
CANADA / JUDGMENT

R. v. Wong

2016 BCSC 1568

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wong,

2016 BCSC 1568

Date: 20160818

Docket: 26792

Registry: Vancouver

Regina

v.

Brandon Garnock Wong

Before: The Honourable Mr. Justice Johnston

Oral Reasons for Sentence

Counsel for the Crown:

P. Mann

Counsel for the Accused:

H.M. Patey

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 16 and 18, 2016

Place and Date of Judgment:

Vancouver, B.C.

August 18, 2016

- [1] THE COURT: Mr. Wong has pleaded guilty to one count of trafficking in cocaine. It is a broad count spanning a time period from June 5, 2013, to June 26, 2013. The circumstances led by the Crown support that this is a wrap-up count, if you like, taking into itself other counts that had been charged involving four separate transactions that took place on June 5, June 14, June 19, and June 26, 2013.
- [2] Each of those transactions had a similar pattern: an undercover police officer called a dial-a-dope line, spoke to someone who identified themselves as Steven, but who I am satisfied was Mr. Wong, arranged to meet in the parking lot at Moody Park, I gather it is called, in order to purchase cocaine. On the first three occasions, the officer paid \$80 each time to buy quantities of cocaine that ranged from .56 to .71 grams. On the last occasion, the officer paid \$105 for .94 grams of cocaine.
- [3] Although not included in the time span covered by the indictment, the Crown also alleges, and it is not denied, that Mr. Wong engaged in earlier sales on the 1st of May, the 7th of May, and the 22nd of May, 2013.
- [4] I am told that the first of these, all told, that is the May 1st transaction, took place outside a drug store, I gather in North Vancouver; that when the officer called Mr. Wong again for another purchase, Mr. Wong was reluctant to use the same place outside the drug store, suggested that he would deliver to the officer's house, but the officer did not want that to happen for obvious reasons, and asked Mr. Wong what alternatives there might be, and Mr. Wong eventually settled on the parking lot of the park. Thereafter, each of the transactions initiated by the officer were conducted at the usual place, being the parking lot.
- [5] It is also alleged that at the last transaction covered in the indictment, that is June the 26th, the officer and Mr. Wong engaged in some general conversation, the officer asking if Mr. Wong were busy and Mr. Wong saying, well, not at that precise time, but he expected to be busy soon because it was Welfare Wednesday. I refer to that because it does suggest somewhat callous indifference to the effects of the drug trade on the lower reaches of society.
- [6] In that same conversation, the officer, and this I believe was for the second time, tried to enlist Mr. Wong to sell heroin, inquiring whether heroin were available, and Mr. Wong the first time said no, that was not part of his stock in trade, and on the second time, indicated that his boss did not like or did not want him to be carrying heroin around. There was an indication that "they" did not sell heroin.

- [7] The Crown suggests that the appropriate range of sentence in these circumstances falls between six and 18 months broadly, but more precisely six to 12 months. The Crown has tendered a number of authorities, starting with *R. v. Franklin*, 2001 BCSC 706, and ending with, at least up until this morning, *R. v. Cisneros*, 2014 BCCA 154. These are all dial-a-dope decisions. They have in common that dial-a-dope drug schemes, and these are findings of various judges, both of this court and the Court of Appeal, are insidious, in part because they make drugs broadly available. They are attractive because dial-a-dope deliveries pose less ostensible risk to the buyers who do not need to go where traffickers congregate in order to get access to their drugs. They are also perhaps or arguably somewhat less easy to detect and stop by the police.
- [8] The cases tendered by the Crown have in common that with offences such as the one Mr. Wong has pleaded guilty to, the objectives of denunciation and deterrence set out in s. 718 of the Criminal Code assume prominence over the other stated objectives of sentencing set out in the section. That does not mean and no one has suggested before me that the other objectives of sentencing can be overlooked. It is simply that the authorities have, over the span of years, looked at the depredations that hard drug use and hard drug sales have wreaked on society and have determined that in cases such as this denunciation and deterrence must assume some primacy in considering the objectives of sentencing.
- [9] The authorities cited by the Crown all involved custodial sentences of between six months, and that was *Cisneros* in 2014, up to 18 months, that was *Ahmed* in 2001. The exception to that was when the conditional sentence regime was available as a sentencing option in cases such as this, an example being the *Schneider* case cited by the Crown, where instead of a term in prison, a somewhat longer term of, we will call it jail, but it is a custodial sentence served in the community, was imposed.
- [10] There is also, and I hate to call it a trend, but the cases cited by the Crown do show some fluctuation in the length of sentence imposed by the various courts, and I say that simply because the last of the cases, again up until this morning, the Crown proffered, being *Cisneros*, was the lower end of the broad range of authorities tendered by the Crown. So if anything can be taken from that, and I do not want to place much on it, it might be argued that the courts have gradually brought the range of incarceration down to six months for the obvious cases of first offender and no egregious aggravating circumstances.
- [11] Previous cases have their greatest utility in suggesting a range of sentences for cases that are broadly similar, but sentencing courts must remain always aware that sentencing is an individual and individualized process. The sentence must be fit for the particular offender, for the particular offence or offences, and a sentence must reflect the circumstances generally. That includes the community in which the offences occur, and that brings in consideration of -- and I earlier referred to the depredations of hard drugs -- the Lower Mainland area is a prime example where trafficking in hard drugs has caused great damage to individuals and to society, and that is a factor that must be borne in mind in sentencing cases such as this.

- [12] Mr. Wong had just turned 18 when the first of these offences occurred. I am told he was eight days over his 18th birthday. He is just 21 now. Mr. Wong had a stable and loving upbringing by a close and hardworking family. I gather that both of his parents lived [sic] when he was quite young and that he was raised to a large extent by his grandparents. What that says is that Mr. Wong does not have as an excuse a broken home or a bad background, but it also says that he still has a warm and loving and supportive family.
- [13] Mr. Wong seemed to start to go astray in high school. The descriptions are of a young man who otherwise seemed perfectly normal and part of a close-knit family, who started, I gather in about Grade 10, to drift into the wrong friendships, to spend more and more time with the wrong people and less and less time in his classes or at his school. He began to rebel against his parents at home. He became what seems to me, and I am reading between the lines of his parents' letters, he became somewhat of a pain to his parents. Eventually he dropped out of school and it was during this period in his life that he drifted into the dial-a-dope business.
- [14] Since his arrest in 2013, Mr. Wong has done a complete change in his life and in his attitude toward life. He has returned to his family. He has begun to carry his weight at home. He has participated more and more in family life. He has returned to school. He completed his high school, has gone on to complete several training courses at the BCIT Marine campus, and he has obtained a marine medical certificate. Mr. Wong started to work part-time at the law office of Mr. Nainaar, where his mother has been employed. He now works there full-time. Mr. Nainaar took him on, aware of the offences that he had committed, which speaks well of Mr. Nainaar for taking a chance on Mr. Wong.
- [15] Having read the character letters tendered and marked as part of Exhibit 2, it seems to me the pattern has been that Mr. Wong did not change completely overnight. He, even after the arrest, continued to exhibit, according to his girlfriend, flashes of temper. Everybody who has written a letter, or no, I should not say everybody, a lot of the people writing letters seem to be highly critical of Mr. Wong's choice of tobacco, but they say that he has even given up tobacco in the last little while.
- [16] Mr. Nainaar does not gloss over the fact that Mr. Wong may not have been the ideal employee when he started, but says that Mr. Wong has improved, that he has steadily improved in his attitude, his punctuality, and his overall approach to his employment.
- [17] That Mr. Wong has the support of his family and his girlfriend and his friends, friends from before he went wrong in high school, is all shown in the letters that are marked Exhibit 2. They establish, and I am satisfied, that Mr. Wong has changed and that the change is genuine since his arrest. Those letters also confirm or corroborate or support the suggestion in the presentence report that Mr. Wong has acknowledged and accepted responsibility for his offences and I accept what Mr. Wong has told me today, which does support his acceptance of responsibility, and that he is remorseful for not just the problem he has gotten himself into, because that frankly does not count much, but that he is remorseful for what

he has put his family through.

- [18] Mr. Wong has also volunteered since his offence and there was some question about how much volunteering he has done. I had inferred from reading the letter that Mr. Wong likely was volunteering because his girlfriend was volunteering, but as it turns out, no, it was at the suggestion of his instructor that he was volunteering. That volunteering is not going to be overstated; it is just a few hours and not nearly enough for Mr. Wong to register on any of the records kept of volunteer activity, but it is something because nobody made him do it, and it is to his credit.
- [19] Courts have to consider aggravating and mitigating circumstances in sentencing. I accept that the aggravating circumstances include that cocaine is both a highly-addictive and very destructive substance. I have already referred to the problems it has caused in this community.
- [20] It is aggravating that the dial-a-dope type of operation makes this drug more readily available than if buyers had to take greater risks travelling to where the traffickers congregate.
- [21] It is an aggravating factor that the transactions occurred in a public place. The parking lot, I am told, is not immediately adjacent to but within hailing range, perhaps, if one spoke loudly, of a playground where children might be expected to collect.
- [22] It is also an aggravating factor, in my view, that Mr. Wong was not addicted to this substance, or any other substance that I know of, at the time. He was not selling in order to support his own addiction. He was in a profit-making trade for what it could give him. On that last point, I have to do a little further explanation. Mr. Wong was not an entrepreneur in this trade. He was not the drug trafficker, that is, it was not all his business that he was conducting. I am satisfied, from his reference to the boss or his boss, that Mr. Wong was relatively low on the ladder of the drug trade at the time of these offences. He was, in effect, working for somebody else. I accept that a large part of Mr. Wong's motivation for engaging in the drug trade was his desire that initially led him astray in high school and continued through his drug transactions, to be accepted by his peers, unfortunately the wrong peers. But I also accept that there was a profit motive of a sort in these transactions and that Mr. Wong was enjoying what money he earned from the drug trade. It allowed him to buy flashy things and made him feel better about himself.
- [23] There are the mitigating factors, some of them I have referred to. Mr. Wong's age, 18 when the offences occurred. The significant change he has made in his life since these offences occurred and he was arrested. I will say there that it is not unusual for offenders who have been caught to put up a show of changing their life. They scramble out to try and find gainful employment, they join a church, they do anything they think might do them some good at sentencing. Courts get quite used to looking through those show or token changes in circumstance. This is not one of them.

- [24] I am satisfied that Mr. Wong's change in attitude, his change in lifestyle, his change in associates is genuine and not prompted in order to try to get a lesser sentence.
- [25] In mitigation is Mr. Wong had no criminal record when these offences occurred. This is his first. His guilty plea is a mitigating factor. He does not get as much credit, because it was not an early or the earliest reasonable time, but it is still a mitigating factor. He has, by his guilty plea, saved the state the cost and delay of proving the charges against him. Finally in mitigation are Mr. Wong's expressions of remorse, which I have accepted as genuine.
- [26] Sentencing in cases like this became difficult or more difficult when Parliament removed the option of a conditional sentence order from the sentencing arsenal of trial judges. That difficulty has led to a series of sentencing decisions where courts have imposed sentences of suspended sentences in cases involving trafficking in controlled substance, including dial-a-dope operation, and here of course I advert to the cases collected under the decision named *R. v. Voong*, 2015 BCCA 285.
- [27] *Voong* involved four different individuals charged with trafficking or possession for the purpose of trafficking, a series of decisions from different sentencing judges where courts imposed suspended sentences. The Crown appealed each of these sentences, arguing that the sentencing judges used the suspended sentence improperly as a substitute for the no longer available conditional sentence order. In its decision in *Voong*, the Court of Appeal reaffirmed the seriousness of dial-a-dope trafficking offences and referred to the first of the cases cited to me by the Crown, *R. v. Franklin*, a decision of this court in 2001, and up to and confirmed by the Court of Appeal 22 days earlier than *Voong* in its decision in *R. v. Oates*, 2015 BCCA 259.
- [28] The court in *Voong* pointed out that before a conditional sentence order had become available to sentencing judges, a suspended sentence had been available and had been employed properly in exceptional circumstances for cases of trafficking. The court in *Voong* cites authorities in support of that. The court in *Voong* referred to the deterrent effect of a suspended sentence in paragraphs 37 to 43, and said that the range of sentence for dial-a-dope traffickers is normally six to nine months for a first offender, but can go up to 18 months if circumstances warrant it.
- [29] The court then canvassed in some detail a range of cases in which this range was developed. Two of the cases referred to in *Voong* are cases cited to me by Crown in this sentencing. At paragraph 59 in *Voong*, the Court of Appeal concludes:
- [59] In summary, absent exceptional circumstances, the sentence for a first offence or with a minimal criminal record, dial-a-dope drug seller will be in the range of six to eighteen months imprisonment, depending on the aggravating circumstances. Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the

end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.

- [30] That paragraph, the judgment in Voong, was written by Madam Justice Bennett of the Court of Appeal. Madam Justice Bennett was a member of the panel that decided Oates 22 days earlier. Madam Justice Bennett was the judge who, as a judge of this court, decided the Sandher decision cited by the Crown in 2008. She has a great deal of experience in these matters as a trial judge and an appeal judge.
- [31] During the submissions, I suggested to Crown, and I was not merely baiting Crown counsel, but I did suggest that the Court of Appeal had set out some sort of a checklist in paragraph 59 and that Mr. Wong had, it appeared to me on the evidence, checked all the boxes.
- [32] I will say this, I agree with Crown counsel, ticking the boxes is not enough. As I said earlier, sentences must be fit and they must reflect the individual before the court, the circumstances of the offence, the aggravating and mitigating factors, indeed all of the circumstances. But having said that, on the evidence, Mr. Wong does meet all of the factors set out by the Court of Appeal in Voong in paragraph 59. It is his first conviction, he has taken significant and objectively identifiable steps toward rehabilitation, and I reflect here that the Court of Appeal does add to that rehabilitation for the drug addict. Addicts were, I think, involved or addictions were involved in all of the people before the court in Voong, and Mr. Wong here clearly is not an addict. I do not see that addiction as an explanation for an offence is a precondition for the application of Voong, and I recognize that Mr. Wong was not and has not been an addict, and has not attempted to explain his offending conduct with that as an excuse.
- [33] But Mr. Wong has completely changed his life around and that, it seems to me, meets that factor in Voong. Mr. Wong has gainful employment. Mr. Wong has shown remorse, he has acknowledged the harm done to his family and I think to his community by his offending conduct, and I say to his community because he has done some volunteer work, to his credit.
- [34] In my view, the public is better protected here by not exposing Mr. Wong to the sort of people he is going to meet if he goes to jail. They are likely the kind of people that led him astray in the first place. The public will also be better served if Mr. Wong continues along the path he now is on, being a useful and productive member of society, and he can contribute further to the public good and, at the same time, meet the objective or one of the objectives of sentencing set out in s. 718; that is, promotion of a sense of responsibility in offenders and acknowledgment of the harm done to victims, and under sub (e), to provide

reparations for harm done to victims or to the community through a suspended sentence and community work service.

- [35] Mr. Wong, stand up, please. I suspend the passing of sentence upon you. I place you on probation for a period of three years. You will forthwith report to a probation officer at Vancouver South Community Corrections at 210, 7577 Elmbridge Way in Richmond, and then you will report as and when directed by a probation officer.
- [36] In the first two years of your probation period, you will perform 150 hours of community work service at the direction of the probation officer.
- [37] You will not possess any controlled substance as scheduled in the Controlled Drugs and Substances Act, except as prescribed by a licensed physician, and then only in the dosages prescribed by the licensed physician.
- [38] You will not own or possess a cellular telephone, except one phone that is registered in your name, and you will provide the number of that cellular telephone to your probation officer. You will not change that number except with the written permission of your probation officer.
- [39] That is the end of my terms. Counsel, have you got anything else you wish to suggest?
- [40] MR. PATEY: Not from my end, My Lord. Sometimes an order like this, it will state that the reporting can cease after the community work service is done, but I am in Your Lordship's hands on that.
- [41] THE COURT: I will leave that to the probation officer.
- [42] MR. PATEY: Yes, it's not a big hardship. Thank you, My Lord.
- [43] MS. MANN: I don't have any submissions, My Lord.
- [44] THE COURT: Nothing further? All right, thank you. We will adjourn.
- [45] MS. MANN: My Lord, there were those ancillary orders that the Crown was seeking.
- [46] THE COURT: Oh, yes.
- [47] MS. MANN: One of them, first of all, despite the suspended sentence, is the mandatory firearms prohibition pursuant to s. 109(3) of the Criminal Code, the 10-year mandatory firearms prohibition that is applicable to this case, from possessing all firearms, crossbows, restricted weapons, ammunition, and explosives.
- [48] THE COURT: Yes, that is ordered.

- [49] MS. MANN: Thank you, and the Crown is also seeking a DNA order pursuant to s. 487.051(3) of the Criminal Code. Because this is a secondary designated offence, drug trafficking, it is within Your Lordship's discretion. There is no criminal record to allege, but given the circumstances of the offence and the nature of the offence, the Crown is seeking a DNA order.
- [50] MR. PATEY: My Lord, I don't have extensive submissions on this. The court has a very, very broad discretion in these circumstances. I will point out Madam Justice Gropper declined to make such an order in the Lo case that was before you, but --
- [51] THE COURT: I have never quite understood why a DNA order is even desired, other than somebody has got a data bank that still has room in it. On the other hand, I suppose it is a relatively minor intrusion on privacy interests, and so I will make the DNA order.
- [52] MS. MANN: Thank you, My Lord, and the final request is for a forfeiture order pursuant to s. 16(1) of the CDSA, because the accused was convicted of an offence, drug trafficking. The Crown is seeking forfeiture of the cocaine exhibits that were seized --
- [53] THE COURT: Oh, of course.
- [54] MS. MANN: -- in relation to the investigation.
- [55] MR. PATEY: No dispute there. My Lord, there is also the surcharge which is --
- [56] MS. MANN: I think it is \$100.
- [57] MR. PATEY: It's two now [inaudible/overlapping speakers]
- [58] MS. MANN: Right, \$200, that's correct.
- [59] MR. PATEY: Certainly there is an ability to pay.
- [60] THE COURT: Yes.
- [61] MR. PATEY: I would ask for perhaps two months to pay that.
- [62] MS. MANN: Time to pay, no objection, My Lord.
- [63] THE COURT: All right. Two months to pay the victim fine surcharge.
- [64] MS. MANN: Two months from today's date.
- [65] THE COURT: Yes.
- [66] MS. MANN: Thank you, My Lord, those are the auxiliary orders that the Crown was requesting.
- [67] MR. PATEY: And My Lord, with regards to the DNA, I think the court, because it's out-of-custody, needs to direct --
- [68] MS. MANN: That's right, thank you.

[69] MR. PATEY: -- Mr. Wong to a particular police station. They have set days and times. Mr. Registrar, I don't know, do we have those handy or Mr. Sheriff, do you know when they do them?

[70] THE SHERIFF: I think it usually goes through the probation office, I'm guessing.

[71] MR. PATEY: Oh, okay.

[72] MS. MANN: There could be a direction that he attend at -- to the probation officer and then thereafter attend within a week. He could attend at the Richmond --

[73] THE COURT: I will make it a term of the probation order that he submit to a DNA sample at the direction of the probation officer, and leave it up to the probation officer to tell him where to go.

[74] MS. MANN: Thank you, My Lord, and I would say within a week of being --

[75] THE COURT: Of his first reporting.

[76] MS. MANN: Of his first reporting, yes.

[77] THE COURT: Yes.

[78] MR. PATEY: It should -- I think they have days every week that they do it, so it should not be an issue.

[79] THE COURT: Right, it should not be that difficult.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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