

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Casey*, 2017 NSPC 55

Date: 20170313

Docket: 2966641

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Tyvon Randell Casey

Judge: The Honourable Chief Judge Pamela Williams, CJPC

Heard: February 17, 2017, in Dartmouth, Nova Scotia

Decision March 13, 2017

Charge: 5(1) of the **Controlled Drugs and Substances Act**

Counsel: Mark Donohue, for the Crown
Jonathan Hughes, for the Defence

By the Court:

Introduction

[1] Tyvon Casey is charged with trafficking in cocaine, contrary to section 5(1) of the *Controlled Drugs and Substances Act*.

[2] On October 19, 2016 Mr. Casey elected to be tried in Provincial Court and entered a guilty plea. Sentencing was adjourned for the preparation of a pre-sentence report.

[3] On February 17, 2017, the Federal Crown recommended a two year sentence indicating that a deterrent message must be sent.

[4] The Defense sought a suspended sentence with probation in the range of 30 to 36 months.

Circumstances of the Offence

[5] On January 20, 2016, an undercover operator approached Mr. Casey, asking for a '40'. In exchange for 2 twenty dollar bills, Mr. Casey supplied a small tinfoil ball containing .23 grams of crack cocaine.

Circumstances of Mr. Casey

[6] Presently, Mr. Casey is a 21-year-old African Nova Scotian young man and a father of two young daughters, ages 3 and 1. He has been in a four and a half year relationship with their mother and they continue to live together as a family. He works fulltime and is the sole financial support for the family.

[7] Information about Mr. Casey's background and circumstances are outlined in a pre-sentence report dated January 9, 2017, character letters and oral submissions.

[8] Mr. Casey was raised, along with his older brother, by a single mom. He never had regular contact with his father. According to his mom, Mr. Casey was 'always a good-hearted kid who did not pose any behavioral concerns when he was a child'.

[9] In her letter of support dated January 11, 2017 she states that ‘Tyvon has played basketball most of his life, even played soccer. He is well liked by many people, his teachers, coaches, community. He was a member of the Boys and Girls Club growing up and graduated high school at the age of 17. He is a day to day DAD, not just a father’.

[10] She goes on to say that this offence is so unlike her son:

Tyvon growing up always had a good heart and was polite and kind and willing to help out people. He has a huge heart. I remember a time when I was trying to borrow money to get some food for the house and at the time my dad wasn't getting paid for a few days for me to borrow from, and Tyvon had his birthday money saved up and he went into his room and brought it to me and said, “Mom, I was saving this to get the Jordan sneakers I wanted but you need it more for food for the house”. He told me sneakers can wait.

[11] She adds:

And all I can think about is how his daughters will not be waking up every morning to their dad who they have had in their life every day. And yes, Tyvon made that choice, made the wrong choice. I think that he went through something when I left 2 years ago, to go to Alberta to do something in life for myself. I raised my boys and they had to live on their own like I had to. I thought he was ready, he had a one year old and was working and he and his girlfriend were living together and I thought he would be good. He took it harder than I thought he did. He felt I left him and forgot him.

[12] Mr. Casey's girlfriend confirms that they have been in a relationship for four and a half years, and they currently live together. It is described as a good relationship. She states that Mr. Casey is a hard worker and that he is really good with the children and with her, always making sure they are taken care of. She has no concerns with respect to alcohol or drug use. She indicates ‘that she was shocked when she learned what happened and although she could see where he was coming from (as he did it to provide for his family) he should not have done it and she does not believe he will do it again’.

[13] Mr. Casey is currently employed by a residential basement waterproofing company. In a letter of reference dated February 14, 2017, his employer states that he has known Mr. Casey for approximately four years, since originally being employed with his company for 12 months in 2013. He adds that he was ‘happy to welcome Mr. Casey back to the company in October 2016, and considers him to be a valuable employee’.

[14] According to his employer, Mr. Casey is employed as a laborer and works on 'Crew #1' and as such is in upwards of five customers' homes per week. He states:

He has proven to be a reliable employee, arriving to work on time for his scheduled shifts and working long hours when required. Tyvon's great work ethic and efficiency have been some of the characteristics mentioned by his foreman in our monthly reviews. It should be noted that we survey our customers/homeowners after each job, and Tyvon has received numerous compliments for being polite, courteous and hardworking. Tyvon's positive attitude, personable nature and skill has gained him the opportunity to be promoted in the near future. We have recently met with him to express we are interested in him taking on the responsibility of being a foreman and running his own crew once his license is reinstated. Mr. Casey is a great asset to our company and I look forward to seeing his professional growth.

[15] Mr. Casey says that he does not have any addiction issues. He admits to having started drinking at age 19 but following his impaired driving charge in 2015, he 'does not really drink now as he works everyday'. He advises that none of his friends have criminal records, nor does his girlfriend.

[16] As for the offence, Mr. Casey accepts responsibility for his actions and said that he was not getting a lot of hours at work at the time. It was 'quick and easy' money, although he states that it will not happen again. Mr. Casey has one prior unrelated conviction as noted above.

[17] A senior outreach worker with Ceasefire Halifax (a non-profit organization, based in the Halifax Regional Municipality which focuses on eliminating violent behavior among youth in Black Nova Scotian communities), confirms that Mr. Casey is a participant with this organization and has reached out for support in changing his behavior. Mr. Casey has also been volunteering at a youth drop-in program at the Dartmouth Boys and Girls Club and has already completed 30 hours. He is also scheduled to volunteer at the SMART program as a mentor starting February 28, 2017.

Sentencing Principles

General

[18] Sentencing is arguably one of the most difficult, yet crucial functions of a trial judge. On the one hand, it is a very individualized process; on the other, it also requires the balancing of societal interests and the application of law.

[19] In sentencing Mr. Casey, I must apply the principles and factors set out in sections 718, 718.1 and 718.2 of the *Criminal Code* and section 10 of the *Controlled Drugs and Substances Act*.

Criminal Code of Canada

[20] The overarching objectives of sentencing are to protect the public and to contribute to respect for the law and to maintain a safe society. This is to be accomplished by imposing just sanctions that have, as their goal, one or more of the following: denunciation, deterrence – both general and specific, separation of offenders from society where necessary, rehabilitation, promotion of responsibility in offenders, and acknowledgement of harm done to victims and the community.

[21] The fundamental principle of sentencing, per section 718.1 is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[22] Section 718.2 requires that I consider the mitigating and aggravating factors related to the offence and the offender, the principles of parity and proportionality, that an offender should not be deprived of liberty, if less restrictive sanctions are appropriate in the circumstances and that 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.

Controlled Drug and Substances Act

[23] Section 10(1) of the *Controlled Drugs and Substances Act* states that the fundamental purpose of any sentence 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 community.

[24] Pursuant to section 10(2), when the offence is not one which mandates a minimum punishment, I am to consider any relevant aggravating factors related to the commission of the offence, a prior related conviction or/and whether he/she engaged the involvement of a person under 18 years of age. Further, if there are relevant aggravating factors, but I decide not to sentence the person to imprisonment, I must give reasons for that decision.

[25] In this case, there are no section 10(2) relevant aggravating factors identified.

[26] Although I do not have the benefit of a cultural impact assessment, I do take judicial notice of pervasive historical systemic and institutional racism which has plagued this province for hundreds of years as well as the over-representation of young African Nova Scotian males in our jails.

[27] In balancing the purpose and principles of sentencing I must be forever mindful of the ultimate goal, that is, the long-term protection of society. Established case law provides guidance in this regard. However the unique circumstances of each case must be factored into the determination.

Denunciation and Deterrence

[28] Time and again the Nova Scotia Court of Appeal have said that denunciation and general deterrence are to be the primary considerations when sentencing those who traffic in Schedule I drugs. (Examples include *R. v. Steeves*, 2007 NSCA 130; *R. v. Butt*, 2010 NSCA 56; *R. v. Scott*, 2013 NSCA 28; *R. v. Oickle*, 2015 NSCA 87). As stated by my colleague Judge Buckle in *R. v. Rushton*, 2017 NSPC 2, a very thorough and thoughtful decision on which I will comment further, ‘emphasizing these objectives reflects society’s condemnation for these offences and acknowledges the tremendous harm they do to communities’.

Rehabilitation

[29] Rehabilitation remains an important objective, despite the need to emphasize denunciation and deterrence. As noted by Buckle, J. in *R. v. Rushton (supra)*:

[65] ... This was recently confirmed by the Supreme Court of Canada in *Lacasse (supra)* (2015 SCC 64) where, in the context of a sentence appeal for the offence of dangerous driving causing death, Wagner, J., writing for a majority, said:

One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.

[30] And as Buckle, J. points out at paragraph 66 of the *Rushton* decision, citing our Court of Appeal in *R. v. Bratzer* (2001 NSCA 166), the rehabilitative objective of sentencing is even more important when dealing with youthful offenders even for serious crimes.

[31] In *Bratzer*, Bateman, J. accepted the comments of the Ontario Court of Appeal in *R. v. Quesnel*, (1984), 14 C.C.C. (3d) 254. In reviewing a trial judge's acknowledged lenient sentence respecting a youthful offender, they stated:

[3] There can, of course, be no quarrel with the proposition that from time to time a judge sentencing a convicted person, particularly a youthful one as in this case, should indeed "take a chance" on such person by exercising leniency in circumstances where leniency might not otherwise appear to be called for. In our opinion, however, there must be some factor present in the case before the sentencing judge that is sufficient to warrant a reasonable belief on his part, going beyond a mere hope, that the leniency proposed to be extended holds some prospect of succeeding where other dispositions available to him may fail.

Proportionality

[32] The principle of proportionality requires that I consider the gravity of the offence and the degree of responsibility of the offender.

[33] Trafficking in cocaine, a Schedule I substance is a very serious offence, attracting a maximum sentence of life imprisonment. It can no longer be considered for a conditional sentence of imprisonment.

[34] I echo Buckle, J. comments in *Rushton*, (*supra*) at para. 71:

[71] The tremendous harm that comes from trafficking these substances has been repeatedly commented on by our Court of Appeal and can be seen in this and other courts every day. Going back to the Court of Appeal's decision in *R. v. Huskins*, 95 N.S.R. (2d) 109, and perhaps before, the Court of Appeal has recognized the "creeping evil" and danger of cocaine. In *Butt* (*supra*) at para. 13, the court referred to cocaine as a deadly and devastating drug that ravages lives. People who traffic in cocaine take of the vulnerabilities of others. Some do it for

profit and some do it because they are themselves addicts with the same vulnerabilities as those they sell to.

[35] Admittedly, Mr. Casey is not an addict. Although he admits ‘it was quick and easy money’, he was a very young father, 20 at the time of the offence, trying to support his family at a time when work was scarce. He made a poor choice.

[36] As to his degree of responsibility, from all accounts, this was an isolated event. Mr. Casey trafficked a small amount of cocaine for \$40, clearly falling within the category of a “petty retailer” as set out in *R. v. Fifield*, [1978] N.S.J. No. 42. This is not an individual “opposed to holding gainful and lawful employment” with a “high degree of moral blameworthiness” as described by Hill, J. in *R. v. Andrews*, [2005] O.J. No. 5708. Nonetheless, Mr. Casey must be held accountable.

Aggravating and Mitigating Factors

[37] As set out in section 718.2 of the *Criminal Code*, I must consider the aggravating and mitigating factors related to the offence and the offender:

Aggravating Factors:

- The substance itself, cocaine;
- Mr. Casey has a criminal record, albeit one prior conviction for failing the breathalyzer, when he was 19 years old;

Mitigating Factors:

- Mr. Casey is a youthful offender;
- He pleaded guilty at a relatively early opportunity;
- He is remorseful and has learned his lesson;
- His record is limited and unrelated;
- There has been no further offending behavior, whatsoever since his arrest over a year ago;
- He has strong family and community support. He is in a stable four and a half year relationship and resides with his partner and their two young

children. His mother and employer are also supportive. He is the sole supporter for his family;

- Mr. Casey works fulltime and from all indications, he is both a hard worker and a likely candidate to take on a leadership role in the workplace. He is described as a ‘valuable’ and ‘reliable employee’, having ‘received numerous compliments for being polite, courteous and hardworking’.
- He demonstrates pro-social behaviors and a desire to be rehabilitated. Mr. Casey is enrolled as a participant with Ceasefire Halifax seeking support in changing his behavior. He meets twice weekly with an outreach worker. Additionally, he volunteers at a drop-in program at the Dartmouth Boys and Girls Club, having already completed 30 hours. He also intends to volunteer at the SMART program as a mentor as of February 28th.

Parity and Range of Sentences

[38] I must consider the range of sentences imposed for trafficking in cocaine and other Schedule I substances. As noted by Buckle, J. in *Rushton (supra)*, a long list of decisions from our Court of Appeal establish that cocaine traffickers should generally expect to be sentenced to imprisonment in a federal penitentiary (See: *R. v. Steeves*, 2007 NSCA 130; *R. v. Knickle*, 2009 NSCA 59; *R. v. Butt*, 2010 NSCA 56; *R. v. Jamieson*, 2011 NSCA 122; and *R. v. Oickle*, 2015 NSCA 87).

[39] I agree with Buckle, J. at para. 81 when she states:

[81] The Court, however, has never established that a federal penitentiary term is mandatory and has recognized that in some circumstances the principles of sentencing can be otherwise satisfied. In those cases, shorter periods of custody served in a provincial institution or in the community under a conditional sentence order, when those were available have been accepted. (See for example: *R. v. Scott*, 2013 NSCA 28 and *R. v. Howell*, 2013 NSCA 67).

[40] It is worthy of note that in *Scott (supra)* at para. 53, the Court determined that it was not necessary for a sentencing judge to find ‘exceptional’ circumstances to justify a sentence lower than two years for trafficking cocaine. I must consider all of the relevant objectives and principles of sentence as set out in the *Criminal Code*, balancing them and arriving at what I conclude to be a proper sentence (para. 26).

[41] As to the range in Nova Scotia for cocaine trafficking, I agree with Buckle, J.’s assessment at para. 85 and 86:

[85] Based on the majority decision in *Scott (supra)* and its interpretation of the previous cases, I would say that the range in Nova Scotia for cocaine trafficking includes incarceration in a penitentiary and incarceration in a provincial institution or a lengthy conditional sentence order (when that was an available sentence). The lower end of the range has generally been used in cases involving one or more of the following: addictions; youth; limited or no prior record; relatively small amount of the drug; some hope of rehabilitation; and, absence of aggravating factors.

[86] As was noted in *Oickle (supra)*, the range across Canada is broader and includes, in some provinces, intermittent sentences or suspended sentences with probation (see for example: *R. v. Peters*, 2015 MBCA 119; *R. v. McGill*, 2016 ONCJ 138; *R. v. Maynard*, 2016 YKTC 51; *R. v. Voong*, 2015 BCCA 285; *R. v. Carrillo*, 2015 BCCA 192; *R. v. Ferguson*, 2014 BCCA 347; *R. v. Arcand*, 2014 SKPC 12; and *R. v. Yanke*, 2014 ABPC 88).

[42] Sentence parity is important. It permits greater consistency among sentences. We as sentencing judges are reminded however that ‘they are guidelines rather than hard and fast rules’ and that we are permitted to go outside the established range for a given offence provided the sentence imposed is a lawful one and that it adequately reflects the principles and purposes of sentencing (*R. v. Nasogaluak*, 2010 SCC 6 at para. 44).

[43] And the words of Wagner, J. in *Lacasse (supra at para. 58)* bear repeating:

[58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are [page 1119] difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender’s degree of responsibility and the specific circumstances of each case ...

Reasonable Alternatives to Custody

[44] Finally, I am to consider that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances and that 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.

[45] Based on the contents of the Pre-sentence Report and other documents filed, I am satisfied that there is no need to deter Mr. Casey. The very real risk that incarceration poses to Mr. Casey - the loss of daily access to his family and their continued financial support and security - has had a profound impact.

[46] Furthermore, Mr. Casey has proven his ability to be rehabilitated. He is fully employed, indeed, a potential candidate for advancement; he has sought out the services of an outreach worker from Ceasefire Halifax to learn ways of improving himself. He is giving back to his community and will soon serve as a mentor to others.

[47] The question remains whether denunciation and general deterrence can be satisfied by imposing a non-custodial sentence or is custody the only reasonable alternative. We know that generally when denunciation and general deterrence are emphasized, imprisonment is most often required. And we know that most cases involving the trafficking of cocaine, attract sentences of two years or more.

[48] I agree with Buckle, J. in *Rushton (supra)* at para. 95 when she says that ‘pre-sentence or extra-judicial consequences can and often do have a collateral denunciatory and deterrent impact’ and can ‘provide significant and meaningful consequences that resonate with the specific offender and the public at large’. As well, Buckle J. points out that non-custodial sentences including probation can have denunciatory and deterrent aspects citing *R. v. George* (1992), 112 N.S.R. (2d) 183 (C.A.); *R. v. Martin*, 154 N.S.R. (2d) 268 (C.A.); and *R. v. R.T.M.*, 151 N.S.R. (2d) 235 (C.A.)).

[49] A suspended sentence can have a deterrent effect because a breach can result in revocation and sentencing, which, in this case, would certainly result in a lengthy custodial sentence. This has been recognized by our Court of Appeal in *R. v. Emerson*, [1993] N.S.J. No. 169: a suspended sentence, when properly administered can be rigorous.

[50] We also know that the Supreme Court of Canada in *R. v. Shoker*, 2006 SCC 44 at para. 13 and 15 acknowledged that supervised probation is a restraint on freedom and that optional conditions in a probation order can be imposed when it is established there is a ‘nexus between the offender the protection of the community and his reintegration into the community’. Imposing conditions for the protection of the community may have a deterrent and denunciatory effect.

Conclusion

[51] Harkening back to the fundamental purpose of sentencing: 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, I conclude that a penitentiary sentence is not required.

[52] If I am required to find that exceptional circumstances exist in this case, I find that they do. Mr. Casey is youthful; he has but one prior unrelated conviction; he exhibits remorse, and he has done much to rehabilitate himself since the commission of the offence. This young African Nova Scotian male is fully employed and supporting his family of four; he is volunteering in his community and is a positive, pro-social role model for others.

[53] I have considered whether a shorter period of custody in a provincial institution is necessary to address denunciation and general deterrence. It would have the effect of removing him from society, for a period, despite the fact he poses no present danger to the public. It would also place him amidst pro-criminal influences, perhaps of the kind that prompted him to offend in the first place. And of course, society would be tasked with funding his period of incarceration and financially supporting his family during that time.

[54] I am convinced that suspending the passing of sentence and placing Mr. Casey on probation is the best means of assuring the long-term protection of the public. Once again I agree with Buckle, J. in *Rushton (supra)*, when she says that ‘when used as it was intended, a suspended sentence allows for there to be a meaningful incentive ... to continue good behavior and efforts toward rehabilitation’.

[55] Mr. Casey will be afforded the opportunity to continue his efforts toward rehabilitation and be a meaningful contributor to society. Supporting his family, both financially and emotionally, maintaining full-time employment and being a role model in his community will serve everyone’s best interests.

[56] Not to at all minimize the serious nature of this offence, a custodial sentence for this ‘one off’ would serve to further marginalize a member of our community who has demonstrated an ability to rehabilitate himself and serve as a valuable role model for others.

[57] The probation order will include conditions that will assist with Mr. Casey's rehabilitation and will have a punitive effect, including a curfew and substantial community service hours. I will also monitor his progress, directing that he report back to the Court at regular intervals.

[58] I am mindful that this sentence is not within the general range for this offence in our province. However, given the small quantity of cocaine trafficked and the very real and positive strides made by Mr. Casey in the interim, I am satisfied that this is a fair and just disposition.

[59] I suspend the passing of sentence and place Mr. Casey on probation for 36 months.

[60] The conditions of probation are as follows:

- Statutory conditions, including that you attend back before the Court on specified dates so that I can monitor your progress, with reporting back, initially every 3 months the first of which will be on June 5, 2017 at 9:30 am.
- Report to a probation officer today and thereafter as directed
- Not to possess or consume alcohol or any other intoxicating substances
- Not to possess or consume a controlled substance as defined by the *Controlled Drugs and Substances Act* except in accordance with a physician's prescription or a legal authorization
- Attend for, participate in and complete any assessment, counselling or treatment as directed by Probation Services, including mental health counselling and substance abuse counselling
- Submit to urinalysis or other screening to determine the presence of alcohol or drugs in his system
- Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer
- For the first 12 months of the Order, to comply with a daily curfew in your residence from 9 pm to 6 am with exceptions for medical emergencies for yourself or a member of your immediate family, for employment purposes, to comply with completion of your community service or with the

prior written approval of your probation officer and prove compliance with the curfew; and,

- Complete 240 hours of community service, preferably in the African Nova Scotia community within the first two years of your probationary period.

[61] There will also be the following Ancilliary Orders:

- Mandatory Victim Fine Surcharge payable by September 11, 2017
- Section 109 firearm/weapon prohibition for 10 years
- DNA Order for the databank

Pamela Williams, CJPC