

CANADA / JUDGMENT

R. v. Melnick

2019 BCCA 390

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 390 R. v. Melnick COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Melnick, 2019 BCCA 390 Date: 20191031 Docket: CA46137 Between: Regina Respondent And Jonathan Melnick Appellant Before: The Honourable Madam Justice D. Smith The Honourable Madam Justice Garson The Honourable Madam Justice Fisher On appeal from: An order of the Provincial Court of British Columbia, dated May 23, 2019 (R. v. Melnick and others, Kamloops Dockets 105129-6-C; 105229-1; 105129-8; 105230-1). Oral Reasons for Judgment Counsel for the Appellant: D.C. Gagnon Counsel for the Respondent: S.E. Elliott Place and Date of Hearing: Vancouver, British Columbia October 31, 2019 Place and Date of Judgment: Vancouver, British Columbia October 31, 2019 Summary: The appellant seeks leave to appeal his sentences of two years concurrent for weapons charges under ss. 94 and 108(1)(b) of the Criminal Code and one year consecutive for possession of firearms and ammunition while prohibited, contrary to s. 117.01(1). He alleges that the sentencing judge erred in applying a range of sentence applicable to offences under s. 95 of the Criminal Code rather than s. 94. He also alleges that the sentence imposed ought not to have been in parity with that of his co-accused, who pleaded guilty to the more serious s. 95 offence. Held: Leave to appeal is granted, but the appeal is dismissed. The two year sentence for the s. 94 offence is not demonstrably unfit in light of the appellant's record and his prior conviction for the same offence. The appellant's sentence amounted to the same term of imprisonment as his co-accused because of the consecutive sentence imposed for the breach offence under s. 117.01(1), and the consecutive nature of that sentence was not in dispute. The judge considered the relative seriousness of the offences and the records of the appellant and the co-accused in imposing equivalent global sentences.

- [1] FISHER J.A.: The appellant, Jonathan Melnick, pleaded guilty to five offences, four being weapons offences. He received effective sentences of two years concurrent on each of three weapons charges and one year consecutive on a fourth.

- [2] Mr. Melnick seeks leave to appeal, and if leave is granted, to appeal his sentences. He alleges in his statement that the sentencing judge erred by failing to "give reasonable consideration" to Gladue factors, applying an incorrect range of sentence, and imposing an overall sentence that ought not to have been in parity with his co-accused. He says that a fit sentence in the circumstances is 15 months concurrent for three of the firearms offences and nine months consecutive for the fourth, which at this time, amounts to time served.
- [3] The Crown submits that the judge properly considered all relevant factors and imposed sentences that were entirely fit given the nature of the offences and Mr. Melnick's serious criminal record. The offences
- [4] In December 2017, Mr. Melnick was involved in a traffic stop near Heffley Creek, B.C. He was driving his SUV with his co-accused, Joshua Susee-Holmes, in the back, second row seat. The police ultimately searched the SUV, the subject of an unsuccessful challenge under ss. 7-10 of the Charter, and found numerous weapons and ammunition. They seized an empty 9 mm magazine clip, an unloaded CO2 pellet gun, two unloaded 12-gauge shotguns with the serial numbers removed, three 12-gauge shotgun shells, an unloaded semi-automatic rifle, and two 9 mm handguns, one which was loaded. They also seized over \$42,000 in cash, false identification containing Mr. Melnick's photograph, a folding knife, and pepper spray.
- [5] After the court's ruling on the Charter challenge, Mr. Melnick pleaded guilty to four of the counts on Information 105129-6-C: · occupying a motor vehicle knowing there were prohibited, restricted and non-restricted firearms in it, contrary to s. 94(1) of the Criminal Code, R.S.C. 1985, c. C-46 (count 4); · possession of the two shotguns knowing the serial numbers had been removed, contrary to s. 108(1)(b) (counts 5 and 6); and · possession of an identity document purporting to relate to another individual, contrary to s. 56.1(1) (count 10).
- [6] Mr. Melnick received a sentence of two years concurrent on counts 4, 5 and 6, and six months concurrent on count 10.
- [7] Mr. Melnick also pleaded guilty to count 1 on Information 105229-1 for possession of firearms and ammunition while prohibited, contrary to s. 117.01(1), and received a sentence of one year consecutive.
- [8] The co-accused pleaded guilty to possession of a loaded prohibited or restricted firearm, contrary to s. 95(1) and to possession of property, currency over \$5,000, obtained by crime, contrary to s. 354(1)(a). He received a global sentence of three years.
- [9] All of the sentences were reduced for time served in pre-trial custody. The offender

- [10] As set out in the reasons for sentence, Mr. Melnick is an indigenous man with a lengthy and serious criminal record. He had a troubled youth. His parents separated when he was an infant. His father was abusive to both him and his mother, was in prison at some point, and died when Mr. Melnick was 20 years old. Mr. Melnick was exposed to racist attitudes and grew up being ashamed of his indigenous heritage. He has a daughter who he did not see for many years but with whom he recently re-connected. He has a mother who is supportive.
- [11] Mr. Melnick has, unfortunately, a significant criminal record, described by the sentencing judge as "unenviable, unending and serious". His record contains about 45 convictions that include violations of court orders, and offences involving property, violence, drugs and weapons. His lengthiest sentence was four years in 2011 for drug trafficking. Most relevant is his history of weapons offences, which include careless use of a firearm (2004), unauthorized possession of a firearm (2004), possession of a loaded prohibited or restricted firearm (2005) and occupying a motor vehicle knowing it contains a prohibited or restricted firearm, contrary to s. 94 (2009). Mr. Melnick received sentences of 14 months for the 2004 careless use offence, one year for the 2005 possession offence and 18 months for the 2009 s. 94 offence, as well as a firearms prohibition. Although his last firearms offence was in 2009, Mr. Melnick's record shows that he has continued to engage in criminal activity as recently as 2015. Reasons for sentence
- [12] The sentencing judge considered denunciation, deterrence and protection of the public to be paramount in cases involving prohibited and restricted weapons. She discussed Mr. Melnick's record, his indigenous background and his troubled youth, as I have described, as well as his efforts to rehabilitate while in custody.
- [13] The judge reviewed the principles in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13, in assessing Mr. Melnick's moral culpability. She did not accept the defence submission that a sentence of 15 months for the s. 94 offence was appropriate in light of his previous conviction for the same offence, for which he was sentenced to 18 months. Nor did she accept the Crown submission for a global sentence of three and a half years. In imposing sentence, the judge took into account parity between the appellant and the co-accused, Gladue factors relevant to Mr. Melnick, and Mr. Melnick's "very promising rehabilitative efforts", and balanced these against the serious nature of his criminal record and the circumstances of the offences. Standard of review
- [14] The deferential standard of review for sentencing decisions is well-known. An appellate court may interfere with a sentence imposed by a lower court only where there has been an error in principle that has materially impacted the sentence or where the sentence is demonstrably unfit. An error in principle includes a failure to consider a relevant factor or an erroneous consideration of aggravating or mitigating factors: *R. v. Lacasse*, 2015 SCC 64; *R. v. Agin*, 2018 BCCA 133 at paras. 56–57. An appellate court may not intervene because it might have weighed the factors differently: *R. v. May*, 2018 BCCA 391 at para. 27. Gladue factors

- [15] Although Mr. Melnick alleged that the sentencing judge did not properly consider Gladue factors, he withdrew that submission during oral argument. His counsel acknowledged that the judge did consider those factors, specifically to him, at paras. 70 to 73 of her reasons.
- [16] It is apparent in the reasons for sentence that the judge balanced Mr. Melnick's unfortunate background, including his First Nations' heritage, against his significant, related criminal record and the seriousness of the offences. Range of sentence and parity
- [17] Mr. Melnick submits that the judge erred in applying a range of sentence applicable to offences under s. 95 of the Criminal Code rather than s. 94. He refers to the judge's statement at para. 67 of her reasons that the range for offences under s. 94, as accepted by this court in May, was three to five years.
- [18] The judge did misstate the range referred to in May. There, this court stated at para. 21:
- [21] On Count 4, the defence and the Crown agreed that the range of sentence was between three and five years. On Counts 5 and 6, the sentencing judge found that the range of sentence was from 12 to 18 months.
- [19] However, I agree with the Crown that the two year sentence she imposed for the s. 94 offence in count 4, being well below a three to five year range, indicates that she did not consider the higher range. While the two-year sentence is above the 12 to 18-month range mentioned in May, the judge expressly rejected the defence submission for a sentence within that range due to his prior conviction and sentence for the same offence. I would not consider the two-year sentence for count 4 to be unfit in light of Mr. Melnick's record, in particular his prior conviction for the same offence for which he already received a sentence at the top of the range. Moreover, the jurisprudence is clear that sentencing ranges are guidelines, not hard and fast rules. As the court stated in Lacasse, "sentencing ranges must in all cases remain only one tool among others that are intended to aid trial judges in their work" (at para. 69).
- [20] Finally, Mr. Melnick complains that his sentence was effectively the same as that of his co-accused, who pleaded guilty to the more serious offence under s. 95. This, he says, provides inappropriate parity given the much more serious nature of the s. 95 offence here, which included a loaded handgun.
- [21] I find no merit in this submission. The sentence imposed for Mr. Melnick's s. 94 offence was appropriate when compared with his co-accused's s. 95 offence (two years and three years respectively). The fact that his global sentence amounted to the same three-year term was the result of his conviction for the possession while prohibited offence under s. 117.01(1) for which he received a consecutive sentence. He took no issue with this sentence being consecutive, both at trial and on appeal.

- [22] Mr. Melnick's submission before us is that the judge ought to have considered the totality principle once the consecutive sentence was imposed. He contends that the appropriate sentence with respect to the totality principle for the offences under both ss. 94(1) and 117.01(1) is time served.
- [23] In my view, the sentencing judge made no error in principle in imposing a consecutive 12-month sentence for the s. 117.01(1) offence given Mr. Melnick's related record. That sentence was at the top of the typical range of 6 to 12 months, and as this court acknowledged in *R. v. Ball*, 2014 BCCA 120, sentences for s. 117 breaches are generally consecutive to other offences (see para. 24). Nor did the judge make an error in principle by imposing equivalent global sentences for both accused. She took into account the more serious nature of the s. 95 offence and the less serious nature of the co-accused's record.

Disposition

- [24] In my view, the sentence imposed in this case was fit, and I see no basis on which this court should interfere. I would grant leave to appeal but would dismiss the appeal.
- [25] D. SMITH J.A.: I agree.
- [26] GARSON J.A.: I agree.
- [27] D. SMITH J.A.: Leave to appeal is granted but the appeal is dismissed. "The Honourable Madam Justice Fisher"

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