

CANADA / JUDGMENT

R. v. Norris

2005 BCCA 576

COURT

British Columbia Court of Appeal

DECIDED

18 November 2005

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2005 BCCA 576 R. v. Norris COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Norris, 2005 BCCA 576 Date: 20051118 Docket: CA033344 Between: Regina Appellant And Calvin William Norris Respondent Before: The Honourable Mr. Justice Donald The Honourable Madam Justice Newbury The Honourable Mr. Justice Smith Oral Reasons for Judgment J.M. Gordon Counsel for the Appellant V. Desroches Counsel for the Respondent Place and Date: Vancouver, British Columbia 18 November 2005

- [1] SMITH, J.A.: The Crown appeals from a conditional sentence of imprisonment of eight months followed by a probationary period of two years imposed on the respondent following a trial in the provincial court at which the judge found him guilty on four counts on an indictment arising out of a so-called 'dial-a-dope' operation.
- [2] The counts on which the respondent was found guilty are: Count 1 Calvin William Norris, on or about the 29th day of December, 2004, at or near Vancouver, in the Province of British Columbia, did possess a firearm, a 9mm Calibre Bryco arms model Jennings nine semi-automatic pistol, knowing that he was not the holder of a licence under which he may possess the firearm and a registration certificate for the firearm, contrary to Section 92(1) of the Criminal Code. Count 2 Calvin William Norris, on or about the 29th day of December, 2004, at or near Vancouver, in the Province of British Columbia, did carry a concealed weapon, a firearm, contrary to Section 90(1) of the Criminal Code. Count 3 Calvin William Norris, on or about the 29th day of December, 2004, at or near Vancouver, in the Province of British Columbia, did possess a firearm, a 9mm Calibre Bryco arms model Jennings nine semi-automatic pistol, while not being the holder of a licence under which he may possess the firearm and a registration certificate for the firearm, contrary to Section 91(1) of the Criminal Code. Count 4 Calvin William Norris, on or about 29th day of December, 2004, at or near Vancouver, in the Province of British Columbia, did possess a loaded prohibited firearm, 9 mm Calibre Bryco arms model Jennings nine semi-automatic pistol with readily accessible ammunition, without being the holder of an authorization or a licence under which he may possess the prohibited firearm in that place and a registration certificate for the firearm, contrary to Section 94(1) of the Criminal Code.

- [3] Because of the rule against multiple convictions set out in *R. v. Kienapple*, the judge entered a conviction on Count 4 and directed judicial stays of proceedings on Counts 1 - 3. Since the Crown proceeded by indictment, s. 95(2) (a) of the Criminal Code, required a minimum sentence of imprisonment on Count 4 of one year. The learned sentencing judge overlooked this provision when he imposed a conditional sentence of imprisonment. It is common ground that the sentence imposed was an illegal sentence and must be set aside. Section 742.1 of the Criminal Code does not permit a conditional sentence of imprisonment in a situation where the offence in question is punishable by a minimum term of imprisonment. The question before us is what would be a fit substitute sentence in the circumstances.
- [4] The respondent was arrested when an undercover police officer telephoned him at a number believed to be associated with drug transactions and arranged to meet with him ostensibly to purchase drugs. When the respondent arrived he was arrested. He had no drugs in his possession but he was carrying a load 9mm. semi-automatic pistol in his pocket and a magazine containing more ammunition for the gun in another pocket. The sentencing judge did not choose between the police theory that the respondent was intending to rob a perspective customer and the respondent's explanation that he had stolen the gun and was intending to sell it. The judge noted that regardless of why the respondent had the gun, the increased presence and use of such weapons in Vancouver and surrounding areas was a matter of serious public concern.
- [5] The respondent is a 23 year old aboriginal offender. He resides, up until the time of this offence, in the downtown eastside area of Vancouver. He suffers from the effects of a dysfunctional family and a disadvantaged upbringing. His mother and older sister are heroin addicts and his brother is involved in the downtown eastside drug milieu as well. He is himself a drug addict. He has a serious criminal record accumulated within the short space of about three years, which includes convictions for trafficking and narcotics, possession of narcotics for the purpose of trafficking and two bank robberies. The sentencing judge found that he trafficked in drugs in order to support himself.
- [6] The Crown submitted before the Provincial Court judge that the sentence should be the maximum provincial time in order to put the respondent on notice that further criminal conduct would likely result in penitentiary time. Accordingly, the sentencing judge concluded that a fit sentence would be two years less a day. After giving the appellant two for one credit for eight months of pre-trial custody, he arrived at the sentence of eight months, which, I have noted, he imposed as conditional sentence.
- [7] The offences of which the respondent was found guilty occurred on December 29, 2004. He was released on bail on January 5, 2005. On January 10 2005, he was arrested and charged with robbery, the robbery having been committed that day. His bail was revoked on January 12, 2005. He is to be sentenced next week in Provincial Court for the robbery. Regrettably, the respondent used drugs in breach of the terms of the conditional sentence shortly after it was imposed. He was brought back before the sentencing judge on the breach and the sentencing judge was not disposed to treat him harshly for this one transgression, which he

concluded was a result, at least in part, of the fact that the respondent was serving his conditional sentence in a recovery house where drug use was rampant. Accordingly, he reinstated the conditional sentence order and ordered that it be served in a different recovery house.

- [8] The respondent has now served three months of this conditional sentence. Since it was reinstated he has abstained from drug use and has committed no crimes. He frequently attends Narcotics Anonymous meetings and he works part-time. He also participates in one-on-one counselling with a drug and alcohol counsellor. The respondent's conditional sentence supervisor has expressed concern about the recovery house in which the respondent is residing, which is not licensed and accredited, and, as well, about the neighbourhood which the supervisor says is characterized by crime and drug use. Nevertheless, the supervisor states that the respondent's desire to live a drug free life outside of jail may be within his grasp. Thus, this young man is at a crossroads in his life.
- [9] Counsel agree that it would be a regressive step in terms of the respondent's rehabilitation if he were now to be imprisoned in a provincial institution. As Crown counsel put it, he is a 23 year old aboriginal youth who is on the verge of being warehoused in a federal penitentiary if he does not change direction in his life.
- [10] Considering all of the circumstances I would set aside the conditional sentence and substitute a sentence of imprisonment of one day. This reflects a credit of 16 months for the eight months pre-trial custody and three months for the time served under the conditional sentence order. I would not interfere with the probation order.
- [11] DONALD, J.A.: I agree.
- [12] NEWBURY, J.A.: I agree.
- [13] DONALD, J.A.: The appeal is allowed. A sentence of one day is substituted for the sentence below and the probation order remains intact. "The Honourable Mr. Justice Smith"

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