PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Naugle*, 2019 NSPC 53

Date: 2019-07-03
Docket: 8239436, 8239581
Registry: Pictou

Between:

Her Majesty the Queen

v

Sean Anthony Naugle

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	2019: 4 June, 3 July in Pictou, Nova Scotia
Charge:	Paragraph 348(1)(b) of the *Criminal Code of Canada*, subsection 4(1) of the *Controlled Drugs and Substances Act*
Counsel:	Bronwyn Duffy for the Public Prosecution Service of Canada T William Gorman for the Nova Scotia Public Prosecution Service Stephen Robertson for Sean Anthony Naugle

By the Court:

Synopsis

[1] Sean Anthony Naugle was caught by police in broad daylight as he fled the private residence of two senior citizens in Stellarton, Nova Scotia. He had gone in wearing gloves to avoid leaving behind identifying markers. Police found Mr Naugle in possession of a laptop computer he had stolen from the home; a pat-down search revealed a small quantity of cannabis.

[2] Mr Naugle is to be sentenced for a straight-indictable count of ¶ 348(1)(b) of the *Criminal Code* (case 8239436), and a single, summary count of § 4(1) of the *Controlled Drugs and Substances Act* (*CDSA*) (case 8239581).

[3] The federal prosecutor seeks a sentence of one-day served by court appearance for the *CDSA* count; the provincial prosecutor seeks a two-year penitentiary term for the break-in, followed by a period of probation, along with ancillary orders. Defence counsel seeks a community-based sentence for the break-in, or a short intermittent term, along with probation. There is no controversy over the ancillary orders or the sentence sought for the *CDSA* count.

[4] As sentencing for the simple-possession charge is not contentious, that one will be dealt with straightaway: the court sentences Mr Naugle to one day in jail served by his appearance in court on that count, case 8239581.

[5] Now for the break-and-enter. That is a far more serious charge, and will require greater analysis. For the reasons that follow, the court suspends the passing of sentence on that count and places Mr Naugle on probation for a period of three years. The court will grant the ancillary orders sought by the prosecution.

General sentencing principles

[6] In *R v MacDonald*, 2018 NSPC 25 at ¶¶ 7-15, aff'd 2019 NSCA 5 (*MacDonald*) I reviewed those general principles of sentencing that are always in play in hearings to determine penalty, and it is not necessary to repeat them here. However, I would make the following observations of the status of the law.

[7] Although the most serious charge facing Mr Naugle—breaking into someone's home—is a major class of offence as it carries a maximum penalty of life imprisonment, the principle of proportionality remains applicable to this case. The court must measure of the seriousness of the offence and the degree of responsibility of the person who committed it. This means that the court must avoid any analysis that would treat a particular type of offence as inherently

aggravating; otherwise, every such offence would be aggravating, thus nullifying the mandate for proportionality: *R v Johnston*, 2011 NLCA 56 at paras 18-20.

[8] Further, it does not seem to be in accordance with the law of this province that the circumstances of an offence or an offender necessarily be found exceptional to warrant a departure from a prescriptive range of sentencing; this was underscored by the majority opinion in *R v Scott*, 2013 NSCA 28 at ¶ 53. *Scott* was an appeal by the prosecution from a conditional sentence imposed in a low-level-cocaine trafficking-case. As the majority stated:

> [53] There is no question that this Court has long stressed the need to emphasize deterrence and denunciation for those that traffic in cocaine, and depending on the circumstances of the offence and of the offender, may well mean that a sentence of federal incarceration is called for. With all due respect, what I cannot accept is that these or any other cases make a federal prison term mandatory - to be avoided only if an offender can demonstrate "exceptional circumstances".

[9] This makes sense. After all, what sort of metric is an "exceptional circumstance", and what conditions should be considered in deciding whether the circumstance is satisfied? Employment? Reputation? Status? Age? Wellness? Or something else that fits within the scope of being "exceptional"? It seems to me that the application of a nebulous and imprecise criterion—such as whether a case exhibits an "exceptional circumstance"—gives rise to the risk of two-tiered justice, and, because of that, ought to be avoided.

[10] The prosecution argues validly that the Nova Scotia Court of Appeal has prescribed a benchmark sentence of three-years' imprisonment for the offence of break and enter: *R v McAllister*, 2008 NSCA 103 at ¶ 38, *R v Adams*, 2010 NSCA 42 at ¶ 29, originating in *R. v. Zong*, [1986] NSJ No. 207 (CA).

[11] However, it is crucial that this court take account of a significant change in the statutory rules of sentencing that occurred after *Zong* was decided. This requires necessarily that the court consider the effect of the modification of Part XXIII of the *Code* in SC 1995, c 22, s 6, in force 3 Sep 1996 in virtue of SI/96-79, introduced originally in the House of Commons as Bill C-41. This amendment carried into effect, among other provisions, s 718.2, particularly ¶¶ (c)-(e); these values of restraint, as explained in *R v Gladue*, [1999] 1 SCR 688 at paras 39 and 48, were part of the first significant reform of sentencing principles in the history of Canadian criminal law. This remedial provision helped carry into effect Parliament's intention to reduce the use of prisons for non-violent persons, and its resolve to expand the use of restorative-justice principles in sentencing. See also, *R v Proulx*, 2000 SCC 5 at ¶ 15, and particularly ¶ 16, where the Court held unanimously:

> 16 Bill C-41 is in large part a response to the problem of overincarceration in Canada. It was noted in *Gladue*, at para. 52, that Canada's incarceration rate of approximately 130 inmates per 100,000 population places it second or third

> highest among industrialized democracies. In their reasons, Cory and Iacobucci JJ. reviewed numerous studies that uniformly concluded that incarceration is costly, frequently unduly harsh and "ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals" (para. 54). ... Prison has been characterized by some as a finishing school for criminals and as ill-preparing them for reintegration into society... iv. In *Gladue*, at para. 57, Cory and Iacobucci JJ. held:
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> > Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. *The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions*. [Emphasis by Lamer C.J.]
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> 17 Parliament has sought to give increased prominence to the principle of restraint in the use of prison as a sanction through the enactment of s. 718.2(d) and (e). Section 718.2(d) provides that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances", while s. 718.2(e) provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". Further evidence of Parliament's desire to lower the rate of incarceration comes from other provisions of Bill C-41: s. 718(c) qualifies the sentencing objective of separating offenders from society with the words "where necessary", thereby indicating that caution be exercised in sentencing offenders to prison . . . .

[12] Where Parliament has created a statutory remedy, one that is more than merely a codification of existing common-law principles, sentencing courts must give effect to that remedy and must recognize, necessarily, the effect the modernisation of the law will have had on the precedential weight of appellate penal benchmarks that predated it. Stated simply, a statutory revision may overtake what had been a binding principle.

Statutory range of penalty

[13] The ¶ 348(1)(b) count carries a maximum term of imprisonment for life, to which might be added a fine (s 734), or a period of probation (¶ 731(1)(b)); it is not eligible for a conditional sentence, given ¶ 742.1(c), nor is it eligible for a discharge, given s 730 of the *Code*. However, it is eligible for a number of purely non-custodial sentences: a fine alone (s 734); a suspended sentence (¶ 731(1)(a)); a fine and probation (¶ 731(1)(b)). As the count involves a dwelling house, it is a primary-designated-DNA-collection offence under s 487.04 "primary designated offence" ¶ (a.1)(ix).

Offence circumstances and seriousness

[14] This does not appear to have been a forced entry; the homeowners had left their back door unlocked, as is common in small communities where people have the rightful expectation that they ought to be able to trust each other. No one was at home when Mr Naugle broke in; accordingly, this was not a home-invasion offence, so that the aggravating principle in s 348.1 is inapplicable. The only item stolen was a laptop computer. Although there was no evidence put before the court as to the file contents of the computer, I draw what I consider to be the common-sense inference that property of this sort is valued in thefts and break-ins because of the portability and pawn-worthiness of high-tech items, and because laptops,

smartphones and the like often contain exploitable private information, including financial information, or at least the means to access it electronically. However, there is no evidence that Mr Naugle rampaged through this home or committed wanton vandalism, in contrast to a case such as *R v Keans*, [1991] NSJ 21 (CA).

[15] The level of victim impact in this case was high; this senior-citizen couple will never feel safe in their home again; the effect of this offence is significant, bringing into operation the provisions of ¶ 718.2(a)(iii.1) of the *Code*:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
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> . . .
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> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
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> . . .
>
> shall be deemed to be aggravating circumstances;
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> . . . .

This is the sort of impact residential break-ins will have upon homeowners, as described in *R v Stewart*, 2009 NSSC 7 at para. 7:

> I accept, without reservation, the Crown's suggestion that homeowners do feel violated by the commission of this kind of offence. To call it a mere property offence is a mis-description. If a property is impacted, it impacts on the feelings of security of not just these particular people, but by others in the community who hear about this - and they do hear about it from them.

[16] Still, while it is true that an illegal entry into a home can result on occasion in violent confrontations with occupants—see *R v MacInnis*, 2014 NSPC 93 at ¶ 9—none of that happened here. Mr Naugle is to be sentenced based on the circumstances of this offence, not on a hypothesised outcome that might have occurred in different circumstances. In fact, it appears Mr Naugle hoped not to be found out by anyone, accounting for his decision to do this break-in by day, with no lone likely to be home. Mr Naugle surrendered quickly when spotted by police.

[17] I would situate this offence toward the lower range of what is undoubtedly a serious classification of offence.

Circumstances and moral responsibility of Mr Naugle

[18] Mr Naugle appears to have been responsible solely for this offence. When he was arrested, he asked about a person named "Micah". To be sure, the court has dealt intermittently over the past number of years with a person of that given name, one who has demonstrated a mastery in the coaxing others to do bad things, and an equivalent dexterity in avoiding official entanglements when the authorities arrive. However, based on the evidence read into the record by the prosecution in accordance with § 723-4 of the *Code* and acknowledged as accurate by defence counsel, I find that Mr Naugle was on his own when he committed this offence.

[19] The court has reviewed in detail a presentence report dated 6 March 2019.

[20] Mr Naugle was 26 years old at the time of his arrest. He has a prior record, which was reproduced only partially in the presentence report. These are Mr Naugle's first offences since 2011, when he received a fine for uttering threats and ordered to pay restitution for a damage-to-property count. There is a big gap from then to now. A long gap is good circumstantial evidence of earlier rehabilitation having succeeded, which is not necessarily undone by a singular exercise of bad judgment. See *R v Mauger*, 2018 NSCA 41 at ¶ 66; *R v Bernard*, 2011 NSCA 53 at ¶ 42.

[21] The presentence report omitted Mr Naugle's youth record, which is admissible under the provisions of § 119(2) and (9) of the *Youth Criminal Justice Act*. It includes a finding of guilt in 2008 for a break-and-enter charge, for which Mr Naugle received a 15-month term of probation along with a restitution order.

[22] I would appraise the presentence report as positive. Mr Naugle overcame a learning disability, and completed high school successfully. He has taken useful employment-skills training. He has held down a number of demanding jobs, and has a realistic plan to re-enter the workforce.

[23] Mr Naugle and his partner have a child, and another is on the way. Their means are limited right now, derived from Income Assistance, and they try to spend their meagre resources carefully.

[24] Substance abuse does not appear to be a problem now.

[25] I would situate Mr Naugle's moral culpability toward the lower to mid-range of the spectrum. No one else is responsible for what Mr Naugle did. However, Mr Naugle's poor choice on 28 June 2018 appears to have been a singular lapse from what appears to have been a reasonably firm commitment to a pro-social lifestyle. He is not an enterprise break-and-enter artist, and he poses no risk of violence to the community. Further, he has proven that he can comply with stringent conditions of release into the community, as he has abided by rigorous terms of bail for precisely a year to this day.

[26] In my view, this case is on par with *MacDonald* and the community-based-outcome cases which I reviewed in that decision.

Sentencing decision

[27] There will be a primary-designated-offence DNA order.

[28] There will be a 3-year term of probation with these conditions:

- Keep the peace and be of good behaviour.
- Report to court as directed.
- Report to the local community-corrections office no later than 16h00 5 July 2019 and after that as required.
- Not be within 100 m of the home of the complainants.
- Have no contact or communication with Micah Osborne.
- Stay away from the persons and home of the complainants and must have no contact or communication with them, directly or indirectly (this includes, but is not limited to, a total prohibition against contact by word of mouth, gesture, printed word, telephone, smartphone or other electronic communication, texting, any form of social media, or any communication done anonymously or through a third party), even if invited to do so except in accordance with the directions of your probation officer to carry out the terms of this order.
- Complete 100 hours of community service work under the direction of your probation officer within the first 12 months of this order. This may be done, at the discretion of your probation officer, through a post-sentencing

restorative-justice agreement in accordance with the existing program authorization.

- Make reasonable efforts to locate and maintain employment or enrol in an educational program as directed by your probation officer.

- Follow a 22h00-07h00 daily curfew, beginning immediately, with exceptions as per the checklist. Comply with curfew monitoring and checks.

- Attend for any assessment, counselling or programming directed by your probation officer.

- Participate in and co-operate with any assessment, counselling or program directed by the probation officer, according to the terms as directed by your probation officer; you must immediately report to your probation officer any missed assessment or counselling appointments.

- Sign immediately all consents to release of information required by your probation officer to arrange services provided for in this order.

JPC