IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Lively, 2008 NSSC 45

Date: 20080211
Docket: CR. No. 274575
Registry: Halifax

Between:

Her Majesty the Queen

-and-

Gordon Allison Lively

Sentencing Decision

Judge: The Honourable Justice Robert W. Wright

Heard: February 11, 2008 in Halifax, Nova Scotia

Oral Decision: February 11, 2008

Written Decision: February 14, 2008

Counsel: Crown - Tim McLaughlin
Defence - Warren Zimmer

Wright J. (Orally)

[1] Mr. Gordon Lively is being sentenced today after having been convicted on November 15, 2007 on two counts of possession of controlled drugs for the purposes of trafficking (namely, cocaine and ecstasy respectively) and two related counts of resisting a peace officer engaged in the lawful execution of his duties, contrary to s. 129(a) of the Criminal Code.

[2] The facts surrounding the case are set out in my decision delivered October 22, 2007 and cited as 2007 NSSC 301. In that decision, the court denied the accused's Charter application and admitted into evidence the controlled substances obtained by the police from the accused during a search and seizure which took place on July 29, 2005. Seized at that time were 15 small baggies of cocaine powder, each weighing between 0.5 and 0.7 grams, and 19 ecstasy laden pills. These quantities of cocaine and ecstasy carried a value of $300 and $380 respectively. Along with the drugs, the police also seized from the accused at that time cash in the approximate amount of $1,014.

[3] The admission of this physical evidence was determinative of the outcome of the trial and convictions were entered against the accused on November 15, 2007 as aforesaid. Sentencing was put over until today to allow time for a pre-sentence report to be obtained.

[4] What the court has since been provided with is a copy of an earlier pre-sentence report dated February 5, 2007 used in conjunction with another sentencing on similar charges and a current update from that report in the form of a

letter dated February 1, 2008. These reports tell us that Mr. Lively is presently 38 years of age and is married with three young children. He has a grade 12 education and last worked in 2007, doing drywall installation and other labour work. He obviously had a difficult childhood, having been sent to the Shelburne School for Boys at the age of 9 for a period of six years and within a year of his release, having been incarcerated at the Nova Scotia Youth Facility at the age of 16. He also reports as having endured abuse while confined to the Shelburne Youth Centre. It appears that substance abuse has since been at the root of many of his life's problems.

[5] In his interview for the present report, Mr. Lively has accepted full responsibility for the offences committed and acknowledged that he was trying to financially gain from his criminal activity in order to make ends meet. He has stated that he has learned his lesson and realizes he has to change his lifestyle for himself as well as his family. He earnestly repeated those sentiments in court this afternoon.

[6] What is most troubling to the court, however, is the fact that the accused is a repeat offender whose record includes six prior convictions for trafficking, or possession for purposes of trafficking, in controlled substances spanning the past 10 years. Indeed, Mr. Lively was sentenced in Provincial Court this morning to federal time totalling 3½ years for committing similar offences. His prior jail terms of four months and nine months obviously have not had the desired effect.

[7] The purpose and objectives of sentencing of drug offenders is set out in s. 10 of the **Controlled Drugs and Substances Act** ("CDSA") in conjunction with the more general principles of sentencing codified in ss. 718, 718.1 and 718.2 of the Criminal Code. Under the former, the stated fundamental purpose in the sentencing of drug offenders 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. Section 718 of the Code similarly sets out a number of sentencing objectives to be attained, namely, (a) denunciation, (b) deterrence (both specific and general), (c) separation of offenders from society where necessary, (d) rehabilitation, (e) reparation to victims and the community, (f) the promotion of a sense of responsibility in offenders.

[8] In the case of drug traffickers, the courts have repeatedly emphasized the need for deterrence as a sentencing objective in the pursuit of the ultimate goal of protection of the public (see, for example, *R. v. Ferguson* (1988) 84 N.S.R. (2d) 255 (N.S.C.A.) and *R. v. Carter* (2004) NSSC 256). Judges at all levels of court in this province have regularly spoken out about the scourge of cocaine upon our society, which need not be repeated at length here. Those who traffic in it can expect the denunciation of the court and the imposition of federal time as a deterrent. Those who are repeat offenders in drug trafficking cases can expect longer periods of federal time as a means of both general and specific deterrence from continuing to engage in such a nefarious trade.

[9] Unfortunately, and as mentioned earlier, Mr. Lively is such a repeat

offender. He was sentenced this morning in Provincial Court to a total of 3½ years' incarceration for similar offences and now has six prior convictions in all for trafficking in controlled substances or possession for the purpose of trafficking. He has other prior convictions as well under the Criminal Code, notably for assault and resisting a peace officer. As a further aggravating factor, the court is informed that Mr. Lively was on parole for one of these previous trafficking convictions when he committed the offences for which he is now being sentenced. One can only hope that he is serious about now wanting to change his lifestyle from a pattern of pre-meditated criminal conduct for financial gain to become a productive member of society.

[10] There is perhaps some room for optimism for that, given the positive comments in the pre-sentence report in terms of his role as a father to his three children as well as a positive reference given by his former employer. Rehabilitation for Mr. Lively should be an attainable goal, if he has truly seen the error of his ways as he expressed in court today.

[11] In stressing deterrence as the primary consideration in sentencing for drug trafficking offences, the Nova Scotia Court of Appeal recently affirmed in *R. v. Dawe* (2003) 210 N.S.R. (2d) 212 that a sentence of two years or more will typically result. As the Nova Scotia Court of Appeal also recently observed in *R. v. Jones* (2003) 214 N.S.R. (2d) 289 (at para. 8), sentences for possession of narcotics for the purpose of trafficking imposed by that court over the last 25 years have consistently been largely influenced by the quantity of drugs involved and the function or position of the offender in the drug operation.

[12] On the one hand, the small quantities of cocaine and ecstacy involved in the present case indicate that Mr. Lively is in the lower level of a street retailer, as opposed to a large retailer or wholesaler. On the other hand, as previously mentioned, he has exhibited a continuing pattern of such criminal conduct over the past several years, which is a significant aggravating factor to be taken into account, as directed by s. 10(2)(b) of the CDSA.

[13] The impact of this aggravating factor leads me to the conclusion that a penitentiary term of more than two years is appropriate. As it were, both Crown and defence counsel have come before the court today with a joint recommendation for a sentence of three years in a federal institution, consecutive to the sentence imposed in Provincial Court earlier today. That recommendation, in my view, is right on the mark in the circumstances of this case and I fully accept it. It is also, I note, entirely consistent with the decision of the Nova Scotia Court of Appeal in the similar case of *R. v. Byers* (1989) 90 N.S.R. (2d) 263.

[14] There remains to consider the two convictions entered against Mr. Lively for resisting a peace officer in the lawful execution of his duties, contrary to s. 129(a) of the Code. Again, the facts surrounding these offences are to be found in my earlier decision in this case cited as 2007 NSSC 301.

[15] The joint recommendation made to the court in respect of these two offences is something in the range of 30 to 60 days imprisonment on both counts, to be

served concurrently with the sentence for the two drug offences. Given the facts of the case, I accept that range as being appropriate and sentence Mr. Lively to 30 days' imprisonment on both s. 129 counts, to be served concurrently with the other sentences.

[16] In the overall result, Mr. Lively is accordingly sentenced to a term of three years imprisonment on both counts of possession of controlled substances for the purpose of trafficking, to be served concurrently. He is also sentenced to 30 days imprisonment on both s. 129 counts, again to be served concurrently with the other sentences.

[17] The Crown also seeks as part of this sentencing a forfeiture of the cash seized from Mr. Lively at the time of his arrest in the amount of $1,014.31. Defence counsel makes no objection to this and the forfeiture of that cash amount is hereby ordered as well.

[18] I will also await from Crown counsel a s. 109 lifetime prohibition order. I understand that such an order was granted earlier today during Mr. Lively's sentencing in Provincial Court and as redundant as it may seem, s. 109 mandates that I now issue another order to the same effect.

[19] Lastly, in view of the overall length of Mr. Lively's incarceration beginning today, the victim surcharge payment will be waived.

J.