
CANADA / JUDGMENT

R. v. Miller

2020 BCSC 954

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 954 R. v. Miller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Miller,

2020 BCSC 954

Date: 20200622

Docket: 68285

Registry: Chilliwack

Regina

v.

Kevin Scott Miller

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Sentencing

Counsel for the Crown:

H. Waldock

Counsel for the Accused:

D. Ferguson

Place and Date of Trial/Hearing:

Chilliwack, B.C.

June 22, 2020

Place and Date of Judgment:

Chilliwack, B.C.

June 22, 2020

Mr. Miller's History of Offending

- [1] Mr. Miller committed sexual offences in 1995 involving strangulation of his female victims. One involved the use of a ligature. He was convicted of two counts of aggravated sexual assault.
- [2] The charges led to protracted legal proceedings during which Mr. Miller spent significant time in custody. The Crown sought an order that Mr. Miller be designated as a dangerous offender.
- [3] In 2006, after three hearings and two appeals, Mr. Miller was declared a Long Term Offender. He was sentenced to a further four years in jail, and a ten-year supervision order was imposed ("LTSO").
- [4] During the sentencing proceedings, certain factors were identified that put Mr. Miller at risk of committing future violent offences. First, substance abuse was a significant factor in Mr. Miller's sexual offences and other prior convictions. Second, concerns were identified about Mr. Miller's interactions with women. His sexual offences involved women with whom he struck up brief and casual relationships in bars, clubs, or on the streets.
- [5] The Parole Board placed conditions on Mr. Miller preventing him from using drugs, monitoring his relationships with women, and requiring him to reside in halfway houses operated by the Correctional Service of Canada.
- [6] Mr. Miller has not been convicted of any substantive offences since 1995. However, there have been difficulties with Mr. Miller's compliance with his LTSO. In particular:
 - a. In 2011, he was convicted of breaching his LTSO by consuming alcohol. He received an effective sentence of 11 months and three weeks.
 - b. In 2012, shortly after his release, concerns arose about his computer use. He fled from Vancouver to Montreal. There, after drinking, he turned himself in. He received an effective jail sentence of 11 months.
 - c. In January 2014, he used marihuana, but the parole officers allowed him to remain in the community. A few days later, Mr. Miller left his Vancouver halfway house and fled to the USA.
 - d. From 2014 to 2015, Mr. Miller spent 19 months in the USA, some of which was a 1-year jail sentence for failing to report as a convicted sex offender. Canada applied for his extradition. Eventually, Mr. Miller waived the extradition hearing.

- e. On his return to Canada, Mr. Miller pled guilty to being unlawfully at large, and received an effective jail sentence of 15 months - also imposed as a "time served" sentence.
- [7] In addition, parole officers have suspended Mr. Miller's LTSO on various occasions and returned him to custody with respect to concerns relating to his risk factors.
- [8] On June 24, 2018, Mr. Miller was required to provide a urine sample. Analysis of the sample revealed significant quantities of amphetamine, methamphetamine, and THC (the active ingredient of cannabis).
- [9] The THC is not of concern as Mr. Miller had a medical marihuana authorization. However, nothing permitted him to use methamphetamine. Amphetamine is a metabolite of methamphetamine and, as a result, the presence of the two drugs in his urine sample does not necessarily mean he was using two different drugs.
- [10] When the parole officers received the lab analysis, they arranged for Mr. Miller's arrest. On his arrest, he had in his possession a business card with a woman's name and phone number on it. The phone number matched the phone number on online advertisements for what appeared to be sex trade work. Mr. Miller had not reported any contact with this woman to his parole officers although he advised them that a woman who attempted to sell him a cell phone had approached him.
- [11] From January to June 2018, Mr. Miller lived quietly in the community. He had worked up to the maximum curfew allowable, was on four-hour visual checks, and was participating in sex offender treatment. He was providing ongoing urine samples.
- [12] When Mr. Miller was arrested, he did not deny his drug use. His counsel submitted that his use of crystal meth was at a time when there was increased use of crystal meth in the Chilliwack CSC unit. His use was opportunistic; he did not go out seeking crystal meth.

Background

- [13] Mr. Miller is 51 years-of-age. He was born in the US. His parents separated and his mother established a new relationship with a partner in Utah. Mr. Miller has siblings and step-siblings from both of his mother's relationships. Mr. Miller was quite close to his stepfather in Utah and was hurt by his stepfather's failure to fight to maintain a relationship with him after his mother left Utah, and moved the family to British Columbia. In British Columbia, Mr. Miller's mother re-partnered with a man who emotionally, physically, and sexually abused him.
- [14] At the age of 13, Mr. Miller was placed in foster care after an altercation in which he was alleged to have assaulted his stepfather. His mother did not support him with respect to the circumstances of the assault.

- [15] Mr. Miller did not do well in care; he repeatedly ran away and was involved in drug abuse and in forced prostitution. When he aged out of the foster care system, he had continued interaction with the criminal justice system. According to his record, his offences started with property offences. He was involved in a serious assault during a break in. That resulted in a four-year federal sentence. In 1995, the sexual offences occurred and he served 15 years.
- [16] Arianne Weathers (phonetic) is Mr. Miller's spouse. She travelled from Victoria to Chilliwack to be in the courtroom during this sentencing hearing. Despite not having lived together for many years, Ms. Weathers has been a constant in Mr. Miller's life. She has supported and advocated for him. Mr. Miller's sister also lives locally and she too has supported him.
- [17] Mr. Miller is an intelligent man, who writes very well. When in the community, Mr. Miller has worked. He was working as a labourer on the construction of the Abbotsford courthouse prior to his arrest.
- [18] He has entered a guilty plea and that is a mitigating factor in this case.
- [19] The primary sentencing goals in this case are denunciation and deterrence.

Proceedings

- [20] The police arrested Mr. Miller on June 29, 2018, on a parole suspension. This charge for breach of the LTSO was laid on September 19, 2018.
- [21] Mr. Miller waived his preliminary inquiry, and pled guilty on November 4, 2019, in this Court; however, he did not wish to immediately proceed to sentencing.
- [22] He remained in custody until March 23, 2020, when the Crown agreed to his release and Justice Devlin ordered it.

Appropriate Sentence for Breach of Long Term Supervision Order

- [23] The Crown submits that the range of sentence, for this offence by this offender, is 18-24 months. However, the Crown submits that an 18-month sentence is appropriate sentence for this offence committed by this offender, but asks for an 18-month sentence in this case. Mr. Miller agrees with the Crown's submission.
- [24] Judges may impose long-term supervision orders only on offenders who pose a substantial risk to the community: Criminal Code, R.S.C. 1985, c. C-46 [Code], s. 753.1.
- [25] In *R. v. Ipeelee*, 2012 SCC 13 at para. 55, Justice LeBel explained how to assess the gravity of the breach of an LTSO:
- [55] The severity of a particular breach of an LTSO will depend, in large part, on the circumstances of the breach, the nature of the condition breached, and the role that condition plays in managing the offender's risk of reoffence in the community. This requires a contextual analysis. As Smith J.A. states in *R. v. Deacon*, 2004 BCCA 78, 193 B.C.A.C. 228, at para. 51, "the gravity of an offence under s. 753.3 must be measured with reference not only

to the conduct that gave rise to the offence, but also with regard to what it portends in light of the offender's entire history of criminal conduct". Breach of an LTSO is not subject to a distinct sentencing regime or system. In any given case, the best guides for determining a fit sentence are the well-established principles and objectives of sentencing set out in the Criminal Code.

- [26] In *R. v. Larocque*, 2012 BCCA 216, a pedophile violated his LTSO by:
- using a computer that was connected to the internet, and
 - leaving his halfway house for two weeks.
- [27] The first breach was not serious. Mr. Larocque used the computer to check his email. This did not form part of the core of his past offending behaviour, nor did it significantly interfere with the parole officers' supervision of his risk. The court upheld a six-month sentence for this breach.
- [28] The second breach was serious. While leaving the halfway house did not necessarily place Mr. Larocque on the path to re-offending, it prevented the parole officers from supervising him, which went to the heart of his LTSO supervision, and justified a consecutive 24-month sentence.
- [29] In *R. v. Lawson*, 2019 BCPC 103, the offender violated an internet ban by sending Christmas messages to his daughter. The court found that his offence did not go to the core of his risky behaviour. The court determined that a six-month sentence was appropriate, even though Mr. Lawson had breached his LTSO several times before.
- [30] In contrast, in *R. v. Paul*, 2012 BCPC 390, the offender committed a series of violent offences against vulnerable Aboriginal intimate partners. Heavy drinking formed a substantial part of his offending. After the last such offence, Justice Grist imposed an LTSO. Mr. Paul breached that order several times. On the last breach, he left the halfway house, consumed alcohol in the company of a vulnerable young Aboriginal woman similar to his past victims. Because this breach included the same factors involved in his past offending, Judge Young imposed 18 months.
- [31] The Paul case illustrates the importance of the applicable risk factors in assessing the gravity of a breach of the LTSO. Shortly after Mr. Paul's LTSO ended, during another drinking session, he murdered a vulnerable Aboriginal woman with whom he had formed an intimate relationship: *R. v. Paul*, 2017 BCSC 2203.
- [32] I agree with the joint submission that Mr. Miller's breach falls closer to the behaviour of Mr. Paul than it does to that of Mr. Lawson. Mr. Miller's use of methamphetamine raises concerns that he is returning to the conduct that led to his original convictions. The business card suggesting contact with a sex trade worker increases this concern.

- [33] In *R. v. Anthony-Cook*, 2016 SCC 43 at paras. 35-40, the Supreme Court of Canada explained the importance of joint submissions on the proper functioning of our criminal justice system. I may not depart from a jointly proposed sentence unless doing so would bring the administration of justice into disrepute, or would otherwise be contrary to the public interest: *Anthony-Cook* at para. 32. The Court emphasized that this is "an undeniably high threshold" that would only be met where the joint submission would cause reasonable and informed persons, aware of all the relevant circumstances, to believe that the proper functioning of the justice system had broken down: *Anthony-Cook* at paras. 33-34, 42.
- [34] Mr. Miller has only approximately two years remaining on his LTSO. These two years are the last opportunity to persuade Mr. Miller to live in the community without the drug use that was a significant risk factor in his offending. Mr. Miller needs to appreciate that returning to drug use could result in a prison sentence that extends beyond the term his LTSO.
- [35] Based on the cases relied on by the Crown, and with the agreement of Mr. Miller, I am satisfied that an 18-month prison sentence is appropriate in this case. It would not bring the administration of justice into disrepute and is not contrary to the public interest.

Credit for Time Served in Custody

- [36] Mr. Miller and the Crown agree that Mr. Miller spent sufficient time in custody before sentencing to satisfy an 18-month sentence.
- [37] There is conflicting authority about whether Mr. Miller is entitled to enhanced credit while being subject to an LTSO that continued to run while he remained in custody. It was not entirely "dead" time.
- [38] However, I need not resolve the conflict in this case as Mr. Miller has spent 18 months and seven days in custody on this breach offence alone.
- [39] In this case,
- the time Mr. Miller has spent in custody is 18 months and seven days;
 - the term of imprisonment that would have been imposed by me before any credit was granted is 18 months;
 - the credit is 18 months less a day; and
 - the sentence imposed is 1 day.

DNA Databank

- [40] The Crown also seeks an order that Mr. Miller provide a DNA sample for inclusion in the national databank.

[41] After considering the factors set out in s. 487.051(3) of the Code, I am satisfied that it is in the best interests of the administration of justice to authorize the taking of samples of bodily substances from Mr. Miller for inclusion in the national DNA databank.

[42] It is not clear whether a DNA order has been previously made with respect to Mr. Miller. If Mr. Miller's DNA is already in the national databank, no further sample will be required.

"MacNaughton J."

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