SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Banfield, 2011 NSSC 56

Date: 20110203
Docket: CRH 301471
Registry: Halifax

Between:

Her Majesty the Queen

v.

Shawn Kenneth Banfield

DECISION

Judge: The Honourable Justice Suzanne M. Hood

Written Decision: February 9, 2011, in Halifax, Nova Scotia
{Oral decision rendered February 3, 2011}

Counsel: Shaun O'Leary, representing the Public Prosecution Service of Canada - Atlantic Region
Josh Arnold, Q.C., representing the Offender

By the Court:

INTRODUCTION

[1] Mr. Banfield, you wish to address the court?

[2] **MR BANFIELD:** Okay.

[3] **THE COURT:** It amplifies so you can..I think you'll be okay..

[4] **MR BANFIELD:** I just want to apologize to the courts for a waste of time and a waste of Shaun's time, three years Saturday..a lot of time. And ah..for you Your Honour, I understand that these charges are very serious and are not to be taken lightly. I realize that this is my third time getting caught sellin' drugs and that the courts are fed up with me. It probably seems like I'm never gonna learn and that I'm always gonna live a life of crime - well, that's not the case. So done with selling drugs, I've realized your friends aren't really your friends and that that crime doesn't pay in the long run. It only hurts people. It's not worth it. I'm labeled ‘a rat' with the whole cop thing and my old peers call me "pc." My drug-dealin' days are over, but this is a good thing. I'm not a hardened criminal yet and I'm still half young - there's still time to get a half-decent job. Everybody from Burnside or Renous Penitentiary knows I'm finished and I have to be a ‘straight john' now. So Your Honour, I'm beggin' you, please, please spare me today with a final sentence close to one we've come up with. Two or five years, it doesn't really matter - I'm never comin' back to prison. The longer I stay in prison will only decrease my chances of gettin' that half-decent job and startin' a little family. Thank you.

[5] **THE COURT:** Thank you, Mr. Banfield.

[6] Mr. Banfield is here to be sentenced with respect to two separate sets of criminal offences. The first one is under s.5(2) of the *CDSA*: possession of cocaine for the purposes of trafficking, with an offence date of February 5, 2008. The amount of cocaine was 125.8 grams. A guilty plea was entered on February 1, 2010. The second set of offences are an offence date of March 9, 2010, s.5(2) of the *CDSA*, possession of marihuana for the purposes of trafficking; 2,527 grams of

marihuana. At the same time there were two charges to which guilty pleas have been entered for breaches under s.145(3) of the **Criminal Code**.

[7] Mr. Banfield before me today is 26 years old, almost 27 years old. At the offence dates he was between 24 or 26 years old. As a young child his parents were allegedly drug dealers. His father was sentenced for drug dealing. They then were very poor, but his parents in my view turned their lives around.

[8] Mr. Banfield is not married and was living with his parents. He is in a relationship and has been for approximately one and a half years. He has a Grade 11 education and while he was in Springhill serving his time for the last drug offence, he completed his GED; however, he has little work history, but before he was on remand he had been working with a friend to become a personal trainer. His presentence report says that he has no money and has a debt for a vehicle, but also says that he has no drug or alcohol problems reported himself. Another significant factor is that he has cooperated with the police in an investigation with respect to alleged extortion by a police officer.

[9] The facts of the offences have been set out by the Crown, not objected to by Defence and I am not going to repeat those.

[10] In my view the presentence report was generally positive. It refers to the cooperation with the police and taking responsibility for the marihuana offence and giving a statement immediately to the police. And I quote from the last paragraph of the PSR:

> He appears to have taken responsibility for his actions and comprehends the [e]ffect it will have on his future. Mr. Banfield explained he can no longer sell drugs as he is labeled a "rat "and has expressed a desire to gain employment on a scallop dragger or continue at East Coast Fitness upon his release from custody.

This is the sort of thing that Mr. Banfield has addressed the court about today as well.

[11] As has been indicated, he has a previous record that is attached to the presentence report. I will ensure that a copy of that presentence report is sent along with my decision to the penitentiary. There are a number of offences, some of them as a youth, but the most significant for our purposes today is the drug offence

of March of 2005: two counts of breaches of s.5(2) of the *CDSA*. There was a two-year federal sentence for that and that sentence was May of 2006.

[12] I am governed by the sentencing principles set out in the **Criminal Code** and in the *CDSA*. I am not going to read these sections, but I refer specifically to s.10(1) of the *CDSA* and ss.718, 718.1 and 718.2 of the **Criminal Code**.

[13] I am required to consider mitigating and aggravating factors. The mitigating factors, to which reference has been made, are the guilty pleas, what is in my opinion a fairly positive PSR, Mr. Banfield's cooperation with the police, and his age. In my view he is considered still young. I am distinguishing his situation from offenders in their 30's, 40's and up.

[14] Aggravating factors include those set out in the *CDSA*. Section 10(2) provides specifically:

> Where a person is convicted of a designated substance offence, the court imposing sentence on the person shall consider as an aggravating factor that the person...
>
> (b) was previously convicted of a designated substance offence.

[15] I also note that Mr. Banfield was on parole at the date of the first offence, the February ‘08 offence and he was awaiting sentencing for that offence on the date of the second offence in March of 2010.

[16] A number of case authorities were cited to me and the courts have on many occasions expressed that the paramount consideration for a court in sentencing in a matter such as this is to be deterrence. The courts have also set out in many cases, as well, the range for trafficking; and I'll mention only the most recent of those cases for the Nova Scotia Court of Appeal which is **R. v. Knickle** 2009 NSCA 59 where the court said in paragraphs 26 and 27:

> 26. The importance of deterrence in sentencing cocaine traffickers must again be endorsed and reiterated as indicated by this court recently in **Steeves**:
>
> 18 This court has been steadfast in emphasizing that deterrence is a primary consideration in sentencing for drug offences. In **R. v. Robins**,[1993] N.S.J. No. 152 (C.A.), Chief Justice Clarke stated at p.1:

> ... The position of this court repeated in many of our decisions since **Byers**, [1989] N.S.J. No. 168, is that there are no exceptional circumstances where cocaine is involved. We are persuaded that general deterrence must be prominently addressed if the public is to be protected from the nefarious trade that has developed in this drug that is so crippling to our society.

See also for example, **R. v. McCurdy**[,] [2002] N.S.J. No. 459 at para. 15.

> 19 Trafficking in cocaine, or its possession for the purpose of trafficking, has traditionally attracted a federal term of incarceration. In **R. v. Dawe**, [2002] N.S.J. No. 504, this court confirmed that a penitentiary sentence is the norm in Nova Scotia in cases involving trafficking in cocaine.

The court continued in paragraph 27:

> 27. As noted above, this court has never wavered in expressing these principles in cocaine trafficking cases. Another example is found in **McCurdy**, *supra*:
>
> 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...

[17] So I must determine a fit sentence, but as the court has said in a number of cases the sentence must also fit the offender and the circumstances of the offence. I go back to the old case of **R. v. Grady**, [1971] N.S.J. No. 93 (C.A.), where the Court of Appeal said in paragraph 7:

> 7. It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing; the presence or absence of remorse, the age and circumstances of the offender, and many other related factors.

The court repeated that type of comment in **R. v. Boyd**, [1979] N.S.J. No. 519 (C.A.), in paragraph 5:

> 5. In considering what is a fit sentence we must always be careful to avoid any rigid or "cookie cutter" approach and to refrain from applying, subconsciously or otherwise, a fixed tariff of penalties and must try imaginatively to determine what is "fit" for the particular offender for his particular offence with regard to the individual needs for protection of society and rehabilitation and reform of the offender. We recognize that a standard, range or scale of appropriate sentences has been developed for most crimes when committed by a typical offender in a typical way.

[18] I was referred to **R. v. Fifield**, [1978] N.S.J. No. 42 (C.A.), which set out the categories of drug offenders. I'll refer to paragraphs 6, 7, 8 and 10 of that decision, without citing the cases referred to in those paragraphs. The categories that they refer to were: "A young user sharing marihuana with a companion or accommodating another user with a small quantity"; or "a petty retailer who peddles small quantities of marihuana, but who is not shown to be involved in full-time or large-scale commercial distribution or the like."

[19] In paragraph 8 they refer to the particular case, "Here a large quantity was involved, indicative of an intention to distribute on a commercial scale and suggestive of similar past experience."

[20] In paragraph 10 they went on to say:

> The quantity is important in helping show the quality of the act or the probable category of trafficker – the isolated accomodator of a friend, the petty retailer, the large retailer or small wholesaler, or the big-time operator.

[21] Because several offences are being sentenced for at this time arising on two different dates, the principle of totality is important. I quote the method for achieving that from **R. v. Adams** 2010 NSCA 42 at paragraph 23:

> 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.

[22] The Crown is seeking a 6 to 7-year federal sentence. They have broken it down as follows: for the cocaine offence: 4 years; for the marihuana offence: 2-3 years; and they agree with concurrency for the two breaches with the marihuana offence.

[23] The Defence, on the other hand, seeks a 5-year total sentence broken down as follows: 3.5 years for the cocaine offence; 1.5 years for the marihuana offence; and for each breach 30 days concurrent to each other and to the marihuana charge, for a total of 5 years or 60 months. Defence refers to the 11 months that was spent on remand which reduces the total sentence to 49 months. Then the Defence submits that since the cocaine charge and the weapons charges were the same date, that the court should consider that the 18 months already served for the weapons offences should be considered to be concurrent to the cocaine charge. Defence therefore submits that the 18 months should be subtracted, leaving a total remaining sentence to be served of 31 months.

[24] Many cases, as I have said, were cited by both counsel; none, of course, were exactly the same as this one. The Crown in Appendix ‘C' to its submissions summarized the case law with a range for trafficking or possession for the purposes of trafficking in cocaine. The low end was mostly less than two years. The petty or street level seemed to be a range of 27 months to 3 years for most, although there were some conditional sentence orders; and then for the higher retailer or wholesalers, they ranged from between a conditional sentence order to a maximum of 5 years in one case. Then there were the high-level traffickers or where there were particularly aggravating circumstances.

[25] In the **Smith** case, a 5-year sentence; **Crossan** - 4.5 years; **Stokes** - 7 years; **Clarke** - 4.5 plus 4.5; **Dempsey** - 9 years; **Dann** - 4.5; and **Hill** - 5 years. Only three were as high or higher than what the Crown is seeking in this case. In **Stokes** there was a 7-year sentence: there were three counts of trafficking in cocaine and one count of possession for the purposes of trafficking in cocaine, and the accused had a lengthy related record. In **R. v. Clarke**, [1994] N.S.J. No. 474 (C.A.), to

which I will refer again, the total sentence was 9 years: it was one kilogram of cocaine and possession of a prohibited weapon, and a lengthy serious record. The **Dempsey** case was a 9-year sentence: it was a case of conspiracy to traffick cocaine and hashish and the accused was seen as a wholesaler and again, had a previous related record.

[26] Among the cases submitted in total in the case book of authorities, in **R. v. Carter** 2004 NSSC 256 there was a sentence of 2 years. In **R. v. Butler**, [1987] N.S.J. No. 237 (C.A.), Mr. Butler was seen as a wholesaler of cannabis resin and he received a 1-year sentence at age 25. In 2010 Mr. Butt (**R. v. Butt** 2010 NSCA 56) was sentenced to 5 years, and that was on appeal. He had committed further offences while he was awaiting the sentence, but at his original sentencing he had said that he had completely turned his life around; he was 35 years old and had $70-100,000.00 worth of cocaine and a prior record including prior drug charges. In **R. v. David** 2004 NSSC 241 the sentence was 30 months; in **R. v. Moore** (unreported: CR 156029) (S.C.) 30 months; in **Knickle**, *supra*, $27,000.00 was the value of cocaine, firearms were found at the same time and there were children in the house. The sentence was 3.5 years.

[27] Other cases were cited including **R. v. Tokic** 2002 NSSC 54 where there were four sales of cocaine by a 37-year old and he received two years on each concurrent. Now **R. v. Roach** 2010 NSSC 370 is under appeal and I will not comment on it further.

[28] The Defence provided a number of case authorities, some of which were duplication of the Crown's cases. Cases like **R. v. Mills**, [1993] N.S.J. No. 596 (S.C.), were submitted where a sentence was given of 8 years for trafficking in cannabis resin, but the value of the drug was $355 million. In others that were referred to, there were huge quantities with a huge value and some of the cases were conspiracies to traffick, and those led to lengthy sentences. **R. v. Bratzer** 2001 NSCA 166 was referred to; it was not a drug case, but it was one where the court gave consideration to the focus on rehabilitation of a youthful offender. Also there were some CSO cases cited although those are not what the Defence is seeking.

[29] Marihuana-trafficking cases were referred to such as **Butler**, **Fifield** and **Boyd**, *supra*. For **Butler** the sentence was 1-year, **Fifield** - 2 years, and **Boyd** -1 year. **Boyd** in particular included a summary of other

marihuana-trafficking cases. The Defence also provided me with two cases which I will refer to as, and have been referred to as, the ‘sad life principle.’ Those are **R. v. R.B.M.**, [1990] B.C.J. No. 381 (C.A.), and **R. v. Landry**, [1995] O.J. No. 2176 (Ont. C.J., Prov. Div.).

[30] Having reviewed all these cases and the submissions of counsel, both written and oral, I conclude as follows.

[31] Mr. Banfield is still a young man. He had pleaded guilty, he has saved a substantial amount of court time for the two trials. I have already said that the PSR is generally positive. He cooperated with a police investigation and that has led to him serving time on remand in segregation. According to him, and I believe this to be the case, he cannot return to the drug trade because he has been labeled "a rat." It is also likely, Mr. Banfield, that you will be segregated in the federal institution.

[32] Mr. Banfield, you have had a difficult childhood, but on a positive note I note that your parents seemed to have turned their lives around. In this case, because of that, I do not really give credence to the ‘sad life principle' to which some cases have referred.

[33] You have a criminal record from your mid-teens and a previous drug offence for which you have served some federal time. You committed one of these offences while you were on parole and the second while you were awaiting sentence. Overall I do accept, as you have said, and as stated in your presentence report, that you have a changed attitude. Part of it is because of the actions you have already taken and I see that as a very positive thing. The courts have often, as you have heard me say, reiterated the seriousness with which we treat drug offences and the necessity for deterrence, especially with cocaine. I cannot but agree with the comments that have been made in the cases about what a terrible, terrible scourge on our society that drug has been. But I do not agree that you have been a high-level drug trafficker. There were significant quantities of the drug, but not hundred of thousands of dollars in value. You were not involved in conspiracy to traffick. The weapon offences in my view were not like those set out in the *CDSA* as an aggravating factor.

[34] Using the principle of totality, I must determine the sentence for each offence and then determine whether they should be consecutive or concurrent, and then look overall at what that brings me to.

[35] There is not a substantial difference in the overall submissions by counsel. For the cocaine offence the Crown is seeking 4 years; your counsel is seeking 3.5. For the marihuana offence the Crown says 2-3 years; and your counsel says it should be 1.5. So the difference is: the Crown seeking 6-7 years and your counsel says that the total sentence, including what has been served, should be 5 years. They both talk about the time spent on remand. The legislation provides that remand is to be credited only at 'one for one.' But I conclude, as I think I am permitted to do under s.719(3.1), that because of the fact that you were 5 months in segregation that I should give 1.5 credit for those months on segregation which increases the total for that to 7.5 months plus the 6 months on a range; so the total credit for remand time in my view is 13.5 months.

[36] The main difference between the two counsel is credit for the prior guilty plea that you made with respect to the weapons offences and the sentence you have already served for that, as a result of that early guilty plea. The Crown says I should rely on **R. v. Clarke**, *supra*, and your counsel says it should be distinguished. I agree that the **Clarke** decision should not be followed with respect to giving consecutive sentences for weapons and drug offences. In my view there were two separate incidents in **Clarke**: the drugs were found in a hotel room and the weapon was found at a later time. So I do not conclude that that stands for the proposition in this case that the sentences must be considered to be consecutive.

[37] Here the drugs and the weapons were found at the same time in the same place. If you were being sentenced for them at the same time, in my view they would be considered to be concurrent. In my view they should not be treated differently, and you should not be prejudiced, because you are being sentenced for those two offences at two separate times.

[38] I therefore conclude that that 18-month sentence already served should be credited on the sentence I am giving today; so therefore, that is a credit of 18 months. It is a novel, I think, submission, but in my view it is consistent with the principle of giving concurrent sentences.

[39] So overall, Mr. Banfield, I sentence you to 4 years for the cocaine offence; 1.5 years for the marihuana offence; 1 month concurrent for each of the s.145(3) breach offences, which is a total of 5.5 years or 66 months. From that you will

receive credit of 13.5 months for the time spent on remand and the 18-month sentence for weapons.

[40] That results in a remaining sentence to be served of 34.5 months.

[41] I also agree, and it is not disputed that there should be a forfeiture of the items seized; a DNA Order and a Weapons Prohibition for life.

[42] So, Mr. Banfield, you say you have turned your life around; it seems to me that you have. You say you have had good influence from your present girlfriend who continues to stand behind you and that you have support from your friend with whom you were doing some work and who may be able to give you some work on your release. You cooperated with the police and I believe that that shows the change in your attitude. But in the end you know it is up to you, that on your release it will be your decisions that will have to be made. You say you are not going to be back here again; I certainly hope that that is the case. I encourage you to make every effort to make sure that that is the case and you make good use of your time while you are incarcerated.

J.