

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. MacIvor, 2002 NSSC 255

Date: 20021127

Docket: S.P. No. 06603

Registry: Pictou

Between:

Her Majesty the Queen

v.

Ronald Murray MacIvor

Judge: The Honourable Justice Walter R. E. Goodfellow

Heard: November 26th, 2002, in Pictou, Nova Scotia

Written Decision: November 27th, 2002

Counsel: Hugh E. Patterson, for the Crown
Stephen M. Robertson, for the Defence

By the Court:

BACKGROUND

[1] This is the sentencing of Ronald Murray MacIvor who pleaded guilty September the 4th, 2002 to the following two counts in the indictment:

Ronald Murray MacIvor of 876 Forbes Mills Road, Merigomish, in the County of Pictou, Province of Nova Scotia stands charged that he,

at or near 876 Forbes Mills Road, Merigomish, in the County of Pictou, Province of Nova Scotia, on or about the 20th day of September, 2001, did unlawfully produce Cannabis (marihuana), a substance included in Schedule II of the Controlled Drugs and Substances Act, S.C. 1996, c.19, and did thereby commit an offence contrary to Section 7(1) of the said Act.

AND FURTHERMORE

of 876 Forbes Mills Road, Merigomish, in the County of Pictou, Province of Nova Scotia stands charged that he,

at or near 876 Forbes Mills Road, Merigomish, in the County of Pictou, Province of Nova Scotia, on or about the 20th day of September, 2001, did unlawfully have in his possession, for the purpose of trafficking in excess of three kilograms, Cannabis marihuana, a substance included in Schedule II of the Controlled Drugs and Substances Act, S.C. 1996, c.19, and did thereby commit an offence contrary to Section 5(2) of the said Act.

AGREED STATEMENT OF FACTS

[2] On September the 20th, 2001 at 15:00 hours a search warrant, authorized under the authority of the *Controlled Drugs and Substances Act*, was executed on the residence owned by Ronald Murray MacIvor situated at 876 Forbes Mills Road, Merigomish. Upon arriving at the residence, there was nobody at home and all of the doors and windows were locked. A search was conducted of the large barn which is situated on the left-hand side of the driveway as you enter upon the property. A search of the barn located a number of cigarette papers that were lined with hash oil. These papers were found on a table that was located on the upper level of the barn.

[3] Entry was gained into the residence by jimmying the lock on the front door. A search of the interior of the residence resulted in the seizure of the following items:

Bedroom to the left of the hallway:

1. Twelve mature marihuana plants were lying on the floor and hanging in the room drying.
2. One cardboard box containing 183 grams of dried marihuana.
3. One clear plastic container with a blue cover that contained 41.6 grams of dried marihuana.

Master bedroom to the right of the hallway:

4. One green garbage bag containing 188 grams of dried marihuana. The garbage bag was located in the closet of the bedroom.

5. One purple plastic hash pipe.
6. One photo album containing pictures of marihuana plants, grown by Ronald Macao, of the past several years.

Kitchen:

7. Three small marihuana plants that had been placed in brown paper bags, which were then stored in the fridge.
8. Packages of marihuana seeds that were located in the freezer portion of the fridge.

Attic:

9. Five mature marihuana plants that were drying in the attic.

Living Room:

10. Four containers of marihuana. The weights were 15.2 grams, 1.2 grams, 1.4 grams and .6 grams. The total weight of the marihuana was 18.4 grams.
- [4] A search of the property outside of the residence located four gardens which contained marihuana plants. The plants were very healthy, ranging in height from five to eight feet. A total of 79 plants of varying varieties were seized. A majority of the stalks were marked with the type of plant which included: Early Sativa, SK, Blue Barrie & Northern Lights, MM or WW, Silver Haze, Juicy Fruit, Afghani & Lethal Purple, BB (Big Bud), and IND.
- [5] At 15:50 hours Ronald and Linda MacIvor arrived home in their vehicle. Both individuals were met in the yard by Cst. Richardson who placed them

both under arrest under the Authority of the *Controlled Drugs and Substances Act*. Ronald and Linda were then taken into the residence where they were given their *Charter* warning and police caution. Initially, Ronald advised that he wished to call a lawyer. He was advised by Cst. Richardson that he could do so; however, if he wanted to speak with a lawyer in private, he would have to be transported back to the Stellarton Detachment where he would be given access to a private room. Mr. MacIvor then decided to wait for the search to end and stated that he would call his lawyer at a later time.

[6] At 16:05 hours, Ronald MacIvor made the following utterance to Cst.

Richardson:

I fully admit to owning the grass, I have a medical condition, I know that is no excuse.

[7] The search ended at 16:30 hours and arrangements were made for Ronald and Linda MacIvor to attend at the Stellarton Detachment on September the 21st, 2001 at 09:00 hours.

[8] On September the 21st, 2001 at 09:00 hours, Ronald MacIvor was interviewed at the Stellarton Detachment by Cst. Richardson. Mr. MacIvor was once again given his *Charter* warning and police caution. Mr. MacIvor stated that he understood both cautions and stated that he did not want to call

a lawyer at this time. Mr. MacIvor then supplied Cst. Richardson with a warned statement in which he admitted to growing the marihuana. Mr. MacIvor stated that he has been growing marihuana for a number of years; however, denied ever selling any of the marihuana or profiting from the marihuana in any way. Mr. MacIvor stated that both he and his wife smoke the marihuana for medical reasons and estimated that they would smoke approximately six to eight joints each per day. Mr. MacIvor stated that the amount of marihuana he smoked depended on whether or not he was working, as he never smoked at work. A copy of the warned statement is attached to the brief.

- [9] At 09:00 hours, Linda Joanne MacIvor was interviewed by Cst. Kellock. Linda confirmed that all of the marihuana plants seized belonged to her husband, Ronald MacIvor. Linda stated that growing marihuana was a hobby for Ronald and that they both used it for medical purposes. Mrs. MacIvor denied that they ever sold the marihuana or gave it away; however, did state that if friends were over visiting, they would all smoke the marihuana together.
- [10] Mr. MacIvor's date of birth is June the 9th, 1954. He has no prior criminal convictions. He suffers from the following medical ailments:

(a) cervical pain attributed to degenerative arthritis and degenerative disc disease in the neck, specifically degenerative deterioration in the C-spine.

(b) lymphocytic leukemia.

[11] The trafficking in this particular offence is on a merely technical nature, to his spouse and his closest friends who were already marihuana users so he did not expose anyone to a new substance. It was done within his residence, so none of his marihuana ever left his property and it was not done for profit.

Dated at New Glasgow, the 21st of November, 2002. The above-noted agreed statement as to facts was signed by both Crown and Defence counsel.

PRE-SENTENCE REPORT

[12] The Court had the assistance of the pre-sentence report that provides many particulars, including that the offender is forty-eight, married, and has no past criminal record. He and his wife have three children: 25, 22 and 20 years of age. The younger two children are attending university and the property in which the production of the banned substance has taken place over a long period of time remains their home to which they return for the summer months.

[13] The offender has grade XI education and in May of 1973 became an apprentice lineman with N. S. Power from whom he received a buy-out in

1995. He is presently in receipt of a disability pension through Summer Industries-Manu-Life. The family income is \$1,356.00 per month and the MacIvors own their own home and have additional assets such as RRSP's. Mr. MacIvor's last employer gave evidence and spoke very highly of him and were it not for his ill health, he would be rehired.

[14] Mr. MacIvor has been diagnosed with chronic lymphocytic leukemia since November 2001.

[15] Mr. MacIvor has used marihuana on a daily basis since he was 32, a period now of 16 years. As noted in the agreed statement of facts, he estimates that he and his wife smoke approximately six to eight joints each per day. He says he is no longer involved in the production of marihuana and is seeking a medical certificate for its use. The investigating officer indicates Mr. MacIvor was very cooperative.

[16] No recommendation as to sentence is advanced by the probation officer who prepared the pre-sentence report.

JOINT RECOMMENDATION

[17] The Court has received a joint recommendation for sentence. It consists of a joint recommendation for a conditional sentence of six months duration, four

months of that being house arrest with the exception for travel bank and forth to work and back and forth for medical, and dental appointments.

Also, during the four months house arrest he will present himself at his door, if the police show up to check on him.

[18] Following the six-month conditional sentence, it was suggested that he be placed on probation for one year, a condition of which will be that he keep the peace and be of good behaviour, report as and when required and abstain absolutely from possession or consumption of drugs and take such drug counselling as directed.

[19] Joint recommendations were, at one time, a somewhat rare occurrence. They are no longer. The Court welcomes all the assistance it can get in a difficult area of determining a fit and proper sentence. A joint recommendation is to be accorded in law a measure of deference and very, very serious consideration. This does not mean the court can abrogate or delegate its responsibility for sentencing.

[20] The Court has carefully considered and weighed the representations of counsel, all the material, doctor's report, case authorities, etc.

MAXIMUM SENTENCE

[21] The maximum sentence provided for a crime gives some indication of the seriousness of the crime from the public's perspective. In this case, s. 7 of the *Controlled Drug and Substances Act* provides a term of imprisonment on the first count not exceeding seven years and with respect to the second count, the seriousness of this count is reflected in that the maximum sentence is one of life imprisonment.

CRIMINAL CODE PROVISIONS

PURPOSE AND PRINCIPLES OF SENTENCING

Purpose

718 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and in the community. 1995, c.22, s.6.

Fundamental Principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. 1995, c.22, s.6.

Other Sentencing Principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence of the offender, and, without limiting the generality of the foregoing ...
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) 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. 1995, c.22, s.6; 1997, c.23, s.17; 2000, c.12, s.95(c).

Imposing of Conditional Sentence

742.1 When a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and

(b) is 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 sections 718 and 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3. 1995, c.22, s.6; 1997, c.18, s.107.1.

CASE LAW

[22] The Nova Scotia Court of Appeal has made a number of pronouncements on conditional sentence recently, including *R. v. Henry*, 2002 NSCA 33; *R. v. McCurdy*, 2002 NSCA 132; *R. v. Longaphy*, 2000 NSCA 136.

[23] In *R. v. McCurdy*, the most recent and germane of the above, the offender pleaded guilty to conspiracy to possess marihuana for the purpose of trafficking and was given a conditional sentence of eighteen months. On appeal, a three-year sentence of incarceration was substituted for the conditional sentence. There were a number of serious factors in *McCurdy* that do not exist here, including that he had a criminal record and committed the offence while on probation.

[24] Any consideration of a conditional sentence must of necessity include a consideration of the Supreme Court of Canada decision in *R. v. Proulx*, [2000], 1 S.C.R. 61. In *McCurdy*, above, Roscoe, J.A. stated at paras. 13 and 14:

[13] The Supreme Court of Canada provided guidance in the application of these provisions in *R. v. Proulx*, [2000] 1 S.C.R. 61. Commencing at para. 58, Lamer, C.J.C., for the court, explained how the first step in the process should be undertaken:

[58] ... In my view, the requirement that the court must impose a sentence of imprisonment of less than two years can be fulfilled by a preliminary determination of the appropriate range of available sentences. Thus, the approach I suggest still requires the judge to proceed in two stages. However, the judge need not impose a term of imprisonment of a fixed duration at the first stage of the analysis. Rather, at this stage, the judge simply has to exclude two possibilities: (a) probationary measures; and (b) a penitentiary term. If either of these sentences is appropriate, than a conditional sentence should not be imposed.

[59] In making this preliminary determination, the judge need only consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 to the extent necessary to narrow the range of sentence for the offender. ... [emphasis in original]

[14] Section 718 sets out several objectives of sentencing including denunciation, deterrence, and rehabilitation. Although conditional sentences are available for all offences for which there is no minimum sentence, Lamer, C.J.C., in *Proulx* has emphasized that incarceration provides more deterrence than a conditional sentence (para. 102), that a conditional sentence is more lenient than incarceration (para. 44) and that in some circumstances the need for denunciation and punishment is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct (para. 102 and para. 100).

[25] As Lamer, C.J.C. stated, a conditional sentence does not normally provide as much deterrence as incarceration and Roscoe, J.A. went on to say for the Court of Appeal:

[15] This Court has indicated several times that in cases of drug trafficking, deterrence will be the primary consideration. For example, in *R. v. Ferguson* (1988), 84 N.S.R. (2d) 255, Justice Jones stated at p. 256:

[6] This Court has repeatedly emphasized the need for deterrence in the case of drug traffickers. Persons who become involved in trafficking do so deliberately with full knowledge of the consequences. The general range of sentences, even for minor traffickers, has been between six and twelve months' imprisonment. The primary element on sentencing for trafficking must be deterrence.

[16] Although it is not necessary that the length of sentence be precisely proportionate to the quantity of drugs involved, commercial distributors and growers require "materially larger" sentences than the petty retailer, as stated in *R. v. Fifield* (1978), 25 N.S.R. (2d) 407 at para. 8. There was no question in this case that the respondent was motivated by financial gain and that the operation was a well established, sophisticated, large-scale commercial venture. These are all aggravating factors. See also, *R. v. Butler* (1987), 79 N.S.R. (2d) 6.

[26] It seems to me the circumstances of each case must be carefully examined to determine if a conditional sentence provides sufficient denunciation and deterrence.

OTHER FACTORS

- [27] The entry of a guilty plea is a mitigating factor and the facts are, as I have said, quite different than in *R. v. McCurdy*, above. The growing operation Mr. MacIvor had, while extensive, including numerous plots and a substantial variety of plants, was not quite as sophisticated as Mr. McCurdy's but nevertheless, it was of considerable dimension and resulted in a count related to s.5(2) of the *Controlled Drug and Substances Act* which relates to an amount in excess of three kilograms. The offender's production here extended to nine different varieties of marihuana. The agreed statement of facts indicates there was no commercial element. The offender's health is a matter of concern and whatever sentence is imposed needs to recognize his need for medical attention.
- [28] While the offender is a first offender, the criminal activity is obviously of some duration and conducting criminal activity in one's home is hardly setting a good example for one's children. It is not conducive to them or other members of the community who visited and enjoyed the illegal substance to respect for the law.
- [29] Deterrence is related to the consequences in each individual case. In some cases, the offender suffers public, family and community humiliation, ie. neighbours, co-workers. Such does not appear to exist here.

[30] The offender committed daily criminal conduct in the family home and shared the spoils of his criminal conduct with other members of the public.

He conducted himself for a lengthy period of time in a manner showing disrespect for the law and involved others to join in in such disrespect.

[31] Often an offender loses respect, employment, etc. that looms large in the consideration of deterrence, as others, who might be tempted, will likely denote such losses may befall them. Nothing of that nature appears to exist here. Indeed, whatever sentence imposed will without doubt become known by those who visited his home and partook of the fruits of the criminal conduct. The suggestion that a term of conditional sentence requiring Mr. MacIvor to refrain from the use of marihuana is naive in the extreme. He has used it daily for many, many years and his wife has joined in such regular consumption and the Court has no faith he would live up to such an undertaking. One can almost sense that under house arrest, the visitors, the offender, and his wife, graciously and gratuitously supplied with marihuana, will rejoice at his avoidance of actual imprisonment despite the magnitude of his home factory. Running such a risk is running the risk of a sentence that fails to project any adequate deterrence and is more likely to continue to

foster disrespect for the law amongst the offender's circle of visitors and friends.

[32] The suggestion that the offender would have to answer the door should the RCMP attend at his home during the period of house arrest provides little comfort. Assuming the police have the resources and inclination to drop by occasionally, what will transpire when the wife simply advises that her husband is indisposed due to his illness? The provisions suggested provide little comfort to the Court.

[33] A component of deterrence is the fear of the loss of freedom that will likely accompany a sentence whether conditional or one of incarceration. There is, however, a number of fundamental differences between house arrest and incarceration.

[34] In house arrest, one is subject to restrictions and normally can only leave for church, medical, dental, haircut, shopping essentials, etc. However, when you are incarcerated, any outside excursion is limited and controlled. In house arrest, one retains many freedoms. For example, one can choose what time one goes to bed and what time one rises, whether and what time of the day or night to watch T.V., listen to a radio, CD or whatever. In house arrest, one can utilize a refrigerator at whatever time one chooses, eat what

one wishes, carry on a personal relationship, wine or beverage of choice at meals or any time of the day or night, have visitors as and when one chooses, etc. The list of freedoms that continue to exist with house arrest is endless. None of these freedoms are available when you are incarcerated.

[35] Mr. MacIvor's illness, which does not provide him with a license to act illegally, is a matter of concern and any sentence should, within reason, minimize the interference with his treatment. The sentence I impose will take this into account and had he not been ill, would have been for a far more lengthy period. I am satisfied that a conditional sentence does not come close to providing the denunciation and deterrence that these serious offences and circumstances warrant.

CONCLUSION

Court to Accused: Mr. MacIvor, do you wish to address the Court before I impose sentence?

Mr. MacIvor: I will be brief, Your Honour, because I'm not feeling well. I want to apologize to the Court for all the trouble and concern I've caused and I wish to apologize to my family for this notoriety that I brought upon it. I have no

... I really want to stress that trafficking was not my intent here, Your Honour. I never ever sold drugs in any form at any time and I offered to the RCMP to take a polygraph test to that effect. I am ashamed of the notoriety this has brought on my sons who are equally ashamed. I want to add that one of my sons is a member of the campus police at St. F.X. University and all of my sons are law-abiding citizens. Um, once again, Your Honour, I apologize to the Court.

The Court: Thank you, Mr. MacIvor. Certainly it is a very unpleasant task and I must repeat that I have accepted the agreed Statement of Facts. Despite the quantity, I have accepted the fact that there has been no commercial and indeed, if there had been a commercial element, you would have been facing a sentence of, in my view, a high probability in the penitentiary range. Nevertheless, it is a very, very serious offence, as I have said, and I am satisfied that a conditional sentence does not come close to providing the denunciation and deterrence that these serious offences and circumstances warrant. Would you please stand, Sir? It is the sentence of this Court that you be imprisoned for a term of four months, followed by one-year probation during which you are to keep the peace and report to the probation authorities as directed by them.

J.