

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Boyer*, 2019 NSSC 332

Date: 20191101

Docket: CRH. No.463048

Registry: Halifax

Between: Her Majesty the Queen

v.

Jeffrey Michael Boyer

LIBRARY HEADING - Sentencing Decision

Judge: The Honourable Justice C. Richard Coughlan

Heard: November 1, 2019 in Halifax, Nova Scotia

Oral Decision: November 1, 2019

Written Decision: November 15, 2019

Subject: Criminal Law – Sentencing – trafficking in cannabis marihuana

Summary: Offender was charged with six offences arising from interprovincial trafficking in cannabis marihuana. This was an ongoing scheme with a number of couriers travelling from British Columbia to Halifax and other cities in eastern Canada. The couriers travelled with marihuana in their checked luggage. They delivered the marihuana, waited for the cash and returned to Vancouver with cash in the checked luggage. On flights east from Vancouver marihuana was tightly packed in the luggage and on flights returning to Vancouver large amounts of cash was in the luggage.

This was a lucrative, sophisticated, large scale drug operation. The motivation for the offences was greed.

Issue: (1) What is the appropriate sentence?

Result:

Offender was sentenced to incarceration for 54 months for conspiracy to traffic in cannabis marihuana and trafficking in cannabis marihuana; three years for conspiracy to transport currency obtained by trafficking in marihuana and transporting proceeds obtained from trafficking in cannabis marihuana. All sentences to be served concurrently.

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Counsel: Monica G. McQueen for the Crown
J. Paul Niefer for the Defence

Coughlan, J. (orally)

[1] On July 26, 2018, Jeffrey Michael Boyer was convicted of six offences: conspiracy to traffic in cannabis marihuana contrary to s.465(1)(c) of the Criminal Code; conspiracy to transport proceeds greater than \$5,000, obtained by trafficking in marihuana contrary to s.465(1)(c) of the Code; conspiracy to possess proceeds obtained by trafficking in marihuana contrary to s.465(1)(c) of the Code; trafficking in cannabis marihuana contrary to s.5(1) of the *Controlled Drugs and Substances Act*; transporting proceeds obtained by trafficking in cannabis marihuana contrary to s. 462.31(1) of the Code; and possession of proceeds greater than \$5,000 obtained from trafficking in cannabis marihuana contrary to s.354(1)(a) of the Code.

[2] The facts of the offences were set out in detail in my judgment delivered on July 26, 2018. The following is a summary of the facts for the purpose of this sentencing decision.

[3] These offences arose out of an ongoing scheme with a number of couriers travelling from British Columbia to Halifax and other cities in eastern Canada. The couriers travelled with marihuana in their checked luggage. They delivered the marihuana, waited for the cash and returned to Vancouver with cash in their

checked luggage. On flights east from Vancouver marihuana was tightly packed in the luggage and on flights returning to Vancouver large amounts of cash was in the luggage.

[4] The investigation which was known in British Columbia as “Operation E Prefer” and in Nova Scotia as “Operation Hagrid” was very busy. Investigative techniques employed included surveillance in British Columbia and Nova Scotia, “sneak and peek” examinations of luggage at airports, tracking devices on motor vehicles and interception of cell phone data.

[5] The charges deal with activity between May 15, 2015 and October 9, 2015. Eventually, Nova Scotia RCMP assumed primary control of the investigations.

[6] Persons involved in the conspiracy beside Mr. Boyer included Stephen Lockett, Reece Germaine, Derek Pilling, Darren Telford and Douglas Neumann. During the period of the investigation couriers made frequent short trips to Halifax and other cities including St. John’s Newfoundland and Labrador, and Toronto, Ontario. They would return to Vancouver the same day or in the next day or two. During the investigation Mr. Telford travelled to Halifax 14 times, Mr. Germaine 12 times, Mr. Neumann nine times, Mr. Pilling seven times and another courier Ryan Franklin five times.

[7] Mr. Boyer and Stephen Lockett directed the couriers in the transport of the cannabis marihuana to eastern Canada including Nova Scotia and the return of the proceeds from the sale of the marihuana to Vancouver. Mr. Boyer during a telephone conference gave directions to Mr. Lockett.

[8] The covert searches of luggage returning to Vancouver showed more than \$1,500,000 cash coming from the trafficking of the marihuana.

[9] This was indeed a very lucrative, sophisticated, large scale drug operation. The searches of the couriers' luggage established large quantities of cannabis marihuana were involved worth large sums of money, a portion of which was discovered during the covert searches of the luggage returning to Vancouver. The motivation for the offences was greed. The desire to make money through the sale of cannabis marihuana.

[10] I have read the written submissions of counsel, the cases to which they referred me, the pre-sentence report, the reference letters submitted by Mr. Boyer and heard the oral submissions of counsel.

[11] Mr. Boyer is 38 years old. He has no prior criminal record. Mr. Boyer is married and has a son currently three years old. The pre-sentence report states Mr. Boyer was raised as an only child with plenty of love and experiences. He

participated in sports. Mr. Boyer told the author of the report he works hard all week, enjoys his weekends and evenings with his young family.

Under the heading “Education, Vocation, Employment, Finances”, the author of the report stated:

Subject explained that he has some learning disabilities that prevent him from reading and understanding things at the same speed as others. His mother confirmed that he was diagnosed with Attention deficit hyper activity disorder and was prescribed medication for some of his high school years. After graduating high school, he worked for Safeway for over a year and then started in the construction field approximately fifteen years ago. Subject’s parents confirmed that subject purchased homes, fixed them up and sold them. They loaned him money for his ventures which, they report he repaid in full. Subject has specialized in roofing throughout his career.

Approximately one year ago, Subject brought on a long-time friend as a business partner. They report that the business is growing and his business partner, Mike Di Placito-Alain has some strong concerns about the viability of the business if Subject is required to serve a custodial sentence in Halifax. Mike also reported that Subject has been under extreme stress over missing important milestones for his toddler. Mike explained that he has known Subject since they were childhood friends and he reports that Subject has never flaunted anything and, between raising his own family and working full time, he never noticed anything concerning regarding Subject’s involvement in criminal activity. He feels that Subject is an extremely loyal and gentle person and he continues to feel shocked over the news of Subject’s criminal activity.

Subject reports a pre-tax monthly income of \$6879.17 from his business while his tax return from 2017 shows that he reported a personal net income of \$18,388.72 annually. He reports that his townhouse is valued at approximately \$750 000 and he disclosed that he holds a mortgage which he estimates is approximately \$390 000. Though, he reports no assets as he states that his home is under forfeiture.

[12] While Mr. Boyer was on interim judicial release conditions there were no concerns or breaches of the terms of release.

[13] Since his release on bail, Mr. Boyer has started a new company, Mountain West Roofing Inc., which currently has eight employees.

[14] The reference letters state Mr. Boyer is a good family man, well liked by his family, friends and business associates. The writers of the letters considered the criminal activity out of character for him.

[15] The Crown is seeking a period of incarceration of five to seven years for the trafficking offences. In addition, the Crown submits a sentence of five years for the money laundering offences, which given the nexus between the offences and the principle of totality could be concurrent offences.

[16] At the sentencing hearing Mr. Boyer's counsel submitted both count 3, conspiracy to process proceeds, and count 6, the substantive offence of possessing proceeds should be stayed on the principle set out in **R. v. Kienapple** [1995] 1.S.C.R. 729. In a subsequent written submission the Crown communicated its intention to consent to the staying of the two charges.

[17] The Crown is also seeking a fine in lieu of forfeiture in the amount of \$568,000.00.

[18] Other orders the Crown is seeking are a ten year mandatory firearm prohibition under s.109 of the Code; forfeiture of the items seized as a result of the search of Mr. Boyer's residence; and a DNA order pursuant to s.487.04 of the Code.

[19] The defence submits an appropriate sentence in the circumstances is incarceration for a period of two years.

[20] That counts 3 and 6 be stayed on the principle set out in **R. v. Kienapple**, supra.

[21] That there is insufficient evidence to order the forfeiture of the \$15,355 in cash seized from Mr. Boyer's residence. Also there is no evidence Mr. Boyer received or had control of \$568,000 in proceeds from trafficking and no evidence of any of the conditions under s.462.37(3) of the Code to allow a fine in lieu of forfeiture.

[22] The purpose and principles of sentencing are set out in the *Controlled Drugs and Substance Act* (CDSA), the *Cannabis Act* and the Criminal Code. Section 10(1) of the CDSA provides:

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 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.

[23] Section 15(1) of the *Cannabis Act* provides:

Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Division 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.

[24] Relevant provisions of the Criminal Code include:

718 The fundamental purpose of sentencing is to protect society and 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 and the harm done to victims or to the community that is caused by 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 or to the community.

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

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 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 and consistent with the harm done to victims or to the community should be considered for all offenders...

[25] There have been recent changes in the law. Under the CDSA the trafficking of cannabis marihuana was punishable by up to life imprisonment. The *Cannabis Act* now has a penalty for selling which is equivalent conduct to trafficking of not more than 14 years imprisonment.

[26] The Crown acknowledges, and I agree, now that the *Cannabis Act* is in force the punishment imposed for the s.5(1) CDSA offence should be determined according to the equivalent conduct as classified under the *Cannabis Act*, which would be a punishment on indictment of not more than 14 years instead of life imprisonment.

[27] Mr. Boyer submits his sentence should take into account the recent changes of the law and social attitudes toward marihuana.

[28] The change in legislation or societal attitudes does not alter the fact the offences here are serious criminal misconduct. As the court stated in **R. v. Strong** 2019 ONCA 15 in dealing with the issue at para. 4:

Parliament has not significantly altered the applicable penalty. Nor, in our view, can one assume that a large scale, prolonged trafficking for profit in marijuana is somehow viewed as less serious because of the legislative changes in respect of personal possession and use. The sentence was within the established range. We would dismiss the appeal.

[29] In **R. v. Fifield** (1978), 25 N.S.R. (2d) 407 (N.S.S.C. – A.D.) MacKeigan C.J.N.S. in giving the court’s judgment in classifying types of offenders stated

persons operating a commercial scale receive materially longer sentences than those given petty retailers. The offences here arise from a very large commercial enterprise engaged in the trafficking of marihuana. Mr. Boyer was a person directing the operation.

[30] In **R. v. Tarlao** [1995], 143 N.S.R. (2d) 237 (NSCA) an offender involved in a sophisticated commercial operation to distribute cannabis resin involving \$200,000 to be used to purchase hashish worth between \$500,000 and \$1,000,000 was sentenced to six years incarceration. (See also **R. v. Jones** 2003 NSCA 48).

[31] In **R. v. Dhaliwal** 2011 MBQB 156, Martin, J., sentenced a trusted courier , with no prior criminal record, convicted of transporting across Canada approximately 778 lbs of marihuana valued between \$1.1 and \$2.7 million to three years imprisonment taking their particular circumstances into account after stating a fit sentence would be four years incarceration.

[32] In **R. v. McCurdy** 2002 NSCA 132, a co-conspirator who was second in command of a marihuana grow operation with three separate sites, and more than 500 plants was sentenced to three years imprisonment. The offender had a prior criminal record.

[33] In **R. v. Tran** 2016 ONSC 3225, the offender Steven Tran with no prior record, was the distributor in a large marihuana trafficking operation. Although the judge thought a three year sentence was appropriate, the sentence was reduced because of onerous bail conditions and other factors to two years less a day. The offender Seddigi received a sentence of 18 months imprisonment although the judge started consideration with a sentence in the range of 2½ years.

[34] In **R. v. Lane** 2009 NLTD 68, the offender Lane, with no prior criminal record, one of the directing minds of a large trafficking conspiracy involving large amounts of marihuana and cash trafficked between British Columbia and Newfoundland and Labrador received a sentence of 30 months incarceration.

[35] In **R. v. Lambe** [2003] N.J. No. 25 (TD), the offender Lambe plead guilty to trafficking in cannabis marihuana and possession of proceeds of crime and was sentenced to 18 months imprisonment – 16 months for trafficking and two months consecutive for proceeds of crime.

[36] When sentencing for money laundering and proccession of proceeds of crime general deterrence and denunciation are important considerations (**R. v. Garnett** 2017 NSCA 33 at para. 26).

[37] Aggravating factors present in this case are:

- (1) Mr. Boyer was one of the directing minds of this large sophisticated drug trafficking operation. Mr. Boyer gave directions to Mr. Lockett
- (2) The operation involved a substantial quantity of drugs and money.
- (3) The operation was pre-meditated requiring considerable planning and was ongoing for a number of months.

[38] Mitigating factors present in this case are:

- (1) Mr. Boyer had no prior criminal record.
- (2) Since being charged Mr. Boyer has started a new business. From the reference letters filed it is obvious Mr. Boyer has strong family support. He is taking a roofing program. It appears his potential for rehabilitation is good. As noted in the pre-sentence report he fulfilled the terms of his release conditions.

[39] In coming to an appropriate sentence I have to consider the particular facts of these offences and Mr. Boyer.

[40] Mr. Boyer submits that the delay in his case should be considered a mitigating factor.

[41] While neither pre-conviction nor post conviction delay violated Section 11 (b) of the Charter; the total time from October 26, 2015 to today, November 1, 2019 amounted to approximately 4 years.

[42] In giving the Court's judgment in **R. v. Bosley** [1992] O.J. No. 2656, Doherty, J.A., stated at para 44:

Before leaving this issue, I would add that excessive delay which causes prolonged uncertainty for the appellant but does not reach constitutional limits can be taken into consideration as a factor in mitigation of sentence *R. v. Cooper (No. 2)* (1977), 35 C.C.C. (2d) 35, 4 C.R. (3d) S-10 (Ont. C.A.). The trial judge expressly held that the delay occasioned in this case served as a mitigating factor in his determination of the appropriate sentence. The sentence he imposed reflected that mitigation.

[43] Mr. Boyer and his family have been facing the real possibility of jail time for that period. This is part of the circumstances of Mr. Boyer to be considered in determining a fit sentence for the offences.

[44] I have also reviewed sentences received by Mr. Boyer's co-conspirators.

[45] Reece Germaine plead guilty to trafficking in marihuana, transporting proceeds of crime and breach of recognizance. Mr. Germaine had no prior convictions. He was a courier. Mr. Germaine was sentenced to time served 408 days, 612 days time was credited, and probation for three years. The sentencing

judge in British Columbia stated the sentence was completely out of the range in terms of the facts because of exceptional circumstances.

[46] Derek Pilling, a courier received a suspended sentence with probation for 36 months.

[47] Kirk Withrow, who was involved in picking up and assisting couriers in Nova Scotia, received a sentence of 30 months incarceration. He was considered to have no criminal record as he had two minor convictions over 35 years ago.

[48] Stephen Lockett plead guilty in 2016. A joint recommendation was accepted and a sentence of 39 months in a federal institution imposed.

[49] Section 718.2(b) of the Criminal Code requires that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[50] In this case, Mr. Boyer is higher in the chain of the operation than the couriers. His situation is different than theirs. Messrs. Boyer and Lockett were directing the couriers.

[51] Mr. Lockett's sentence was the result of a joint recommendation after guilty pleas.

[52] After considering the purpose and principles of sentencing and the circumstances of the offences and Mr. Boyer and all submissions and material filed, I have determined the sentence for Mr. Boyer as follows:

[53] Mr. Boyer, will you please stand.

[54] I sentence you for Count 1, conspiracy to traffic in cannabis marihuana contrary to Section 465(1) (c) of the Criminal Code to a period of incarceration for 54 months to be served in a federal institution.

[55] I recommend Mr. Boyer serve his sentence in British Columbia, if possible. Of course, this recommendation is not binding on the authorities.

[56] For Count 2, conspiracy of transporting currency obtained by trafficking in marihuana contrary to Section 465 (1) (c) of the Criminal Code to a sentence of incarceration of 3 years to be served concurrently to Count 1.

[57] For Count 4, trafficking in cannabis marihuana contrary to Section 5 (1) of the *Controlled Drugs and Substances Act* to a sentence of incarceration of 54 months to be served concurrently to Count 1.

[58] For Count 5, transporting proceeds obtained by trafficking in cannabis marijuana contrary to Section 462.31 (1) of the Criminal Code to a sentence of incarceration of three years to be served concurrently to Count 1.

[59] Counts 3 and 6 are stayed on the basis of the principle set out in **R. v. Kienapple**, supra.

[60] I order a 10 year weapons prohibition Order pursuant to Section 109 of the Criminal Code.

[61] I grant an Order authorizing the taking of samples of Mr. Boyer's bodily substances reasonably required for the purpose of forensic DNA analysis pursuant to Section 487.051 of the Criminal Code.

[62] The Crown is seeking forfeiture of the items seized during the search of Mr. Boyer's residence including cash of \$15,355.00, on the basis that it is offence related property pursuant to Section 16 of the *Controlled Drugs and Substances Act*. I am satisfied on the balance of probabilities the items including the cash, are related to the offences for which Mr. Boyer is being sentenced. I order the property be forfeited to Her Majesty in the right of Canada.

[63] The Crown is also seeking a fine in lieu of forfeiture pursuant to Section 462.37 of the Criminal Code in the amount of \$568,000.00, which the Crown

submits is the sum of cash observed during covert searches of couriers' luggage on September 8 and September 16, 2015.

[64] Section 462.37(1) and (3) of the Criminal Code provides:

462.37 (1) Subject to this section and sections 462.39 to 462.41, if an offender is convicted, or discharged under section 730, of a designated offence and the court imposing sentence on or discharging the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime obtained through the commission of the designated offence, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

(3) If a court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made in respect of any property of an offender but that the property or any part of or interest in the property cannot be made subject to an order, the court may, instead of ordering the property or any part of or interest in the property to be forfeited, order the offender to pay a fine in an amount equal to the value of the property or the part of or interest in the property. In particular, a court may order the offender to pay a fine if the property or any part of or interest in the property

- (a) cannot, on the exercise of due diligence, be located;
- (b) has been transferred to a third party;
- (c) is located outside Canada;
- (d) has been substantially diminished in value or rendered worthless; or
- (e) has been commingled with other property that cannot be divided without difficulty.

[65] Section 462.37 provides for forfeiture of proceeds of crime where an offender is convicted of a designated offence. Mr. Boyer was convicted of designated offences.

[66] The evidence shows the trafficking scheme involved much more than the \$568,000.00 the Crown is seeking from Mr. Boyer. The issue of a fine instead of forfeiture was address by Rosenberg, J.A., in giving the Court’s judgment in **R. v. Dwyer**, 2013 ONCA 34 where he stated at paragraphs 23 and 24:

23 The part of the definition that applies in this case is para. (b), being “property originally in the possession or under the control of any person”. I accept that the Crown proved that the designated offence of fraud was committed in relation to the entire \$633,750. The difficulty is that the Crown failed to prove that the entire amount was originally in the possession or under the control of the appellant.

24 In my view , an order for a fine in lieu of forfeiture can be made under s. 462.37(3) only where the offender has possession or control of the property in question or at least had possession of the property at some point. This conclusion flows from the use of the phrase ‘any property of an offender’ in s. 462.37(3), and the definition of ‘property’ in s. 2. Such an interpretation is consistent with the objectives of s. 462.37, which are to deprive offenders of the proceeds of crime and ensure that they do not benefit from those proceeds: see *R. v. Appleby*, 2009 NLCA 6, 242 C.C.C. (3d) 229 (N.L.C.A.), at paras. 26, 32-33. Those objectives would not be furthered by making orders in relation to property that was never in the possession of the offender, over which the offender never had control and from which the offender did not benefit: see also *R. v. MacKenzie*, [2002] O.J. No. 2512 (Ont. C.J.).

[67] In this case there is no evidence establishing the amount in the possession or under the control of Mr. Boyer. The decision to order a fine instead of forfeiture must be based on the evidence. (See **R. v. Lavigne**, 2006 SCC 10 paragraph 35).

[68] There is no evidence before me to support making the requested order. Even if there was evidence justifying an order of forfeiture, which there is not, there is no evidence before me of any of the necessary circumstances set out in Section 462.37 (3) to order a fine instead of forfeiture. I cannot order the requested fine.

[69] Mr. Boyer is to pay a victim fine surcharge in the amount of \$800.00 being \$200.00 for each charge for which he was sentenced, to be paid within one year of his release from custody.

Coughlan, J.