

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Hobbs, 2009 NSSC 258

Date: 20090825

Docket: CRH 287874

Registry: Halifax

Between:

Her Majesty the Queen

v.

Kevin Patrick Hobbs

Judge: The Honourable Justice C. Richard Coughlan

Heard: August 25, 2009, in Halifax, Nova Scotia

Decision Rendered: August 25, 2009 (Orally) (Re Sentence)

**Release of
Written Decision:** August 27, 2009

Counsel: Timothy McLaughlin, for the Crown
Luke A. Craggs, for the Accused

Coughlan, J.: (Orally)

[1] On June 1, 2009, a jury found Kevin Patrick Hobbs guilty of unlawfully having in his possession for the purpose of trafficking in excess of three kilograms of cannabis marihuana, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, and also of unlawfully producing cannabis marihuana, contrary to s. 7(1) of the *Controlled Drugs and Substances Act*.

[2] I have read the presentence report dated October 1, 2008, the updating report of July 10, 2009, the presentence briefs submitted by counsel and heard the submissions of counsel for the Crown and Mr. Hobbs, and the evidence of Detective Constable Andrew Pattison and Constable Ian Nielson.

[3] The Crown seeks incarceration for a term of 20 to 24 months, together with a forfeiture of items seized pursuant to s. 16 of the *Controlled Drugs and Substances Act*, a weapon prohibition order pursuant to s. 109 of the *Criminal Code*, and an order to provide a DNA sample. The defence is seeking a sentence in the neighbourhood of a 20 month conditional sentence.

[4] Mr. Hobbs, born January 28, 1980, is 29 years old. He is not married and does not have any dependents. Mr. Hobbs graduated from high school in British Columbia in 1998. From 1999 to 2001, he attended Douglas College in a Bachelor of Arts program. From 2001 to 2003, he attended the University of Kings College in Halifax, Nova Scotia, but did not graduate. Mr. Hobbs states he is currently continuing an on-line Mutual Funds and Canadian Securities course.

[5] Mr. Hobbs met with the Registrar of the University of Kings College on June 16, 2008 and Mr. Hobbs has contacted the Registrar's office and has applied to enter a program for a degree with a major in Commerce and a minor in Business Program for the fall of 2009. Today an unsigned letter on letterhead of the Office of the Registrar, University of King's College, dated July 23, 2009 was entered into evidence. The letter states Mr. Hobbs has been accepted into the Bachelor of Arts program at the University of King's College for the 2009/2010 fall term.

[6] Currently Mr. Hobbs is unemployed. Mr. Hobbs stated to the writer of the presentence letter of July 10, 2009 he is the Operations Manager for his mother's on-line business, Pet Supplies & Trinkets, although he does not receive a salary for his work.

[7] The Crown entered into evidence a Certificate of Disposition Indictment, Number 7248, Case Number N10145-2006, from the Supreme Court of New York, under seal signed by the Court Clerk dated January 17, 2007 certifying Kevin Hobbs, born January 28, 1980, was convicted of criminal possession of marihuana 1st degree and sentenced to one year imprisonment.

[8] Also entered into evidence was a Certificate of Disposition Indictment, Number 7247, from the Supreme Court of New York, under seal signed by the Court Clerk dated January 17, 2007 certifying Kevin P. Hobbs, born January 28, 1980, was convicted of intimidating a victim or witness 3rd degree and sentenced to one year imprisonment concurrent to N10145-2006.

[9] The Certificates of Disposition Indictment are admissible into evidence pursuant to s. 23 of the *Canada Evidence Act*. The question remains, is Kevin P. Hobbs mentioned in the certificates Kevin Patrick Hobbs being sentenced today?

[10] Kevin Patrick Hobbs who is being sentenced today was born January 20, 1980.

[11] The defence submits the Crown has not proved that Kevin P. Hobbs is the Kevin Patrick Hobbs being sentenced today.

[12] Detective Constable Pattison testified he spoke to a Detective or Sergeant Russo of the Queens District Attorney's Office in New York and obtained the Certificates of Disposition Indictment entered into evidence. Detective Constable Pattison, who never met Detective or Sergeant Russo, was told by the person he understood to be Detective or Sergeant Russo that Jennifer Backman was in court at least once in a hearing involving Kevin P. Hobbs and posted bail for Mr. Hobbs. Detective Constable Pattison testified at one time a Jennifer Backman was Mr. Hobbs' girlfriend in Halifax.

[13] Constable Ian Nielson testified he had been familiar with Mr. Hobbs since November, 2004 and Mr. Hobbs had a girlfriend named Jennifer Backman.

[14] Constable Nielson had a telephone conversation with a person who identified himself as Detective Michael Sykora, who told him that Kevin Hobbs

when arrested in New York had a British Columbia driver's license and a Canadian passport, and a Ms. Jennifer Backman was attempting to post bail.

[15] Prior to the trial, Mr. Hobbs applied pursuant to s. 11(b) of the *Canadian Charter of Rights and Freedoms* for a stay of proceedings based on delay. I found the delay in this proceeding from November 8, 2006 to November 2, 2007 was caused because of Mr. Hobbs' incarceration in the United States.

[16] Under all the circumstances, I find the Kevin Hobbs or Kevin P. Hobbs named in the Certificates of Disposition Indictment is the Kevin Patrick Hobbs being sentenced today. Therefore, Mr. Hobbs has a prior criminal record in the United States for criminal possession of marihuana 1st degree and intimidating a victim or witness 3rd degree.

[17] With regard to sentencing, s. 10(1) of the *Controlled Drugs and Substances Act* provides:

10. (1) Purpose of sentencing - Without restricting the generality of the *Criminal Code*, 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.

[18] The following are sentencing principles set out in the *Criminal Code* relevant to this proceeding:

718. Purpose - 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 to the community.

718.1 Fundamental Principle - A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 Other sentencing principles - 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 or the offender, ...

. . . .
- (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.

[19] I have been asked to consider a conditional sentence. Section 742.1 of the *Criminal Code* provides:

742.1 Imposing of conditional sentence - If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of 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 to 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 compliance with the conditions imposed under section 742.3.

[20] The issue of conditional sentences was addressed by the Supreme Court of Canada in *R. v. Proulx* (2000), 140 C.C.C. (3d) 449, where Lamer, C.J.C. stated at p. 475 in referring to s. 742.1:

In my view, the first three criteria are prerequisites to any conditional sentence. These prerequisites answer the question of whether or not a conditional sentence is possible in the circumstances. Once they are met, the next question is whether a conditional sentence is appropriate. This decision turns upon a consideration of the fundamental purpose and principles of sentencing set out in s. 718 to 718.2. ...

[21] In this case, the offence is not punishable by a minimum term of imprisonment.

[22] In a recent decision of the Court of Appeal, *R. v. Knickle*, 2009 NSCA 59, Roscoe, J.A., in giving the Court's judgment in a case dealing with a charge of possession for the purpose of trafficking in cocaine, stated at paras. 17 and 18:

The judge failed to recognize how this court has consistently categorized drug traffickers, based on the type and amount of drug involved and the level of involvement in the drug business, to assist in placing them within the range. In *R. v. Fifield*, [1978] N.S.J. No. 42, the court described the following general categories of drug traffickers: the young user sharing marijuana with a companion; the petty retailer who is not shown to be involved full-time or in a large-scale commercial distribution; the large-scale retailers and commercial wholesalers. Chief Justice MacKeigan noted that the amount of drugs involved helps determine the quality of the act or the probable category of trafficker. The *Fifield* categories have also been applied by this court to cocaine and crack cocaine trafficking cases. See, for example: *R. v. Carvery*, [1991] N.S.J. No. 501 - high level retailer - 6 1/2 ounces cocaine - five years' incarceration; *R. v. Steeves*, 2007 NSCA 130 - not a lower level trafficker - 77 grams of cocaine, and 100 pills of ecstasy - 2 years, six months' incarceration; *R. v. Sparks*, [1993] N.S.J. No. 448 - four counts of selling small amounts of crack cocaine and one count of possession for the purpose - totalling just over 1.5 grams - not a petty retailer - 32 months' incarceration.

Numerous other sentencing decisions from this court repeatedly and consistently emphasize that persons involved in trafficking in cocaine will be subject to sentences of incarceration. This has been absolutely clear since the very first case heard by this court involving trafficking in cocaine: *R. v. Merlin*, [1984] N.S.J. No. 346, 63 N.S.R. (2d) 78. See also, for example: *R. v. Dawe*, 2002 NSCA 147; *R. v. Jones*, 2008 NSCA 99; *R. v. Stokes*, [1993] N.S.J. No. 412, 126 N.S.R. (2d) 66; and *R. v. J.B.M.*, 2003 NSCA 142. This court has never approved or endorsed a conditional sentence on charges of possession for the purpose of trafficking or trafficking in cocaine. As well, we have regularly allowed appeals from conditional sentence orders for trafficking in large amounts marijuana and substituted penitentiary terms. See for example: *R. v. Hill*, 1999 NSCA 118; *R. v. McCurdy*, 2002 NSCA 132; *R. v. Jones*, 2003 NSCA 48. The sentencing judge in this case did not refer to any decisions of this court.

[23] In *R. v. Jones, supra*, Roscoe, J.A., in giving the Court's judgment, stated at para. 10:

An examination of possession for the purposes cases, reveals that the typical range of sentences for small wholesalers or large retailers, the people on the third of the four rungs of the ladder identified in *Fifield*, is two to five years incarceration. It also appears from this survey that the quantity of cannabis resin necessary to categorize a person at this level is two to ten kilograms, with values in the tens of thousands of dollars range. The presence of exceptional mitigating circumstances, such as youth, or previous unblemished character, may, of course, take an offender out of the normal range. ...

[24] In this case, the marihuana grow operation involved 203 plants in the basement of 69 Chelton Woods Lane, Halifax, Nova Scotia, made up of five "mother plants", that is, seed plants, and 198 producing plants. It was a substantial marihuana grow operation. In his report, the expert witness, Constable Darren Slaunwhite, estimated the operation would produce 37 pounds of marihuana in a single crop, which would have a value of between \$74,000 to \$335,960 depending on how it was sold, clearly within the small wholesaler or large retailer category as set out in *R. v. Fifield, supra*.

[25] Mr. Hobbs rented the residence which was the site of the grow operation. The utilities were in his name. Mr. Hobbs was in control of 69 Chelton Woods Lane. As set out in the Crown's presentence submission:

In terms of culpability, it is submitted that the evidence at trial established that Mr. Hobbs was in control of the marihuana grow operation. He leased the

residence and received the utility bills, therefore he was in control of the property. He used the address of 69 Chelton Woods Lane for personal purposes and was physically present on numerous occasions. In addition, exhibit 26, the 'shopping list for marihuana grow equipment' was located in 87 Cutter Drive in a bag containing numerous items associated to him. While Mr. Noonan tended the plants, the Crown submits that Mr. Hobbs' level of culpability was greater than that of Mr. Noonan's, based on his degree of control over the operation. In effect, Mr. Hobbs was 'higher up the chain of command'.

[26] The marihuana grow operation was a commercial venture. The presentence report dated October 1, 2008 sets out Mr. Hobbs stated "he does not do drugs"; therefore, the marihuana was being grown for profit.

[27] The range of sentences for small wholesalers or large retailers being two to five years incarceration, absent exceptional mitigating circumstances, two years is at the low end of the range.

[28] I am not satisfied serving the sentence in the community would be consistent with the fundamental purpose and principles of sentencing. The Court of Appeal has stated several times that in cases of drug trafficking deterrence is a primary consideration. Here, Mr. Hobbs was in control of the premises of the grow operation, the operation was substantial and Mr. Hobbs was involved for the profit. Under all the circumstances, Mr. Hobbs serving the sentence in the community would not provide the required deterrence, and would not be in keeping with the principles of sentencing.

[29] Mr. Hobbs is in a different situation from Lewis Noonan who received a conditional sentence of 20 months. Mr. Hobbs was in control of the property, as set out in the Crown's submission, "higher up the chain of command". Mr. Hobbs has a criminal record relating to drugs. I understand Mr. Noonan did not have a criminal record relating to drugs.

[30] The Crown submits the appropriate sentence is a period of incarceration in the range of 20 to 24 months despite the Court of Appeal stating absent exceptional mitigating circumstances the range of sentences for small wholesalers or large retailers is two to five years incarceration.

[31] In *R. v. Barton*, [2002] O.J. No. 4105, Cronk, J.A., in giving the Court of Appeal's judgment, stated concerning the role submissions of counsel play in sentencing at para. 15:

This was not a joint submission. The sentencing judge is not bound by the submissions of counsel in determining an appropriate sentence. It is apparent that the judge gave careful consideration to the submissions of both counsel. The fact that he imposed a sentence slightly in excess of the range suggested by Crown counsel reflects no error in principle. I would not give effect to this ground of appeal.

[32] Mr. Hobbs, would you please stand?

[33] Mr. Hobbs, I sentence you on the charge pursuant to s. 5(2) of the *Controlled Drugs and Substances Act* to incarceration for a period of 30 months, to be served in a federal institution.

[34] To the charge under section 7(1) of the *Controlled Drugs and Substances Act*, I sentence you to incarceration for a period of 30 months in a federal institution, to be served concurrently to the charge pursuant to section 5(2).

[35] I grant the forfeiture order, pursuant to s. 16 of the *Controlled Drugs and Substances Act*, for forfeiture of the items seized.

[36] I order a weapons prohibition order, pursuant to s. 109(2) of the *Criminal Code*.

[37] I am not prepared to order a DNA sample, pursuant to s. 487.051(3)(b) as requested. I see no reason why such an order should be granted.

[38] I order a victim surcharge in the amount of \$100.00 for each offence, totaling \$200.00, to be paid by September 30, 2009.

Coughlan, J.