

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Smith*, 2014 NSSC 124

Date: 20140327

Docket: CRH 412257

Registry: Halifax

Between:

Her Majesty the Queen

v.

Dylan Robert Smith

SENTENCING DECISION

Judge: The Honourable Justice Peter P. Rosinski

Heard: March 27, 2014, in Halifax, Nova Scotia

Counsel: Sean Mc Carroll, for the Provincial Crown
Leonard MacKay for the Federal Crown
Mr. Smith, self-represented

By the Court:

[1] Mr. Smith is before the Court for sentencing on eight counts of the Indictment filed herein dated April 10, 2013. Specifically he pleaded guilty on January 15, 2014 before Justice Arnold to offences all occurring on October 25, 2012 at or near Timberlea, Halifax County, Nova Scotia, being counts one, five, six, seven, nine, eleven, twelve, and thirteen. Those counts reference the following *Criminal Code* sections:

Count one – s. 88(1) *Criminal Code* – possession of a shank for a purpose dangerous to the public peace or for the purpose of committing an offence;

Count five – s. 86(2) *Criminal Code* – store in a careless manner a firearm – .32 calibre revolver Iver Johnson;

Count six – s. 88(1) *Criminal Code* – possession of a weapon, a .32 calibre revolver Iver Johnson, for a purpose dangerous to the public peace or for committing an offence;

Count seven – s. 92(1) *Criminal Code* – possession of a firearm .32 calibre revolver Iver Johnson, knowing he was not the holder of a license or the holder of a registration certificate for the firearm under which he may possess it;

Count nine – s. 96(1) *Criminal Code* – possession of a firearm, a .32 calibre revolver Iver Johnson, knowing that it was obtained by the commission in Canada of an offence;

Count eleven – s. 88(1) *Criminal Code* – possession of a weapon, that being a folding knife for a purpose dangerous to the public peace or for the purpose of committing an offence;

Count twelve – s. 90 *Criminal Code* – not being authorized under the *Firearms Act* to carry a weapon – a folding knife, and did carry it concealed;

Count thirteen – s. 5(2) *Controlled Drugs and Substances Act*, that is have in his possession for the purpose of trafficking, not in excess of 3 kg cannabis [marijuana] a substance included in Schedule 2 of that Act.

[2] Mr. Smith was charged on an Information sworn to October 26, 2012 alleging offences on October 25, 2012. He appeared in court in custody on October 26 and was released on a recognizance with one surety. While represented by counsel on his initial court appearance he has been self-represented thereafter. The Crown proceeded by way of Indictment and the Preliminary Inquiry was waived, and he was committed to trial in Nova Scotia Supreme Court on February 11, 2012 and elected to have his trial by judge alone. He appeared in the Nova Scotia Supreme Court before Justice Robertson on February 21, 2013. The matter was adjourned to April 5, 2013 and he pleaded not guilty at that time to all charges. A pretrial conference was held and recorded in courtroom number 304 on April 5, 2013. On April 11, 2013 Mr. Smith appeared before Justice Murphy and pleaded not guilty to a 13 count indictment that replaced the previous 12 count Indictment. That is the subject Indictment involved here, which was dated April 10, 2013. Mr.

Smith next appeared in relation to an application to vary his recognizance on May 16, 2013 before Justice Wright. By consent, a variation was made. The matter next appeared in court before Justice Cacchione on December 12 and was adjourned to December 19 to set pretrial conference dates with the trial judge. On December 19 Justice Cacchione adjourned the matter further to January 2, 2014 for arguments on a motion that had been made by Mr. Smith and advised that Justice Arnold would be hearing the matter. On January 2, 2014 when the matter was called before Justice Arnold, it appeared that Mr. Smith was not going to proceed with his intended motion, and the result was the matter was adjourned to January 6 before Justice Arnold for resolution conference. On January 9, 2014 the matter was further adjourned to January 15 for continuation of the resolution conference.

[3] Finally, on January 15, 2014 Mr. Smith entered guilty pleas on the understanding that there would be a joint recommendation on sentence, a Presentence Report would be created, and the matter set over for sentencing with his bail conditions to continue as they were.

Circumstances of the offences

[4] As I understand it, on October 24, 2012 Constable Boucher authored a *Controlled Drugs and Substances Act* search warrant for the residence of Mr.

Smith in Timberlea where he rented a room, I understand, in a building from his aunt. On October 25, 2012 at about 9:58 in the morning a search warrant was executed. Mr. Smith was arrested for possession of cannabis/marijuana for the purpose of trafficking. Located during the search of his residence was a metal shank found in an upstairs bedroom; 15 rounds of .32 calibre ammunition in a storage case located in a safe in the upstairs bedroom; five rounds of .32 ammunition located in an upstairs bedroom; and a five shot .32 calibre revolver located in an upstairs bedroom.

[5] Also located in the search in relation to s. 5(2) of the *Controlled Drugs and Substances Act* were:

- A zip lock bag of marijuana, roughly 26.4 grams, located in the upstairs bedroom as well as a 100 gram weight scale with residue and suspected marijuana seeds located under a mattress;
- Zip lock bag of marijuana (41 grams) located in the basement recreation room along with some other drug paraphernalia;
- Rolled money, approximately \$1,000, and loose bills located in the bathroom of the top floor the residence;

- Packaging materials located in the upstairs bedroom as well as approximately \$190 and 2 cell phones.

[6] In a warned and *Charter* compliant statement, Mr. Smith advised that the marijuana in the rec room was not his as he claimed the basement is a separate unit in which at that time he believed his mother and her boyfriend were living. However, he claimed the marijuana in the bedroom. He claimed to have found the gun in a ditch on the side of the road but then altered that to say he had found the gun by the old barn which used to be beside the Tim Horton's in Timberlea and that he also found the ammunition there for it. Towards the end of the interview he stated he wished he'd never "bought" that gun but almost immediately corrected that to say, "I wish I'd never found the gun".

[7] He also stated that he only sold marijuana to five of his friends to make a little extra money this way. He usually was selling it in the form of singles or dime bags.

[8] Mr. Smith has been released on the recognizance, for about a year and a half, with the condition that he remain in his residence from 9 p.m. until 6 a.m. the

following day, seven days a week except as indicated below, and that would be for employment, medical emergency exceptions, and such.

[9] I also have the benefit of a Presentence Report dated March 17, 2014. It indicates that Mr. Smith has no previous criminal record. He was born October 17, 1992 and therefore is a youthful offender.

[10] The Presentence Report outlines that Mr. Smith was raised by his mother, Karen Baker, in the Timberlea area. In order to support them, his mother was often working two jobs. This meant that often Mr. Smith was therefore home alone. During that time he learned to do and continued to do, household chores such as cooking, cleaning and doing laundry, among other things.

[11] Mr. Smith left school at the end of grade 10 in 2008. He did not find the school experience was to his liking, as a result of an unspecified learning disability, which in combination with what he said was the violence and gang related issues at his school, which caused his attendance to suffer. He characterizes himself as a “self taught critical thinker”.

[12] In spite of his contact with family and non-family negative peer groups, he himself has avoided having a criminal record until he pleaded guilty to these offences.

[13] His mother confirms that he does not himself use drugs and does not have a substance abuse problem. Although she lived in close proximity to him in the building in which he rented from his aunt, she claims she was not aware that he had a gun. Mr. Smith stated he had not used non-prescription drugs in over five years nor had he consumed alcohol since March 2013.

[14] Greg Sullivan, the probation officer, summarized the situation as follows: “he described himself as a guy who was working full time and just happened to own a gun.”

[15] Mr. Smith similarly claims the gun had nothing to do with, or had no relation to his selling marijuana to his friends. He states he had the gun to help protect against animal such as coyotes when he is practicing his survivalist training.

[16] Mr. Sullivan characterized Mr. Smith “as an independent thinker who accepts little responsibility for the offences and has minimized and rationalized his actions. He has presented no indications of issues with substance abuse or anger management. He may benefit from educational upgrading or employment training if considered for a term of community supervision.”

[17] I note myself that the report confirms that Mr. Smith relies heavily on the internet to obtain information that is of interest to him.

[18] It is clear to me that Mr. Smith, throughout his life, had to be self-reliant. But for these offences, he has resisted being involved in criminal activity. He had, until these offences were discovered, a full-time job stocking shelves at the Clayton Park Sobey's store. Since that time he had worked in construction as a labourer, at Tim Hortons and at the Miller Waste facility, but given an anticipated term of custody he was facing, he had not made further efforts to find employment on a longer term basis.

[19] As is evident from his earlier filings in the court file, he has a tendency to associate himself with the "freeman on the land" beliefs.

[20] To my mind, all these circumstances point generally in the same direction. Mr. Smith has been forced, through circumstances, to rely very much upon himself since a very young age. His ability to advance his education or training has been limited by factors fairly characterized as beyond his control.

[21] It seems to me that this self-reliance has created in Mr. Smith a belief that his actions, such as these offences, are simply a matter of him doing what he has to

do to survive in society. He sees himself, therefore, as a “self-taught critical thinker”, and this reinforces his belief that these offences are not that serious.

[22] In spite of that belief, and the associated minimization of the seriousness of these offences by Mr. Smith, I do view the Presentence Report as generally positive.

[23] I say this because in spite of those beliefs, Mr. Smith is self-reliant, and has avoided criminal activity other than these offences, in circumstances where others in his position may have easily been drawn into criminal activities. He has made a great number of positive decisions throughout his young life – he does not have substance abuse issues; he does not, prior to these offences, have a criminal record. He has the makings of a person who could become a productive member of society and his potential for rehabilitation is excellent.

[24] I note that he has pleaded guilty. He has given a statement to the police upon arrest. He did assist in the removal of four items, prohibited weapons – taking them out of circulation by assistance to the police, and of course he has been on his release conditions for 18 months and without incidence as I understand it.

[25] Unfortunately, however, these convictions will create obstacles for him. They will place him in the company of a negative peer group and they will saddle him with a criminal record.

[26] However, I am hopeful that he will take the time during the sentence to reassert his self-reliance, and begin building a more positive future for himself, taking advantage of the time and educational/training opportunities that exist there to support his rehabilitation.

[27] Now, turning to the joint recommendation here.

[28] I have before me a joint recommendation by the Crown, and agreed to by Mr. Smith during the resolution conference held with Justice Arnold. The details of the Crowns' positions are contained in their March 18, 2014 jointly filed brief.

[29] The provincial and federal Crown suggest to the Court an appropriate sentence here is two years in custody in a federal penitentiary followed by 12 months probation. They cite in support of that recommendation that Mr. Smith has no prior criminal record, and that he has pleaded guilty to these serious offences - and implicit I will say in that is that, they view his potential for rehabilitation as very good.

[30] They would break down the sentence of custody as follows.

[31] For the three counts of s. 88(1) of the *Criminal Code*, the recommendation is that each one should be one month in jail consecutively for a total of three months. In relation to the s. 86(2) *Criminal Code* count, it should be a three month sentence consecutive. For the s. 92(1) *Criminal Code* count, they recommend a further five months in jail consecutive. For the s. 96(1) *Criminal Code* count, which has a minimum punishment of one year jail, the Crown suggests the minimum period of punishment, which is one year. For the s. 90 *Criminal Code* count, they suggest it is appropriate that one month in jail consecutive be imposed. Finally, for the s. 5(2) *Controlled Drugs and Substances Act* trafficking conviction, the Crown recommends a six month jail sentence served concurrently, such that the total sentence in custody is 24 months in a federal institution.

[32] I certainly recommend to the Correctional Services authorities that Mr. Smith be very seriously considered for educational and employment training during his custodial sentence. To the extent that he can obtain upgrading in his education and skills, and not be drawn into the negative subculture of the criminal peer group with which he is incarcerated, we may all expect his rehabilitation to be a success.

[33] The prosecution also recommends 12 months probation with conditions to follow his period of custody. Those conditions include the statutory conditions which have to be included in every order in s. 732.1(2), as well as conditions that he:

- Abstain from owning, possessing or carrying a weapon (and that would be as defined in the *Criminal Code*);
- Abstain from the consumption of drugs, including but not limited to those defined in the *Controlled Drugs and Substances Act*, except in accordance with a medical prescription;
- Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer;
- Attend for assessment counseling or a program intended to protect society and/or facilitating your successful reintegration into the community, as directed by your probation officer;
- Participate and cooperate with any assessment, counseling or program above-noted as directed by your probation officer.

[34] Lastly, the Crown seeks further orders; that is, pursuant to s. 109(1) and 109(2) of the *Criminal Code*, a Prohibition Order, and for Mr. Smith not having a previous record the applicable section is s. 109(1)(c) and specifically section (2) which reads:

(2) An order made under subsection (1) shall, in the case of a first conviction for or discharge from the offence to which the order relates, prohibit the person from possessing

(a) any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance during the period that

(i) begins on the day on which the order is made, and

(ii) ends not earlier than ten years after the person's release from imprisonment after conviction for the offence or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence; and

(b) any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

[35] I note here as well, just for the record, that a .32 calibre handgun is a "prohibited firearm" under the definition in s. 84 of the *Criminal Code*.

[36] The question ultimately is: should I accept the joint recommendation made by the Counsel and Mr. Smith here? A joint recommendation, which I will presume without deciding, is technically a correct description where a self-

represented individual is involved, should fall within a range of sentences that would be appropriate for similar offenders in similar circumstances.

[37] The prosecution has drawn to my attention a number of cases:

- *R. v. McKenna*, 2012 NSSC 177 – that case involved a plea of guilty to various firearms related offences and breaches of recognizance for which Mr. McKenna received a global sentence of four years;
- *R. v. Greencorn*, 2014 NSPC 2 – a global sentence of one year was imposed for trafficking, contrary to s. 5(2) *Controlled Drugs and Substances Act* and one count under s. 92(1) and s.145(3) of the *Criminal Code*. Mr. Greencorn was 22 years old when sentenced, and had a previous criminal record;
- *R. v. Harvey*, [2004] O.J. No. 5786 – the Superior Court determined that a global sentence of 18 months was appropriate for a 24-year-old offender convicted of possession of a handgun obtained by theft, possession of a restrictive firearm (a colt 45 semi-automatic) without authorization, misleading police, and possession of a restricted

weapon (a switchblade). The loaded handgun had been concealed in a car;

- *R. v. Nur*, 2011 ONSC 4874 –Justice Code of that Court reviewed what would have been a fit sentence prior to the mandatory minimum sentences that emerged in 2008 in relation to a 19-year-old offender in possession of a loaded prohibited handgun. He sentenced the youth to 40 months imprisonment. Between paragraphs 41 and 45 Justice Code found that the range of sentences for such offences and such offenders is from between “two years less a day to three years imprisonment”.

[38] In relation to joint recommendations as made by counsel and, in this case, Mr. Smith, as to the appropriate range of sentences in criminal matters, our Court of Appeal has repeatedly emphasized that sentencing judges, such as myself, must give very serious consideration to the recommendations presented, and that the judge must assess whether the recommendation is within the acceptable range of sentences; and even where it is outside that range it ought to be given serious consideration bearing in mind that there are also practical constraints on disclosure of important information to the Court and legitimate factors which may have

influenced the parties involved to give the joint recommendation – See *R. v. MacIvor*, 2003 NSCA 60; *R. v. GEP*, 2004 NSCA 154; *R. v. Cromwell*, 2005 NSCA 137, and more recently, a Court of Appeal decision *R. v. Wright*, 2010 NSCA 30.

[39] The appropriate range of sentence is dependent upon a similarity between this offender and these circumstances, and other offenders and circumstances.

[40] Recently our Court of Appeal has spoken about sentences in relation to trafficking contrary to the *Controlled Drugs and Substances Act* in *R. v. Scott*, 2013 NSCA 28 and *R. v. Howell*, 2013 NSCA 67.

[41] In *Scott* the trial judge imposed a conditional sentence of two years less one day plus one year probation for having had possession for the purpose of trafficking 30 grams of powdered cocaine in his vehicle, as well as scales and a small amount of marijuana and \$280 in cash. The Crown had sought 30 months imprisonment. Defence counsel sought a conditional sentence and the majority of the Court of Appeal, being Chief Justice McDonald and Justice Beveridge writing the decision, concluded the sentence was not manifestly unfit or unreasonable. The third member of that panel, Justice Saunders, vigorously dissented in principle, and concluded that Mr. Scott ought to have received a sentence of 2 ½ years in prison,

which is 30 months as requested by the Crown. Though given his extended period of release while he had received a conditional sentence, Justice Saunders was not prepared to have him re-incarcerated and therefore would have suggested a more stringent conditional sentence order than would have been imposed by the majority in those specific circumstances.

[42] In *R. v. Howell*, Justice Beveridge, writing for himself and Justices Farrar and Bryson, dismissed the Crown's appeal of the conditional sentence order of two years less one day imprisonment imposed after conviction for possession of cocaine for the purpose of trafficking. Mr. Howell was a low-level street dealer of cocaine supporting his drug habit, and only had one gram of cocaine in his possession when arrested.

[43] I also refer to the principles of sentencing which are contained in s. 718 to 719 of the *Criminal Code of Canada*. Specifically in relation to illegal drugs, s. 10 of the *Controlled Drugs and Substances Act* can also have relevance but it has not been argued as applicable here and it doesn't appear that it is.

[44] In assessing the appropriate range of sentence specifically relevant to Mr. Smith I keep in mind the cases cited to me. In assessing the appropriate specific

range of sentence that could be imposed upon Mr. Smith I keep in mind the principles of sentencing and specifically ss. 718 and 718.2.

Conclusion

[45] The joint recommendation herein is for two years imprisonment and 12 months probation to follow. I accept the recommendation and impose a sentence of two years imprisonment in a federal penitentiary, broken down as suggested by the Crown, to be followed by 12 months probation with the conditions sought by the Crown and outlined earlier – and when I say “sought by the Crown”, it is a joint recommendation, so it’s agreed to by Mr. Smith as well.

[46] Furthermore, I impose a mandatory Firearms Prohibition Order pursuant to s. 109(1)(c) and subsection (2) of the *Criminal Code* in relation to the s. 5(2) of the *Controlled Drugs and Substances Act* trafficking conviction. Thus, Mr. Smith will be prohibited, as I indicated, from being in possession of any prohibited firearms, restricted firearms, prohibited weapons and prohibited devices and ammunition for life; and any firearm otherwise, crossbow, restricted weapon, ammunition and explosive substance during a period beginning today and ending 10 years after Mr. Smith’s release from imprisonment after the conviction for these offences.

[47] I also note that s. 5(2) is a “secondary designated offence” under s. 487.04 of the *Criminal Code* regarding possible DNA orders, but that no order was sought here, and therefore none will be granted.

[48] All the exhibits here, as is usual, will be forfeited – those are those offence related items pursuant to s. 16 of the *Controlled Drugs and Substances Act*. As well, the .32 calibre firearm, which is a prohibited firearm, will be forfeited pursuant to s. 491(1) of the *Criminal Code*.

[49] As to recommendations, I recommend to the Correctional Services authorities, as I stated earlier, that Mr. Smith be very seriously considered for educational and employment training during his custodial sentence. To the extent that he can obtain upgrading in his education and skills, and not be drawn into the negative subculture of the criminal peer group with which he is incarcerated, we may all expect his rehabilitation to be a success.

[50] Now I note, gentlemen, that there are other counts on the Indictment which were not dealt with, so is it appropriate to consider those dismissed for want of prosecution?

[51] CROWN [both]: Yes, My Lord, the Crown will be offering no evidence on the remaining counts.

[52] THE COURT: So that means Counts No. 2, 3, 4, 8, and 10 are then dismissed for want of prosecution – which means, Mr. Smith, that they are ...

[53] MR. SMITH: Withdrawn?

[54] THE COURT: Better than that in some respects, yes, so that you wouldn't be subject to any further penalties or proceedings on those.

[55] MR. SMITH: Okay, Your Honour.

[56] THE COURT: Alright, anything further gentlemen on that?

[57] MR. MacKAY: My Lord, I will draft the Forfeiture Order if that's agreeable?

[58] THE COURT: Okay, is that the s. 16 and the 491(1) or ...

[59] MR. MacKAY: I don't think they need separate Orders ... I think the forfeiture of the weapon can be dealt with in relation to the Prohibition Order perhaps as well.

[60] THE COURT: I'm sorry .. oh, because there's a section on there I think, yes.

[61] MR. MacKAY: My friend drafted the Prohibition Order – it seemed to have a section ...

[62] THE COURT: Okay, we're just talking about the Firearms Order, Mr. Smith. There is a portion of that that requires any prohibited firearms to be surrendered so effectively the police have therefore already seized it, so it's in their custody.

[63] MR. MacKAY: It says ... it does say "surrender" so perhaps I'll include the s. 491 in my Order as well.

[64] THE COURT: Which, again, is a mandatory order as well. So, Mr. Smith, that then is the sentence of the Court. As I say, you know you've made a lot of good decisions in your life and you have shown self-reliance, and I really hope you maintain your independence as it were – remain self-reliant, doing the right things; and avoiding such, which you hadn't done really very well at becoming involved in this, criminal activity, while you're incarcerated, which necessarily places you in the company of people who are already criminals themselves. But if you can get through that, and maybe get some skills, upgrading, and you have an interest in the internet, so perhaps there is something that could be done there that might be able to assist you in the future. This is the beginning of

your life – this particular sentencing should not define your life, and I hope you don't let it define your life.

Rosinski, J.