
CANADA / JUDGMENT

R. v. Young

2021 BCCA 462

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 462 R. v. Young

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Young,

2021 BCCA 462

Date: 20211112

Docket: CA47260

Between:

Regina

Respondent

And

Frank Jean Young

Appellant

Corrected Judgment: The text of the judgment was corrected in the

Summary on December 7, 2021.

Before:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated

January 15, 2021 (sentence) (R. v. Young, Queen Charlotte Docket 6763-1).

Oral Reasons for Judgment

Counsel for the Appellant

(in person November 9, 2021; via teleconference November 12, 2021):

E. Holzman

Counsel for the Respondent:

R.J. Carrier

Place and Date of Hearing:

Vancouver, British Columbia

November 9, 2021

Place and Date of Judgment:

Vancouver, British Columbia

November 12, 2021

Summary:

The appellant seeks leave to appeal his sentence for possession of cocaine for the purpose of trafficking and challenges the sentence. He argues the trial judge erred in principle by treating him as a commercial-level drug trafficker who was highly morally blameworthy despite a dearth of evidence to support that conclusion. Held: Leave to appeal granted and appeal dismissed. The judge made no error in principle and there is no reason to interfere with the trial judge who conducted a thorough assessment of the circumstances of the offence and the appellant's unique circumstances.

DICKSON J.A.:

Introduction

- [1] Frank Young lives in the small community of Skidegate on Haida Gwaii. On July 17, 2020, he pleaded guilty to possessing three ounces of cocaine for the purpose of trafficking, which trafficking he conducted from his home. On January 15, 2021, Judge Patterson found that Mr. Young was engaged in a busy retail operation related to his desire for profit, that his moral blameworthiness was high and that but for the mitigating circumstances, particularly Mr. Young's poor health, a fit sentence would be 18 months' imprisonment, followed by two years of probation. He went on to impose a sentence of a one-year period of incarceration followed by a two-year period of probation.

- [2] Mr. Young seeks leave to appeal and, if leave is granted, appeals his sentence, contending the judge erred in principle in sentencing him as a commercial-level trafficker of high moral blameworthiness rather than a street-level trafficker supporting his own addiction. In his submission, the judge focused unduly on the amount of drugs seized and their value and this error affected his assessment of whether there were exceptional circumstances that warranted a non-custodial sentence, which, he says there were. I cannot agree.
- [3] For the reasons that follow, I would grant leave to appeal sentence and dismiss the appeal.

Circumstances of the Offence

- [4] In February 2019, Mr. Young and his wife lived with their daughter in a house in a Skidegate residential neighborhood. One of their sons lived in the house next door. Acting on an anonymous tip that the couple was engaged in drug trafficking, police surveilled the residences and observed comings and goings consistent with such activity. As a result, they conducted two "takeaway-buy" arrests of customers, both of whom had purchased cocaine.
- [5] On February 15, 2019, police officers searched Mr. Young's residence, where they located and seized approximately three ounces of crack cocaine from a safe in the master bedroom closet. They also located and seized, among other things, a scale, many baggies and other packaging materials, and \$1,150 in cash. The bulk value of the seized cocaine was something in the range of \$4,800 to \$6,000; its street value was at a minimum \$6,720 to \$8,400, and, depending on packaging and possible dilution, up to \$11,000.

Circumstances of the Offender

- [6] Mr. Young was 61 years old when he was sentenced. Born in Germany of non-Indigenous parents, he moved to Skidegate with his mother and Indigenous stepfather when he was 12 years old. Thereafter, he resided continuously in Skidegate, where he experienced what he described as a normal childhood. He graduated from high school in 1978 and worked in the logging industry until he retired from legal employment in 2015.
- [7] Mr. Young began using drugs as an adult. Over the years, his habit increased to the point where he was spending \$450 every couple of days on cocaine. He also consumed alcohol regularly and described himself as a high-functioning addict. At his sentencing hearing, Mr. Young's counsel advised the Court that he quit cocaine "cold turkey" in September 2020, but had experienced some relapses.
- [8] Mr. Young and his wife met in 1978 and married in 2000. The parents of four adult children, they separated shortly before Mr. Young's sentence was imposed. At the time of sentencing, he was residing with his brother, while his wife remained in the family residence. He had no significant debt and received pensions of approximately \$1,800 per month.

- [9] A pre-sentence report was prepared in advance of the sentencing hearing. The author reported that Mr. Young stated he began drug trafficking in 2015 as a means to support his own cocaine addiction. He also reported Mr. Young held the view that "he was simply providing drugs for people that were in search of drugs", "views his customers as adults making a decision that is theirs to make", and maintains he "provides a service for a demand" without "employing predatory practices" or selling to children: at paras. 47-48. In his sentencing reasons, the judge commented that "Mr. Young did not express any sentiment to [the author of the pre-sentence report] that would indicate he appreciated the consequences of his drug dealing on the community": at para. 48.
- [10] Unfortunately, Mr. Young suffers from significant heart and lung disease. In 2000 and 2016 he suffered heart attacks, in 2019 he suffered a ruptured abdominal aortic aneurysm and, at the time of sentencing, he had been diagnosed with locally advanced lung cancer, which required treatment by radiation and chemotherapy. He has a dated criminal record, however, the judge did not consider the three convictions to be relevant to the sentencing: at para. 69.

Community Impact Statement

- [11] A Skidegate Band councillor, Michelle McDonald, presented a Community Impact Statement at the sentencing hearing. In the written statement, she referred to the hard work undertaken by her community to address the harms of colonization and residential schools on community members and noted that "[a] very large impact has been the use of drugs and the cycle of addiction that exists because of intergenerational trauma". She also described the fear experienced by Mr. Young's neighbours due to "the many people who visit at all hours to purchase drugs" and related "ongoing atmosphere of fear, mistrust and continual disruption" and noted how that fear "gets in the way of healing and trust".
- [12] In his sentencing reasons, the judge quoted extensively from the Community Impact Statement:
- [89] In describing how Mr. Young's offence has affected community members physically, Ms. McDonald wrote:

Community members do not want their children to walk home or play outside or be in the general area. This goes for Elders as well, no one feels safe to move freely in the area. Safety planning has to be used just to live in that area, this is unacceptable and unfair. Pitbulls are used as a way to control the area and enforce a fear mentally, this effects neighbors deeply.

- [90] In describing how Mr. Young's offence has affected the community financially, Ms. McDonald wrote:

Skidegate Band has to put more resources towards patrolling one area, Nightwatchman, has to spend huge amounts of time and energy on this one issue. Band Council uses it's limited resources on many meetings to address complaints and meet with relevant agencies (RCMP, SHC community members) that could be better used elsewhere. The long term effects of drug dealing are a drain on the whole community and vulnerable addicted individuals use funds they need for rent, food bills to purchase drugs. The cycle of poverty and addiction is playing out endlessly.

[91] In describing the fears community members have for their security, Ms. McDonald wrote:

Elders, youth and families are fearful of the accused and the type of people that are at the home. They fear retaliation when they speak out. They do not want contact with offender. They also have to worry about theft and vandalism in regards to the desperation that exists from people trapped in the scourge of addiction. They fear for young people who visit, that they will be exploited or preyed upon in the context of drug use or trading favors for drugs. The community doesn't see that there is a consequence for the behaviors/incidents that continually happen and mistrust that the justice system will protect them.

Determination of the Sentence

[13] The Crown sought a one-year jail term for Mr. Young, followed by a term of probation. Mr. Young sought a three-year suspended sentence, with the first year spent largely under house arrest and thereafter a strict curfew.

[14] After reviewing the circumstances of the offence and the offender, the Community Impact Statement and the existing provincial public health emergency, the judge summarized the purpose and principles of sentencing. He dealt with various Gladue issues unrelated to this appeal, then turned to the question of whether there were exceptional circumstances warranting a non-custodial sentence, as contemplated in *R. v. Voong*, 2015 BCCA 285. He found that there were not. In explaining this conclusion, the judge said this:

[154] In my view, there are no circumstances that are above and beyond the norm such as to justify a non-custodial sentence for Mr. Young. In particular:

1. Mr. Young has a criminal record, albeit unrelated to the offence that I am sentencing him for.
2. Other than quitting cocaine "cold turkey" on September 20, 2020, Mr. Young has taken no significant and objectively identifiable steps towards rehabilitation for his drug addiction.
3. Although Mr. Young blames his drug addiction for his decision to get into the drug dealing business, he has pled guilty to the offence of possessing three ounces of cocaine for the purpose of trafficking. The court has not been provided with any evidence as to the daily quantifies of cocaine Mr. Young was regularly consuming in February of 2019. Nor has the court been told if Mr. Young was, in February of 2019, a powder cocaine user, a crack cocaine user, or perhaps both.

4. Based on the evidence before the court, including the dollar values for the cocaine seized in this case, the only conclusion I can draw is that Mr. Young was making a profit from his cocaine drug dealing in excess of the funds he required to support his personal addiction. In other words, he was not simply trafficking in cocaine to support his own addiction. He was a professional drug dealer.
5. At 61 years of age, Mr. Young has been retired from his lawful employment in the logging industry since 2015. The only rational conclusion I can draw is that even with his self-professed cocaine addiction, Mr. Young has an excess of funds available to him.
6. On January 12, 2021, Mr. Young apologized to the Court and said he was sorry. I have taken into consideration Mr. Young's apology. Despite the apology, I do not see any indication from Mr. Young that he acknowledges, never mind regrets, the harm drug dealing generally, and his drug dealing in particular, has had on the community in Skidegate and elsewhere in Haida Gwaii. Rather, as expressed in the Pre-Sentence Report and as set out above, Mr. Young sees his drug dealing as a community service.
7. There is nothing in the Pre-Sentence Report, the submissions of [defence counsel], or the words spoken by Mr. Young, that leads me to conclude that Mr. Young has truly turned his life around. I hope that Mr. Young has quit cocaine as he told me on January 12, 2021. If he has, he has a life long struggle in front of him to remain committed to an illicit drug-free life.
8. I am unable to find that Mr. Young has remorse, other than the irritation he may very well feel having been found out, charged and having to go through the sentencing process.
9. I cannot find that the protection of the public would be better served by Mr. Young receiving a non-custodial sentence.

Conclusion

- [155] Based upon the totality of the evidence before the court, I find that there are no exceptional circumstances in Mr. Young's case.
- [15] The judge went on to address the collateral consequence of the risk posed by COVID-19 to Mr. Young, given his serious health issues. In doing so, he noted that he must not overcompensate "to the point of allowing Mr. Young to receive a sentence that is disproportionate to the offence and his degree of moral responsibility" and accepted that he must consider Mr. Young's health issues and their implications in crafting a fit sentence: at paras. 178, 182. After noting that he was sentencing Mr. Young only for the offence committed on February 15, 2019 and acknowledging the grave harms cocaine visits on society generally and the Skidegate community in particular, he stated that courts have recognized different levels of seriousness in trafficking and possession for the purpose of trafficking offences.

- [16] In recognizing that trafficking offences may involve different levels of seriousness, the judge distinguished between small volume retail sellers who earn just enough to support a personal drug addiction, on the one hand, and, on the other, busy retail sellers or full-time commercial operations. Then, he made this finding regarding the category into which Mr. Young fell:
- [202] Based upon the entirety of the evidence, I am of the view that Mr. Young falls within the category of busy retail seller or full-time commercial operation. Mr. Young's possession of the three ounces of cocaine for the purpose of trafficking was related to his desire for financial profit, over and above what he required to support his own personal cocaine addiction. The amount of recovered cocaine is indicative of a busy retail operation, especially for a small isolated First Nations community like Skidegate. As such, a sentence in the range for commercial trafficking is appropriate.
- [17] Next, the judge noted there were various mitigating factors to consider in constructing a sentence specifically for Mr. Young. For example, he noted, Mr. Young entered a guilty plea, had only a minor and unrelated criminal record, and would experience significant collateral consequences as a result of his health issues. He also stated that, as a judge who sits regularly in Haida Gwaii, he was "all too aware of the impact illicit drugs have on local communities generally and the Haida people in particular": at para. 210. Then, he stated that Mr. Young's moral blameworthiness was "at the highest end of the spectrum" and, absent the mitigating factors, a fit sentence would be 18 months' imprisonment, followed by two years' probation: at para. 211.
- [18] Weighing all of the factors for consideration, the judge concluded that he should reduce the period of incarceration to be imposed from 18 months to one year, but not reduce the period of probation. Accordingly, he held, "a fit, just, and proportionate sentence for [Mr. Young] requires a one-year period of incarceration followed by two years' probation", which he considered the minimum sentence possible as "[a]ny lesser sentence would bring the administration of justice into disrepute and be contrary to the public interest": at paras. 216-217.

On Appeal

- [19] Mr. Young contends that the judge erred in principle by treating him as a commercial-level drug trafficker who was highly morally blameworthy despite a dearth of evidence to support that conclusion. For example, he notes, unlike in many cases, there was no evidence here of score sheets, couriers, large amounts of cash, or supplying street-level traffickers with drugs, all of which are the sort of indicia that typically point to an offender engaged in mid-level commercial trafficking. He says, in this case, the judge focused solely and unduly on the amount of drugs seized by police and their value, which was an inadequate basis to support his finding of mid-level trafficking. According to Mr. Young, this error led the judge to overstate his moral blameworthiness and undervalue the exceptional circumstances that justified a non-custodial sentence, namely, his serious health issues, his virtual first-time

offender status, and his position as a struggling addict dealing in drugs to feed his own addiction.

- [20] Mr. Young goes on to contend the judge should have found that, as stated in Voong, the appropriate range of sentence for a first-time small volume retail drug trafficker such as himself is six to 18 months' imprisonment, absent exceptional circumstances. However, given his exceptional circumstances, he says an appropriate sentence was a 36-month probation order with strict conditions, as proposed by defence counsel. In his submission, such a sentence would be proportionate and fit in his unique circumstances, properly understood and analyzed. Accordingly, he submits, this Court should impose this sentence.

Discussion

Standard of Review

- [21] In *R. v. Friesen*, 2020 SCC 9, the Supreme Court of Canada emphasized the limited role of appeal courts on sentencing appeals:
- [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

Did the judge err in principle?

- [22] In my view, the judge made no error in principle. He inferred from the admitted facts that Mr. Young was "not simply trafficking in cocaine to support his own addiction". Rather, he was a "professional drug dealer" who trafficked in cocaine "to make a profit" and, despite his addiction, had "an excess" of available funds. This was an entirely reasonable inference grounded in the whole of the evidence, including Mr. Young's retirement from lawful employment in 2015 to traffic in drugs, his debt-free financial circumstances, and his decidedly commercial view of the customer demand he was supplying. In other words, contrary to Mr. Young's submission, the judge's finding that he was a commercial-level drug trafficker was not based simply on the amount of drugs seized by police and their value. In my view, it is entitled to appellate deference, as is his related conclusion that Mr. Young's moral blameworthiness was very high.

- [23] The judge conducted a thorough, careful, individualized assessment of the circumstances of the offence and Mr. Young's unique circumstances, including the collateral consequences associated with his serious health issues. Although he was not engaged in a commercial operation of the scale sometimes seen in larger centers, I see no error in the judge characterizing Mr. Young as a "busy retail seller" in the Skidegate context and sentencing him with that general characterization in mind. In doing so, he considered the applicable sentencing principles, relevant authorities, and appropriate range of sentence. Given his experience in Haida Gwaii, he was particularly well-placed to assess the impact of the offence on the local community and to account for that reality in determining an appropriate sentence.
- [24] As the Supreme Court of Canada affirmed in *R. v. Lacasse*, 2015 SCC 64, the determination of a just and appropriate sentence is a delicate art that may benefit from an appreciation of local community needs and conditions. As this Court and others have long recognized, cocaine is a highly addictive drug that destroys lives, tears families apart, and damages communities, particularly those that may be unusually vulnerable, such as isolated northern communities. For all of these reasons, trafficking in cocaine is considered a serious offence which should typically attract significant penal consequences: *R. v. Aguilera Jimenez*, 2020 YKCA 5. In my view, the judge appropriately accounted for these considerations in crafting a sentence that was fit and proportionate given the circumstances of the offence and the offender. I see no reason to interfere on appeal with the sentence he imposed.

Conclusion

- [25] I would grant leave to appeal the sentence and dismiss the appeal.
- [26] FENLON J.A.: I agree.
- [27] GRAUER J.A.: I agree.
- [28] FENLON J.A.: The appeal is dismissed.

"The Honourable Madam Justice Dickson"

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