

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Routledge, 2012 NSPC 109

Date: 20121031

Docket: 2085086

Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

Raymond Routledge

Defendant

DECISION

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

Heard: October 31, 2012

Charges: Section 5(2) *Controlled Drugs and Substances Act*

Counsel: David Iannetti, for the Crown
Patricia Fricker-Bates, for the Defence

Introduction

[1.] As a result of an Information received from confidential sources and police surveillance, the Cape Breton Regional Police Service obtained a search warrants to search the home of Raymond Routledge and the home of his mother.

[2.] The police seized from his mother's residence the following:

- (1) A small amount of marijuana;
- (2) \$7,695.00 in cash/coin;
- (3) And \$1,620.00 which was returned to the defendant's daughter.

[3.] At the defendant's residence they seized, among other things:

- (1.) 23 grams of marijuana; and
- (2.) 58 grams of cocaine.

[4.] On June 20, 2011 I denied the defendant's *Charter* application and ruled the evidence should be admitted at trial. There were a number of adjournments for various reasons, but on June 15, 2012 Mr. Routledge pled guilty to the charge of possession of cocaine for the purpose of trafficking contrary to Section 5(2) of the *Controlled Drugs and Substances Act*.

[5.] Sentencing was adjourned to have a Presentence Report prepared and obtain medical information.

[6.] Dr. Ali testified at the sentencing hearing that Mr. Routledge is “opiate dependant”. It was his opinion that the defendant has an “inability to abstain from opiates, causing psychosocial and functional impairment.”

[7.] Mr. Routledge has been and is still being treated by Dr. Ali in the “methadone program”, the Global Recovery Program, which offers methadone as an “opiate substitute”. It diminishes the craving for opiates and “liberates an addict from seeking them as the nucleus of their life.”

[8.] Dr. Ali anticipates the defendant will be in the program for a further two and a half years. He testified the defendant is motivated to continue and there have been no problems during treatment.

[9.] Dr. Ali recommends a “slow tapering” for the defendant because rapid withdrawal may result in a relapse and more significantly, Mr. Routledge suffers from a cardiac condition. Any rapid reduction would have a “serious impact on his health.”

[10.] If Mr. Routledge is sent to jail he could not continue to participate in the Global Recovery Program (the methadone program) or be seen by Dr. Ali. The

impact on the defendant's health with an interruption was described by Dr. Ali as "risk of future cardiovascular catastrophe."

[11.] A Presentence Report was prepared by Probation Services. Mr. Routledge is 49 years of age and has no criminal record. It appears he came from a hardworking family and stable home environment. The defendant is married and has one daughter. However, the couple separated in 2009 because of his involvement with drugs. The defendant says his wife was unaware of his involvement with drugs until he went to the hospital with a heart problem. They are attempting to reconcile.

[12.] Mr. Routledge has had some sporadic work history but had to "quit" because of health problems. He receives Canada Pension.

[13.] The defendant has had health problems from a very young age suffering from rheumatic fever and undergoing surgery to repair a heart valve. He currently takes seven different medications to treat a variety of medical problems including diabetes, a rheumatic heart condition and anxiety.

[14.] Mr. Routledge's family physician confirmed the defendant "has a very serious heart condition which will be life threatening in the long run, if not the short run." It was the doctor's opinion that the defendant "must stay in close contact with a cardiologist for the remainder of his life."

[15.] The defendant, like many individuals, began abusing drugs a number of years ago and when he could not get his drug of choice, he would substitute it with cocaine. The defendant has abstained from abusing drugs since being in the Global Recovery Program beginning in 2010.

[16.] Ms. Fricker-Bates provided the defendant's medical records which confirm the pre-existing and ongoing medical issues; along with a history of his emergency room visits and his substance abuse history.

[17.] The Crown submits that although the court is bound by *R. v. Knickle* [2009] N.S.J. No. 245 (C.A.), this case appears to fit under the guise of "exceptional circumstances", i.e. the defendant's medical condition and in particular the impact jail would have on his cardiovascular condition. The Crown emphasizes that save and except for this they would not be recommending a sentence of two years less a day to be served by way of conditional sentence.

[18.] Ms. Fricker-Bates joins in this recommendation:

... the case of *R. v. Knickle* [2009] N.S.J. No. 245 (C.A.) which is, of course, the case that more or less indicated that trafficking or possession of cocaine for the purpose of trafficking may very well result in a custodial term, usually a term in a penitentiary.

I would submit, Your Honour, that in that particular case you had a high level retailer. You don't have that in this particular case. I found a quote in *Knickle (supra)* that I think would be helpful. The court indicated, after referring to some other cases where a conditional sentence had been imposed:

“25. These four cases are noticeably different from the situation here, essentially because they involved very low level or petty retailers of small amounts of cocaine. (*And that is in relation to the previously quoted cases.*) With a stash of more than 400 times the amount of cocaine that Mr. Provo sold, Mr. Knickle is not in the same category. The respondent must be placed in the higher retail level of the Fifield categories. (*And Your Honour is aware of the Fifield case and the categorization of the trafficking activity for the purposes of sentencing.*).... (emphasis added)

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. (*And I want to emphasis that insofar as the Crown is not alleging, nor does the evidence substantiate or even indicate that Mr. Routledge is in anyway a high level retailer of cocaine in this community. Quite the contrary, Your Honour. It began as personal use, then he was trying, as my friend has indicated, he was trying to sustain that addiction and made a poor choice in doing so, Your Honour.*) (emphasis added)

Having gotten beyond the *Knickle (supra)* case, Your Honour, I am going to refer you to *R. v. Howell* [2012] N.S.J. No. 386 (N.S.S.C.) on page 9. In *R. v. Howell (supra)*, again that was a petty retailer in cocaine. The court imposed a conditional sentence of two years less a day, plus probation. In the *Howell (supra)* case you had a 41 year old offender who was convicted in trafficking cocaine. He had a previous record and in the *Howell (supra)* case the conditional sentence was broken down into two time periods. For the first nine months he was on house arrest and for the next six months he was ordered to be in a curfew.

The court in *Howell (supra)* certainly recognized the seriousness of cocaine in the community. He said:

Occasionally, an exceptional circumstance arises where people who are victims themselves rise up above their own circumstances, cure themselves of their own addictions and reform themselves.

And I think, Your Honour, that is an observation that I believe would be appropriate in the case at bar as well. My client, as I have indicated earlier, has made substantive rehabilitative efforts to get beyond the addiction that has brought him here today.

I also have provided the case of *R. v. Scott* [2012] N.S.J. No. 80 (N.S.Prov.Ct.). Again that is on page 10 of the sentencing brief. He was petty retailer. He also received a conditional sentence and in that particular case, Your Honour, I would submit that the court indicated, I'm looking at page 11, at the middle of the page, the court said:

Finally, while I must be guided by the purpose and principles of sentencing I describe above, sentencing is an individualized exercise and no two cases are identical.

And so the court in that case granted the conditional sentence.

.... There was the *Coombs* [2005] N.S.J. No. 158 (N.S.S.C.) case on page 14. On that case, Your Honour, again it was a conditional sentence plus a 10 year firearms prohibition. In that particular case the police agent sold 50 grams of cocaine to the accused in return for \$3,200. He did have a prior record in that case. The Crown did seek a three year period of incarceration, but after reviewing the circumstances in that particular case, the court found that a conditional sentence was appropriate. And the reason I want to emphasize the *Coombs (supra)* case is that the exceptional circumstance, from my reading of the case, was that the accused had been on a 30 month breach free period of release.

Now in *Coombs (supra)* the accused had been guilty of one breach prior to that 30 month period, but he was guilty of a breach, they dealt with it and then he went on to successfully follow through until his trial date.

I want to emphasize that Mr. Routledge has been on a recognizance since August 31, 2009. A recognizance with \$3,500 cash bail that was amended on November 10, 2009 and September 14, 2012 with Crown consent.

The original recognizance of August 2009 was replaced by a new recognizance on May 4, 2011 incorporating earlier amendments and reducing, Your Honour, his bail deposit, his cash bail, from \$3,500 to \$2,000. Again he not charged with any breaches of condition while on release.

I should note, as well, Your Honour, that my understanding from reading the information is that between August 31, 2009 and September 14, 2010 Mr. Routledge was on house arrest of 24 hours a day, seven days a week of course subject to certain conditions, and thereafter, Your Honour, the Crown agreed that he would go on a curfew.

The importance of this is that as we progress through the period of release pending the conclusion of this matter, I would submit that Mr. Routledge is not seen as a threat to the community. And I note as well, Your Honour, in the updated PSR on page 2, there was a contact with the Records Department of Cape Breton Regional Police and they indicate the offender has not come to their attention since this current matter before the court. So I think, Your Honour, that again can inform your decision on the presence of exceptional circumstances in this case. I would just reiterate that Mr. Routledge has been on conditions for 38 months without a breach.

Then you had the *Messervey* [2004] N.S.J. No. 520 (P.C.) case, Your Honour, and one of the significant situations in *Messervey (supra)*, despite there was 85 grams of cocaine involved and he acted as a courier, the court indicated at that particular point that his release conditions and the period that he had successfully completed his release conditions was essential to the court's decision.

Provo [2001] N.S.J. No. 526 (N.S.S.C.), Your Honour, again it was a small amount of cocaine in *Provo (supra)* but in that case the court in granting a conditional sentence indicated that Mr. Provo had made significant changes in his life and what the court was trying to do in *Provo (supra)* and which is what I am hoping the court will do here today, they were trying to strike a balance between ensuring the safety of the community and enabling Mr. Provo to continue to act on the significant changes he made in his life and become a positive member of the community. And again, Your Honour, I would submit that in this case you have heard from Dr. Ali. I thought particularly telling was his observation that Mr.

Routledge had indicated that had he had methadone treatment before he may not even be here today but, Your Honour, the reality is that he is here. And that Mr. Routledge has made significant changes which I would submit to the court is worthy of consideration in forming your decision on the exceptional circumstances.

[19.] In *R. v. Messervey* [2004] N.S.J. No. 520 Chisholm, J. states at p. 3:

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 offense, the sophistication and scope of the enterprise. ...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. ...consider whether or not there any exceptional circumstances to support a sentence outside the usual range which is incarceration in a federal institution.

[20.] What is an appropriate sentence for this defendant?

[21.] 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*.

[22.] 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.

[23.] 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.

[24.] Other common law principles of sentencing must also be appropriately applied.

In the end, the punishment must be proportionate to the moral blame-worthiness 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.

[25.] 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. Routledge eligible for a conditional sentence order. There is no minimum term requirement.

[26.] 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 purpose and principles of sentencing set out in the *Code*.

[27.] 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.

[28.] 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.

[29.] 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.

[30.] 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 both physical or psychological and 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.

[31.] Is jail appropriate? The answer is yes, given all of the circumstances before the court.

[32.] Are there any exceptional circumstances to support a sentence outside the usual range?

[33.] Factors: The defendant is 49 years of age, has no criminal record. Police seized 58 grams of cocaine. The defendant gave a statement that it was not to sell, but use for his own addiction. Medical records confirm a long history of addiction. The police accept this statement because the search warrant related to marijuana. The defendant was not known by police to sell cocaine. The defendant was not on any court order such as probation. The defendant has not come to the attention of police for anything since these charges. And the defendant has some very serious health concerns.

[34.] Does the totality of these factors justify a sentence outside the usual range?

[35.] I conclude yes and it should be less than two years.

[36.] Should the defendant be allowed to serve it in the community pursuant to a conditional sentence order?

[37.] The defendant is 49 years of age, has no criminal history, but does have a long history of opiate addiction. He is successfully attending the Global Recovery

program and is abstaining from the use of illegal substances. Mr. Routledge has several serious health issues and interruption with the methadone program would put him in serious risk of a future “cardiovascular catastrophe.” He has been on strict conditions since being charged and has not breached any conditions. He is no longer associating with a negative peer group. He has not come to the attention of the police since he was charged in 2009.

[38.] And a final consideration, is a conditional sentence order consistent with the principles of sentencing, specifically the need for deterrence and denunciation. The *Controlled Drugs and Substances Act* has provisions with respect to the principles of sentencing. There are no aggravating factors put forth by the Crown pursuant to Section 10(2) of the *Controlled Drugs and Substances Act*.

[39.] I have already mentioned Section 718 of the *Criminal Code*:

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

[40.] Besides that statement, I must also consider the frequency of the type of offence with which I am dealing. Trafficking in cocaine and other drugs is rampant throughout our Province. We see the harm to victims and to the community. We see the harm to Mr. Routledge, i.e. his deteriorating health and the breakdown of his family. His wife left him.

[41.] Our Supreme Court has gone so far as to question the appropriateness of a conditional sentence. Some in the community would say “lock him up and throw the key away”, so what.” However, the court must temper justice with compassion. The principles of sentencing can be met with very strict conditions.

[42.] Mr. Routledge will be allowed to serve his sentence in the community because of his serious health issues. Save and except that “exceptional circumstance”, Mr. Routledge would be going to jail.

[43.] The court has already imposed a s.109 firearms prohibition, a DNA order and forfeiture order for items seized at the time of arrest.

[44.] The defendant is to serve a conditional sentence of two years less a day.

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

R. v. Knickle, [2009] N.S.J. No. 245 (C.A.)

R. v. Howell [2012] N.S.J. No. 386 (N.S.S.C.)

R. v. Scott [2012] N.S.J. No. 80 (N.S.Prov.Ct.)

R. v. Coombs [2005] N.S.J. No. 158 (N.S.S.C.)

R. v. Messervey [2004] N.S.J. No. 520 (P.C.)

R. v. Provo [2001] N.S.J. No. 526 (N.S.S.C.)