

R. v. Pineda, [2016] O.J. No. 4074

Ontario Judgments

Ontario Court of Justice

St. Catharines, Ontario

P.H. Wilkie J.

Heard: April 26, 2016.

Oral judgment: April 26, 2016.

Information Nos. 15-S2326-03 and 16-SR0399-03

[2016] O.J. No. 4074

Between Her Majesty the Queen, and Marvin Pineda

(48 paras.)

Counsel

D. Anger, Counsel for the Federal Crown.

K. Hetherington, agent for J. Goldlist, Counsel for Marvin Pineda.

REASONS FOR SENTENCE

P.H. WILKIE J. (orally)

- 1 These are the reasons for sentence in respect of Marvin Pineda who on February 24th of this year pled guilty to possession of cocaine for the purpose of trafficking.
- 2 Mr. Pineda was one of ten persons who were arrested in early July of 2015, following an investigation that lasted several months into cocaine trafficking in the Niagara Region. The investigation involved extensive surveillance the interception of many communications, at least one covert entry to plant a camera and the execution of 15 search warrants.
- 3 During the investigation Mr. Pineda became known to police as one of the persons buying and selling cocaine. Some of the discussions regarding those transactions were captured on the intercepts. At the time of his arrest, Mr. Pineda was found in possession of a set of keys to a rented motor vehicle. Inside the car the police found 166 grams of cocaine. In addition, he was also in possession of a set of keys that unlocked a room to a residence on Bunting Road in St. Catharines. In that room was found a further 292 grams of cocaine. In total, therefore, Mr. Pineda admitted to the constructive possession of just about exactly one pound of cocaine. This is a lot of cocaine an amount which in many circumstances, would cause the Court to consider a sentence in the range of four or perhaps five years, which is exactly what the Crown seeks. However, the context within which this offence was committed and the placement of this offender, according to the Crown, within the hierarchy of those involved in the conspiracy of which he was a part, require the Court to temper the sentence considerably.
- 4 Mr. Pineda will be the second person from group to be sentenced. The first was Jesse Orr who pled guilty to the conspiracy count. Mr. Orr had a previous conviction for cocaine trafficking for which he received a penitentiary sentence. He was not found in possession of any cocaine but there was \$41,000 in cash at his house and 52 kilos of a

cutting agent a storage locker. At his sentencing, Mr. Orr, who was living in Toronto was described as one of two persons who was supplying the cocaine to persons such as Pineda in the Niagara Region and as such was close to the top end of the conspiracy.

5 During submissions in relation to a third accused, Mr. Orr was again described as a person with access to larger amounts of cocaine which he would have delivered to persons such as Mr. Pineda and others similarly situated. Notwithstanding that, the Crown join the submission that his sentence be effectively some 27 months. In contrast, for Mr. Pineda who unlike Orr has no prior record and is conceded to be lower on the distribution train, the Crown seeks five years. They acknowledged that he was not trafficking in drugs at the pound level but is captured in the wire taps seeking advice and instruction from others about where and to whom smaller quantities of drugs should be distributed. Still they based their position, that is the Crown, on the fact that the focus of the sentence should not be on the conspiracy or his role in it but solely on the amount of drug actually found in his possession.

6 The quantity of drug in his possession is an important measure of how active and seriously involved he is and must, in some degree, influence the quantum of sentence. I cannot however ignore the overall context and base a sentence purely on how much is under his control when the warrants are executed. Especially not when his position in the hierarchy is below that of Mr. Orr.

7 The fact is that absent the joint submission, Orr's sentence would have been much greater As it is however, I find it impossible to reconcile the 27-month sentence agreed to for Mr. Orr, a man with a serious prior drug record and determined to be a supplier of drugs to Pineda and others at his level, with the fives sought for Mr. Pineda, a distributor of smaller amounts with no prior record. If the prince of parity is to mean anything, I am bound to use the Orr sentence established by the Crown as a rough bench mark for others connected to the same criminal activity.

8 Mr. Pineda's personal circumstances must also, of course, be given due consideration in determining the appropriate sentence and in this regard they work in his favour. He is 28 years of age, and as noted has no prior record. He is single and without children but enjoys a long term stable relationship and strong family support. It is clear from the presentence report that he takes full responsibility for is offending and has resolved to make positive changes in his life. By all accounts, Mr. Pineda appears to have a reasonable rehabilitative potential. He co-operated with authorities on arrest, did not seek bail and pled guilty at a relatively early opportunity without regard to the result this may have had on his conscripted involvement in ongoing charges against others in the group.

9 The Court accepts that he has a long standing history of drug use including cocaine and that he initially became involved in selling it to support his addiction. That said there is a no doubt that his involvement at the level he was operating, which included sales at the ounce level, had a strong profit motive and he must be sentenced on that basis and not as an addict trafficker.

10 His possession of a pound of cocaine is part and parcel of a commercial enterprise. Despite the fact as referred to, which weigh against the sentence recommended by the Crown, these are not the circumstances where possession of this quantity of such a dangerous and deceptive drug can attract anything less than a penitentiary range sentence. Clearly, but for the sentence agreed to by the Crown for an offender involvement at another level, Mr. Pineda's sentence would be greater as well. The circumstances notwithstanding, the Court must bear in mind that general deterrence and denunciation are principles that must receive significant weight in these cases. Balancing the very serious nature of the offence and Mr. Pineda's high degree of moral culpability with principles of fairness and parity, I've determined that the proper sentence for Mr. Pineda is one of 30 months in custody.

11 He has been in custody since arrest, a period of nine and a half months, and will receive credit for 14 months of pretrial custody. The end result is a further sentence of 16 months. This will be followed by 18 months' probation.

12 Probation will include, the following terms: He will keep the peace and be of good behaviour, he will report forthwith upon release and thereafter as required to probation, he will co - operate with the probation officer, he will possess no weapons and he will have no contact or communication with the other persons involved in the conspiracy.

- 13 THE COURT: And Mr. Anger, could you perhaps supply a list of those persons to Madam Clerk due course?
- 14 MR. ANGER: Well, they should be listed on the indictment or on the information.
- 15 THE COURT: They are.
- 16 MR. ANGER: That might be the easiest ...
- 17 THE COURT: What about Mr. Morales, are you - would you require him to be he's his brother.
- 18 MR. ANGER: Well, that's that's his it's his half-brother so he that should probably be an excluded person.
- 19 THE COURT: All right. Well, I'll give you a list Madam Clerk. I can give you a list.
- 20 COURTROOM CLERK REGISTRAR: They are on the information.
- 21 THE COURT: Yes, they are but there's a Morales there? He's to be excluded from the ...
- 22 COURTROOM CLERK REGISTRAR: Wilbur Morales is the exception?
- 23 THE COURT: Right.
- 24 MR. HETHERINGTON: And Cortes, Laura Cortes.
- 25 THE COURT: How does she get to be an exception?
- 26 MR. HETHERINGTON: She's his fiancé.
- 27 THE COURT: Oh, she's the ...
- 28 MR. HETHERINGTON: Right.
- 29 THE COURT: Right, sorry.
- 30 MR. HETHERINGTON: Please, Your Honour, thank you.
- 31 THE COURT: No, you're quite right. So Ms. Cortes. The only othe term of the probation s that you will take any counselling for substance abuse that probation deems appropriate and not discontinue that counselling without probation's approval and sign releases in relate to that counselling. There's a victim fine surcharge, you'll have a year to pay that. There's also a section 109 Order. Am I right, Mr. Anger?
- 32 MR. ANGER: Section 109 for 10 years and DNA secondary designated offence.
- 33 THE COURT: There will be a section 109 order for 10 years and a DNA order. There's no forfeiture order to make in respect of ...
- 34 MR. ANGER: There was forfeiture order al signed for Mr. - when Ms. Goldlist was here. The only forfeiture order that sort of associates to Mr. Pineda is actually for Ms. Cortes which is forfeiture of \$7980 that was found in her dresser. That was discussed on t wiretaps and so Ms. Pineda, sorry Ms. Cortes, is consenting to the forfeiture of that money. The Crown is seeking the return of some an currency and some American currency that was found in a different part of the home and for which I have sworn affidavits from the parents that the money was theirs and, in fact, they also testified at the prelim that the money was theirs, while under oath. And so I have two copies of that order for Your Honour to consider endorsing.
- 35 THE COURT: All right. It's all. ...

36 MR. HETHERINGTON: It's on agreement, I gave ...

37 THE COURT: In agreement.

38 MR. HETHERINGTON: ...the affidavits to Mr. Anger with respect to the parents who are both present and seated behind Mr. Root.

39 THE COURT: All right, Mr. Pineda, the effect of my sentence is that you have 16 months to serve in a reformatory followed by 18 months' probation. As I indicated in my reasons, I am satisfied that you have a good potential for rehabilitation. I am gratified that you have the support of your fiance and your family and I know that you will come through this successfully and I am quite confident we won't see you again, sir. Good luck.

40 MARVIN PINEDA: Thank you.

41 MR. HETHERINGTON: Your Honour, I've been instructed to ask that there be an endorsement recommending treatment while he's in custody as well.

42 THE COURT: Oh yes, I can apart from having him ...

43 MR. HETHERINGTON: Simply to have someone come and talk to him about it while he's serving out his sentence.

44 THE COURT: Well, I don't think well, I am always content to make an endorsement and I am confident that Mr. Pineda can access those services on his own but I'll make the endorsement.

45 MR. HETHERINGTON: Thank you, Your Honour.

46 MR. ANGER: And then once Your Honour endorses the forfeiture order, I'll ask the charges all charges against Ms. Cortes there is to be marked as withdrawn and charges remaining against Mr. Pineda can marked as withdrawn, please.

47 THE COURT: All right. All of the charges against you, Mr. Pineda, are withdrawn and where's Ms. Cortes? Would you stand up, please ma'am. All the criminal charges you were facing when you came in this morning are now withdrawn by the Crown madam and you are free to go and good luck to you as well.

48 MR. Hetherington: Thank you, Your Honour.