

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. DeWolfe*, 2016 NSSC 14

Date: 2016-01-12

Docket: *Pictou*, No. 441229

Registry: Pictou

Between:

Her Majesty the Queen

against

Trevor Edward Harold DeWolfe

Judge: The Honourable Justice N. M. Nick Scaravelli

Heard: January 12th, 2016, in Pictou, Nova Scotia

Counsel: J. Patrick Young, for the Provincial Crown

Bronwyn Duffy, for the Federal Crown

Douglas Lloy, for Trevor E. H. DeWolfe

Orally By the Court:

[1] Trevor Edward DeWolfe appears for sentencing following guilty pleas to two charges of break and entering and committing theft on February 25th, 2015 and March 9th, 2015, contrary to section 348(1)(b) of the *Criminal Code*. The offender also pled guilty to two counts of possession of Schedule I controlled substances on March 9th, 2015, contrary to section 4(1) of the *Controlled Drugs and Substances Act* (CDSA), namely methadone and hydromorphone.

Circumstances of the offence

[2] On March 9th, 2015 at approximately 2:00 am, the New Glasgow Police responded to an alarm call at the Medical Shoppe Pharmacy located on East River Road, New Glasgow, Nova Scotia. The police observed the front glass window of the premises was smashed out. It was determined that nine bottles of methadone was stolen from the fridge of the pharmacy as well as \$40 in marked bills. A police dog led the police to a nearby apartment house occupied at the time by the offender, his uncle, ex-common law partner and their child.

[3] The police acting on a search warrant seized seven bottles of methadone and 33 hydromorphone capsules. Hydromorphone known as “Dilaudid” is a prescription narcotic. The actual amount contained in the capsules is unclear as

some of them were apparently empty. The offender was advised that he was also the suspect on a previous break and enter into the same medicine shop on February 25th, 2015, captured on video surveillance where a plate glass window was broken and \$435 in cash was stolen.

[4] The offender gave a statement to the police admitting to both break and enters and possession of the drugs.

Circumstances of the Offender

[5] A pre-sentence report was prepared. The offender is 37 years of age having achieved grade 12 through adult education. He is estranged from his partner and their child. His source of income over the past number of years has been social assistance. He has a history of struggling with an addiction to prescription medication and has received treatment in the past.

[6] While in custody, the offender completed the six week addictions program. He accepted responsibility for his offence. His motive was to sustain his drug habit. He is willing to accept services.

[7] The offender has a prior criminal record of some 25 convictions including offences for theft and a conviction in 2001 for being unlawfully in a dwelling. He

has several convictions for breaches. There was a significant gap in his record between 2001 and 2013 when he was sentenced to 90 days imprisonment for theft related charges and breaches. There were no related convictions for substance offences.

[8] The offender was on probation at the time these offences occurred.

Sentencing Principles

[9] In determining the appropriate sentence, I must consider the purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*.

The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Aggravating and mitigating circumstances are to be considered. I am also required to consider the rehabilitation prospects of the offender. A sentence should be in a range imposed for similar offences in similar circumstances. Where consecutive sentences are imposed, the combined sentence should not be unduly harsh. I must also consider the purposes of sentencing as set out in section 10 of the *CDSA*.

Mitigating and Aggravating Circumstances

[10] The mitigating factors are:

1. The offender was cooperative with the police;
2. The offender pled guilty after waiving preliminary hearing;
3. The offender has accepted services and expressed remorse.

[11] The aggravating circumstances are:

1. The offences were pre-meditated;
2. The break-ins were motivated by a desire to sustain a drug habit;
3. The offender has a criminal record.
4. The offender was on probation at the time of his arrest. A condition of his probation order included not possessing controlled substances.

Positions on Sentencing

[12] The provincial crown recommends a sentence for the February 25th, 2015 break and enter of 3.5 years imprisonment and 4 years imprisonment for the March 9th, 2015 break and enter to be served consecutively for a total of 7.5 years.

Considering the principles of totality the crown recommends a global sentence in the range of 5 to 6.5 years consecutive to the sentence imposed for the offences under the *Controlled Drugs and Substances Act*.

[13] The federal crown seeks a sentence of 6 months incarceration for the possession of methadone consecutive to the sentences for break and enter and a 1 month concurrent sentence for the possession of hydromorphone.

[14] The offender submits a global sentence of 4 years, 3 months for all the offences is appropriate.

Sentence

[15] The offence of break and enter committing an indictable offence contrary to section 348(1)(b) of the *Criminal Code* carries a maximum sentence of 10 years imprisonment. The offence of possession of a section I substance contrary to section 4(1) of the *CDSA* carries a maximum sentence of 7 years imprisonment where prosecuted by indictment and on a summary conviction for a first offence, a fine not exceeding \$1000 and/or a maximum of 6 months' imprisonment.

Break and Enter

[16] The courts have consistently stated that the objectives of deterrence and denunciation must be emphasised where offences have been committed of this nature. When break and enter is associated with search for drugs it is incumbent

upon the court to protect the public from further consumption and possible distribution of prohibited drugs. *R. v. Zong* [1986] N.S.J. 2007 (NSCA).

[17] In *Zong* the offender and co-accused, while under the influence of alcohol broke into a pharmacy using a double bladed axe, a mall, a metal wedge, a crowbar and gloves. They were searching for drugs. The offender was 54 years of age and had a lengthy criminal record evidenced by the fact that he spent about 33 years of his life in prison. The Court of Appeal overturned the trial judge's sentence of 18 months' imprisonment followed by probation and imposed a sentence of 3 years imprisonment.

This Court has frequently observed that it looks seriously upon the invasion of property by break and enter and it has expressed the view that three years' imprisonment is a benchmark from which a trial judge should move as the circumstances in the judgment of the trial judge warrant.

[18] The bench mark on sentencing has been applied frequently by our courts. *R. v. Adams* [2010] NSJ 275 (NSCA); *R. v. McAllister* [2008] NSCA 103; *R. v. Sinclair* [2013] NSSC 86.

[19] In *Adams* the offender was sentenced for 2 counts of break and enter, a number of accounts for possession of stolen property, 1 count of theft and 1 count of counselling perjury. On one occasion the offender and others broke into a convenience storage facility and stole electronic equipment valued at \$190,000.

On another occasion a break and enter occurred at a commercial warehouse where a forklift and patio set worth \$27,000 were stolen. Utilizing the principle of totality the court sentenced the offender to a total of 5 years for the 2 break and enters.

[20] In *McAllister* the Court of Appeal upheld a sentence of 3 years' imprisonment for break, enter and theft. The offender broke into a courthouse and stole cash and cheques from a safe. The offender had a lengthy young offender record including several break and enter convictions. This was his first conviction as an adult.

[21] Counsel have referred the court to the decision of *R. v. Myers* [1985] N.S.J. 303 (NSCA) which predated *Zong*. In that case the accused entered pleas of guilty to break and enter into two separate pharmacies, six weeks apart. The accused was 32 years of age with an extensive criminal record. He was sentenced to 3 years for the first break and enter and one year consecutive for the second break and enter for a total sentence of 4 years.

Possession of Controlled Substances

[22] In seeking a term of 6 months' imprisonment for possession of methadone the crown did not provide the court with authorities in support. The increase in the

maximum sentence for possession of Schedule I drugs as opposed to other schedules shows that Parliament wanted the offences to be punished more harshly.

Totality

[23] Where, as in this case, consecutive sentences are called for, the court must insure that the total sentence imposed corresponds with the moral blameworthiness of the offender. Proportionality in this context is explained in the totality principle. In Nova Scotia the approach for taking totality into consideration was explained by Bateman, J. in *Adams* (supra) as follows:

[23] . . .The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced. . . .

[24] I note the opposite approach has been endorsed by the Ontario Court of Appeal. That is, the court first determines a global sentence and then assigns sentences for each offence and designates each as concurrent or consecutive to fit within the global sentence. *R. v. B.(R.)* [2014] ONCA 840.

[25] In determining a fit and proper sentence, I am mindful of the need to emphasize the objective of denunciation and deterrence. I also am taking into consideration the offender's relatively young age and prospects for rehabilitation.

He has taken steps while in pre-sentence custody to address his drug issues.

Although he has a criminal record, the offender was crime free for a period of 12 years between 2001 and 2013. Prior to these offences the maximum time the offender served in custody was 90 days incarceration. Considering the offences separately I would have imposed a sentence of 3 years for the February 25th, 2015 break and enter, 3 ½ years consecutive for the March 9th, 2015 break and enter.

[26] I would have imposed a sentence of 3 months concurrent for possession of methadone as the possession was part of the same transaction of the March 9th break and enter. The sentence for possession of hydromorphone would be 1 month consecutive for a total sentence of 6 years, 7 months.

[27] Taking into consideration the principles of totality the sentence the court is as follows:

1.	February 25, 2015 Break and Enter	3 years
2.	March 9 th , 2015, Break and Enter	2 years consecutive
3.	March 9 th , 2015, Possession of Methadone	3 months concurrent
4.	March 9 th , 2015, Possession of Hydromorphone	-
		<u>1 months concurrent</u>
	<u>Total sentence</u>	5 years

[28] The offender has served 310 days in pre-sentence custody. The Crown concedes he is entitled to 1.5 days credit for everyday spent on remand. His total pre-trial credit is rounded to 465.

[29] As a result, his net sentence is **3 years, 266 days**.

[30] The break and enter offences are secondary designated offences pursuant to section 487.051(3) of the *Code*. On application of the crown with consent of the offender, the court grants a DNA order.

[31] The court will also grant a stand-alone Restitution order payable to the establishment in the amount of \$3,150.51.

Scaravelli, J.