

CANADA / JUDGMENT

R. v. Shaw

2017 BCCA 187

COURT

British Columbia Court of Appeal

DECIDED

5 May 2017

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2017 BCCA R. v. Shaw COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Shaw, 2017 BCCA 187 Date: 20170505 Docket: CA44241 Between: Regina Appellant And Wayne Peter Shaw Respondent Before: The Honourable Mr. Justice Frankel The Honourable Mr. Justice Tysoe The Honourable Madam Justice D. Smith On appeal from: an order of the Provincial Court of British Columbia, dated January 18, 2017 (R. v. Shaw, Prince Rupert Docket No. 28488) Oral Reasons for Judgment Counsel for the Appellant: R. Leong Respondent appearing In Person via teleconference: W.P. Shaw Place and Date of Hearing: Vancouver, British Columbia May 5, 2017 Place and Date of Judgment: Vancouver, British Columbia May 5, 2017 Summary: The Crown applies for leave to appeal and, if granted, appeals the conditional sentence order imposed on the accused for trafficking in marihuana and cocaine on the basis that the sentence was illegal. After November 20, 2012, conditional sentence orders were not available for drug trafficking offences punishable by 10 years or more in prison. Held: leave to appeal is granted, the appeal is allowed and the sentence is varied by replacing the conditional sentence order with a term of imprisonment of one day and time served under the conditional sentence order, followed by a probation order for a period of 18 months on the same terms as the original order.

- [1] D. SMITH J.A.: The Federal Crown applies for leave to appeal, and if leave is granted appeals the January 18, 2017 illegal sentence imposed on Wayne Peter Shaw. On May 27, 2016, Mr. Shaw pleaded guilty in Provincial Court to two counts of trafficking in marihuana and two counts of trafficking in cocaine, contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The maximum penalty for drug trafficking is life imprisonment. Mr. Shaw was sentenced to a conditional sentence order of six months, followed by a one year probation order. However, after November 20, 2012, a conditional sentence order was no longer available for drug trafficking offences.
- [2] The circumstances of the offence involved four discrete occasions when the 55-year old offender, raised in a First Nations community, arranged to "hook-up" an undercover police officer in order to purchase drugs. The officer made the purchases. For acting as a "go-between", Mr. Shaw demanded and received a fee from the officer on two of the four occasions.

- [3] The Pre-Sentence report indicated that Mr. Shaw "may continue to have some unresolved issues from his childhood that he has not dealt with" and has a substance abuse problem. Mr. Shaw denies those statements. However, he has a lengthy criminal record that includes 11 convictions for mischief, possession of narcotics (x3) the last of which was in 1992, assault (x2), assault Peace Officer, obstruct Peace Officer, failing to comply, breach of probation (x2), theft under \$5,000, and sexual assault (x3). He has also had four breaches of National Parole.
- [4] Before the sentencing judge, the Crown requested a "long" conditional sentence order. Mr. Shaw submitted a conditional sentence order in the range of three to six months would be appropriate. The judge settled on a six month conditional sentence order to be followed by a one year period of probation. Neither of the parties, nor apparently the judge, was aware of the change to s. 742.1 of the Criminal Code, R.S.C. 1985, c. C-46, on November 20, 2012, which eliminated the availability of a conditional sentence order for any drug trafficking offence punishable by 10 years or more in prison.
- [5] Mr. Shaw has served close to three months of his six month conditional sentence order under house arrest.
- [6] In the unique circumstances of this case, I would accede to the Crown's request that the sentence be varied by imposing a jail sentence of one day and the time served by Mr. Shaw under the conditional sentence order, to be followed by a probation order for a period of 18 months, which shall expire on the same date as the original probation order, and include the same conditions as the original probation order.
- [7] FRANKEL J.A.: I agree.
- [8] TYSOE J.A.: I agree.
- [9] FRANKEL J.A.: Leave to appeal is granted. The appeal is allowed and the sentence is varied as stated by Madam Justice Smith. "The Honourable Madam Justice D. Smith"

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