

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Robinson, 2012 NSPC 12

Date: 20120112

Docket: 222092, 222093

Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

Fabian Robinson

Defendant

SENTENCING DECISION

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: January 12, 2012

Charges: Sections 5(1) x 2 *Controlled Drugs & Substances Act*

Counsel: Theresa O'Leary, for the Crown
Doug MacKinlay, for the Defence

Introduction

[1.] The Drug Section of the Cape Breton Regional Police used two undercover operators in a planned operation. The officers approached targets or made cold calls for prescription drugs.

[2.] On July 26, 2010 the officers went to the defendant's mother's house and asked for Fab. The defendant came to the door and they asked him for Percocet. He made arrangements to facilitate the purchase. Mr. Robinson went with the undercover officers in their car and exited the car when they got to a destination. When he returned he had two hydromorphone 24 mg. The undercover officers had given him \$120 earlier.

[3.] On August 11, 2010 the undercover officers went to Mr. Robinson's house again to buy drugs from him. They told him they wanted hydros. The defendant made arrangements by calling on a cell phone. The officers had given him \$30. Mr. Robinson then got them two hydros, 6 mg.

[4.] Mr. Robinson does not deny the essential facts but says he is not a drug dealer. He was targeted because he was buying drugs from Cory Kendall. The police officers asked him to go get them, meaning drugs, and they would give him a 12. Because, as he testified, "I was dying sick" he got them the drugs.

[5.] For both transactions Mr. Robinson received drugs for getting them the pills they requested.

[6.] Mr. Robinson is 23 years of age with no prior adult criminal record. He has had a troubled upbringing witnessing violence, abuse and trauma. A stepfather introduced him to drugs at a very young age. He developed a serious addiction to opioids by the age of 16. He has a number of medical and mental health issues as a result. He has completed Grade IX and hopes to attend Nova Scotia Community College next year. He is laid off from Eyking Farms but advises he is on call. The manager had positive comments to make about Mr. Robinson.

[7.] Mr. Robinson is currently attending the Global Recovery Program and has had negative urinalysis tests with respect to illicit drugs. He had contact with Addictions Services but it was sporadic due to employment. After speaking with a Ms. Brown he was given a normal discharge.

[8.] Mr. Robinson has a girlfriend and a new baby. They reside with his mother. His new daughter is his motivation he says to remain clean and sober.

[9.] Mr. Robinson accepts responsibility for the offences, however, citing it is out of character for him.

[10.] From the court's assessment it appears that Mr. Robinson is driven by his own drug addiction and was a facilitator for these transactions, but exchanging drugs for money is still trafficking.

[11.] Mr. Robinson's mother and his girlfriend testified the defendant is doing extremely well with his job, attending the methadone program, and helping out with the baby. Both women acknowledge that Mr. Robinson had concealed his addiction from them, or as in his mother's case, she said she had blinders on.

[12.] Mr. Robinson acknowledged that he was a drug addict before he was arrested, but now he wants to be clean and sober because of his daughter. He attends the Global Recovery Program and gets his medication. He indicates that if he was sent to jail it would create a financial hardship for his family and great difficulty for his girlfriend regarding the care of their daughter.

[13.] The Crown is seeking a two year jail term, a DNA order, a firearms prohibition and a forfeiture order. Crown counsel cites **R. v. Knickle**, [2009] N.S.J. No. 245 arguing this is trafficking in a Schedule I drug, there are no exceptional circumstances, and general deterrence must be emphasized.

[14.] Defence counsel is seeking a conditional sentence and distinguishes **Knickle** *supra* and several other cases by quantity, level of involvement and paraphernalia.

Counsel urges me to consider **Messervey**, [2004] N.S.J. No. 520, **Coombs**, [2005] N.S.J. No. 158, and **Talbot** [1999] N.S.J. No. 187, who he says were not overturned or rejected by the Court of Appeal. I would note they were decided before **Knickle** *supra*. The defendants in those three cases I just mentioned received a conditional sentence for trafficking in cocaine.

[15.] **Messervey** *supra* was 21 years old, had no prior record, and over a period of four days acted as a courier delivering small amounts of cocaine for which he received no share in the profit. In the two years between the date of the offence and the sentencing he had abided by the terms of his release and commended an employment training program, all of which led the sentencing judge to conclude there were exceptional circumstances justifying a two year less a day conditional sentence.

[16.] In **Coombs** *supra* the 29 year old defendant pled guilty to trafficking in 50 grams of cocaine. The judge found that he was a “middle-man” in the transaction who had been approached by a police agent who sought to purchase cocaine in order to get closer to the target of the drug investigation. Mr. Coombs had a very positive pre-sentence report and the offence was found to be out of character. He was remorseful and had been subject to strict conditions of release including house arrest for two and a half years pending sentence.

[17.] The defendant in **Talbot**, *supra* was 23 years old, had no record and was involved as the middle-man in one sale of .22 grams of crack for \$40. He had a Grade XII education, some university credits and planned to return to school.

[18.] What is an appropriate sentence for Mr. Robinson in this particular case?

[19.]

“It is a basic theory of punishment that the sentence imposed bear a direct relationship to the offence committed. It must be a fit sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender deserves the punishment received and feel confidence and fairness in the rationality of the system. To be just, the sentence imposed must also be commensurate with the moral blameworthiness of the offender. A sentence that is not just and appropriate produces only disrespect for the law. These common-law principles have been codified in sections 718, 718.1 and 718.2 of the *Criminal Code*.

Parliament has codified a number of other important values to help sentencing judges give effect to the fundamental principles of proportionality. The articulated principles however, are general in form, and moreover they provide no mechanism for resolving the inevitable conflicts that arise between these various principles in individual cases. Sentencing judges are simply told to weigh and balance the competing principles and fashion an appropriate sentence.” **Ruby, Sentencing, 6th Edition**

[20.] In crafting the appropriate sentence the Court must have regard to the factors set out in the *Code* as well as the nature of the offence committed and the personal circumstances of the offender. According to the Supreme Court of Canada, the

appropriate sentence will also depend on the circumstances of the community in which the offence took place.

It must be remembered that in many offences there are varying degrees of guilt and it remains the function of the sentencing process to adjust the punishment of each individual offender accordingly.

The appropriate sentence for the specific offender and offence is therefore determined, having regard to the compendium of aggravating and mitigating factors present in the case. It is the weight attached to the aggravating and mitigating factors which shape and determine the sentence imposed and this is an individual process. In each case the court must impose a fit sentence for this offence in this community.

The nature and gravity of the offence is properly the central factor in sentencing. It is and must be the first rule that prompts the court. The concern behind this consideration is that there should be a just proportion between the offence committed and the sentence imposed. Our basic notion of fairness demands that every sentence be primarily and essentially appropriate to the offence committed having regard to the nature of the crime and the particular circumstances in which it was committed. **Ruby, Sentencing, 6th ed.**

[21.] Other common law principles of sentencing must also be appropriately applied. In the end, the punishment must be proportionate to the moral blameworthiness of the offender. The public must be satisfied that the offender deserved the punishment received and must feel a confidence and fairness and rationality of the sentence. This principle of proportionality is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may

be imposed only on those who possess a moral culpable state of mind. The cardinal principle is that the punishment shall fit the crime.

[22.] When considering whether to impose a conditional sentence, the first part of the test is whether or not jail is an appropriate sentence in the circumstances, and if so, should it be two years less a day, which would make Mr. Robinson eligible for a conditional sentence. There is no minimum term requirement.

[23.] The second part of the test is that the court must be satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purposes and principles of sentencing set out in the *Code*.

[24.] The essence of a conditional sentence is that the offender who otherwise would serve up to two years in prison may instead remain in the community for the entire duration of the sentence, provided that he or she abides by the conditions of a conditional sentence order.

[25.] The safety of the community is primary and only if the court is satisfied that the safety of the community would not be endangered by a conditional sentence

order are the other fundamental purposes and principles of sentencing to be considered.

[26.] The issue of safety is confined to concerns that are specific to the offender and general deterrence must not be considered as a factor in determining safety.

[27.] In order to determine whether the safety of the community will be placed at risk by a conditional sentence, the judge must consider both the risk that bound by conditions and given supervision, the offender will re-offend, and the amount of harm, physical or psychological or economic that is likely to occur if the risk accrues. If the judge determines there is a real risk of re-offending, then a conditional sentence cannot be imposed. Even when the risk of recidivism is minimal, a small risk of a very harmful offence will preclude a conditional sentence.

[28.] Is jail appropriate? If yes, what is the range for this type of offence? If it is two years less a day, then the court can go on to consider the second test and whether or not there are any exceptional circumstances for Mr. Robinson.

[29.] The court must consider the case of **R. v. Knickle** *supra*. At paragraph 16, the first step of the analysis is a consideration of the appropriate range of sentence for the offence. At paragraph 17, the Court of Appeal states:

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 him within the range.

[30.] At para. 18 of **Knickle**, *supra*, the Court of Appeal states:

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. This court has never approved or endorsed a conditional sentence on charges of possession for the purpose of trafficking or trafficking in cocaine. ...

The importance of deterrence in sentencing cocaine traffickers must again be endorsed and reiterated as indicated by this court recently in **Steeves**:

This court has been steadfast in emphasizing that deterrence is a primary consideration in sentencing for drug offences.

[31.] Chief Justice Clarke went on to say:

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.

[32.] At para. 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 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.

As noted above, this court has never wavered in expressing these principles in cocaine trafficking cases.

[33.] Another example is found in **McCurdy** at paras. 15 and 16:

This Court has indicated several times that in cases of drug trafficking, deterrence will be the primary consideration. Although it is not necessary that the length of sentence be precisely proportionate to the quantity of drugs involved, commercial distributors and growers require “materially larger” sentences than the petty retailer, as stated in **R. v. Fifield** (1978), 25 N.S.R. (2d) 407 at para.8. There was no question in this case that the respondent was motivated by financial gain and that the operation was a well established, sophisticated, large-scale commercial venture. These are all aggravating factors.

[34.] At para. 28 in **R. v. Knickle**, the Court of Appeal states:

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.

[35.] At para. 29, the Court of Appeal goes on to say:

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.

[36.] With respect to the cases cited by defence counsel, I would distinguish **Messervey** by saying that here Mr. Robinson was a “facilitator” for this drug transaction and received something for doing it, i.e. drugs.

[37.] Regarding **Coombs**, here Mr. Robinson was targeted by police because he was associated to Cory Kendall who sold drugs. Mr. Robinson bought from him in the past.

[38.] Regarding **Talbot** *supra*, here the defendant was motivated by his drug addiction and received something for facilitating the sale, i.e. drugs.

Appropriate Range of Sentence

[39.]

The maximum sentence for trafficking in cocaine is life imprisonment. Sentences for possession of narcotics for the purpose of trafficking have consistently been largely influenced by the quantity of drugs involved and the function or position of the offender in the drug operation. Other factors considered either more or less relevant depending on the circumstances are the criminal record and age of the offender, whether the offender was on probation at the time of the offence, the sophisticated and scope of the enterprise. In a series of decisions, the courts have set the range for small wholesale or large retail operations to be two to five years in a federal penitentiary, and that is for trafficking in any narcotics. Trafficking in cocaine is viewed as an aggravating factor by the courts.

Messervey, [2004] N.S.J. No. 520

[40.] In this particular case, it is not cocaine, but hydromorphone – still a Schedule I drug. The defendant on two occasions “facilitated” drug sales in return for drugs. Although “out of character” for the defendant, he was targeted because he got his drugs and associated with Cory Kendall, a known drug dealer.

[41.] The case law requires as a general range a period of incarceration in a federal institution. But are there any exceptional circumstances to support a sentence outside the usual range?

[42.] The defendant is 23 years old. He has no prior criminal record or any convictions under the *Controlled Drugs and Substances Act*. The defendant claims he was not involved in the communal drug trade other than to the extent he was involved on these two occasions – motivated by his own addiction. It was not cocaine.

[43.] I find that all of these factors justify a sentence outside the usual range, that is a sentence in a federal institution. Having reached that conclusion, I go on to consider whether or not a conditional sentence is appropriate on the facts of this case. There is no mandatory minimum for drug trafficking.

[44.] Mr. Robinson :

- (1.) Would be considered a facilitator.
- (2.) Hydromorphone is a Schedule I drug.
- (3.) These were cold calls by strangers who knocked on his mother's door (where he was living) looking for drugs.
- (4.) He received drugs to maintain his habit.

[45.] One of two considerations in relation to a conditional sentence is whether or not such a sentence is consistent with the principles of sentencing, specifically, the strong need for deterrence and denunciation. The CDS has provisions with respect to principles of sentencing. There are no aggravating factors, and this is admitted by the Crown, in relation to the *Controlled Drugs and Substances Act*, Section 10(2). Section 10(1) and section 718 of the *Criminal Code* contain general statements with respect to the fundamental purpose of sentencing, and I quote:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society.

[46.] In addition to that general statement, I must consider the frequency of the type of offence with which I am dealing. Trafficking in Schedule I drugs is rampant in this area and throughout the Province. I must consider the harm to victims and to the community.

[47.] Goulding, J. in **R. v. Carter**, 248 Nfld & PEIR 191, at para. 16 quotes **R. v. Oates** [1992] N.J. No. 165 (C.A.), wherein Marshall, J. states:

Trafficking in cocaine in itself is grave as it preys upon the addictions of others for profit leaving in its wake inestimable individual and social damage and desolation.

[48.] Later at para. 18, Goulding, J. again quotes from **Oates** *supra* wherein Steele, J. states:

It is imperative and particularly today, that the courts be resolute in their effort to discourage the committed and those contemplating the illegal drug trade.

[49.] Taking into consideration the issue of parity with respect to other cases of individuals involved in trafficking Schedule I drugs and taking into consideration the principle of proportionality, I have considered the nature of the offence, the nature of Mr. Robinson's involvement, and all of his personal circumstances, including his age, lack of criminal record and his rehabilitation efforts. I conclude that a short, sharp period of custody is appropriate in the circumstances and that a conditional sentence would not be consistent with the fundamental purposes and principles of sentencing.

[50.] Therefore, the disposition of this court is a primary DNA Order on Count #1, weapons prohibition pursuant to Section 109, a forfeiture order, and on Count #1 you will do two months in jail; Count #2 you will do two months consecutive months, for a total of four months custody. This will be followed by a period of 20 months probation with conditions including making reasonable efforts to get counselling for any issues that you might have including mental health issues, substance abuse and anger management. There are a number of other conditions

with respect to reporting and abstaining from drugs and alcohol, and I have provided the clerk with other conditions to include in the probation order. There will be no victim fine surcharge.

The Honourable Judge Jean M. Whalen