
CANADA / JUDGMENT

R. v. Peterson

2010 BCSC 2032

COURT

Supreme Court of British Columbia

DECIDED

19 March 2010

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2010 BCSC 2032 R. v. Peterson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Peterson,

2010 BCSC 2032

Date: 20100319

Docket: 25067

Registry: Vancouver

Regina

v.

Gregory Eugene Peterson

Before: The Honourable Mr. Justice Kelleher

Oral Reasons for Sentence

Counsel for the Crown:

J.R. Dow

Counsel for the Accused:

D. Markovitz

Place and Date of Hearing:

Vancouver, B.C.

January 22, 2010

Place and Date of Judgment:

Vancouver, B.C.

March 19, 2010

[1] THE COURT: This is my sentencing decision.

[2] Mr. Peterson pled guilty to committing forgery by making an Ontario driver's licence in the name of John Ducey contrary to s. 367 of the Criminal Code and defrauding Sandman Signature Inns and Suites of hotel services contrary to s. 380(1) of the Criminal Code. In addition, the jury found Mr. Peterson guilty of two other counts of the indictment; first:

1. At or near Vancouver, in the Province of British Columbia, on or about the 23rd day of February, 2009, he did possess a loaded restricted firearm, a Norinco 54-1 handgun without being the holder of an authorization or a licence under which he may possess the restricted firearm in that place and a registration certificate for the firearm, contrary to Section 95(1) of the Criminal Code.
2. At or near Vancouver, in the Province of British Columbia, on or about the 23rd day of February, 2009, fraudulently and without colour of right, he did possess credit card data on a laptop that would enable a person to use a credit card or to obtain the services that are provided by the issuer of a credit card to credit card holders, contrary to Section 342(3) of the Criminal Code.

[3] This is Mr. Peterson's second conviction under s. 95(1). In these circumstances, s. 95(2) mandates a minimum sentence of five years.

95(2) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of
 - (i) in the case of a first offence, three years, and
 - (ii) in the case of a second or subsequent offence, five years; or
- (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

[4] The Crown is seeking a nine-year penitentiary sentence. Mr. Peterson has been in custody since February 23, 2009, and the Crown agrees on two-for-one credit for that time.

[5] The facts are not in dispute. The accused's vehicle was stopped at Nanaimo and East Broadway in the City of Vancouver. The police decided to search the vehicle. One of the officers had a police dog who was trained in sniffing drugs and firearms. The police were able to locate a semiautomatic firearm concealed below the console of the car. The gun was loaded and there was ammunition nearby. The police also found gloves, night-vision goggles, handcuffs, a laptop computer, and a publication called The Anarchist's Cookbook.

The laptop had credit card data on it.

- [6] A witness was called by the defence. This witness said it was he who left the firearm and the laptop in the car. The jury did not accept the evidence of the witness and convicted on both counts. The laptop contained credit card data including in excess of 1,000 credit card numbers. The accused admits committing the offence of forgery. He also admits he committed fraud at the Sandman Hotel in Richmond on February 20 by using forged identification, one of the forged credit cards, to obtain hotel services.
- [7] Section 718 of the Criminal Code, R.S.C. 1985, c. C-46, sets out the purposes to be served by a sentence:
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.
- [8] Section 718.1 provides:
- 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [9] Denunciation and deterrence, both general and specific, are particularly important principles in respect of weapons offences. The firearms offence of which Mr. Peterson has been convicted is a serious one. As the Alberta Court of Appeal said in *R. v. Chin*, 2009 ABCA 226, 457 A.R. 233:
- [10] Mere possession of loaded firearms is inherently dangerous. When such weapons are allowed in the community, death and serious injury are literally at hand, only an impulse and trigger-pull away. The case of *R. v. Wharry* offers a tragic illustration. There, the accused responded to what he believed to be a slight from a group of passing pedestrians by shooting his loaded handgun at them, killing a woman celebrating her 18th birthday. It was reported at trial that the offender's lifestyle involved street-level cocaine trafficking and that he carried the gun for "protection".

[11] This problem is not unique to Alberta; it has become a nationwide phenomenon. The situation was fairly described in *R. v. Danvers* where the Ontario Court of Appeal cited with approval Ewaschuk J.'s comments, in reference to the Toronto experience:

Death by firearms in public places in Toronto plague this city and must be deterred, denounced and stopped. Only the imposition of exemplary sentences will serve to deter criminals from arming themselves with handguns.

[12] These crimes present a particularly serious threat to the safety and security of the community. Like drug trafficking, they also require forethought and planning. The weapon must be obtained, which is in itself a serious offence. Keeping it loaded, or with ammunition nearby, means that it is to be used for more than intimidation. Simply put, carrying a loaded restricted or prohibited firearm is an extremely dangerous act for which there is absolutely no justification.

[10] To the same effect are the remarks of Mr. Justice Joyce in *R. v. Vidal*, 2009 BCSC 1095. He said:

[45] The cases to which I have referred make it clear that when sentencing for these kinds of serious weapons offences the court must have regard particularly to the principles of denunciation and deterrence, both general and specific.

[46] The increase in the use of handguns and other prohibited firearms in our community and others nearby is troubling. These are deadly weapons that create a serious risk for those who would choose to carry them and use them as well as to innocent bystanders who may just be in the wrong place at the wrong time. The safety of the public must receive priority. Those who would carry and use these kinds of weapons must know that the consequences upon conviction will be serious.

[11] The accused has an extensive record. There are some 29 convictions beginning with convictions in Youth Court in 1990. The accused is currently 33 years of age. It is noteworthy that the criminal record includes three prohibitions on possession of weapons which the accused violated in committing the offence in question. He was given a 10-year weapons prohibition in May of 2004, then a lifetime prohibition on May 31, 2004, and a lifetime prohibition on November 17, 2006.

[12] In *R. v. Porsch*, 2007 BCSC 1621, 76 W.C.B. (2d) 143, aff'd 2008 BCCA 488, Madam Justice Dillon accepted that the possession of a loaded handgun by an accused in breach of a weapons prohibition - in that case, it was a term of bail - is an aggravating factor in sentencing an accused found guilty of an offence under s. 95(1). She said this:

[63] ...The possession of a handgun by someone on court order release not to possess firearms was said in *R. v. J.G.*, [2005] O.J. No. 4599 at para. 37 (Ont. S.C.J.) (QL) to be outrageous and a clear danger. The court continued to say:

38 in terms of general deterrence, if weapons prohibition[s] are to have any meaning and effect, the violation of such orders must be taken very seriously. It cannot be left in any doubt to those persons who are subject to such orders that if they choose to violate those orders, that choice will attract serious consequences.

39 Parliament has decreed that the maximum penalty for the more serious of these offences, namely possession of a loaded, prohibited firearm and breach of a prohibition order, is ten years. It must be assumed that, in setting that maximum, Parliament was of the view that there was going to be conduct deserving of such a penalty. In J.G.'s case, I am faced with his criminal record including two prior convictions for possession of a prohibited weapon, his possession in this case of a loaded handgun in violation of numerous prohibition orders, and his many violations of the terms of his release. There is precious little that is present here to mitigate against the negative impact of those facts.

In that case, the offender was sentenced to six years for possession of a loaded handgun when he was prohibited under s. 109 of the Criminal Code.

[13] Mr. Peterson had several convictions until 1994. He was then convicted in 2003 of obstructing a police officer and had a series of convictions up until 2006. There are a number of convictions for breaking and entering and assault and assault with a weapon. The most serious convictions were in Youth Court in 1994 when he was sentenced to three years concurrent for assault with a weapon, forcible confinement, robbery, breaking and entering, and use of a firearm during the commission of an offence. There is no dispute that because of the previous weapons conviction, the mandatory minimum sentence is now five years.

[14] The position of the Crown is that nine years is an appropriate sentence. The Crown relies on *R. v. Frohock*, 2008 BCSC 735, appeal dismissed 2009 BCCA 227. In that case, Mr. Frohock was convicted of four offences, three of which pertained to the possession of a loaded sawed-off shotgun. A sentence of nine years was imposed. The circumstances were particularly egregious. Madam Justice Arnold Bailey said at para. 42:

[42] There was nothing in the evidence at trial that diminished the highly dangerous nature of the conduct engaged in by the accused. Mr. Frohock did not testify at trial, and apart from the suggestion put to Constable Coutu by defence in cross-examination that Mr. Frohock might have said he was reaching for his licence to which Constable Coutu responded that he stopped him, there is nothing in the evidence to detract from the most logical inference to be drawn, which is that upon meeting a uniformed police officer, Mr. Frohock was reaching for the loaded sawed-off shotgun he had at hand and concealed under his coat.

[15] This conduct influenced Her Ladyship in sentencing. She said this at para. 94:

[94] I turn to the matter of specific deterrence. In my view, Mr. Frohock poses a very grave threat to the safety of the community, particularly the police. It is rare that the offender who set the "high water mark" for sentences in relation to a particular kind of offence years ago

returns to court to be sentenced again for the same kinds of offences in more aggravating circumstances. It is difficult to conceive of a clearer case demonstrating the need for specific deterrence and protection of the public by way of a lengthy jail sentence. Undeterred and with a lengthy criminal record, engaged in a very anti-social, cocaine-fuelled lifestyle, Mr. Frohock is back before the courts again for the same kind of offences that gave rise to the imposition of a three-and-a-half year or 42 month sentence in 1989. [emphasis added]

- [16] The Court of Appeal in dismissing the appeal concluded that although the sentence was at the upper end of the range, it was not demonstrably unfit or unreasonable in the circumstances.
- [17] The Crown also relies on dicta from the Supreme Court of Canada's reasons in *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90. The Criminal Code provision at issue in that case provided for a minimum sentence, and the question before the court was whether it constituted cruel and unusual punishment. The court unanimously held the sentence did not constitute cruel and unusual punishment. McLachlin J., as she then was, and Arbour J. wrote a concurring opinion suggesting the interpretive approach which should be taken to mandatory minimum sentences. They expressed the view that they constitute an inflationary floor, setting a new minimum punishment for the so-called best offenders, at para. 75:
- [75] To the extent possible, mandatory minimum sentences must be read consistently with the general principles of sentencing expressed, in particular, in ss. 718, 718.1 and 718.2 of the Criminal Code: *Wust (S.C.C.)*, supra, at para. 22. By fixing a minimum sentence, particularly when the minimum is still just a fraction of the maximum penalty applicable to the offence, Parliament has not repudiated completely the principle of proportionality and the requirement, expressed in s. 718.2(b), that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Therefore, in my view, the mandatory minimum sentences for firearms-related offences must act as an inflationary floor, setting a new minimum punishment applicable to the so-called "best" offender whose conduct is caught by these provisions. The mandatory minimum must not become the standard sentence imposed on all but the very worst offender who has committed the offence in the very worst circumstances. The latter approach would not only defeat the intention of Parliament in enacting this particular legislation, but also offend against the general principles of sentencing designed to promote a just and fair sentencing regime and thereby advance the purposes of imposing criminal sanctions.
- [18] Counsel for the accused urges me not to follow this approach. He argues that the minimum sentences have been increased since that decision was written, and that in any event the statement is obiter dicta from only two members of the court. The other members of the court did not comment on it.
- [19] I cannot agree. The statement of two justices of the Supreme Court of Canada must be accorded respect even though it may not be binding on me.

- [20] Moreover, the Court of Appeal came to a similar conclusion in *R. v. P.M.V.*, 2010 BCCA 34. Mr. Justice Hall said this about the effect of mandatory minimum sentences. He said:
- [10] Sentencing is an individualized process, but it appears odd that what seems to be a fairly aggravated set of circumstances would only attract the minimum mandatory sentence. This Court recently observed in *R. v. B.C.M.*, 2008 BCCA 365, 238 C.C.C. (3d) 174:
- [45] ... the enactment of Bill C-2 has changed the frame of reference within which to judge the fitness of a sentence imposed for making child pornography. The sentencing range is limited to incarceration for a term of between one and ten years. While all of the sentencing objectives set out in s. 718 of the Code remain relevant, they are no longer weighted equally. The sentencing judge must give primary consideration to denunciation and deterrence. The result is that sentencing decisions that preceded the enactment of Bill C-2 are now of limited assistance in ascertaining whether a sentence is proportionate to the gravity of the offence and the circumstances of the offender.
- [11] While I do not know if it could be said that the enactment of the higher mandatory minimum sentences in recent amendments to the Criminal Code has had an "inflationary effect" on the sentencing range in this class of matter, it can, I think, be fairly observed that the enactment of these minimum sentence provisions is an indication that Parliament has taken a serious view of these types of offences. The courts should pay heed to this intention of Parliament. Cases that were decided prior to the enactment of this new sentencing regime will have less precedential value.
- [21] On the other hand, I agree with Mr. Markovitz that the circumstances of the accused are far different from those of Mr. Frohock. There was no violence or threat of violence. Mr. Peterson got out of the truck when he was instructed to do so by the police, and never had the weapon in his hands.
- [22] In all of the circumstances, a just and proper sentence is six years in respect of the firearms offence. Mr. Peterson has been in custody for 13 months and is entitled to two-for-one credit or 26 months. He is sentenced to one year on each of the other three charges. All four sentences will be concurrent. The sentence will therefore be three years and 10 months.
- [23] As well, there will be a DNA order, a lifetime weapons prohibition, and the forfeiture of what was seized.
- [24] The victim fine surcharge is waived.

"Mr. Justice Kelleher"

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