NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Steeves*, 2007 NSCA 130

Date: 20071228
Docket: CAC 282671
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Matthew Weldon Steeves

Respondent

Judge(s):	Bateman, Saunders and Oland, JJ.A.
Appeal Heard:	November 23, 2007, in Halifax, Nova Scotia
Held:	Application to admit fresh evidence dismissed; appeal against sentence allowed as per reasons for judgment of Oland, J.A.; Bateman and Saunders, JJ.A. concurring.
Counsel:	Monica McQueen, for the appellant Matthew Weldon Steeves, self-represented respondent

Reasons for judgment:

[1] The respondent pled guilty to two offences contrary to s. 5(2) of the *Controlled Drugs and Substances Act (CDSA)*, namely possession of methylinidioxyamphetamine (ecstasy) for the purpose of trafficking and possession of cocaine for the purpose of trafficking. On May 22, 2007 Judge Robert Stroud of the Provincial Court sentenced the respondent to a period of incarceration of two years less a day to be served in the community, followed by twelve months probation.

[2] The Crown appeals against that sentence. It also applied for an order permitting the admission of fresh evidence on its appeal. For the reasons which follow, I would deny that application, and I would allow the appeal against sentence.

Facts

[3] At the sentencing hearing, the circumstances surrounding the offence, as derived from police reports and presented by the Crown, were not disputed. The police were conducting surveillance on a convicted drug trafficker when they observed what they believed to be a drug transaction. Afterwards, they stopped the car driven by the person under surveillance. The respondent was in the front passenger seat. When searched, after being arrested and given his *Charter* rights, he was found with 14 grams of powdered cocaine and 63 grams of crack cocaine for a total of 77 grams of cocaine, and 100 pills of ecstasy, on his person. The Crown and his counsel did not agree as to the value of these drugs, and that was not established at the sentencing hearing.

[4] The sentencing judge was presented with two pre-sentence reports. One was prepared in February 2007 in relation to the respondent's guilty pleas to charges of operating a vehicle while impaired and blood alcohol exceeding 0.08 (s. 253(a) and (b) respectively of the *Criminal Code*). The second was a supplement prepared that April for these drug offences. The 29 year old respondent is the father of a ten year old child and, with his common-law partner, of an infant son. He has type 1 Charcot-Marie-Tooth disease, a rare neurological disorder that affect peripheral nerves, causing weakness in the feet and legs, and later, sometimes in the hands. He is unable to work and receives a disability pension.

[5] The judge was also provided with the respondent's criminal record. On February 28, 2007 the respondent had been sentenced to fines, a one year suspension of his driver's license, and 18 months probation for the s. 253(a) and (b) driving offences. A decade earlier, he had been sentenced to six months custody and six months probation each on three charges, namely mischief under $5,000 (s. 430(4)(b) of the *Code*), theft under $5,000 (s. 334(b)), and failure to appear (s. 145(4)(b)), these sentences to run concurrently.

Sentencing decision

[6] The judge's reasons, in their entirety, read:

> Well, even though there's some question being raised about the value and the weight of the substances that were seized here and they're shown in exhibit 1, there's no question that the value is significant, and the weight is significant in terms of whether this could have been used for simple possession for the purpose of using it yourself or trafficking, so clearly the guilty plea is applicable here.
>
> The only question is the quantum of sentence that should be imposed. I meant to say it earlier and I forgot, but I'll say it now, the problem that drugs are creating in our society today is just, just absolutely horrendous, probably at least 60 to 75 percent of the work in this court is one way or another connected to the drug trade, and it's destroying our youth, and to a large degree our culture, I believe.
>
> Having said that, I'm sure Mr. Steeves is not a danger to society. He has a rather insignificant record, the three charges back in 1997, and then the recent impaired driving charge, for which he was fined and put on Probation. And there are other factors, of course, his health situation, and so on.
>
> Bearing all that in mind, I am prepared to order a sentence of two years less a day. I will allow him to serve it on a Conditional Sentence basis in the community, and perhaps I'll get Counsel to sit down for a few minutes and come up with the conditions for that, and the exceptions that would be appropriate? I'll review it and if there's any problem between Counsel, I'll resolve that, but if Counsel can come up with something that's acceptable to them and to me I will go along with it.

He also imposed a s. 109 prohibition against possession of firearms for ten years.

Analysis

[7] I will deal first with the Crown's application for fresh evidence and then turn to the merits of its appeal.

Fresh evidence application

[8] As indicated earlier, the respondent was sentenced for these drug offences on May 22, 2007. On appeal, the Crown sought to admit fresh evidence pursuant to s. 683 of the *Code*. It wanted the following considered:

1. the New Brunswick Provincial Court having sentenced the respondent, on July 9, 2007, to a six month conditional sentence for theft under $5,000 committed on March 14, 2007; and

2. the respondent having admitted to breaches of both conditional sentence orders, the sentences having been terminated on August 16, 2007 by a New Brunswick Provincial Court judge, and he having been ordered to serve the remainder of his sentence in jail.

[9] In support of its application, the Crown filed an affidavit deposed by a prosecuting agent for the Public Prosecution Service of Canada, to which were attached *inter alia* copies of three breach allegation reports. It maintains that it meets all the criteria set out in the test for the admission of fresh evidence set out in *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193. According to the Crown, had the sentencing judge here been aware of the New Brunswick conviction for theft, even though the sentencing process there had not been completed, the sentence he imposed for the drug offences in Nova Scotia would likely have been different.

[10] In order to dispose of this application for the admission of fresh evidence, it is not necessary that I proceed to consider each factor of the *Palmer* test. Nothing in the affidavit that the Crown filed in support indicates that the respondent had pled guilty, or that a conviction had been entered in Moncton Provincial Court in regard to the charge of theft committed in March 2007 prior to the imposition of the sentence under appeal in May 2007. There is no evidence of any guilty plea taken or any determination of guilt already made in New Brunswick that the judge

here could take into account when he determined the sentence for the drug offences.

[11] Accordingly, I would dismiss the Crown's application to admit evidence of a theft conviction in New Brunswick. However, the information regarding the breaches of the conditional sentences and the respondent now serving the remainder of his sentence in jail all relate to the period following his sentencing for trafficking and are receivable by the court on appeal pursuant to s. 687.1 of the *Code*.

Principles of sentencing

[12] The judge imposed a sentence of two years imprisonment to be served in the community and a s. 109 firearms prohibition. According to the Crown on its appeal against sentence, in ordering a conditional sentence, the judge failed to apply the proper principles of sentencing; and, given the circumstances of the offence and of the respondent, the sentence is demonstrably unfit and/or manifestly inadequate.

[13] The seriousness of the offences to which the respondent pled guilty are reflected in the maximum sentences set out in the legislation. Pursuant to s. 5(3) of the *CDSA*, possession of ecstasy for the purposes of trafficking is punishable by a maximum of ten years imprisonment. Possession of cocaine for the purpose of trafficking is punishable by life in prison.

[14] The jurisdiction of this court in the context of a sentence appeal is set out in s. 687(1) of the *Code*:

> Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive:
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.

[15] Only where the trial judge has committed an error in principle, failed to consider a relevant factor or overemphasized a relevant factor, or where the sentence is demonstrably unfit will the appellate court exercise its discretion under s. 687(1): *R.v. C.A.M.*, [1996] 1 S.C.R. 500 at ¶ 88-89. The standard of review is a deferential one, and the decision of a sentencing judge is not to be interfered with lightly: *C.A.M* at ¶ 91.

[16] With these principles in mind, I turn to an examination of the sentencing judge's reasons for determining that a conditional sentence for these offences and this offender was appropriate. The decision was short, as is often the case in a court where the docket is a very busy one. The judge began by accepting that a significant quantity of drugs was involved. He noted that drugs cause serious damage to society. Without any analysis, he concluded that the respondent is not a danger to society. After mentioning the respondent's record and health, he imposed a conditional sentence.

[17] In my respectful view, the judge failed to apply the proper principles of sentencing. In particular, there is no indication in his decision that he considered the principles of general and specific deterrence, or the historical ranges for these trafficking offences. Moreover, in imposing a conditional sentence, he failed to direct his mind to the approach described in *R. v. Proulx*, [2000] 1 S.C.R. 61. By failing to do so he erred in principle.

[18] This court has been steadfast in emphasizing that deterrence is a primary consideration in sentencing for drug offences. In *R. v. Robins*, [1993] N.S.J. No. 152 (C.A.), Chief Justice Clarke stated at p. 1:

> . . . The position of this court, repeated in many of our decisions since **Byers**, is that there are no exceptional circumstances where cocaine is involved. We are persuaded that general deterrence must be prominently addressed if the public is to be protected from the nefarious trade that has developed in this drug that is so crippling to our society.

See also, for example, *R. v. McCurdy* [2002] N.S.J. No. 459 at ¶ 15.

[19] Trafficking in cocaine, or its possession for the purpose of trafficking, has traditionally attracted a federal term of incarceration. In *R. v. Dawe*, [2002] N.S.J. No. 504, this court confirmed that a penitentiary sentence is the norm in Nova

Scotia in cases involving trafficking in cocaine. There the appellant had been sentenced to 15 months incarceration on charges of possession of four grams of cocaine, 200 grams of hashish and 225 grams of marijuana for the purpose of trafficking, to be served concurrently. Hamilton, J.A. for the court, at ¶ 6 wrote:

> The appellant has not satisfied us that the sentence is demonstratively unfit. To the contrary, the sentence is, if anything, unduly lenient. Possession of cocaine for the purpose of trafficking typically results in sentences of two years or more, as the judge pointed out.

[20] While time served in a federal penitentiary is the norm, this is not to say that conditional sentences are precluded for trafficking in cocaine. Conditional sentences have been imposed where the judge has determined that exceptional circumstances exist. See, for example *R. v. Cameron*, [2002] N.S.J. No. 80 (S.C.); *R. v. Provo*, 2001 NSSC 189; *R. v. Messervey*, [2004] N.S.J. No. 520 (P.C.); and *R. v. Coombs*, 2005 NSSC 90. Circumstances that are sufficiently exceptional as to change a sentence of incarceration for such a serious offence to one that can be served in the community are rare.

[21] The sentencing judge here did not identify any exceptional circumstances. He did make mention of the respondent's health situation, but without more. For example, his decision does not suggest that the respondent needs serious medical treatment which would not be available to him if the respondent were sentenced to a penitentiary term of incarceration.

[22] Nor is it to be forgotten that the respondent pled guilty not only to possession for the purpose of trafficking cocaine, which generally attracts a sentence of two years or more, but also to possession for the purpose of trafficking ecstasy. The police found 100 pills on him. In *R. v. Bercier*, [2004] M.J. No 131 (Man. C.A.), the 20 year old appellant who had no related record appealed an effective sentence of 28 months incarceration for possessing 91 pills of ecstasy for the purpose of trafficking. At ¶ 32-37, Hamilton, J.A. of the Manitoba Court of Appeal described ecstasy as a dangerous drug that can be toxic and cause long-term central nervous disorders, although there is no conclusive evidence that it is addictive. After reviewing a number of sentencing decisions from various jurisdictions and levels of court, she noted at ¶ 38 that all were sentences of imprisonment, some to be served conditionally in the community and others not,

and that in many cases, the offenders pled guilty, had no criminal records and were low risks to re-offend. The sentence under appeal was upheld. Among the decisions noted in *Bercier*, supra was this court's decision in *R. v. Bedford*, 2000 NSCA 100, which upheld a sentence of 12 months incarceration to be served in the community imposed on an offender without any criminal record, who had sold two pills of ecstasy to a victim who later died after taking two more pills obtained from a third party.

[23] In addition to failing to consider deterrence and the range of sentences for these offences, the sentencing judge erred in principle by failing to follow the approach judges are to use in determining whether to impose a conditional sentence described by the Supreme Court of Canada in *Proulx*, supra at ¶ 58-63. The judge begins by excluding probationary measures and a penitentiary term. In making this determination, he or she is to consider the fundamental purpose and principles of sentencing as set out in ss. 718 to 718.2 of the *Code* only to the extent necessary to narrow the range of sentence. If either of those sentences is appropriate, a conditional sentence should not be imposed. If neither is appropriate, the judge then determines whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing as set out in those provisions. In doing so, he or she considers those principles comprehensively, determines the duration and venue of the sentence and, if a conditional sentence, the appropriate conditions. Before imposing a conditional sentence, a sentencing judge must be satisfied that the safety of the community would not be endangered.

[24] With respect, nothing in his reasons indicates that in determining that a conditional sentence was appropriate, the sentencing judge here considered the approach in *Proulx*, supra. He did not reject both a penitentiary term and probation as appropriate dispositions. His decision failed to include any consideration as to whether a conditional sentence was consistent with the principles and purposes of sentencing. In particular, it was silent in regard to deterrence and denunciation which are so significant in cases involving drug trafficking. Moreover, his conclusion that the respondent is not a danger to society was not grounded on any assessment of the risk of his re-offending or the gravity of the damage that could ensue were he to re-offend.

The sentence

[25] While the standard of review of a sentence imposed by a sentencing judge is a deferential one, the errors in principle here are such as to attract appellate intervention. I would allow the appeal against sentence.

[26] At the hearing of his appeal, the respondent declined counsel, choosing to represent his own interests. He made it clear to the court that he hoped the Crown's appeal would succeed, and that a prison term in a federal penitentiary would be imposed so that he would enjoy better prospects for trades training and rehabilitation than would, in his opinion, be available elsewhere. His position played no part in my determination that the sentence was unfit or in fixing the new sentence.

[27] I must craft an appropriate sentence for the respondent. This calls for a determination of whether a probationary or penitentiary term is appropriate by considering the purpose, objectives and principles of sentencing set out in ss. 718, 718.1 and 718.2 of the *Code* and the circumstances of the offender and the offence. The respondent pled guilty to possession for the purpose of trafficking both cocaine and ecstasy. Deterrence is a primary consideration in sentencing for such offences. The amounts in his possession were, as the sentencing judge stated, substantial and, in my view, sufficient to take him outside the lower categories of drug traffickers described in *R. v. Fifield*, [1978] N.S.J. No. 42 (C.A.). While these are his first drug-related offences, the respondent is not a first offender. His trafficking of cocaine and ecstasy would put a substantial amount of these drugs on the street, with devastating effects for many individuals and their families. Having considered these matters, I am of the view that a penitentiary term is appropriate. That being the case, pursuant to the analysis in *Proulx* summarized above, a conditional sentence is not available.

[28] I must then determine the duration of the respondent's incarceration. He is a grown man, with a criminal record. Years ago, he was sentenced for mischief, theft and failure to appear, and only a few months before the sentence under appeal, for driving while impaired. He breached the conditional sentence imposed for these drug trafficking offences. The respondent's guilty pleas are mitigating factors. Although he has been diagnosed with a neurological disorder, the respondent did not submit that any special consideration be given to his medication condition in relation to sentencing.

[29] Reconsidering the principles, objectives and purposes of sentencing and the circumstances of this offence and of this offender, I would set aside the conditional sentence and impose a term of imprisonment of two years and six months commencing May 22, 2007, the date sentence was originally imposed. The respondent is to receive credit on a one to one basis for the time he has already served.

Oland, J.A.

Concurred in:

Bateman, J.A.

Saunders, J.A.