.A.: Malachi Lee seeks leave to appeal and, if leave is granted, appeals a global sentence of seven years' imprisonment, less 20 months' credit for pre-trial custody. The sentence was imposed following his guilty pleas to one count of possession of cocaine, methamphetamine, fentanyl, heroin and GHB for the purpose of trafficking and one count of possession of a prohibited .45-calibre handgun with readily accessible ammunition, both committed on January 25, 2017. Mr. Lee entered the guilty pleas on January 17, 2018 before Judge Saunders of the Provincial Court of British Columbia. The global sentence consists of four years for the drug offence and three years for the firearm offence to be served

consecutively.

- [2] On appeal, Mr. Lee contends the judge erred by imposing consecutive sentences for the two offences, which, he says, were committed as part of a single endeavour. He also says she failed to give weight to his guilty pleas and punished him twice for the firearm offence by treating it both as an aggravating factor and imposing consecutive periods of imprisonment. Finally, Mr. Lee submits that the judge crafted an unfit sentence which overemphasized denunciation and deterrence while giving insufficient weight to rehabilitation.
- [3] For the reasons that follow I would grant leave to appeal the sentence, but dismiss the appeal. Circumstances of the Offence
- [4] On January 25, 2017, police officers observed Mr. Lee and another person move a heavy bag out of a suspected drug house near Courtenay, British Columbia into a vehicle. They pulled the vehicle over shortly thereafter. Mr. Lee was in the front passenger seat. When police searched the vehicle, they located several items, including: a .45-calibre handgun; a box of ammunition containing 42 rounds suitable for use in the handgun; 11.7 ounces of cocaine; 65.7 grams of heroin and fentanyl mix; nine ounces of crystal methamphetamine; 500 millilitres of GHB; over \$3,000 cash; four cell phones and other items commonly associated with drug trafficking. The total value of the cocaine was \$33,000; for the heroin and fentanyl, \$12,000; for the crystal methamphetamine, \$20,300; for the GHB, \$1,000; for the total value of \$66,000 on the high end and \$36,750 on the low end of the range.
- [5] The Crown tendered an expert report describing the dangers of fentanyl. Counsel agreed the court could take judicial notice of the fact that there is a drug crisis in British Columbia. Central and North Vancouver Island are two of the regions where the rates of illicit drug overdose deaths are highest. Fentanyl is the leading cause of unnatural deaths from overdose. Circumstances of the Offender
- [6] Mr. Lee was 27 years old at the time of sentencing. He was raised in the Comox area and had the support of his family and a previous employer. He had a grade 7 education and was addicted to drugs, although he had recently taken steps to meet with drug and alcohol counsellors. Over the years, he had worked on and off in roofing, dry walling and machine operation. He had been dealing in drugs since he was 21 years old.
- [7] Mr. Lee's criminal record included ten convictions for different offences, starting in February 2011. Among them were two convictions for possession of a controlled substance and seven convictions for possession for the purpose of trafficking on three different occasions, the most recent in February 2016, when he received a 15-month sentence and a mandatory lifetime firearms prohibition. The firearms prohibition was one of three that bound Mr. Lee when he committed the offences for which Judge Saunders imposed sentence. He was also on probation at the time. Reasons for Sentence

- [8] At the sentence hearing, defence counsel sought a sentence of three to five years on both counts to be served concurrently. In support of his position, he emphasized Mr. Lee's guilty pleas, his relatively young age, and the support of his family and previous employer. The Crown sought a four-year sentence for the drug offence and a four-year sentence to be served consecutively for the firearm offence, together with ancillary orders. In support, Crown counsel emphasized Mr. Lee's criminal record, the presence of the handgun and the significant nature, quantity and value of the drugs.
- [9] The judge began her Reasons by summarizing counsel's positions and the circumstances of the offences. After describing Mr. Lee's personal circumstances and criminal record, she identified various aggravating and mitigating factors to be taken into account. In particular, she cited Mr. Lee's criminal record as an aggravating factor, noting that his seven prior convictions for possession for the purpose of trafficking all occurred within four years of the events leading to the charges. She also cited the large quantity and value of the drugs, Mr. Lee's role as a mid-level dealer in a community plagued by fentanyl-related deaths and the presence of a handgun with ammunition in the vehicle when he was subject to multiple prohibitions. She described these factors as highly aggravating, individually and cumulatively. As to mitigating factors, she cited Mr. Lee's guilty pleas, which, she said, showed that he had taken responsibility for his actions. She also noted that Mr. Lee had support from his family and previous employer and stated "he is still a young man and can be rehabilitated".
- [10] Next, the judge addressed the applicable sentencing principles and relevant case authorities. Noting that counsel agreed a federal term of imprisonment should be imposed, she identified the main issue as being whether the sentence on the firearms offence should be consecutive or concurrent. After reviewing sentences imposed in cases involving drug offences, including trafficking in fentanyl, and firearms offences, she turned to those involving a combination of both, citing, among several others, this Court's decision in *R. v. Borecky*, 2013 BCCA 163, *R. v. Swales*, 2016 BCCA 502, *R. v. Li*, 2009 BCCA 85, as well as the decision of the Ontario Court of Appeal in *R. v. Houle*, 2008 ONCA 287.
- [11] In the course of her thorough case review, the judge accurately noted that the question of whether to order sentences to be served consecutively or concurrently is a matter within a sentencing judge's discretion, having regard to the principles of totality and proportionality and the offender's overall culpability. She also stated that "whether the acts were linked" and "whether the offences amounted to separate attacks on society's different interests" are necessary considerations. She went on to describe Mr. Lee's moral culpability as very high, noting the lethal character of fentanyl and his status as a repeat offender and mid-level dealer. She also inferred he had the prohibited firearm with him for protection purposes connected to his drug trafficking activity. Then she stated:

- [70] In *R. v. Borecky*, the Court of Appeal gives a sentencing judge the discretion to impose a sentence concurrently or consecutively, provided the court considers the principles of totality and proportionality, and whether or not the offences are connected or amount to an attack on different legally protected rights which affect the community.
- [71] In determining that the sentence on [the firearms count] ought to be consecutive, the following factors are relied on. It is not disputed that Mr. Lee was subject to no fewer than three mandatory firearms prohibitions, all of which were still in effect at the time of the offences in 2017. He was charged on [the firearms count] with possession of a prohibited weapon contrary to s. 95 of the Code and on a breach of the prohibition orders. The offence of possession of a prohibited weapon is a serious offence as it is intended to accommodate the legislative and judicial aim of ensuring the safety of the public when it comes to restricted or prohibited weapons.
- [72] While the presence of the firearm was in the vehicle where the drugs were located and was a factor in the drug trafficking, the more serious issue which dictates a consecutive sentence is that s. 95 is a different offence and addresses a different societal interest; namely, keeping prohibited and restricted weapons out of the public forum for public safety, and furthermore that Mr. Lee was prohibited for life from possessing firearms, and despite that he had a firearm and ammunition in the vehicle, along with the drugs.
- [73] The fact that the firearm was in the vehicle at the time of trafficking, is connected to the activity, but the overall and more compelling factor is that the offence offended society's overall right to be safe from drug dealers using guns in their trade which could imperil the safety of innocent members of the community. If Mr. Lee is sentenced to a concurrent sentence, that message would be lost and the principles of deterrence and denunciation for this type of offence would not be recognized.
- [74] Having found that it would be appropriate to impose a consecutive sentence on [the firearms count], it is necessary to take account of the principle of proportionality to ensure the total sentence is appropriate for this offender and for these offences, with this particular level of moral blameworthiness, which is not disproportionate to similar sentences for similar offenders.
- [12] In the result, the judge imposed a sentence of four years' imprisonment on the drug trafficking offence to be served consecutively to a three-year sentence on the firearms offence, less credit for time served, together with ancillary orders. She also reminded Mr. Lee that he is a young man and urged him to start working on his rehabilitation. On Appeal
- [13] Mr. Lee contends that the judge made four distinct errors. First, he says, although she adverted to his guilty pleas, she failed to give them any, or sufficient, weight as a mitigating factor in crafting her sentence. Second, and most significantly, she imposed a consecutive sentence for the firearms offence despite finding that the drugs and firearm formed a single endeavour, which finding, he says, supported the imposition of a concurrent, not a consecutive, sentence. Third, he says, the judge punished him twice for the firearms offence

by treating it both as an aggravating factor and imposing a consecutive sentence. Fourth, while he concedes the sentences were within the appropriate range individually, he says the global sentence was unduly harsh and focused on denunciation and deterrence without accounting for his prospects for rehabilitation, thus amounting to an unfit sentence. In his submission, a fit global sentence would be something in the range of five years, with both sentences to be served concurrently and the sentence on the drug offence increased from four to five years taking into account the presence of the firearm as an aggravating factor.

- [14] Crown counsel responds that the judge made no reversible error. In his submission, given the circumstances of the offence and the offender, a global sentence of seven years was entirely warranted. Emphasizing the discretionary nature of a judge's decision on whether to impose concurrent or consecutive sentences, he says the four-year sentence for the drug offence was at the low end of the range given the nature and amount of drugs involved. However, Crown counsel says it was fit when combined with the consecutive three-year sentence for the firearms offence, taking into account the totality principle. He also says the judge took Mr. Lee's guilty pleas into account, weighed the mitigating and aggravating factors appropriately and applied the proper approach to ensure that the total sentence she imposed was proportionate. Discussion
- [15] The applicable standard of review is uncontentious. As this Court recently affirmed in *R. v. Mann*, 2018 BCCA 265, appellate intervention is justified on a sentence appeal where the judge committed an error in principle that had an impact on the sentence or imposed a sentence that is demonstrably unfit. Did the judge fail to give any, or sufficient, weight to Mr. Lee's guilty plea?
- [16] I see no merit in this ground of appeal. The judge identified Mr. Lee's guilty pleas as a mitigating factor near the outset and specifically noted their significance as an indication that he took responsibility for his actions. In my view, she was not obliged to repeat the point later in her analysis when she addressed the issues of whether to impose consecutive or concurrent sentences and the application of the proportionality principle. Did the judge err by imposing a consecutive rather than concurrent sentence on the firearms offence?
- [17] In *Mann*, this Court also affirmed that, as stated in *Borecky*, the decision to order concurrent or consecutive sentences is a discretionary exercise that must be treated with the same appellate deference owed to sentencing judges concerning the length of the sentence imposed. In upholding consecutive sentences imposed for drug and firearms offences closely linked in time and place in *Mann*, Justice Fitch further affirmed that, in such circumstances, judges may impose consecutive sentences so long as they ensure that the aggregate sentence is proportionate by having regard to the totality principle.
- [18] In my view, *Mann* is dispositive of this ground of appeal. As this Court held in *Li*, the test for the imposition of a consecutive or concurrent sentence is "whether the acts constituting the offence were part of a linked series of acts within a single endeavour". That test does not, however, compel the imposition of concurrent sentences where there is similar or

overlapping evidence relating to both charges or a close link in time and place between them. Nor does consideration of whether the offences engage different legally protected interests amount to a legal error. On the contrary, in Mann, the offender pleaded guilty to drug-related offences and to possession of a loaded handgun found in close proximity to the drugs in his residence. The sentencing judge in Mann imposed a global sentence of seven years' imprisonment comprised of consecutive sentences for the drug and firearms offences. Applying *R. v. Crevier*, 2015 ONCA 619, the sentencing judge concluded that a consecutive sentence should be imposed for the firearms offence because, although committed at the same time, the gun and drug offences engaged different legally protected interests. On appeal in Mann, this Court saw no error in principle in the sentencing judge's analysis.

- [19] I am similarly unable to see any error in principle in the judge's analysis in this case. It was open to the judge to impose concurrent sentences, but she was not obliged to do so. Although she reasonably inferred that the firearm was connected to Mr. Lee's drug trafficking activity and noted it was located in the vehicle with the drugs, the judge did not find the two offences "were part of a linked series of acts within a single endeavour". Nor did she err in considering whether they addressed different societal interests. Rather, taking into account all of the circumstances, she exercised her discretion in accordance with established legal principle, and, in doing so, had appropriate regard to the totality principle. In my view, her decision is entitled to appellate deference. Did the judge err by punishing Mr. Lee twice for the firearms offence?
- [20] In my view, this ground of appeal lacks merit. The judge plainly recognized that she could either treat the firearms offence as an aggravating circumstance in crafting her sentence on the drug offence or impose consecutive sentences. She chose to do the latter. Is the global seven-year sentence unfit?
- [21] In my view, there is also no merit in this ground of appeal.
- [22] As the Crown emphasized, citing, among other authorities, Mann and *R. v. Smith*, 2017 BCCA 112, fentanyl is a scourge that imposes intolerable risks on society and sentences of four to six years' imprisonment have been imposed for offences involving trafficking in fentanyl alone. Similar sentences have also been imposed in cases involving substantial quantities of cocaine and methamphetamine: *R. v. Francis*, 2008 BCCA 309; *R. v. Godbout*, 2015 BCCA 168; *Borecky*. In addition, a three-year sentence for a firearm conviction in "true crime" circumstances is near the bottom of the appropriate range of sentences: *R. v. Holt*, 2015 BCCA 302; *R. v. Kachuol*, 2017 BCCA 292. In my view, considered against this backdrop, taking into account the circumstances of the offences and Mr. Lee's recent, related criminal record and prohibitions, the seven-year global sentence imposed by the judge is manifestly fit. I would not disturb it on appeal.

Conclusion

[23] For all the foregoing reasons, I would grant leave to appeal, but dismiss Mr. Lee's appeal from sentence.

[24] GARSON J.A.: I agree.

[25] HUNTER J.A.: I agree.

[26] GARSON J.A.: Leave to appeal is granted, but the appeal is dismissed. "The Honourable Madam Justice Dickson"

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