

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Brady*, 2016 NSSC 148

Date: 20160601

Docket: CRANT 428954

Registry: Antigonish

Between:

Her Majesty the Queen

v.

William Leigh Brady

SENTENCING DECISION

Judge: The Honourable Justice Denise Boudreau

Oral Decision: April 27, 2016

Written Release of Oral Decision: June 1, 2016

Counsel: Wayne MacMillan, for the Crown
Adam Rodgers, for the Defence

By the Court (Orally):

[1] The matter before the court is the sentencing of William Leigh Brady.

[2] Mr. Brady was found guilty by a jury in February of 2016, of two charges pursuant to the *Controlled Drugs and Substances Act*. As a result of discussions this morning with counsel, on the first conviction I will enter a stay due to the *Kienapple* principle. The sentencing is in respect to the remaining conviction, the section 5(1) *Controlled Drugs and Substances Act* charge, trafficking in a substance included in Schedule II to wit: cannabis marijuana over three kilograms.

[3] The facts briefly are, that as a result of wiretapped interceptions, the police became aware of Mr. Brady. On November 14, 2012, while doing surveillance, they observed Mr. Brady parked at the side of the Trans-Canada Highway, in Antigonish County, along with another person and another vehicle. When both parties left, police followed the second vehicle. This second vehicle was owned by Mr. Brady, but driven by a third party. The second vehicle was stopped and searched, and an amount of cannabis marijuana was seized from that vehicle. The amount was over 9,000 grams of cannabis marijuana. Those are essentially the facts that founded the conviction as I have described.

[4] I have a Pre-Sentence Report before me in respect to Mr. Brady, which I have reviewed. I would describe that Pre-Sentence Report as generally positive. Mr. Brady is 65 years of age, he is married. He is a local business person; he owns, as I understand it, two retail stores in the area of Antigonish and Pictou County. Mr. Brady has three adult children who do not live in the local area.

[5] It appears, based on the Pre-Sentence Report, that Mr. Brady has always been a hardworking productive member of society. He has some health issues; notably, and perhaps of most interest to us, is the fact that due to a past injury Mr. Brady has a prescription for medical marijuana. Mr. Brady is a firm believer, I would be safe in saying, in that particular medicine as something that works for him.

[6] Mr. Brady was granted a conditional discharge in 2010 with respect to a previous *CDSA* charge (production of substance). The Pre-Sentence Report indicates that during his period of supervision there were no issues, and there were no incidents of concern with Mr. Brady.

[7] Interestingly, however, that was the same type of offence that is now before the court. I say interesting because, were it not for Mr. Brady's involvement with marijuana, he would have no involvement with the criminal justice system.

[8] The purpose and principles of sentencing, noted at s. 10 of the *Controlled Drugs and Substances Act*, are:

10. ... 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.

[9] The sentencing decisions from this province are generally in agreement that in cases involving drug trafficking, deterrence is a primary consideration, both general and specific. The reasoning behind that, of course, is that people who traffic in illegal substances are aware that they are trafficking in illegal substances; and therefore, should be aware of the consequences. Certainly a person in Mr. Brady's situation should be well aware of the consequences of his actions.

[10] The cases that have been quoted to me from Nova Scotia, are: *R. v. Ferguson* (1988) NSCA 83 NSR (2d) 255 (NSCA), *R. v. McCurdy*, 2002 NSCA 132, *R. v. Jones*, 2003 NSCA 48.

[11] As the Crown has indicated here, the case law demonstrates that the range for this type of offence would be in the range from two to five years' incarceration. Obviously that is dependent on many factors: the amount of the drug, the personal circumstances of the offender, his age, his criminal record, whether the facts involved money, as well as other circumstances. In this particular case, we are

dealing with an offender who would be a mid-level dealer in this particular drug. I accept that this describes Mr. Brady.

[12] This case has a few more considerations than in other sentencing decisions. Firstly, as noted by counsel for Mr. Brady, the current federal government has made recent announcements about the legalizing of the possession of marijuana.

[13] The other interesting factor is Mr. Brady's commitment to this cause (the decriminalisation of marijuana). I have heard from Mr. Brady himself today, and I observed him as he testified at his trial. I have no doubt that Mr. Brady truly believes in this issue. He has told this court that he has been interested in this as far back as high school. I take note of that. However, the other side of that coin, is that Mr. Brady appears to have no remorse for his actions.

[14] Mr. Brady said many interesting things in his comments before me today. But the very first thing he said, struck me: he noted that 48 years ago, he heard the government was legalizing marijuana, and he described his pleasure at that news. However, Mr. Brady, that hasn't happened yet, 48 years later.

[15] Counsel have acknowledged that the Canadian government is saying that it is going to legalize possession of marijuana. That very well may happen. Trafficking in marijuana remains a crime today. In my view it is speculative to

discuss what decriminalisation would look like. It is also speculative to suggest that such would have any effect in a case such as the one at bar, since trafficking in marijuana, one would assume, would still be a crime, even if possession would be legalized.

[16] Mr. Rodgers, on behalf of Mr. Brady, made an analogy with medical marijuana. As I understand the analogy, earlier in the medical marijuana timeline, the government had starting the process of bringing in legislation to allow it. Certain people “jumped the gun”, for lack of a better term, and started distributing marijuana for medical purposes, before it was technically legal. Those persons were dealt with fairly leniently at sentencing. Mr. Rodgers provided me with a number of cases where this occurred. He argued that there is an analogy to be made with the case before me; I should perhaps see Mr. Brady as also having “jumped the gun”, and deal with him in similar fashion.

[17] I disagree. The difference I see with the medical marijuana cases and the situation before me, is the issue of motivation. The motivation of the offender, in every medical marijuana sentencing case provided by Mr. Rodgers, was to address and alleviate human suffering. You can agree or disagree with what the offenders did, and you may or may not agree with the provision of marijuana for medical purposes, but that appears to have been their motivating factor.

[18] I wish to address the issue of profit. Counsel, and Mr. Brady, have talked about profit today. Historically, the only reason to traffic in illicit drugs was profit; there simply was no other reason: it is a lucrative business.

[19] Having said that, the medical use of marijuana raised an entirely different scenario. The government was dealing with issues of compassionate concerns and constitutional challenges. It would appear, based on the cases provided by Mr. Rodgers, that certain people acted beyond the scope of the law, to speed up that process. This was to alleviate suffering. The courts recognized what was happening.

[20] When those persons were sentenced, the results in those cases were different than the normal range, in my view, because of those “sympathetic” realities. Those realities do not exist here.

[21] In relation to the possession of marijuana generally, I do not see the “great societal shift” that Mr. Rodgers has argued exists. I have no evidence of that and I do not take judicial notice of anything like that. Having said that, it has long been recognized that an offence involving marijuana is not usually going to attract the same sentences as one involving other “harder” drugs, cocaine, for example.

[22] I also understand and accept, Mr. Brady, that this is an honestly held belief on your part, that marijuana should be decriminalised. Having said that, I do not think you are engaging in “civil disobedience” purposefully.

[23] I find that, even when a person honestly disagrees with a law, deterrence remains an important factor. A person cannot simply decide to ignore a law because they want it changed, or believe it is going to be changed.

[24] The laws relating to marijuana possession may change; but as of this date they remain. Our country operates by the rule of law. Unless and until this law is changed, it makes an indictable offence of trafficking in this amount of marijuana. The very real difficulty for you, Mr. Brady, is that your personal views are bringing you in conflict with the law. You need to think about that. If you persist in breaking the law, you will be punished.

[25] I find, therefore, that the case law from this province that has been quoted to me, with respect to sentencing for trafficking in marijuana, is still good law. I find that the range for such an offence could normally start with a federal sentence of two years. I note to you, for example, Mr. Brady, the case of *R. v. Jones (NSCA)*. Mr. Jones was found to be courier of a large amount of marijuana, along with a

substantial amount of cash. The Court of Appeal imposed a sentence of three years incarceration. That certainly gives you a sense of the seriousness of this offence.

[26] The Crown proposes a sentence here that is, in fact, somewhat lower than the range that could be found within the cases provided to me. This is in recognition of the mitigating factors here. The Crown seeks a period of incarceration of 18 months, and does not oppose that the sentence be served in the community by way of a conditional sentence of imprisonment, pursuant to ss. 742.1 of the *Criminal Code*.

[27] I agree, based on the case law, that a period of incarceration is appropriate. I also agree, having reviewed the requirements of ss. 742.1, that Mr. Brady meets the criteria for a conditional sentence. The Crown's proposal of 18 months custody, as a conditional sentence to be served in the community, sounds, in my view, completely appropriate. I would agree with that sentence and I impose that sentence.

[28] The conditional sentence order will be for a period of 18 months. The compulsory conditions are that Mr. Brady will:

- (a) keep the peace and be of good behaviour;
- (b) appear before the court when required to do so by the court;

- (c) report to a supervisor on or before Friday, April 29, 2016, and thereafter when required by the supervisor and in the manner directed by the supervisor;
- (d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor;
- (e) notify the court and the supervisor in advance of any change of name or address and promptly notify the court or the supervisor of any change of employment or occupation.

[29] Mr. Brady's further conditions are:

- (f) that he reside at 7067 Highway 337, Cape George, Nova Scotia;
- (g) that he be in his place of residence 24 hours a day, 7 days a week, except for the following purposes:
 1. compliance with the conditions of the conditional sentence order;
 2. attending scheduled medical appointments for himself or any members of his family residing with him and any medical

emergencies for himself or any members of his family residing with him;

3. attending scheduled appointments with his lawyer and traveling directly to and from those appointments;
 4. personal or necessary needs during one 3-hour period each week, Saturdays from 3:00 p.m. to 6:00 p.m.
- (h) for employment and traveling directly to and from his place of employment, at times and at a location that he will have personally informed his supervisor of in advance;
- (i) attending court at any scheduled appearance, and traveling directly to and from court;
- (j) any other valid purpose approved of, in writing, in advance, by his supervisor, which written approval must be carried on his person when he is out of his residence for that purpose;
- (k) Mr. Brady is permitted to attend for the volunteer activity of mowing the grass at the Cape George lighthouse, as long as he has prior notification given to his supervisor;

- (l) during any times when he is required to be in his place of residence, to present himself at the door of his residence upon the request of his supervisor or anyone acting on behalf of his supervisor or any peace officer;
- (m) to carry a copy of his conditional sentence order on his person at all times when outside of his residence;
- (n) in addition Mr. Brady, there will be a mandatory prohibition order in respect of firearms, because you were convicted of an offence pursuant to section 5 of the *CDSA*. The *Criminal Code* says that the court shall, in addition to other punishment, impose an order:
 - (a) prohibiting you from possessing any firearm (other than a prohibited firearm or restricted firearm), crossbow, restricted weapon, ammunition, and explosive substance for a ten year period which would begin today;
 - (b) prohibiting you from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition, for life.

J. Denise Boudreau