
CANADA / JUDGMENT

R. v. Nguyen

2010 BCSC 903

COURT

Supreme Court of British Columbia

DECIDED

4 June 2010

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2010 BCSC 903 R. v. Nguyen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nguyen,

2010 BCSC 903

Date: 20100604

Docket: X69684-2

Registry: New Westminster

Regina

v.

Trung Van Nguyen and Thi Men Tran

Before: The Honourable Mr. Justice Grauer

Oral Reasons for Sentence

Counsel for the Crown:

C. Fast

Counsel for the Accused Nguyen:

D. Albert

Place and Date of Hearing:

New Westminster, B.C.

June 2-4, 2010

Place and Date of Sentencing:

New Westminster, B.C.

June 4, 2010

- [1] THE COURT: Pursuant to a plea of guilty, Trung Van Nguyen was convicted of one count of unlawfully producing a controlled substance, marihuana, contrary to s. 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (the "CDSA"). The conviction was for what is more commonly known as running a marihuana grow operation in the offender's home in Surrey, B.C. Two other counts on the Indictment were stayed.
- [2] The grow op was discovered by the Surrey RCMP when they searched the house on May 4, 2005 pursuant to a warrant. It took up most of the basement of the house which was a crawl space type area with a height of about four feet. The crawl space was accessed by a stairway under a trap door in the floor of an under-stair closet entered from the home's laundry and utility room. There were no locks on the trap door, the closet door, or the laundry room door, nor was the house fortified in any way. In fact, it appeared to be exceedingly vulnerable. No weapons were found. The operation was powered by electricity obtained from B.C. Hydro by an illegal by-pass.
- [3] According to the evidence of Sergeant Arsenault of the RCMP who testified as an expert witness, the grow op was a sophisticated commercial operation consisting of a total of 947 plants in different stages of growth pursuant to a schedule of crop rotation. The operation appeared to be designed to produce successive crops of "B.C. Bud" every two weeks with each crop having what I consider to be a conservative bulk value of \$50,000. The paraphernalia indicated that the crop maturing when the operation was discovered was not the first to be produced. The photographic and video evidence was entirely consistent with Sergeant Arsenault's opinion, and I have no difficulty accepting it.
- [4] The plants were healthy and the yield was large, clearly benefiting from skill and attention, aided by grow equipment. The grow equipment included high intensity lamps, fans, venting, pots, electrical wiring, ballasts and timers that had a wholesale value of approximately \$14,000.
- [5] I should also note that a warranted search of the offender's safe deposit box yielded two bricks of cash wrapped in aluminum foil. The first brick contained \$2,000 in United States currency in two bundles of \$1,000 in twenty dollar bills. The second brick consisted of three bundles. Two of them comprised \$10,000 each in Canadian currency in one hundred dollar bills, the third consisted of \$10,000 in United States currency in two smaller bundles, one of which was made up of 50 United States \$100.00 bills while the other consisted of five stacks of 10 one hundred dollar bills.

- [6] I should note that both the cash and the house are the subject of a forfeiture application by the Crown which I will consider separately and which will be the subject of further evidence and argument after I have delivered these reasons for sentence.
- [7] Turning to the circumstances of the offender, no evidence was called on the offender's behalf. I am advised by his counsel in what apparently passes as an acceptable substitute for evidence in proceedings such as this though it is utterly untested, that Mr. Nguyen is 35 years old and fled Viet Nam as a boat person in 1988. He landed in the Philippines where he lived for three years in a refugee camp before being cleared to emigrate to Canada in 1991 with his parents, three sisters and a brother. Despite living in this country for nearly 20 years, he speaks little English. In 1997, he married, and he and his wife have two daughters, Linda, born 2001, and Trish, born 2007 - after this offence was committed.
- [8] I am told that he has worked hard in a number of odd jobs and by 2001 was able with his extended family to buy a house in Cloverdale, selling it at a profit in 2004, and buying the house where the grow op was developed. That house was registered in Mr. Nguyen's name.
- [9] There is no evidence as to how he came to be the principal operator of the grow operation in his basement.
- [10] I am told that since the charges were laid in May of 2005, more than five years ago, Mr. Nguyen has been of good behaviour and is presently self-employed in the area of landscaping and janitorial services. He collected Unemployment Insurance through much of 2009 after being laid off from a previous job. No criminal record is alleged.
- [11] In speaking to the Court, Mr. Nguyen stated that he was very regretful for letting this happen. He said that if he could be forgiven this time he would not offend again.
- [12] Section 7(2)(b) of the CDSA provides for a maximum sentence of imprisonment for seven years. There is no specified minimum penalty. The purposes and principles of sentencing are set out in ss. 718, 718.1 and 718.2 of the Criminal Code, R.S.C. 1985, c. C-46, as follows:
718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- (a) to denounce unlawful conduct;
 - (b) to deter the offender and other persons from committing offences;
 - (c) to separate offenders from society, where necessary;
 - (d) to assist in rehabilitating offenders;
 - (e) to provide reparations for harm done to victims or to the community; and
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[13] Section 718.1 states as a fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[14] Section 718.2 provides other sentencing principles and mandates that a court that imposes a sentence shall take into consideration the following principle:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender .

The section provides also that:

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

...

- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[15] The position of the Crown is that the appropriate sentence, taking into account the size, scale and sophistication of what was clearly a commercial grow operation, the fact that Mr. Nguyen was the principal operator, the risk to the community, and other aggravating factors, is imprisonment for 12 months.

[16] In the Crown's submission, a conditional sentence order would not meet the need for deterrence and denunciation and therefore would not be consistent with the fundamental purpose and principles of sentencing as required by s. 742.1 of the Criminal Code.

[17] Crown counsel relied on the following cases in support of his position. I am simply going to cite the name of the accused in each one: Su, 2000 BCCA 480; Vu, 2003 BCCA 339; Van Santvoord, 2007 BCCA 23; Le, 2007 BCCA 139; Wallis, 2007 BCCA 377; Koenders, 2007 BCCA 378; Luu, 2007 BCCA 486; and Vo, 2009 BCCA 471.

[18] The position of counsel for the defence is that the appropriate sentence in the circumstances is a conditional sentence order. Mr. Albert submitted that the need for deterrence and denunciation can be met by a conditional sentence order, that Mr. Nguyen has demonstrated in the past five years that he is not a danger to the community and is unlikely to re-offend, and that we are clearly dealing with a situation where a custodial sentence of less than two years would be imposed, thus meeting all of the preconditions of s. 742.1.

- [19] Mr. Albert relied on a number of cases to support his position, including the following: Lam, 2010 BCPC 47; Kreutziger, 2005 BCCA 231; McLennan, 2001 BCCA 299; Shah, 2003 BCCA 294; Shaw, 2005 BCCA 380; Whyte, 2002 BCCA 293; Tanasichuk, 2007 BCSC 1028; Chung, 2006 BCPC 298; Nguyen, 2006 BCPC 428; Farewell, 2007 BCSC 160; and Trinh, 2001 BCCA 677.
- [20] I have already reviewed ss. 718, 718.1 and 718.2 of the Criminal Code. In my view, the objectives of s. 718 that are principally in play here are to denounce unlawful conduct, to deter the offender and other persons from committing offences, and to promote a sense of responsibility in offenders. This is not a case where it is necessary to separate the offender from society or where rehabilitation comes to the forefront.
- [21] The sentence must, of course, be proportionate to the gravity of the offence and the degree of Mr. Nguyen's responsibility. As to gravity, the case law is quite clear: this is considered to be a very grave offence indeed. The proliferation and profitability of marihuana grow operations in the Lower Mainland as discussed by Sergeant Arsenault and the risk arising from violent crimes associated with grow operations in the form of grow ops, particularly when located in a residential area as was this one, are very serious matters.
- [22] The degree of Mr. Nguyen's responsibility is not in doubt. He pleaded guilty. There is no evidence of anyone else being involved in the operation of this grow op.
- [23] Turning to s. 718.2, defence counsel relies on the principle that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. That section also directs the Court to take into account any relevant aggravating or mitigating circumstances.
- [24] With respect to mitigating circumstances, I note two that I consider to be relevant: the offender has no criminal record; and the offender has lived in society over the past five years since the offence without untoward incident.
- [25] I should note that the delay in getting this matter on for hearing was by the consent of both the Crown and defence counsel in order that the court conducting the sentence hearing and the forfeiture applications would have the benefit of the decision of the Supreme Court of Canada in *R. v. Craig*, [2009] 1 S.C.R. 762, which judgment was released a year ago.
- [26] Counsel for the offender asserted that additional mitigating factors include the absence of booby traps, security systems, and reinforced locks, the absence of weapons on the premises, the fact that the operation was limited to a crawl space as opposed to the liveable portion of the house and the fact that although it was not a small operation, many discussed in the cases were larger, and Mr. Nguyen's background.
- [27] In my view, the absence of booby traps, security systems, reinforced locks and weapons is at best a neutral factor. I say the same about Mr. Nguyen's background.

- [28] The size of the operation and its location are more properly seen as aggravating factors. I refer to the operation's location because it was in a reasonably dense residential neighbourhood. Mr. Nguyen therefore subjected his neighbours to a considerable risk. The operation was also located in a house occupied by the offender's wife and child whose safety and well-being Mr. Nguyen was clearly prepared to ignore. With respect to the size of the operation, the fact that it was based on a system of rotating crops capable of yielding a new harvest of bud every two weeks, each harvest being worth \$50,000, indicates the scope of its financial prospects. This was a well-organized, profit-making enterprise.
- [29] Other aggravating factors include the theft of electricity and the risks to Mr. Nguyen's wife and child posed by the electrical wiring used to by-pass B.C. Hydro's meter.
- [30] Mr. Albert submitted that with respect to deterrence, a conditional sentence order that imposes real limits on Mr. Nguyen for a period of a year or more is likely to have greater deterrent effect in his community than a custodial sentence which simply removes him from the community for a few months. There is no evidentiary foundation for this proposition and I find myself unable to accept it as a matter of either logic or intuition.
- [31] In the recent cases of *R. v. Anderson*, 2007 BCCA 581 and *R. v. Vo*, 2009 BCCA 471, our Court of Appeal endorsed the proposition that a conditional sentence may not adequately address deterrence in cases such as this, noting that commercial grow operations will "generally warrant more severe sentences in order to denunciate [sic] and deter illegal conduct and to contain the spread of marihuana grow operations in this Province" (*Anderson* at para. 19, quoted with approval in *Vo* at para. 17).
- [32] While I fully accept that a conditional sentence order can, in the right circumstances, adequately address the objectives of denunciation and deterrence, I have concluded that the circumstances before me are such that those objectives require a custodial sentence even though, as I have indicated, I do not consider that Mr. Nguyen is a danger to the community.
- [33] Considering all of the circumstances of the offences and the offender, and the range of sentences that have been put before me in cases that are somewhat similar, as well as the purpose and principles of sentencing to which I have referred, I would ordinarily consider that a sentence of 12 months in accordance with the Crown's position would be appropriate. However, taking into account the five years that elapsed since the offence during which Mr. Nguyen appears to have been of good behaviour, I impose instead a sentence of nine months' imprisonment with no probation to follow.
- [34] As mandated by s. 109 of the Criminal Code, I order that Mr. Nguyen is prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device or any prohibited ammunition for life, and is further prohibited from possessing any firearm, any crossbow, restricted weapon, ammunition and explosive substance for a period that ends ten years after he is released from custody.

- [35] The Crown requested an order requiring that Mr. Nguyen provide a DNA sample pursuant to s. 487.051(3) of the Criminal Code. Counsel for Mr. Nguyen took no position. I am satisfied that it would be in the interests of the administration of justice to make the order requested and I so order it. The sample is to be taken in the usual way for inclusion in the Databank.
- [36] There has been no request for the imposition of a victim fine surcharge and I decline to impose one.
- [37] I will deal with the various applications for forfeiture after hearing further evidence and submissions.

"GRAUER J."

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