

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. Tolliver, 2011 NSSC 54

**Date:** 20110204

**Docket:** CRH 320705

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

John Terrence Tolliver

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**SENTENCING DECISION**

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**Judge:** The Honourable Chief Justice Joseph P. Kennedy

**Sentencing Date:** February 4, 2011 in Halifax, Nova Scotia

**Counsel:** Jeffrey S. Moors for the federal Crown  
Nicole M. Campbell for the accused

**By the Court:**

[1] This is the matter of The Queen v. John Terrence Manny Tolliver - one count trafficking cocaine. We had scheduled for January 10<sup>th</sup> and we didn't proceed at that time because I had not received a Pre-Sentence Report and the reasons I didn't have a Pre-Sentence Report was because Mr. Tolliver had not participated in the process the way he had been required to do. So we set it over to today's date to obtain a Pre-Sentence Report and I do have that and I presume counsel have got a copy of that, so I have read that Pre-Sentence Report. I am familiar with it and it will, along with many other factors, will be a factor in relation to this sentence today. Mr. Prosecutor, Mr. Moors?

[2] **MR. MOORS:** My Lord, thank you. Your Lordship heard this commenced - there was a *voir dire* held and during the course of the *voir dire* all of the facts that the Crown would intend to have discussed today were put before Your Lordship by way of *viva voce* evidence. The matter proceeded following the *voir dire* to trial before a jury and once the jury was selected, Mr. Tolliver entered guilty pleas to the charges that Your Honour has read.

[3] Just to reacquaint the Court with the facts concerning this, in the early morning hours of September 16<sup>th</sup>, 2008 at 2320 Gottingen Street, police observed what they believed to be a hand-to-hand transaction involving Mr. Tolliver and some others. Then later on, at 3:49 in the morning they observed Mr. Souva and Mr. Prosser - Sean Souva, David Prosser - walk northbound on Gottingen Street and approach Ray Johnson. Mr. Johnson is then having a discussion with Mr. Tolliver. He points Mr. Tolliver out to Mr. Souva and Mr. Prosser. Mr. Prosser walks a short distance to Mr. Tolliver and Mr. Prosser hands something, believed to be money, to Mr. Tolliver. Mr. Tolliver then hands him crack cocaine in a tin foil ball. It's all part of one hand motion, as the police described it. Mr. Prosser then turned and handed the crack ball to Mr. Souva. Mr. Souva put it in his jacket pocket and walked southbound on Gottingen. Mr. Prosser stayed behind and appears to be smoking something with Mr. Johnson and after a short while Mr. Prosser jogged to catch up with Mr. Souva and they walked along southbound together.

[4] Constable Withrow arrested Mr. Souva and searched him. He found a foil wrapped ball of crack cocaine weighing 1.2 grams in the right front pocket of Mr. Souva's sweatshirt, and where Constable Cook had observed Mr. Souva place it earlier on. And then, with that confirmation, police then radioed that Mr. Tolliver was

arrestable and Constables El-Diri and Smith, in a police van, asked to speak to him for a moment. Mr. Tolliver walked away and tried to get into his van. Constable Smith grabbed his hand to prevent this and arrested him. Mr. Tolliver actively resisted the arrest by hanging on to his mirror, struggling with the officers, swinging his arms. Constable Josh Lobsiger arrived and applied a neck restraint and eventually all went to the ground - Constable Lobsiger on top and Mr Tolliver, and at that point Constable Lobsiger saw Mr. Tolliver spit a small tin foil wrapped ball of crack cocaine, the weight there .11 gram, My Lord, and then after further search of Mr. Tolliver, police found cash in his pockets. The cash was \$320 in 20 dollar bills; \$100 US dollars, all in 20's; \$100 Canadian bill - a one hundred dollar bill; and two \$10 bills, totalling \$20 of course; and then eight \$5 bills, totalling \$40. They also seized a Samsung cell phone.

[5] Those are the facts that the Crown intends to rely upon, My Lord, with respect to the sentencing.

[6] **THE COURT:** Thank you. As to the facts, Ms. Campbell?

[7] **MS. CAMPBELL:** Those facts are admitted, My Lord.

[8] **THE COURT:** Alright, then, sentence?

[9] **MR. MOORS:** The sentence, My Lord, the Crown and Defence - we're putting forward a joint recommendation, My Lord, and I believe we've communicated that number to you earlier on, and I believe that the joint recommendation is for three and a half years jail term; a DNA Order; a Forfeiture and a lifetime Firearms Prohibition.

[10] Now, Mr Tolliver comes before the Court with a prior drug record that the Crown notes and the record is before you in the Pre-Sentence Report. Specially, the Crown noted, My Lord, the possession for the purpose of trafficking offence of March 9<sup>th</sup>, 1999 and for that Mr. Tolliver received a . . . sentence date March 9<sup>th</sup>, 1999 - the offence date December 4<sup>th</sup>, 1997, Mr. Tolliver received a 90 day concurrent sentence of intermittent custody at a provincial facility. My suspicion is that that is marijuana that he's being sentenced for there.

[11] Mr. Tolliver has a lengthy record for *Criminal Code* matters, My Lord, and I won't review all of those because, as I've mentioned, they are before you in

documentary form and the .. I mentioned the point in time of the process at which Mr. Tolliver entered his guilty plea. Your Lordship will be familiar with your own comments in the *Arnel Wade Carter* case, the decision is at 2004 NSSC 256, at para. 5:

... I make reference to my brother Goodfellow's statement about that business in *R. v. Gray*, [2002] unreported, "Trafficking cocaine is a despicable crime that has far reaching consequences. The trafficker places his greed for the easy almighty dollar above all other considerations. The trafficker is a retailer of poison. Cocaine destroys lives and breeds crime." I spoke of the same situation in *R. v. Kenneth George Moore* (2003) unreported, "What a miserable business it is. The business of human suffering and human degradation. What an awful business" and I want on to provide anecdotes about what I have seen before this Court over the years, of people's wasted miserable lives caused by addiction to cocaine and then crack cocaine, that cheap little people destroyer.

[12] Those comments, My Lord, I can tell you have been cited numerous times in Provincial Court by judges and in Supreme Court for that matter. The Court of Appeal, I think it's fair to say, has set a benchmark for trafficking in crack cocaine or cocaine of any kind, hard drug, of two years and so moving from that, having regard to Mr. Tolliver's record, the Crown jointly recommends the three and a half year sentence, and had regard during the course of considering that, My Lord, to the decision of Justice Wright in *The Queen and Gordon Allison Lively* [2008 NSSC 45] essentially just to say that in that case, My Lord, the Court .. there was a joint recommendation - page 5, para. 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.

[13] Simply to say, My Lord, and I could go into the circumstances of Mr. Lively's case, simply to say that the sentence recommended by Crown and Defence, in my respectful submission, is within the range for offences such as this in circumstances such as Mr. Tolliver's, and I also have, My Lord, for your reference - and I'll hand a copy to my friend - *The Queen and Byers*, the Court of Appeal decision from some time ago from Justices Hart, Jones and Pace - Justice Hart writing for the Court there,

and the well-quoted paragraph second .. third last paragraph of the decision of Justice Hart, My Lord:

In my opinion the time has come for this Court to give a warning to all those greedy persons who deal in the supply and distribution of the narcotic cocaine that more severe penalties will be imposed even when relatively small amounts of the drug are involved. Nor should the lack of a criminal record stand in the way of a substantial period of imprisonment. No one today can claim to be so naive as to think that trafficking in cocaine can be conducted without serious damage to our social structure.

[14] I'll conclude my comments at that, My Lord. I think simply to urge the joint recommendation upon the Court and if you have any questions, I'd be happy to answer them.

[15] **THE COURT:** Thank you. Ms. Campbell, what do you think?

[16] **MS. CAMPBELL:** Thank you, My Lord. I'm here with Mr. Tolliver asking this Honourable Court to adopt the sentence that's being recommended as a jointly recommended sentence of three and a half years here this morning. Your Lordship has had opportunity to review Mr. Tolliver's circumstances in some detail in the Pre-Sentence Report which is before this Honourable Court here this morning.

[17] Mr. Tolliver is 43 years old. He has a GED degree. He is a lifelong resident at Halifax. The offences before this Court for sentencing occurred in September 2008. Mr. Tolliver was released on those matters through to January 2011. These are Mr. Tolliver's only pending matters outstanding at this point in time before Provincial or Supreme Courts. Your Lordship has seen in the Pre-Sentence Report there is some history of employment for Mr. Tolliver which appears to be positive, some positive comments from a recent employer, I would submit. There's also some history outlined with respect to a business involvement that Mr. Tolliver's had in direct sales.

[18] In terms of his circumstances, we also have some comments from Mary Robson, who recently supervised Mr. Tolliver while on a period of probation and those comments, again, appear largely to be positive with respect to compliance by Mr. Tolliver while on probation.

[19] In terms of these offences before the Court, as noted the pleas of guilty came really, I suppose, at two different stages - the plea of guilty prior to jury selection with

respect to the charge of resisting, and then the plea of guilty with respect to the charge of trafficking following jury selection.

[20] Mr. Tolliver heard the facts as Your Lordship heard throughout the *voir dire* and subsequently to that there were some further plea discussions resulting in the change of plea and the presentation going forward to today's date of a jointly recommended sentence of three and a half years in a federal institution.

[21] Mr. Tolliver has a criminal record which, again, is before this Court. He having that record, certainly has been before the criminal justice system in the past. He has accepted responsibility for these offences. He seems to have, Your Lordship, some insight with respect to the offending behaviour. With respect to the comments in the Pre-Sentence Report regarding his involvement, at this point in time, at his age, the hope is that that insight counts for something upon the completion of any federal sentence that is put into place today.

[22] These are certainly serious offences. The offence of trafficking in cocaine - I again note the case law that's been noted by My Friend. I had the opportunity to review Your Lordship's decision in the *Carter* case prior to coming in here this morning, as well as other decisions, including decisions out of the Nova Scotia Court of Appeal - the decision of *Steeves* and the decision of *Knickle* with respect to the seriousness and the sentences in trafficking in crack cocaine. Those decisions and the range of sentence in these sorts of offences, specifically trafficking in cocaine - crack cocaine - were considered in reaching the proposed recommended sentence of three and a half years, or I should say the recommended sentence of three and a half years.

[23] I think it's clear that deterrence is paramount in an offence like this when considering the principles of sentencing in s. 718 of the *Criminal Code* and I would submit respectively, Your Lordship, that the proposed jointly recommended sentence encapsulates that principle of sentencing.

[24] I think in terms of mitigation, I again would note the guilty pleas by Mr. Tolliver - though it is noted they came late in the process.

[25] In terms of the circumstances of the offence, I would briefly note the quantity involved here. We are dealing with the sale of commonly what's referred to as twenty stones as we heard throughout the *voir dire* in this case, though as noted in the case

law even the sale of a small amount of this drug certainly is reflected in a sentence of a federal length.

[26] This is a jointly recommended sentence. With respect to the ancillary orders of course, I'll make no further comment with respect to those orders. The proposed sentence would involve federal incarceration. As a result, I would wonder about Victim Fine Surcharge being waived with respect to these matters. I'm here asking this Honourable Court to accept this jointly recommended sentence.

[27] Those would be respectful submissions, unless Your Lordship has any questions. Thank you.

[28] **THE COURT:** Does Mr. Tolliver wish to say anything prior to sentencing in the matter?

[29] **MR. TOLLIVER:** No, I don't, Your Honour.

[30] **THE COURT:** No, okay, thank you. Firstly, I'm glad I read the Pre-Sentence Report. It is of significance. It causes me to understand a couple of things. One, Mr. Tolliver is not stupid. Two, he can talk - he's a good talker. He told a probation officer back in 2008 - 2007 was his sentencing date - he told the probation officer that he was going to make a conscious decision to refrain from criminal activity, at that time - 2007/2008. Here we go again.

[31] He's got an extensive record but in fairness to him much of it is dated, including the drug count possession for the purposes - sentencing date was 1999, and you've got the other additional counts, some of which involve violence which is interesting. Most of them are dated as well.

[32] I'm going to say a few things. Firstly, I'm going to speak generally. I've said, I guess, as much as I can say about trafficking in cocaine in this province and that I'll simply say that I'll repeat what I've said in previous sentencing opportunities that it is a mean and dirty business. The break-ins that we have, the robberies of the corner grocery stores, the people chasing each other all over Dartmouth shooting at one another out of cars, it's all drugs - people in the business of drugs, commonly cocaine. It's a nasty business. So that the way we address that situation is when we get those traffickers, when we get those people who profit from human misery before us, we have to not only sentence in the specific, but the sentence has to have some form of

what I would refer to as educational value. Now, I'm not naive enough to think that I can deter a lot of people in relation to this business, but I can deter some. At least I can speak to consequences - acts and consequences - that if you're going to be a trafficker in cocaine in the province of Nova Scotia, then make doing federal time a part of your future plan. You're going to do federal time and the more you traffic, the more federal time you're going to do. If you do it again, Mr. Tolliver, you're looking at a minimum six years - six years. You're 43 years old for God's sake - 43 years old. The time most people are 43 years of age, they've got a house and the picket fence and two mortgages, and you're still standing on Gottingen Street selling crack cocaine. Is that why you were put on this earth, Mr. Tolliver, to traffic in cocaine? Is that all you're worth? Is that what you're about - because if that's all you're worth, then we have institutions that have been built and created to deal with people who have no more value than to be drug pushers. So take another crack at it - no pun intended. Try again, Mr. Tolliver, because one thing that you and I know and that is they've got your name and every time they see you in Gottingen Street at three o'clock in the morning, they're going to be watching you and if you continue to traffic in cocaine in these circumstances, inevitably you're going to get picked up again and the next time you do it, it's just going to be more and more federal time. I hope that doesn't happen to you because I think you've got some value. I don't think you're stupid. I think there are some, like so many people, there are some good aspects to your situation. Maybe if you can get your life under control - the next twenty years of your life, which is reasonably what you should be looking at, what you've got left, might be better than the last twenty years. Who knows? It's up to you.

[33] Three and a half years in the circumstances is not a sentence that I consider to be unreasonable. It's a joint recommendation from two experienced counsel. They know what they're doing. After having had the benefit of the Pre-Sentence Report, I think that that's a sentence that (a) addresses the things that need to be addressed with sentencing in cocaine - trafficking; and (b) clearly, it's not the worst thing that could have happened to Mr. Tolliver. The worst may be yet to come unless his circumstances change, and they will. People change. I see remarkable changes in people. At a certain point in their lives they've just said, "Look, I can't do this anymore. I'm too old for this." And you're too old for this, Mr. Tolliver. This is the last time you're going to be incarcerated, or it's the last time you're going to be incarcerated for anything as light as three and a half years. One or the other.

[34] I am satisfied with the recommendation made by joint counsel. I am going to sentence and I do sentence John Terrence Manny Tolliver to three and a half years in



a federal institution. I have had the benefit previously of those Orders - that body substance DNA Analysis Order and I'm going to sign that Order now. The Forfeiture Order is being executed and the Prohibition Order that speaks to firearms, prohibited weapons, devices, and prohibited ammunition - I've signed those three Orders. Mr. Prosecutor - anything else?

[35] **MR. MOORS**: Thank you, My Lord, nothing else.

[36] **THE COURT**: Thank you. Mr. Tolliver, you are smarter, I think, than the average cocaine dealer, so use those brains sir, don't come back. Thank you.

Kennedy, C.J.