

SUPREME COURT OF YUKON

Citation: *R. v. Guan*, 2010 YKSC 36

Date: 20100705
Docket S.C. No.: 09-01511
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

YAO LIN GUAN

Before: Mr. Justice R.S. Veale

Appearances:
Jennifer Grandy
Gordon Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): Mr. Guan has been convicted of two offences; firstly, unlawfully possessing cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drug and Substances Act*, R.S.C. 1996, c. 19, and secondly, on the same date, September 30, 2009, failing without lawful excuse to stop his vehicle as soon as was reasonable when being pursued by a peace officer, contrary to s. 249.1(1) of the *Criminal Code*.

[2] The Crown seeks a ten-year firearms prohibition and forfeiture of \$365 cash and a cell phone. The Crown also seeks a custodial sentence of 14 months on the possession for the purpose conviction and two months consecutive on the s. 249.1(1)

offence. The defence submits that a conditional sentence is appropriate.

Circumstances of the offence

[3] On September 30, 2009, Mr. Guan, who had been previously observed in what appeared to be a drug transaction, was followed by the police. Upon being observed and failing to stop at an intersection, the policeman activated his siren and four-way flashers. Mr. Guan attempted to evade the police and, as he did so, he threw a baggie of cocaine out of the vehicle window. Ultimately, there was a recovery of seven spit balls of cocaine weighing approximately 12 grams.

[4] The aggravating circumstances are that, firstly, he was in possession of cocaine for the purposes of trafficking, which is considered to be a very serious offence in this community and one that often attracts a jail sentence. Two, Mr. Guan was in the drug business for the purpose of making a profit; and, three, he attempted to evade the police briefly in an attempt to avoid arrest for possession for the purpose.

[5] There are mitigating circumstances. This is a first offence for this 46-year-old man. He has family support in that his wife, Hu Yan Hang (phonetic), who resides in a house at 6408 Commercial Street in Vancouver, has supported him by attending the trial and the sentencing hearing and is prepared to have him reside with her in Vancouver.

[6] Probation Officer Shayne King prepared a helpful pre-sentence report indicating that Mr. Guan was born in China and immigrated to this country in 2005. According to Mr. Guan, he completed grade school in China and then attended university in Canton. He says he completed four years and obtained a degree in construction engineering. He

apparently worked for 16 years in China with a large construction company but came to Canada in 2005.

[7] Since arriving in Canada he has not been able to hold any job for a long period of time. He indicates, rather surprisingly, that he came to Canada with \$600,000 Canadian worth of government savings bonds. He has briefly been in Whitehorse where he was working as a cook in Kathy's Kitchen at the T & M Hotel, and he was employed for about a month and a half before his arrest. He was granted bail and returned to work at the restaurant until he was found guilty in this Court.

[8] It is his intention to return to Vancouver where he hopes to pursue employment in the restaurant field. He indicates he is likely to find gainful employment there because of the large Chinese community.

[9] He was wed in 1990 and he and his wife have been together for 20 years. He also has a 19-year-old son, who resides at 6408 Commercial Street with his wife, and is planning to attend university in September.

[10] Mr. King made these observations at the conclusion of his pre-sentence report, and I quote:

Attempting to make a recommendation on whether Mr. Guan is a viable candidate for a community disposition is extremely difficult. It is impossible to tell if Mr. Guan was being truthful with his responses as there are no collaborative contacts available to verify the little information that was collected. There are aspects of Mr. Guan's responses that don't make sense. Such as why an engineer who has six hundred thousand dollars in savings bonds would decide to come to Whitehorse without his family to work in a restaurant kitchen, later only to be arrested a month after arriving for being involved in drug activity. This is

not to say that Mr. Guan was lying but trying to clear an oddity like this up through further questions proved to be extremely difficult.

And continuing with the next paragraph, I quote:

The only recommendation that the writer feels comfortable in making in this case is that supervising Mr. Guan on a community disposition in Whitehorse is unrealistic. The services to be effective in that capacity simply are not available. If the court feels that a community disposition is appropriate, one of the conditions recommended for Mr. Guan would be to return to Vancouver to be supervised by an agency in that area.

I am assuming that that comment relates to Mr. Guan's inability to speak the English language.

[11] As I indicated, defence counsel seeks a conditional sentence in this matter.

Section 742.1 of the *Criminal Code* has two conditions; one, that the Court imposes a sentence of less than two years, and secondly, that the Court must be satisfied of two things: one, that serving the sentence in the community would not endanger the safety of the community, and two, it would be consistent with the fundamental purposes and principles of sentencing in s. 718 to 718.2.

[12] It is no secret that the Courts in this jurisdiction lean in the direction of sentencing drug offenders to jail. There are good reasons for so doing. A single drug trafficker can do a great deal of damage to people in the community, and Yukon society generally, as they ply their trade. It was well put by Faulkner J. in *R. v. Smarch*, 2008 YKTC 18, at paragraph 5:

- [5] I am prepared to assume that the benefits of incarceration for the offender himself are easy to overstate, but that is not the only consideration in sentencing, especially for crimes like drug trafficking. In such cases, the Yukon courts, and indeed other courts, have consistently held that deterrence and denunciation are of paramount importance. While recognizing that a conditional sentence can include elements of deterrence and denunciation, I think that the Court should be cautious before imposing conditional sentences in cases of drug trafficking. Matters of deterrence and denunciation aside, it is obvious, in the first place, that putting a drug pusher on a conditional sentence leaves him in the community, where, especially in these days of advanced communications, it is very easy for the convicted trafficker to simply take up where he left off. Secondly, and more specifically related to the present accused, the probation report reveals that he has no job, and, as I have said, a poor record of maintaining employment. Thus, for him, the lure of easy money will be all the greater.

I endorse those comments but having said that, there are two factors set out in *R. v.*

Chang, 2002 BCCA 644, at para. 9, that must be taken into consideration:

9. Unless there was a special need to impose a term of imprisonment, and I do not think the evidence reasonably supports that in this case then, in my view, the trial judge was obliged to follow a different line of authority on these principles:
- (1) Deterrence and denunciation in drug cases can be achieved by a conditional sentence. See *R. v. Kozma*, [2000] B.C.J. No. 1595; *R. v. Bui*, [2001] B.C.J. No. 1574; *R. v. Clough*, [2001] B.C.J. No. 2336; and *R. v. Poole*, [2001] B.C.J. No. 2715; and
- (2) Incarceration of first offenders should be avoided. See *R. v. Whyte*, [2002] B.C.J. No. 1040.

Disposition

[13] I have concluded from reviewing the cases presented by counsel that a sentence of 14 months imprisonment is appropriate in this case. As noted in *R. v. Miller*, 2009 YKSC 36, a lesser term of imprisonment may be considered based on the age of the

offender, whether or not a guilty plea was entered, and the plan put forward. In that case, Mr. Miller, age 30, pled guilty, made a personal and tearful apology and made arrangements to attend school in British Columbia.

[14] In this case, Mr. Guan, age 46, did not plead guilty, but it is his first offence and he has a home to return to in Vancouver where his wife and son reside. He does not appear to be a professional drug trafficker but someone who had employment. He admitted in Court that he has done wrong and wants to make amends. While Mr. Guan has not presented the type of plan that assists in obtaining a conditional sentence, given his language constraints and the fact that he has not made his home here, his proposal to serve his sentence conditionally meets the requirements of s. 742.1 in that he does not appear to be a danger to the community, and it is consistent with the principles of sentencing for a first offender.

[15] Would you please stand up, Mr. Guan. I therefore sentence you to a term of 14 months imprisonment to be served in the community on the following conditions:

1. That you keep the peace and be of good behaviour, and that you appear in Court when required to do so by the Court;
2. That you report to a Conditional Sentence Supervisor immediately upon your release from custody and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
3. That you remain within the Province of British Columbia unless you have written permission from your Supervisor or the Court;

4. That you reside at 6408 Commercial Street in the City of Vancouver and that you not change that residence without the prior written permission of your Supervisor;
5. That you abstain absolutely from the possession or consumption of controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;
6. That you are to be under house arrest, which means that you must remain inside your residence except for the purpose of reporting to your Supervisor or going directly to and from your place of employment as approved in writing by your Supervisor, and also for the purpose of purchasing the necessities of life for two hours a week;
7. You must carry a copy of this order with you at all times and any permission that your Supervisor gives you in writing with respect to your place of work or travel;
8. That you perform 120 hours of community service as directed by your Supervisor or such other person as your Supervisor may designate, and this community service is to be completed by the end of your term of 14 months;
9. That you seek and maintain suitable employment; and
10. You are prohibited from possessing or using a cell phone.

[16] With respect to the offence of failing to stop your motor vehicle as soon as reasonable in the circumstances, contrary to s. 249.1(1), you are sentenced to time served, which I understand to be 82 days.

[17] There will be a firearms prohibition for ten years pursuant to s. 109 of the *Criminal Code*.

[18] There will be an order of forfeiture of the \$365 cash and your cell phone.

[19] Is there anything arising?

[20] MR. COFFIN: Yes. There will be some time, I would expect, required for him to book a plane out of here. For instance, I don't know if he could get on a flight this afternoon, for instance, so.

[21] THE COURT: No, I am sure he cannot. He has got to go. He has to meet -- I should have had Mr. King here, I guess, but he has to meet his Supervisor here.

[22] MR. COFFIN: That could be, but perhaps the reside could be at that address or as directed by the Supervisor, because the Supervisor could direct him to spend a night here some place, for instance. If he met with Mr. King upon leaving the building, they could go over the terms of the order and he could direct him to reside at a particular location until they can arrange transfer to Vancouver.

[23] MS. GRANDY: Except that Mr. King can't talk to him directly to arrange anything.

[24] THE COURT: Well, he is going to have to speak to him to arrange for the transfer.

[25] MS. GRANDY: Oh, I understand he is going to have to speak to him, but the fact is, they can't communicate, I mean. So that's the difficulty, right?

[26] THE COURT: Well, maybe we could impose on our interpreter to assist.

[27] MR. COFFIN: Perhaps Mr. King should be contacted by the Clerk and requested to come over and they could deal with it here before leaving the building.

[28] THE COURT: Why don't you see if you can do that, Mr. Clerk?

[29] THE CLERK: I'll make those arrangements, Your Honour.

[30] THE COURT: Okay. Do you need me for that or just if we can get him over here, that would be the best, would it not?

[31] MR. COFFIN: I think so.

[32] THE COURT: I am concerned about the "as directed." we could indicate in that term that we could say, "When you arrive in Vancouver."

[33] MR. COFFIN: Yes, yes. That would be fine.

[34] MS. GRANDY: I think the only other condition that might be a problem is the remain within B.C.

[35] THE COURT: The jurisdiction to make that order, do you mean?

[36] MS. GRANDY: No, no, no, just he's clearly not in B.C. now and until he gets to B.C. he'll be in --

[37] MR. COFFIN: Yes, again [indiscernible].

[38] MS. GRANDY: -- technically in breach of it.

[39] THE COURT: To remain in B.C. when you get there?

[40] MR. COFFIN: After he arrives, yes, it --

[41] MS. GRANDY: I don't know that there's a -- unless there's a way to delay, you know, when that particular condition takes effect, for example.

[42] THE COURT: I will say to remain within the Province of British Columbia when you arrive there. Am I missing something?

[43] MS. GRANDY: And I'm not trying to -- if the intent is that the order be served in British Columbia, then I wonder if maybe giving him a period, a window of time, or saying, essentially, you are to leave the Yukon and reside in British Columbia for the duration of that order, or something to that effect, because --

[44] THE COURT: It is pretty clear that that is where he is residing.

[45] MS. GRANDY: Just, I guess, to remain within British Columbia when you arrive there. I mean, technically speaking, if he never goes, then he never has to remain because he never arrives. Just on that -- that bare reading, I would say.

[46] THE COURT: Okay. And sorry, so what are you seeking, then, as a change?

[47] MS. GRANDY: Well, if it's going to take a week, then say after. If he can have his affairs in order in less than a week, then say after such-and-such a date remain within the Province of British Columbia. Or remain within the Province of British Columbia except with permission, and that way Mr. King can give him permission.

[48] THE COURT: Well, that is what I have already got.

[49] MR. COFFIN: And that's already there, so I think --

[50] MS. GRANDY: Okay. My understanding was that it was a straight -- a strict remain.

[51] THE COURT: No, I said remain within the Province of British Columbia unless you have the written permission from your Supervisor or the Court.

[52] MS. GRANDY: My apologies, that was --

[53] MR. COFFIN: And I think that should cover Mr. King and give him permission to make the arrangements.

[54] THE COURT: Yes. And feel free to call me back if you have any difficulties.

[55] MR. COFFIN: The only other thing, Your Honour, is the victim fine surcharge.

[56] THE COURT: Nobody mentioned that, so I thought there will be a victim fine surcharge.

[57] MR. COFFIN: And that will require some time; I'm not sure. I believe --

[58] THE CLERK: The amount?

[59] MR. COFFIN: I think it's \$100 on each because it went by indictment.

[60] THE COURT: The amount of \$100 on each count?

[61] MR. COFFIN: Yes, so a total of \$200. I would suggest two months time to pay that, just to make the transfer to B.C.

[62] THE COURT: Two months to pay.

VEALE J.