NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Conway***, 2009 NSCA 95

Date: 20090923
Docket: CAC 303692
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Michael Foster Conway

Respondent

Judges:	Roscoe, Bateman and Saunders, JJ.A.
Appeal Heard:	September 14, 2009, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal allowed per reasons for judgment of Bateman, J.A.; Roscoe and Saunders, JJ.A. concurring.
Counsel:	Susan Y. Bour, for the appellant Cameron MacKeen, for the respondent

Reasons for judgment:

[1] Michael Conway pleaded guilty to two counts of drug trafficking (**Controlled Drug and Substances** Act, S.C. 1996, c. 19, s. 5(2) ("**CDSA**")). The Crown seeks leave to appeal and, if granted, appeals the imposition of a conditional sentence of two years less a day plus two years probation.

[2] Mr. Conway packaged and delivered drugs from his van in what is known as a "Dial-a-Dope" enterprise. At the time of his arrest he was in personal possession of five dime bags of crack cocaine; five dime bags of marijuana; a cell phone with a headset and two hundred and sixty-five dollars ($265) in cash. Found in the master bedroom and in a safe during a warranted search of his home were several working scales containing drug residue; one inoperative set of scales; ziplock packaging; baggies and bags of cannabis marijuana and cocaine both in bulk and broken down into sale portions; and various amounts of cash. In a second bedroom were found additional baggies of marijuana, roaches, a bong and smoking papers. The total drug weight, value and amount of currency was 103.1 grams of crack cocaine with an approximate street value of $10,310.00; 264.12 grams of cannabis marihuana with an approximate street value of $2,650.00 and $2,938.00 in Canadian currency.

[3] Mr. Conway is 65 years old with limited formal education and has no prior record. He is one of two drivers for a cleaning business which he and is wife operate. About ten years ago he suffered a stroke which limits his strength and, to a degree, impedes his speech. He takes a daily blood thinner and cholesterol pill. He helps his wife around the home. They have a son, not living at home, and a teenage daughter who resides with them. Mr. Conway did not testify at the sentencing hearing. The reason for his involvement in the offence was said to be the family's tight financial circumstances.

[4] The Crown requested a period of federal incarceration of 2.5 years. Mr. Conway successfully sought a conditional sentence. With respect, the judge's oral reasons were exceedingly brief. I reproduce the material parts of his decision in full:

> Mr. Conway is here today to be sentenced on two charges of possession of drugs, marijuana and cocaine, for the purpose of trafficking.

...

> The Crown has asked for a sentence of two and a half years in a federal penitentiary. The Defence has asked for a conditional sentence order, followed by a period of probation. The two positions are different in the sense of the emphasis that deterrence should be given in the sentencing. Principles of sentencing are set forth in Section 718 of the Code, as well as the *Controlled Drugs and Substances Act*.
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> In favour of the Crown's position is the quantity of drugs found in (sic) the nature of the operation Mr. Conway was involved in, as well as the background factors, such as scales, baggies and other paraphernalia found either in the truck or the residence.
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> The Defence, on the other hand, indicates that Mr. Conway is --at the time, was a 65-year old man; is now a 66-year old man, with health problems, who has managed to reach this age without previous criminal convictions; that he has been industrious his life, a good husband and father to his children; and that found -- got himself involved in these circumstances, because of hard times brought about through a combination of health issues between himself and his wife.
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> ...
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> Having considered the matter, and given Mr. Conway's age, and lack of previous record, sentencing Mr. Conway to a conditional sentence of two years, less a day. Satisfied that serving this sentence in the community will not endanger its safety, and is consistent with the fundamental purpose and principles of sentencing.

[5] Mr. Conway was required to remain in his residence for the full term of the sentence, provided he could leave for employment, medical appointments, meetings with his lawyer and probation officer and for court attendances. In addition he was permitted to attend his daughter's graduation from high school. There were no conditions attached to the probation order other than the usual statutory requirements.

[6] The Crown says the sentence is manifestly unfit; that the judge erred by failing to apply the applicable sentencing principles for such offences; gave undue weight to Mr. Conway's motive, age and lack of prior record; failed to conduct the analysis required by **R. v. Proulx**, 2000 SCC 5; and failed to provide reasons for sentence.

[7] This Court may intervene on a sentence appeal only where there is error in principle; a failure to consider a relevant factor; an overemphasis of the appropriate factors; or the sentence is demonstrably unfit. It is not sufficient that we simply disagree with the disposition. This standard is reflective of the great deference owed to the decisions of sentencing judges (**R. v. L.M.**, 2008 SCC 31 at para. 14 *per* LeBel J.).

[8] Recently, in **R. v. Knickle**, 2009 NSCA 59, this Court thoroughly canvassed the approach to be taken by a judge in deciding whether a conditional sentence is appropriate for an offence and summarized the prior case law relevant to drug trafficking offences. While the reasons for judgment were delivered after the disposition under appeal here, **Knickle** does not till new ground. The principles and approach applicable to conditional sentences and to sentencing drug trafficking offences are long established. In **Knickle** Roscoe, J.A. wrote for the Court:

> [15] The Supreme Court of Canada provided guidance in the application of these provisions in **R. v. Proulx**, *supra*. Lamer, C.J., for the court, explained how the first step in the process should be undertaken:
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> > [58] ... In my view, the requirement that the court must impose a sentence of imprisonment of less than two years can be fulfilled by a preliminary determination of the appropriate range of available sentences. Thus, the approach I suggest still requires the judge to proceed in two stages. However, the judge need not impose a term of imprisonment of a fixed duration at the first stage of the analysis. Rather, at this stage, the judge simply has to exclude two possibilities: (a) probationary measures; and (b) a penitentiary term. If either of these sentences is appropriate, then a conditional sentence should not be imposed.
> >
> > [59] In making this preliminary determination, the judge need only consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 to the extent necessary to narrow the range of sentence for the offender. ...
>
> [16] The first step of the analysis is a consideration of the appropriate range of sentence for the offence. Here the judge briefly commented that the sentencing range in Nova Scotia for cocaine trafficking is a penitentiary term in the range of two to five years. Then without further analysis, indicated that there was nothing to warrant a sentence in a three and a half year range, and finally concluded that

> the defence had satisfied her that a sentence of two years less a day would be appropriate because of exceptional circumstances.
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> [17] The judge failed to recognize how this court has consistently categorized drug traffickers, based on the type and amount of drug involved and the level of involvement in the drug business, to assist in placing them within the range. In **R. v. Fifield**, [1978] N.S.J. No. 42, the court described the following general categories of drug traffickers: the young user sharing marijuana with a companion; the petty retailer who is not shown to be involved full-time or in a large-scale commercial distribution; the large-scale retailers and commercial wholesalers. Chief Justice MacKeigan noted that the amount of drugs involved helps determine the quality of the act or the probable category of trafficker. The Fifield categories have also been applied by this court to cocaine and crack cocaine trafficking cases. See, for example:
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> **R. v. Carvery**, [1991] N.S.J. No. 501 -- high level retailer -- 6 ½ ounces cocaine -- five years' incarceration;
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> **R. v. Steeves**, 2007 NSCA 130 -- not a lower level trafficker -- 77 grams of cocaine, and 100 pills of ecstasy -- 2 years, six months' incarceration;
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> **R. v. Sparks**, [1993] N.S.J. No. 448 -- four counts of selling small amounts of crack cocaine and one count of possession for the purpose -- totalling just over 1.5 grams -- not a petty retailer -- 32 months' incarceration.
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> [18] Numerous other sentencing decisions from this court repeatedly and consistently emphasize that persons involved in trafficking in cocaine will be subject to sentences of incarceration. This has been absolutely clear since the very first case heard by this court involving trafficking in cocaine: **R. v. Merlin**, [1984] N.S.J. No. 346, 63 N.S.R. (2d) 78. See also, for example: **R. v. Dawe**, 2002 NSCA 147; **R. v. Jones**, 2008 NSCA 99; **R. v. Stokes**, [1993] N.S.J. No. 412, 126 N.S.R. (2d) 66; and **R. v. J.B.M.**, 2003 NSCA 142. This court has never approved or endorsed a conditional sentence on charges of possession for the purpose of trafficking or trafficking in cocaine. As well, we have regularly allowed appeals from conditional sentence orders for trafficking in large amounts (sic) marijuana and substituted penitentiary terms. See for example: **R. v. Hill**, 1999 NSCA 118; **R. v. McCurdy**, 2002 NSCA 132; **R. v. Jones**, 2003 NSCA 48. The sentencing judge in this case did not refer to any decisions of this court.

[9] While sentencing is an individualized process and there can be exceptions to what would otherwise be a fit sentence, there were no exceptional factors apparent here sufficient to take this sentence out of the usual range for a mid to high level

retailer. Nor did the sentencing judge refer to any such circumstances. Provincial Court judges, in particular, preside over exceptionally heavy dockets and, in the interests of time must usually express their reasons concisely. However, when imposing a disposition outside the usual range, it is critical that the judge clearly articulate the rationale which supports the sentence.

[10] The sophistication and planning evident in Mr. Conway's drug operation belied any suggestion that his involvement was impulsive or short term. This was a premeditated course of criminal conduct. The quantity of drugs was substantial. Cocaine, in particular, is a drug that ravages lives. The family's difficult financial circumstances in no way mitigate Mr. Conway's involvement in the retail drug trade (**R. v. Collette**, [1999] N.S.J. No. 190 (Q.L.)(C.A.)).

[11] As in **Knickle**, **supra**, the judge here erred in failing to consider the appropriate range of sentence for these offences. Had he done so he could not have concluded that a sentence of less than two years was available to this offender (see also **R. v. Steeves**, 2007 NSCA 130). Therefore, a conditional sentence was not an option. With respect, there was clear error here.

[12] I again refer to the words of Roscoe, J.A. in **Knickle**, **supra**, which are equally appropriate here:

> [28] In this case the sentencing judge erred in principle by imposing a conditional sentence to be served in the community. The range of sentencing for a higher level retailer of cocaine starts at two years in penitentiary. It does not include two years less a day or any other sentence that is available to be served in the community. The judge erred in excluding the penitentiary term in the first stage and it was not necessary to consider the second stage of the **Proulx** analysis. There are no extraordinary or exceptional circumstances in this case that deserve any consideration of the possibility of deviation from the normal range of sentence. The sentence is excessively lenient and demonstrably unfit. It was, as mentioned above, also an illegal sentence because conditional sentences are only available for sentences of less than two years.
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> [29] The jurisprudence reviewed above, including **Carvery**, **Steeves**, **Sparks**, **Jones**, **Dann** and **McCurdy**, dictates that the principle of deterrence must be emphasized. In order to give effect to the principle of proportionality, and taking into account the seriousness of the offence, given the large amount of cocaine involved, and other aggravating circumstances such as the presence of improperly stored weapons in the residence where teenage children were living, it is

> necessary to impose a sentence of incarceration at least in the middle of the range. Given all the circumstances, an appropriate sentence would be a penitentiary term of 3 ½ years. Credit should be given for the nine months served on the conditional sentence, so that the balance remaining is 33 months.

[13] It is for these reasons I would grant leave and allow the appeal. The conditional sentence and probation order is set aside. I would substitute a sentence of 30 months incarceration, provided that Mr. Conway is to receive credit for the full time served under the conditional sentence (Calculated to be eleven months and one week as of the date of the appeal hearing). I would not disturb the weapons prohibition and forfeiture orders imposed by the sentencing judge.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Saunders, J.A.