IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Cater 2012 NSPC 37

Date: May 3, 2012

Docket: 1997530, 1997536, 1997539, 1997542, 1997545, 1997548;

2035773 to 2035780

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

Kyle Cater

DECISION ON THE CROWN'S APPLICATION FOR SUMMARY DISMISSAL OF THE DEFENCE CHARTER MOTION

JUDGE: The Honourable Anne S. Derrick

HEARD: April 18, 2012

DECISION: May 3, 2012

CHARGES: Sections 88(1) x1; 95(1) x 2; 92(1) x 2; 92(2) x 1; 100(2) x 5; 99(2) x 4; of the *Criminal Code*

COUNSEL: Richard Hartlen, for the Crown

DEFENCE: Elizabeth Cooper, for Kyle Cater

By the Court:

Introduction

[1] This decision concerns the issue of whether I should summarily dismiss a Defence application for *Charter* relief. The *Charter* relief being sought is in relation to the mandatory minimum sentences applicable to the offences for which Kyle Cater is being sentenced. Ms. Cooper for Mr. Cater submits that the mandatory minimums under sections 95 (firearms possession), 99 and 100 (firearms trafficking) of the *Criminal Code* are contrary to section 12 of the *Charter*, the prohibition against being subject to any cruel and unusual punishment. Mr. Cater has been convicted of offences under each of these provisions of the *Criminal Code*.

[2] Ms. Cooper provided a seven-page brief that includes her submissions on the *Charter* motion. It was filed on April 13. She has not tendered any evidence.

[3] The Crown has provided me with nine cases, one of which is the Ontario Superior Court of Justice decision in *R. v. Nur, [2011] O.J. No. 3878* decided on August 30, 2011. *Nur* discusses the constitutionality of the mandatory minimum sentence that attaches to a conviction under section 95(1) where the Crown has proceeded by indictment. Mr. Hartlen has advised that *Nur* was forwarded not as the Crown's response to Ms. Cooper's *Charter* motion, which he had not anticipated when he assembled his sentencing cases, but because it contains a review of the law and sentencing range in relation to section 95(1) in paragraphs 41 – 58 (the 1998 sentencing regime) and paragraphs 145 – 149 (the post-2008 sentencing provisions).

[4] In *Nur* the mandatory minimum of three years' imprisonment for a conviction of possessing a prohibited firearm was upheld as constitutional. Some months later, on February 13, 2012, another decision of the Ontario Superior Court, *R. v. Smickle, [2012] O.J. No. 612*, declared the mandatory minimum sentence of three years' imprisonment for possession of a restricted firearm to be unconstitutional. In seeking *Charter* relief for Mr. Cater, Ms. Cooper is relying heavily on the reasoning and result in *Smickle*. She has submitted that the mandatory minimums applicable to the offences for which Mr. Cater stands convicted prevent the imposition of a fit and proper sentence. She submits that on

the firearms possession charges Mr. Cater should receive an absolute discharge and on the firearms trafficking charges he should be sentenced to time served.

The Charter Motion

[5] On April 18 I was to have dealt with Mr. Cater's sentencing but in light of Ms. Cooper's *Charter* application, I deferred the sentencing and heard the Crown's motion for a summary dismissal of the Defence application. Mr. Hartlen and Ms. Cooper made submissions.

[6] I can fairly summarize Ms. Cooper's *Charter* motion as follows: it is her submission that Kyle Cater's culpability on the firearms possession charges (by this I mean the charges relating to the firearms seized from his father's residence at 80 Cavendish Road) is much less than that of Mr. Smickle and the offenders in the cases referred to in *Smickle* at paragraphs 66 – 74: *Los*, (paragraphs 67 and 68), *Snobelen* (paragraphs 69 and 70), and *Canepa* (paragraphs 71 – 74).

[7] In her brief, Ms. Cooper says the following about Mr. Cater: "Mr. Cater Junior was not caught in possession of any firearm, let alone a loaded one, nor found in public with a loaded firearm, as in the cases noted." Ms. Cooper compares Mr. Cater's culpability to the three offenders discussed in *Smickle*. Mr. Los kept a found shotgun for self-protection in a dangerous neighbourhood, firing it off into the air on one occasion to disperse a fight that he thought was going to lead to someone being killed. Mr. Snobelen, a provincial Cabinet Minister, neglected to turn in a semi-automatic handgun which he had originally acquired lawfully in the United States when he purchased a ranch and its contents. The contents that were later shipped to him in Canada included the handgun which his wife, during a time of marital discord, disclosed to police. Mr. Canepa directed police during a drug search to a loaded restricted firearm that he admitted owning.

[8] Mr. Los was convicted following a trial. The most serious offence he was convicted for carried a one year mandatory minimum sentence. Mr. Los received an 18 month sentence with the court emphasizing his impressive efforts to turn his life around and characterizing his crime as one of "bad judgment and misguided intention." *(paragraphs 27 and 28)* The Crown proceeded summarily against Mr. Snobelen who pleaded guilty and was given an absolute discharge. Mr. Canepa

pleaded guilty to simple possession of a firearm without legal authorization and mitigating circumstances led to him receiving a conditional sentence of one year.

[9] I have referred briefly to the facts in *Los*, *Snobelen*, and *Canepa* because it is Ms. Cooper's argument that Mr. Cater should be viewed in an even more favourable light than these offenders. Ms. Cooper is effectively saying that Mr. Cater should be eligible for the same or lesser penalties as Mr. Los, Mr. Snobelen, and Mr. Canepa received. It is Ms. Cooper's submission that the fact that mandatory minimums disentitle her client to the same or lesser penalties is a violation of his right not to be subject to cruel and unusual punishment.

[10] Ms. Cooper makes this same argument in the context of comparing Mr. Cater to Mr. Smickle. Mr. Smickle was found by police in a friend's apartment posing with a loaded handgun. He did not own the gun and Molloy, J. held that: "…beyond the actual possession, there was no criminal intent in respect of the gun." She accepted that Mr. Smickle's possession of the gun was nothing more than "adolescent preening." She found that: "Although possession, even fleeting possession, of a loaded handgun is a dangerous activity, the circumstances of this case put it at the lowest end of the scale of conduct constituting the offence." *(Smickle, paragraph 60)*

[11] Ms. Cooper has submitted that the facts in *Los*, *Snobelen*, *Canepa*, and *Smickle* are all more serious than the facts in Mr. Cater's case. She goes so far as to say that the *Snobelen* facts are more serious because Mr. Snobelen was in actual possession of a loaded handgun whereas Mr. Cater "was not caught in physical possession."

[12] It is Ms. Cooper's submission that it would be grossly disproportionate to sentence Mr. Cater more severely than Mr. Snobelen, a submission underpinning her position that Mr. Cater should receive an absolute discharge for the convictions relating to his constructive possession of the 80 Cavendish firearms. The unavailability of this disposition, due to the operation of the mandatory minimum sentence of three years, is the basis for Ms. Cooper's assertion that the mandatory minimum attached to section 95 offences is grossly disproportionate and a violation of Mr. Cater's section 12 *Charter* rights.

[13] On the firearms trafficking charges, Ms. Cooper invokes the *Grant* decision *(R. v. Grant, [2009] S.C.J. No. 32)*. Mr. Grant was acquitted of trafficking a firearm in circumstances where he was found in possession of a loaded handgun that he admitted he was going to drop off somewhere up the road. *(R. v. Grant, [2006] O.J. No. 2179, paragraph 69 (C.A.))* The Supreme Court of Canada found that the definitional terms included under "transfer" in the context of transfers that amount to weapons trafficking had as their "common element…the notion of a transaction." It was held that "Parliament did not intend s.100(1) to address the simple movement of a firearm from one place to another." *(paragraph 144)*

[14] In my March 14 decision I found that *Grant*, which Ms. Cooper referenced in her submissions following trial, had no relevance "to the charges and evidence against Kyle Cater." *(Cater, paragraph 191)* Rather than grasping the significance of this finding, Ms. Cooper has trotted *Grant* out again, even suggesting in her brief that Mr. Cater "did not even come close to doing what Mr. Grant did, as there is no evidence that he was ever in physical possession of a firearm, let alone being caught with a loaded firearm in his possession."

[15] Ms. Cooper's *Charter* application in relation to mandatory minimum sentences for the firearms trafficking offences advances this proposition: it would constitute cruel and unusual punishment to sentence Mr. Cater to prison when Mr. Grant was acquitted. Ms. Cooper states in her brief: "How do you sentence someone for trafficking who has done far less than what the Supreme Court of Canada determined was not trafficking? Mr. Cater only talked on the phone. I have found no case where the offence was made out on this basis."

Mr. Cater's Moral Culpability

[16] Ms. Cooper's submissions on the *Charter* motion reveal how little my findings in this case have penetrated her perceptions of Mr. Cater and her understanding of the facts and evidence. She not only seems unable to grasp the reasoning that underpins her client's convictions, she has shown herself to be incapable of understanding that Mr. Cater does not compare favourably to any of the offenders she has identified. In *Smickle* it was determined that a three year mandatory minimum sentence would be grossly disproportionate for that offender and his "single act of bad judgment and foolishness." *(Smickle, paragraph 81)*

Other than being a youthful first offender, Mr. Cater does not bear any resemblance to Mr. Smickle nor do his convictions compare to Mr. Smickle's offence. Although it may be experienced as tedious, in light of Ms. Cooper's submissions I find it necessary to reference some of the conclusions I reached on the evidence, following Mr. Cater's trial.

Trial Findings - Replay

[17] On March 14, 2012 I convicted Kyle Cater of a number of firearms-related charges. In my decision (*R. v. Cater, [2012] N.S.J. No. 139*) I determined that the Crown had established beyond a reasonable doubt that Kyle Cater was in possession, both constructively and jointly, of the firearms, magazines and ammunition located at 80 Cavendish Road. *(paragraphs 178 and 179)* I found that Mr. Cater exercised a measure of control over the firearms and ammunition magazines *(paragraphs 171 – 177)* and concluded that "Kyle knew the firearms were at 80 Cavendish, he exercised some control over them, and he consented to Paul and Torina housing them…" *(paragraph 182)* I found it to be immaterial that Kyle did not live at 80 Cavendish Road. *(paragraph 176)* As Ms. Cooper has been repeatedly told in the course of these drawn-out proceedings, including in the context of this motion, actual residence is not required for establishing possession. Furthermore, constructive and/or joint possession is no less culpable than actual physical possession.

[18] The evidence established that Kyle Cater was also engaged in the illegal gun trade for commercial purposes. I will refer back to two paragraphs from my trial decision:

> **186** I have already discussed the intercepts that indicate Kyle Cater was in the business of acquiring and distributing guns. He was a "go-to guy" for associates looking for guns. He operated in the context of a network, reassuring S.G. that he had people in Edmonton who could supply an ammunition magazine and conferring with a number of associates locally about guns. The evidence establishes that he was risk aversive: he did not carry the guns on him, "that would be crazy" he told L.S., he was keenly aware of the police presence in his neighbourhood -- "the heat", and he stashed his guns with associates, such as Aaron Marriott. Money is discussed in the intercepted calls and he mentions having a partner. When guns are on offer, he's keen: he responds to I.E.'s enthusiasm about the "beautiful, clean, fresh 7-45" he is about to view by

> indicating, "It sounds good to me." He is "very interested" in the Smith and Wesson R.S. tells him about.
>
> **204** The photographs do not decide the issue for me, the intercepts do. The intercepted communications provide me with all the evidence I need to be satisfied beyond a reasonable doubt that the guns being discussed in the intercepts, including the .410 gauge shotgun, the Derringer pistol, the .308 calibre rifle, the .45 calibre handgun, and the Smith and Wesson, were "firearms" under the *Criminal Code* definition. Kyle Cater and his associates all talked about the guns in a manner that makes it clear these were operable, functioning firearms. The use of coded language, concerns about police detection, stashing, references to large amounts of money, and enthusiasm for something that is "fresh", "clean", and "beautiful", lead me to the irresistible conclusion that it was firearms that were being discussed. It is a ridiculous proposition that D.S, "C.", D.M., or L.S. were looking to Kyle Cater for inoperable, broken or facsimile weapons. They wanted something that would go "bop-bop" or not be "loud" or clothe them with protection when they were "naked." They knew, as did his other associates, that he dealt in real, working guns. I have no hesitation in finding the Crown has proven beyond a reasonable doubt that the guns referred to in the intercepted conversations were "firearms" as defined in the *Criminal Code.*

Establishing a Charter Violation

[19] Kyle Cater bears the burden of establishing a *Charter* breach. If “the facts as alleged by the defence in its summary [of its *Charter* claim] provide no basis for a finding of a *Charter* infringement…then the trial judge should dismiss the motion without hearing evidence.” *(R. v. Kutynec, [1992] O.J. No. 347, paragraph 32 (C.A.))* As Ms. Cooper’s submissions are “entirely at odds with the analysis provided in the controlling precedents from…the Supreme Court of Canada”, a summary dismissal of the *Charter* motion is justified. *((R. v. R.K., [2005] O.J. 2434 (C.A.), paragraph 58))*

[20] Ms. Cooper’s written and oral submissions in support of her client’s application for *Charter* relief from the mandatory minimum sentences applicable in this case do not disclose any basis for finding a *Charter* infringement. Mr. Cater will be sentenced on the basis of having been found to be (1) in possession of prohibited firearms, and (2) engaged in multiple instances of commercial-level firearms trafficking. The facts in this case are very unfavourable facts determined by me following a lengthy trial process. There is no merit in the assertion advanced by Ms. Cooper that the facts and circumstances in this case lend themselves to a comparison with offenders whose moral culpability is markedly less than Mr.

Cater's. I cannot fathom how she sees a resemblance between Mr. Cater and his offences and the facts in *Snobelen*. I am flummoxed by her apparent belief that Mr. Cater's only crime was talking on the phone about firearms. Mr. Cater's telephone conversations provided the evidence of the crimes he was committing. The Part VI interceptions established that he was possessing and transferring illegal firearms. The specifics of these criminal acts are described in comprehensive detail in my trial decision.

[21] Crimes of the nature of Mr. Cater's attract substantial custodial sentences. In *Nur* it was observed that by 2005 the "firmly entrenched" approach to "a first offence of possession of a loaded handgun *simpliciter*, where there were no additional convictions such as for drug trafficking, tended to be between two year less a day and three years imprisonment." *(paragraph 42)*

[22] Gross disproportionality is what constitutes cruel and unusual punishment under section 12 of the *Charter*. A three year prison sentence was found to be a grossly disproportionate punishment for Mr. Smickle. Mr. Cater is no Mr. Smickle.

Invoking Other Charter Rights

[23] This is as good a time as any to deal with two other submissions made by Ms. Cooper that seek to moderate Mr. Cater's sentence by invoking *Charter* rights.

[24] In making an argument that Mr. Cater should receive triple credit for his time on remand – a 3:1 ratio, Ms. Cooper cites the Ontario Court of Appeal decision of *R. v. Rashid, [2010] O.J. No. 3789* where a 4:1 remand credit was upheld. The Ontario Court of Appeal concluded that: "…the denunciation of the Durham Police Services detention practice with the enhanced credit for pre-trial custody properly addresses the seriousness of the [*Charter*] breach." *(paragraph 8)*

[25] There has been no finding of a *Charter* breach in Mr. Cater's case with respect to his pre-sentence custody and I cannot see how *Rashid* applies. I do note that in sentencing Mr. Cater, applying *R. v. Wust, [2000] 1 S.C.R. 455*, I will be crediting him for his time on remand but not on the basis of an extraordinary ratio of 3:1 especially in the absence of any evidence that would justify doing so.

[26] Ms. Cooper further invokes the length of time that Mr. Cater's case took coming to trial as a factor that should be "significant[ly] mitigating…" I expressly found that the delays in Mr. Cater's case did not constitute a *Charter* breach. *(R. v. Cater, [2011] N.S.J. No. 610)* I do not see how the discussion of the issue of *Charter* breaches and their relevance to sentencing in *R. v. Nasogaluak, [2010] 1 S.C.R. 206*, at paragraphs 47 – 55, referred to in Ms. Cooper's brief, has any application here. I specifically found no evidence in this case of state misconduct or impropriety even short of *Charter* infringement. *(see, for example: R. v. Cater, [2011] N.S.J. No. 627, paragraph 20)*

[27] However, Mr. Cater's 28 months on strict house arrest is a factor for me to consider when I examine, in the context of fixing his sentence, the mitigating factors to be applied in that calculus.

Conclusion

[28] Ms. Cooper's *Charter* application is underpinned by submissions that have no connection to the jurisprudence governing section 12. There is nothing before me to justify hearing a *Charter* challenge to the mandatory minimums in this case. The application is summarily dismissed.