

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. MacPherson*, 2014 NSPC 13

Date: 2014-04-02

Docket: 2598613, 2598616

Registry: Pictou

Between:

Her Majesty the Queen

v.

Robert Thomas MacPherson

DECISION ON SENTENCE

Judge: The Honourable Judge Del Atwood

Heard: April 2, 2014, in Pictou, Nova Scotia

Decision: April 2, 2014

Charges: Section 216(1) *Excise Act*
Section 5(2) *Controlled Drugs and Substances Act*

Counsel: Bronwyn Duffy for the Public Prosecution Service of Canada

Douglas Lloy Q.C., Nova Scotia Legal Aid, for Robert
Thomas MacPherson

By the Court:

[1] Mr. MacPherson is before the court in order to be sentenced in relation to a summary charge under sub-section 216(1) of the *Excise Act*--possession of unstamped tobacco product--as well as an indictable charge under sub-section 5(2) of the *Controlled Drugs and Substances Act*, possession of hydromophone for the purposes of trafficking.

[2] The court heard sentencing submissions on, I believe it was 27 February, and the matter was adjourned to 25 March, and then set over to today's date because of the storm.

[3] There was a joint sentencing recommendation for a one-year period of imprisonment in relation to the *CDSA* count with probation to follow, as well as ancillary orders under Section 109 of the *Criminal Code*, a secondary-designated-offence DNA collection order, and a proceeds-of-crime-forfeiture order. Also recommended jointly was a \$500 minimum fine on the *Excise Act* count. The court expressed significant concerns regarding the joint submission pertaining to the *CDSA* count, and invited further submissions. I have received written briefs from the prosecution and defence which I have reviewed in detail.

[4] I have received, Ms. Duffy, your sentencing memorandum, which, is certainly, very thorough, as well as yours, Mr. Lloy, which refers to the pertinent case law involving joint submissions. Were there additional submissions that counsel wished to make to the court at this time?

[5] **MS. DUFFY**: Nothing further from the Crown, Your Honour.

[6] **THE COURT**: Thank you. And Mr. Lloy?

[7] **MR. LLOY**: Nothing further from Defence, Your Honour.

[8] **THE COURT**: Thank you. Mr. MacPherson, is there anything that you would like to tell me, sir, before the court imposes sentence?

[9] **Mr. MACPHERSON**: No, sir.

[10] **THE COURT**: Thank you very much.

[11] The court has for sentencing Mr. Robert Thomas MacPherson. As I mentioned a moment ago, Mr. MacPherson entered a guilty plea earlier on to a single summary count of sub-section 216(1) under the *Excise Act*, possession of unstamped tobacco product. He also elected trial in this court and entered a guilty plea to an indictable charge of possession for the purpose of trafficking, sub-

section 5(2) of the *Controlled Drugs and Substances Act*. The substance involved was hydromorphone which is a Schedule I substance.

[12] The mitigating factors are that Mr. MacPherson entered guilty pleas to these two counts. However, in relation to the *CDSA* charge, the mitigating effect of the guilty plea is attenuated somewhat, or minimized somewhat, by Mr. MacPherson's attitude toward the illegal use of prescription narcotics as laid out in what he told the author of the pre-sentence report. Notice of greater penalty was not served, and so Mr. MacPherson does not face any sort of statutory-minimum sentence on the *CDSA* count.

[13] Mr. MacPherson is a 61-year old male who is in failing health due to a disabling injury, and the court must be careful that it not impose a sentence that would crush the prospect of rehabilitation.

[14] It is important for the court to note that Mr. MacPherson has been unemployed for a considerable period of time and has been receiving a Canada Pension disability as a result of an injury suffered almost thirty (30) years ago.

[15] I am alive to what was held by the Supreme Court of Canada in the decision of *R. v. M. (C.A.)* [1996] S.C.J. No. 28 at para. 74 dealing with the sentencing of elderly or infirm offenders. However, there is nothing in the pre-sentence report,

nothing in the information relayed to me regarding Mr. MacPherson's health and current circumstances, that would suggest that the imposition of a Federal sentence would be in excess of Mr. MacPherson's life-expectancy.

[16] With respect to aggravating circumstances, Mr. MacPherson was found in possession of hydromorphone for the purpose of trafficking. Hydromorphone is a Schedule I substance. The maximum penalty prescribed under the statute pursuant to paragraph 5(3)(a) of the *Controlled Drugs and Substances Act* is life, and, accordingly, that offence is excluded from the conditional-sentencing regime under para. 742.1(c) of the *Criminal Code*.

[17] Mr. MacPherson has prior findings of guilt under the *CDSA*. Mr. MacPherson was sentenced to a period of two years plus a day in March 2003 in relation to a sub-section 5(2) *CDSA* charge, possession for the purpose of trafficking. That meets the definition of a designated offence under section 2 of the *CDSA*. He was also convicted on the same date and sentenced to eighteen (18) months concurrent in relation to a charge of production under sub-section 7(1) of the *CDSA*.

[18] Mr. MacPherson was sentenced on 17 November 2008 in relation to a para. 4(3)(a) indictable possession, which is a designated offence under the *CDSA*, and

he was sentenced to an intermittent 30-day term on 1 September 2011, in relation to a sub-s. 4(1) *CDSA* offence, which is not a designated offence.

[19] The pre-sentence report records Mr. MacPherson as intending to return to the abuse of prescription narcotics at the conclusion of the sentence that I have to impose today. I base that on Mr. MacPherson's conversation with the author of the pre-sentence report, in which Mr. MacPherson is quoted as saying as follows, and this is under the *Offender Profile* section of the pre-sentence report, page 4:

"I shouldn't have done it. I did wrong. I broke the law so off to jail I'll go, but I am not stopping." This writer asked what he would not stop and he replied, "my pills." This writer questioned the offender regarding the trafficking of the pills, and he had no comment.

[20] The fundamental principle of sentencing as set out in Section 718.1 of the *Criminal Code* is proportionality. The court is informed further of the following important sentencing factors laid out in Section 10 of the *CDSA*:

The fundamental purpose of any sentence for an offence under this part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation and treatment in appropriate circumstances of offenders and acknowledging the harm done to victims and to the community.

[21] Dealing with a principle of proportionality, the *CDSA* offence is a serious offence for which Mr. MacPherson bears significant responsibility. Mr.

MacPherson had in his possession three capsules of hydromorphone and 256 emptied hydromorphone capsules as well as \$1700 in cash and a set of scales.

[22] In my view, this evidence is circumstantial evidence of a busy retailing operation involving the trafficking of hydromorphone. The court knows well from the many cases it has dealt with involving hydromorphone abuse that traffickers will acquire this potent analgesic narcotic in capsule form, then break open the capsules and extract the powdered form of hydromorphone for retail. It will then be taken by users through intravenous injection or insufflation to get it into the blood stream quickly.

[23] It is well known to the court from cases that have appeared on my docket, as well as from the many pre-sentence reports and fitness assessments that I have read dealing with prescription-drug abusers, that hydromorphone is a highly potent and highly addictive Schedule I analgesic narcotic that is derived from morphine; this is apparent from its classification in Schedule I of the *CDSA*. When not taken under prescribed medical direction, it is a dangerous substance, and unprescribed ingestion creates a high risk for lethality. This is because non-medical use is often combined with other substances that can amplify the effect of the drug. Non-medical use--particularly when ingested other than in the dispensed capsule form--

may easily result in over-dosing. Intravenous use exposes addicts to the risk of biological infections. And then there is the effect on the community as those who have become abusively dependent on the substance interact with the public. The court has dealt with many, many cases involving property theft and fraud committed by prescription-pill abusers. And then there is the violence. One of the three Blue Acres robberies from two years ago involved a hydromorphone abuser. There was the case involving a serious and life-threatening assault upon a local tradesperson in his own home in New Glasgow by a former school bus driver in this county who was seeking to feed a hydromorphone habit. Just this past week, the court had the occasion to sentence an individual whose life--including a career as an almost-20-year member of Canada's military--was substantially impacted by the abuse of prescription narcotics. And then there are those who have not returned to court. Their prosecutions have been abated because of prescription-drug-related death. There have not been many of those cases over the past three and a half years that I've sat in this court, but there have been plenty enough to be memorable.

[24] Mr. MacPherson has been before the court before, and the Federal sentence that he received in 2003 did not have the intended effect of deterring him permanently from the commission of drug-related offences, and that is an

aggravating factor under para. 10(2)(b) of the *Controlled Drugs and Substances Act*. In fact, after the 2003 sentence, Mr. MacPherson went on in 2008 to commit a further designated offence under para. 4(3)(a) of the *Controlled Drugs and Substances Act*.

[25] Because of Mr. MacPherson's stated attitude toward this offence, I find that the prospect for rehabilitation is bleak. I find, as well, that the risk of Mr. MacPherson becoming involved again in the illegal trade in hydromorphone or similar potent analgesics is substantial.

[26] Late last month, the court had occasion in the case of *R. v. Greencorn* 2014 NSPC 10, to impose a three-year sentence upon a 19-year-old male with no prior record who was found in possession of cocaine for the purpose of trafficking. The possession in that case involved two (2) grams. Mr. Greencorn had no prior record and appeared to be a guardedly favourable candidate for rehabilitation, unlike Mr. MacPherson's situation here today.

[27] In my view, there is very little to distinguish hydromorphone from cocaine in terms of the potential for lethality. As Ms. Duffy pointed out in an extremely able sentencing brief, the Court of Appeal of this province has typically imposed

sentences in the range of three (3) years for possession of cocaine for the purpose of trafficking and I referred to those cases in the *Greencorn* decision.

[28] The court does not depart lightly from a joint submission negotiated by experienced counsel who obviously have a far better understanding of the strengths and weaknesses of the case than the court might have at a sentencing hearing. The court receives recommendations from Ms. Duffy and from Mr. Lloy on a regular basis and assigns great weight to the sentencing recommendations of these highly experienced and able counsel. However, in this particular case, applying the principles that, indeed, were set out in *R. v. MacIvor*, 2003 NSCA 60 at para. 33, I find that the imposition of the one-year sentence that has been recommended here would bring the administration of justice into disrepute. The risk that Mr. MacPherson poses to the community is too great for the court to impose the sentence that has been recommended. Significant denunciation and deterrence are needed here, and Mr. MacPherson must be separated from society for a substantial period of time to protect the community from the inevitable consequences of his drug dealing. Having said that, I do intend to give Mr. MacPherson credit for the 35 days that he has spent on remand.

[29] First of all, in relation to the *CDSA* charge, there will be a secondary designated offence DNA collection order. There will also be a Section 109 order, and the court will prohibit you, Mr. MacPherson, from possessing any firearm other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance beginning today's date and running for a period of thirteen (13) years, and the court also prohibits you from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life. The court will also sign, Ms. Duffy, an order in relation to forfeiture of offence-related property.

[30] **MS. DUFFY**: Thank you, Your Honour.

[31] **THE COURT**: There will be a \$50 victim surcharge amount in relation to the *Excise Act* charge, and there will be a \$100 victim surcharge amount in relation to the *CDSA* count.

[32] In relation to the *CDSA* count, there will be a sentence of imprisonment of three (3) years' incarceration less 35-days' credit for the remand. The court will order and direct in accordance with the *Truth in Sentencing Act* that the warrant of committal and the Information be endorsed to record that, but for the 35 days of remand, the sentence for the *CDSA* offence would have been three years.

[33] In relation to the *Excise Act* offence, applying the principles set out by the Newfoundland and Labrador Court of Appeal in *R. v. Hatcher* 2000 NFCA 38, although the statute does prescribe a minimum \$500 fine, the court can impose a sentence greater than that including a period of custody. The court is going to impose, in relation to the *Excise Act* charge, a period of imprisonment for thirty (30) days; however, that will be ordered to be served concurrently to the *CDSA* charge. Anything further, counsel, in relation to Mr. MacPherson?

[34] **MS. DUFFY**: No, thank you, Your Honour.

[35] **MR. LLOY**: Not by defence, Your Honour.

[36] **THE COURT**: Mr. MacPherson, I'll have you go with the sheriffs, please, sir.

[37] **COURT REPORTER**: Excuse me, Your Honour, due date for the victim surcharges?

[38] **THE COURT**: 36 months. Thank you.

Atwood, JPC.