CANADA / JUDGMENT

R. v. Windrum

2014 BCSC 1909

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Supreme Court of British Columbia	23 September 2014

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2014 BCSC 1909 R. v. Windrum

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Windrum,

2014 BCSC 1909

Date: 20140923

Docket: 26464

Registry: Vancouver

Regina

v.

Sean Douglas Windrum

Before: The Honourable Madam Justice Fisher

Oral Reasons for Sentence

Counsel for Crown:

J.A. Cramer

Counsel for Defence

appearing via teleconference:

R. Dhanu

Place and Date of Hearing:

Vancouver, B.C.

September 16, 2014

Place and Date of Judgment:

Vancouver, B.C.

September 23, 2014

[1] THE COURT: The accused, Sean Windrum, has pleaded guilty to three counts: dangerous operation of a motor vehicle, contrary to s. 249(1)(a) of the Criminal Code, RSC 1985, c. C-46; possession of cocaine and heroin, contrary to s. 4(1) of the Controlled Drugs and Substances Act, SC 1996, c. 19 and evading a police officer, contrary to s. 249.1(1) of the Criminal Code.

Circumstances of the Offence

[2] These offences arise from an incident that took place on June 26, 2011. Mr. Windrum has admitted the facts, which are set out in some detail in a statement of facts marked Exhibit 1 to these proceedings.

[3] Briefly, at about 6 a.m. on the morning of June 26, 2011, Cst. Ian Sneddon observed Mr. Windrum driving southbound on Highway 99 at a speed of over 130 kilometres per hour. He activated his vehicle lights, followed Mr. Windrum's vehicle as it exited the highway onto No. 5 Road in Richmond, and pulled the vehicle to the side of the road. As the officer approached the vehicle on foot, Mr. Windrum drove away. Cst. Sneddon set out in his vehicle to follow him, eventually catching up and pulling him over again. This time he ordered Mr. Windrum and his passenger out of the vehicle. The passenger got out but Mr. Windrum drove away again.

[4] Cst. Sneddon continued in pursuit, following Mr. Windrum's vehicle back onto Highway 99 northbound. He called ahead for other officers to lay a spike belt across the highway ahead of him to force a stop. Cst. Bailey responded to this request and laid a spike belt across the northbound lane at the south end of the Oak Street Bridge. Mr. Windrum slowed his vehicle almost to a complete stop in front of the spike belt, swerved sharply to the right, and drove around it. While doing so, he accelerated in front of Cst. Bailey, who was forced to jump out of the way.

[5] Mr. Windrum continued driving north over the Oak Street Bridge. Cst. Sneddon caught up to him, continuing to West 57th Avenue, where Mr. Windrum turned and entered the underground parkade of an apartment complex. Cst. Sneddon was able to get inside the parkade on foot. Mr. Windrum drove to the back of the parkade, reversed, and then accelerated towards Cst. Sneddon, who took cover behind a concrete beam. Mr. Windrum was finally detained near the entrance to the parkade.

[6] During the pursuit, Mr. Windrum drove at approximately the speed limit and observed the rules of the road. When he accelerated towards Cst. Bailey at the spike belt and at Cst. Sneddon in the parkade, he was doing so at about 10 to 15 kilometres per hour.

[7] Mr. Windrum was searched incidental to his arrest and was found to be in possession of five packages of crack cocaine weighing a total of 2.3 grams, one package of cocaine weighing 3.8 grams, and 26 rocks of crack cocaine weighing a total of 11.8 grams. After being arrested for possession of cocaine for the purpose of trafficking, police searched his vehicle and found four flaps of heroin weighing a total of about 1 gram, .22 grams of crack cocaine, 8.12 grams of marihuana, and five empty plastic baggies. An additional flap of heroin was later found on his person.

[8] Police observed Mr. Windrum to be behaving erratically, and they inferred he was on drugs. After several hours, he sobered up, was given the opportunity to speak to duty counsel, and was then interviewed by Cst. Bailey.

[9] In the interview, Mr. Windrum said that he was a heroin addict and had taken some heroin that morning before leaving for work. He fled the scene because he was afraid that police would smell the marihuana in his car. He explained that he drove the speed limit during the pursuit because he wanted to avoid getting a traffic ticket. He was not thinking of the repercussions when he drove towards Cst. Bailey at the spike belt and assumed the officer would get out of the way.

Circumstances of the Accused

[10] Mr. Windrum has no criminal record but he does have a significant driving record, which he admits. The record, marked Exhibit 2, shows that since 2008, Mr. Windrum has had four 24-hour suspensions, three due to drugs and one due to alcohol. The most recent suspension for drugs was in July 2012, subsequent to the incident giving rise to these charges. He has also been suspended from driving six times for periods of between one and 12 months. Currently, his driver's licence is cancelled.

[11] Mr. Windrum is now 24 years old. Several years ago, after he moved away from home, he fell into the wrong crowd and began using cocaine and then heroin. He had a job at London Drugs but used most of his income to support his addiction. When that was not enough, he took to stealing from his family and used all his savings of about $7,000 to $8,000. After this incident in 2011, he lost his job.

[12] Since then, Mr. Windrum has taken steps to deal with his addiction. In March 2012, he successfully completed a recovery program, and he continues to attend AA and NA regularly. He has a mentor who assists him with his recovery. For the past nine months, he has been on a methadone program under the care of an addiction doctor. He has managed to reduce his daily dose of methadone and plans to wean himself off methadone in time.

[13] Mr. Windrum is currently working part-time, about 16 hours a week, doing yard work. He also volunteers with AA, working the crisis line counselling those at risk of relapsing. He has received positive feedback and wants to train as a paramedic or counsellor.

[14] Mr. Windrum advised me that he takes responsibility for his actions and is taking steps to make sure this does not happen again.

Position of the Crown

[15] The Crown is seeking a global sentence for all three counts of two months' jail, forfeiture of all drug paraphernalia, a period of probation, and a two-year driving prohibition under both s. 259 of the Criminal Code and s. 98 of the Motor Vehicle Act, RSBC 1996, c. 318.

[16] The Crown considers Count 2 the less serious charge, being simple possession. Mr. Cramer points to the substantial amount of drugs seized, including heroin, which renders the circumstances more serious, but balances this with the signs of personal use and Mr. Windrum's acknowledgement that he is a heroin addict.

[17] Crown counsel does not suggest that this count on its own would warrant a jail term but considers the driving offences serious enough to require a short, sharp sentence. He submits that there are four aggravating factors:

(a) Mr. Windrum's conduct in accelerating towards Cst. Bailey at the spike belt was dangerous. He did this with the intention of forcing the officer to jump out of the way, putting Cst. Bailey at risk of being struck by him or other vehicles on the highway. While his speed was only 10 to 15 kilometres per hour, this must be considered in relation to the risk posed to a pedestrian.

(b) Although the traffic was light at that time of day, Mr. Windrum's conduct presented a danger to other people using the highway. Although he was not speeding, his sudden lane change to avoid the spike belt was a danger to other drivers.

(c) Mr. Windrum fled from police to avoid detection of his criminal activity, namely, possessing drugs in his vehicle and driving under the influence of heroin.

(d) Mr. Windrum's driving record is very serious and indicates a degree of moral culpability despite his drug addiction.

[18] Mr. Cramer acknowledges that a conditional sentence order is available for consideration in this case but submits that Mr. Windrum's deliberate conduct in fleeing the police over a protracted period of time requires a short custodial sentence in order to address the goals of denunciation and deterrence.

Position of the defence

[19] The defence agrees that Counts 1 and 3, the driving offences, are the most serious, particularly Mr. Windrum's conduct in driving towards the police officers, but submits that a custodial sentence is not warranted. Mr. Dhanu stressed the importance of rehabilitation given Mr. Windrum's efforts to address his addiction as the root cause of his problems. He says that the driving record is indicative of this addiction.

[20] The defence submits that the range of sentence is broad in a case like this, and includes consideration of a conditional discharge or a suspended sentence. Mr. Dhanu suggested that a period of probation in addition to one of these options would balance the competing principles of sentencing. Alternatively, if a custodial sentence is required, the principles of denunciation and deterrence can be addressed with a conditional sentence order.

[21] The defence submits that there are mitigating circumstances that include the guilty plea (although late in the process), the absence of a criminal record, Mr. Windrum's young age (22 at the time of the incident and 24 now), and the positive steps he has taken in his rehabilitation. A custodial sentence would interfere with the progress he has made so far.

[22] Mr. Dhanu proposed either a conditional discharge or suspended sentence with probation for a period of 12 to 18 months, community work service, and an apology to Cst. Bailey and Cst. Sneddon, and alternatively, a conditional sentence of four to six months with a curfew, followed by a period of probation. He says that Mr. Windrum meets the criteria for a conditional sentence order and does not at this time pose a danger to the public. He does not oppose a two-year driving prohibition.

Sentencing Principles

[23] It is important for Mr. Windrum to understand the sentencing principles that I must apply. As set out in the Criminal Code, the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and maintenance of a just, peaceful, and safe society by imposing just sanctions. The sentence must be proportionate both to the gravity of the offence and the degree of responsibility of the offender.

[24] Section 718 sets out a number of objectives that a sentencing judge must consider. These objectives are:

(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 the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[25] I am also guided by the principles set out in s. 718.2, which include the following:

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

(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...

[26] The Controlled Drugs and Substances Act reiterates these principles in s. 10:

(1) Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

Case law

[27] The Crown provided cases that establish a range of sentence for various driving offences, from a conditional sentence order to about two years, the higher range for more serious conduct by offenders with criminal records: R. v. Hanna, 2006 BCCA 417 (two and ½ years); R. v. R.W.R.P., 2003 BCPC 161 (17 months and three years' probation); R. v. Vansanten, [2007] BCJ No. 2950, varied by increasing credit for time served 2008 BCCA 76 (6 months for the evading count); R. v. Myke, 2010 ONCJ 160 (one year conditional sentence order and three years' probation) ; and R. v. Beauchamp, 2008 ABCA 37 (three months).

[28] Hanna is clearly at the high end of the range involving a high-speed chase, a serious record involving similar offences, and a high risk to reoffend. P.W.R.P. involved a relatively minor flight from police but a lengthy criminal record and a previous failure to abide by a conditional sentence order. In Vansanten, the pursuit was quite serious. The offender had a criminal record and a diminished capacity. The pursuit in Myke was short and fast. There was some minor property damage, and alcohol was involved, but the offender was an aboriginal honour roll student with a driving record but no criminal record. Beauchamp was a low-level case and the offender had no record.

[29] The defence referred me to R. v. Giles, 2012 BCSC 775 where a suspended sentence was imposed, and R. v. Callaghan, (1983) Kelowna Registry No. CR96-82 (BC Co. Ct.), where a conditional discharge was given.

[30] Giles was a case of dangerous driving causing bodily harm with circumstances of distracted driving. Callaghan involved charges of impaired driving, failure to provide a breath sample, and criminal negligence in the operation of a motor vehicle. The accused there was a mature businessman with no record who had reacted to a violent encounter with another driver in a parking lot.

[31] As all of these cases demonstrate, driving offences can be committed in many different ways, and few provide helpful guidance in this case. The facts in Giles and Callaghan are not at all comparable to those here. Most of the cases referred to by the Crown were more serious, but Myke was reasonably comparable in some respects.

[32] I agree with both counsel, however, that there is a fairly broad range of sentence for offences of dangerous driving and evading police. Much will depend on the danger of the situation and the history of the accused.

Application in this case

[33] This case has some aggravating factors. Mr. Windrum's conduct was deliberate. While he was acting erratically, his objective was to evade detection of the drugs he had in his possession, and his continued evading of the police created a danger to the officers involved and a potential danger to others, despite the early hour of the day and the light traffic. His action in driving towards the officers on foot was particularly dangerous. Also aggravating is his very poor driving record with its numerous prohibitions and suspensions.

[34] On the other hand, Mr. Windrum's lack of any criminal record, his guilty plea, and his age, now 24, are mitigating factors. Also mitigating is the effort he has made towards addressing his drug addiction and the progress he has made thus far.

[35] I do not consider a conditional discharge to be appropriate here. As established in R. v. Fallofield, [1973] BCJ No. 559 (CA), a discharge must be in the best interests of the accused and not contrary to the public interest. Neither of these conditions is present.

[36] Mr. Windrum has had a serious drug addiction which led him into financial ruin and these charges, which include possession of a fair quantity of drugs. He also has a very poor driving record which continued after this incident to the point where his driver's licence was cancelled. I consider a conviction to be necessary to deter him from future offences, and the public interest in general deterrence requires a conviction.

[37] The same applies to a suspended sentence.

[38] However, I am not convinced that the principles of denunciation and deterrence must be met with a jail sentence, even a short one. I agree with the defence that rehabilitation is an important consideration in this case. I am concerned that a jail sentence would interfere with the progress Mr. Windrum has made so far in his own rehabilitation. In my view, the criteria required for a conditional sentence order under s. 742.1 of the Criminal Code is satisfied here. These criteria are:

(a) the offence for which the accused has been convicted does not have a minimum term of imprisonment;

(b) the appropriate sentence is imprisonment for less than two years;

(c) serving the sentence in the community would not endanger the safety of the community; and

(d) serving the sentence in the community is consistent with the fundamental purpose and principles of sentencing as set out in ss. 718 to 718.2.

[39] None of these offences have a minimum term of imprisonment, and the appropriate sentence for them, separately or together, is clearly imprisonment for less than two years.

[40] I am satisfied that serving the sentence in the community would not endanger the safety of the community given Mr. Windrum's acceptance of responsibility for his conduct and the steps he is taking to address his addiction. My only concern is that he stays out of the driver's seat. His last prohibition due to drugs occurred in July 2012, after he completed a recovery program. So long as he continues with his methadone program under the care of a physician, I expect that he will abide by a driving prohibition, which I intend to include as a condition in a conditional sentence as well as a probation order, in addition to a prohibition under s. 259 of the Criminal Code and s. 98 of the Motor Vehicle Act.

[41] I am also satisfied that serving the sentence in the community is consistent with the fundamental purpose and principles of sentencing, including the objectives of denunciation and deterrence.

[42] As established in R. v. Proulx, [2000] 1 SCR 61, a conditional sentence can provide a significant amount of denunciation, particularly where onerous conditions are imposed and the term is longer than would have been imposed as a jail sentence. It could also provide significant deterrence if sufficiently punitive conditions are imposed.

Sentence

[43] Mr. Windrum, I am going to impose a conditional sentence of six months, to be followed by a period of probation of 12 months.

[44] The conditional sentence will have the following mandatory conditions under s. 742.3(1). You are to:

(a) keep the peace and be of good behaviour;

(b) appear before the court when required to do so by the court;

(c) report to a supervisor

(i) within two working days after this order is made; and

(ii) thereafter when required by the supervisor and in the manner directed by the supervisor.

(d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and

(e) notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or supervisor of any change of employment or occupation.

[45] There will also be the following additional conditions:

(f) For the first three months, you will be under "house arrest", where you will be required to remain in your home at all times except as required for employment, volunteer work (including work at AA and NA), and community work service; for medical and counselling appointments and emergencies; and for one hour a day to attend to personal matters, including shopping and exercise. You must proceed immediately to these matters and return directly home afterwards, and you must report all activities to your supervisor and seek prior approval for specific times permitted to attend your employment, volunteer and community work service.

(g) For the second three months, you will be under a curfew and required to be in your residence by 9 p.m. each evening unless given prior permission by your supervisor to return at a later time.

(h) You are to abstain from consuming drugs, except in accordance with a medical prescription, and you are to continue to be under the care of a physician for treatment for your drug addiction.

(i) You are to perform 50 hours of community service within the first five months of this conditional sentence order.

(j) You are prohibited from driving a motor vehicle.

[46] You should be aware, Mr. Windrum, that if you are found to have breached any of the conditions of your conditional sentence, the sentence may be terminated or suspended, and you may be required to serve all or part of the unexpired sentence in custody.

[47] The terms of the probation that will follow your conditional sentence for 12 months will include:

(a) keep the peace and be of good behaviour;

(b) appear before the court when required to do so by the court;

(c) remain with the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor;

(d) notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation;

(e) abstain from consuming drugs except in accordance with a medical prescription and continue under the care of a physician for treatment for your drug addiction, or take any other treatment as approved by the province and recommended by your supervisor; and

(f) you are prohibited from driving a motor vehicle.

[48] In addition, you will be prohibited from driving for a period of two years under s. 259 of the Criminal Code and s. 98 of the Motor Vehicle Act. As well, all drug paraphernalia seized by the police will be forfeited.

[49] Now, the only remaining matter is the victim surcharge. Is that being sought by the Crown?

[50] MR. CRAMER: I have no submissions on the subject.

[51] THE COURT: Well, I think it is a problem, and it needs to be addressed.

[52] MR. CRAMER: I am in the hands of my friend with respect to whether or not there are any reasons why Mr. Windrum ought not to pay the victim fine surcharge.

[53] MR. DHANU: Mr. Windrum is only working on a part-time basis, and certainly, the next six months will be very -- well, he's working on a part-time basis, essentially. My Lady, I would ask that the surcharge be waived.

[54] THE COURT: The ability of the court to waive that has been taken away, although I don't think that the provision was in force at the time of this incident.

[55] MR. DHANU: Yes, this incident predates the amendments.

[56] THE COURT: All right. So on that basis, the victim surcharge will be waived.

[DISCUSSION ABOUT CONDITIONS REGARDING VOLUNTEER WORK AND COUNSELLING]

[57] THE COURT: Mr. Windrum, I hope you are able to carry on and stay off drugs and stay out of the driver's seat of a car.

[58] THE ACCUSED: I will.

[59] THE COURT: Thank you.

[60] THE ACCUSED: Thank you, Your Honour.

Fisher, J.

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