SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Forward*, 2017 NSSC 190

Date: 2017-07-07
Docket: Bwt No. 454364
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Wayne Derek Forward

Judge: The Honourable Justice Gregory M. Warner

Oral Submissions: June 21, 2017, at Bridgewater, Nova Scotia

Oral Decision: July 7, 2017, at Kentville, Nova Scotia

Counsel: Rachel Furey, crown attorney
David Hirtle, counsel for the accused

By the Court:

Overview

[1] On April 21, 2017, this court convicted Mr. Forward of possession for the purpose of trafficking cocaine, MDMA and cannabis marihuana after several days of motions and trial. Cocaine and MDMA are Schedule I drugs. Submissions on sentencing were made on June 21, 2017. This sentencing decision was adjourned to July 7, 2017 at the offender's request.

Circumstances of the offence

[2] Pursuant to a search warrant the RCMP searched Mr. Forward's home on February 11, 2014, and found 20 grams of cocaine, 56 grams of MDMA, 183 grams of marihuana, 2 sets of digital scales with hard-drug residue, 2 knives with hard-drug residue, dime bags and other drug sale paraphernalia, a substantial amount of cash in small denominations, as well as a note book containing what the court accepts was a score sheet recording transactions. A cell phone was seized from Mr. Forward that was seen to be shutting down when it was obtained from him, and which was missing its SIM card when examined. There were firearms in

a locked storage cabinet, a firearm in a gun bag in the kitchen and baseball bat in mid-winter next to the main entrance.

Circumstances of Mr. Forward

[3] Defence counsel requested a pre-sentence report. A report dated June 14th shows the following:

a) Mr. Forward is 33 years of age. He lives in his home with a common-law spouse, his five-year-old child and his father.

b) His mom was a stay-at-home mother. His parents did not use alcohol or drugs.

c) Mr. Forward has Grade 12 education. At the age of 18, Mr. Forward went to Fort MacMurray to work. He was trained and worked in the oil fields until 2008, when he returned to Nova Scotia.

d) He has not had steady employment since 2008. He is presently unemployed and, for the last six or seven years, on disability.

e) He met his present common-law partner in Alberta They have a five-year old daughter. There are no substance abuse issues in their

relationship. Mr. Forward is the primary care giver for their daughter while his partner works outside the home. He has no debt issues.

f) He says that he has several health issues – heart arrhythmia, sleep apnea, diabetes, high cholesterol and acid reflux. In 2014, he was operated for testicular cancer. He says he suffers from depression and anxiety, but takes no medication for it.

g) He says that he experimented with drugs when younger and has a medical marihuana license, but does not have any substance abuse issues.

h) He does not have a related criminal record.

i) Finally, in this report, he does not admit responsibility for the offences for which he was convicted.

Sentencing Principles

[4] The matrix in *R v. Rushton*, 2017 NSPC 2, is at great variance to that in this case, but the judge's recent review of the sentencing principles is an articulate guide.

[5] In sentencing Mr. Forward, I must apply the sentencing provisions in ss. 718, 718.1 and 718.2 of the *Criminal Code* and s. 10 of the *Controlled Drugs and Substances Act*.

[6] The objectives of sentencing are to protect the public and to contribute to respect for the law and the maintenance of a safe society. Section 718 instructs that this is to be done by imposing just sanctions that have, as their goal, one or more of the following: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

[7] Section 718.1 says that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[8] Section 718.2 requires that I consider the aggravating and mitigating factors relating 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 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.

[9] Section 10 of the *CDSA* incorporates these principles and specifically requires that a sentence encourage treatment of offenders in appropriate circumstances.

[10] The over-arching goal of long-term protection of the public informs how I balance the principles and purposes of sentencing and apply them to the facts to arrive at a fit sentence. The caselaw provides me with guidance as to how I should interpret and balance these principles and how they should be applied to different categories of offence. However, the best means of addressing the principles and attaining the ultimate objective will always depend on the unique circumstances of the case. Because of that, it has been consistently recognized that sentencing is an individualized process (*R v LaCasse,* 2015 SCC 64 at para. 1, and *R v M(CA),* [1996] 1 S.C.R. 500 at paras. 91-92.

Denunciation and Deterrence

[11] Our Court of Appeal has repeatedly stated that denunciation and general deterrence must be the primary considerations when sentencing those who traffic in Schedule I drugs. (*R v Steeves*, 2007 NSCA 130; *R v Butt*, 2010 NSCA 56; *R v Scott*, 2013 NSCA 28; *R v Oickle*, 2015 NSCA 87.) Emphasizing these objectives

reflects society's condemnation for these offences and acknowledges the tremendous harm they do to communities.

Rehabilitation

[12] Rehabilitation continues to be a relevant objective, even in cases requiring that denunciation and deterrence be emphasized. This was recently confirmed by the Supreme Court of Canada in *LaCasse* where, in the context of a sentence appeal for the offence of dangerous driving causing death, Wagner, J., writing for a majority, said at para. 4:

> 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.

[13] The rehabilitative objective of a sentence is a significant consideration when dealing with youthful offenders.

Proportionality

[14] The principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender requires that I first consider the gravity of the offence.

[15] Possession of cocaine and MDMA, Schedule I substances, for the purpose of trafficking are very serious offences. This is reflected by the fact that Parliament has set the maximum sentence at life imprisonment and removed the offences from consideration for a conditional sentence order.

[16] The tremendous harm that comes from trafficking these substances has been repeatedly commented on by our Court of Appeal. It has recognized the "creeping evil" and danger of cocaine. In *Butt*, at para. 13, the court referred to cocaine as a deadly and devastating drug that ravages lives. People who traffic in cocaine take advantage 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.

[17] The other aspect of proportionality is the degree of responsibility of the offender. Mr. Forward was found in possession of significant amounts of powdered cocaine, MDMA and cannabis marihuana, paraphernalia, and cash. The Crown and

defence agree that he falls within the definition of a petty retailer, as that term was described in *R v Fifield*, [1978] NSJ No. 42.

[18] There is no evidence that anyone else was involved in the offence. Mr. Forward is solely responsible. Sometimes courts have held that moral blameworthiness is reduced when the offender is young or an addict (selling to support his or her addiction). Mr. Forward does not fit into either category.

[19] In *Oickle,* Scanlan, J.A. questions whether addiction is properly considered a mitigating factor on sentencing for drug trafficking offences. He comments that the consequences of drug trafficking to individuals and communities is the same whether the trafficker is motivated by profit or addiction.

[20] An addiction certainly does not excuse criminal behavior, but it has been recognized by some courts as a factor which, when proven, can have a mitigating effect on sentence. Justice Hill of the Ontario Superior Court of Justice in *R v. Andrews,* [2005] OJ No. 5708, provides a summary of the philosophy behind this approach:

> **36** As a general rule, heroin and cocaine trafficking are properly seen as grave offences with a high degree of moral blameworthiness. Most often, these are planned crimes carried out for profit by individuals apparently philosophically opposed to holding gainful and lawful employment as opposed to simply conducting illicit drug

sales. Not surprisingly then, the overarching principles of sentencing in these cases have been denunciation and general deterrence.

37 That said, the law has tended to treat the addict who trafficks to support her habit somewhat differently - the profiteering for greed element is absent, a serious health issue emerges as context, and many question the efficacy of general deterrence in controlling the actions of one who is ill.

38 In *R v Smith*, (1987) 34 C.C.C. (3d) 97 (S.C.C.), Justice Lamer, speaking in the context of a drug importing case, stated, at page 124:

> The direct cause of the hardship cast upon their victims and their families, these importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts in order to feed their demand for drugs. Such persons with few exceptions (as an example, the guilt of addicts who import not only to meet but also to finance their needs is not necessarily the same in degree as that of cold-blooded non-users), should, upon conviction, in my respectful view, be sentenced to and actually serve long periods of penal servitude.

39 In a possession of heroin for the purpose of trafficking case, *R v Pimentel*, [2004] O.J. No. 5780 (S.C.J.), at paragraph 20, I stated;

> The gravity of the circumstances of an offender's involvement in marketing heroin may be mitigated in some measure by the existence of any of the following factors:
>
> 1) The offender is addicted to heroin. The onus is upon the offender to establish not only the addiction but also "a causal connection" between his or her addiction and the unlawful activity involving the drug in the sense that the addiction was at least a materially contributing cause for the criminality: *R v Holt* (1983), 4 C.C.C. (3d) 32 (Ont. C.A.) at 51. Where the evidence is "sketchy", the onus is not discharged: *R v Bahari*, [1994] O.J. No. 2625 (C.A.) at para. 4. Where the matters are proven: 'The courts have always distinguished between a drug addict who is trafficking for the purpose of supplying his habit and the non-addict who is trafficking purely out of motives of

> greed.' (*R v Mete*, [1980] O.J. No. 1438 (C.A.) at para. 12). See also: *R v Wright*, [1976] O.J. No. 1096 (C.A.) at para. 2; *R v McCarthy*, [1990] O.J. No. 2163 (C.A.) at paras. 2 and 3; *R v Bell*, [1976] O.J. No. 585 (C.A.) at para. 2; *R v Richards*, (1979) 49 C.C.C. (2d) 517 (Ont. C.A.) at 524-5; *R v Nguyen*, [1996] O.J. No. 2593 (C.A.) at para. 5; *R v Wood*, [1979] O.J. No. 855 (C.A.) at para. 5; *R v Zamini*, [1999] O.J. No. 3780 (C.A.) at para. 2.

40 In *R v Reid*, [2003] P.E.I.J. No. 118 (C.A.), at paragraph 19, the Court stated:

> While the addiction is not an excuse, it becomes relevant when a sentencing decision is made because of the potential for protecting the public in the long term by ordering the addictions issues to be treated as part of the sentence.

Mr. Forward discloses no substance abuse issues.

Aggravating and Mitigating Factors

[21] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender.

Aggravating Factors

[22] The nature of and serious harm caused by the two of the three substances - cocaine and MDMA.

Mitigating Factors

[23] The offender has no related criminal record.

Parity and Range of Sentences

[24] Section 718.2 requires consideration of the principle of parity. This necessitates an examination of the range of sentences imposed for trafficking cocaine and other Schedule I substances. A long line of cases from our Court of Appeal have established that cocaine traffickers should generally expect to be sentenced to imprisonment in a federal penitentiary (*Steeves*; *R v Knickle*, 2009 NSCA 59; *Butt*; *R v Jamieson*, 2011 NSCA 122; and *Oickle*).

[25] Our Court of Appeal has not 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 have been accepted. (For example, *Scott* and *R v Howell*, 2013 NSCA 67)

[26] In *Scott*, Beveridge, J.A., writing for the majority, concluded that it was not necessary for a sentencing judge to find "exceptional" circumstances to justify a sentence lower than two years for trafficking cocaine (para. 53). The task of a sentencing judge in imposing a sentence for cocaine trafficking is the same as any other offence – "considering all of the relevant objectives and principles of

sentence as set out in the *Criminal Code,* balancing those and arriving at what that judge concludes is a proper sentence" (para. 26).

[27] It is rare for a cocaine trafficker to receive a sentence less than a federal penitentiary sentence, but where the proper application of sentencing principles justifies that result, a sentencing judge is not required to make any specific conclusion that the circumstances are exceptional.

[28] In *Rushton*, Judge Buckle suggests that the lower end of the range has generally been invoked 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.

Reasonable alternatives to Custody

[29] Section 718.2 requires me 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.

[30] Based on the evidence in this case, I am satisfied that there is a need for specific deterrence of Mr. Forward. His failure to accept responsibility for his behaviour is not aggravating but does make specific deterrence a relevant consideration.

[31] Mr. Forward's personal circumstances, including his age, and the circumstances of the offence, contain nothing that would suggest that he is a good candidate for rehabilitation.

[32] In cases where denunciation and general deterrence must be emphasized, imprisonment will often be the only option for meeting those objectives (*LaCasse,* at para. 6). For Schedule 1 drugs, our Court of Appeal has repeatedly said that in most cases, denunciation and deterrence will require sentences to a federal penitentiary.

Position of the Crown and defence

[33] The Crown refers the court to Nova Scotia Court of Appeal decisions in *Oickle*, *Knickle* and *Steeves*. The Crown submits that the range for this type of offence and offender is two to five years. She submits 27 months is an appropriate sentence that would serve the purposes and principles of sentencing.

[34] The Crown states that the only mitigating factor is a lack of a related record. She notes the Court of Appeal's focus is on denunciation and general deterrence. This sentence should include a message to Mr. Forward and others. She notes that Mr. Forward was found in possession of not one but three prohibited drugs. If it was only marihuana, sentencing factors may have been different. She noted that Mr. Forward is not an addict, a factor that might reduce his moral blameworthiness. She notes that cases where sentences are at the lowest end of the range involve guilty pleas, youthful offenders or other significant mitigating factors. None of these mitigating factors apply to this case.

[35] Mr. Hirtle submits that Mr. Forward should be incarcerated for not more than 24 months. He submits that the failure to plead guilty is not an aggravating circumstance. He emphasizes the absence of a related criminal record and the fact that his family relies upon him. He is the primary care giver for his young daughter while his partner works outside the home. Mr. Forward's conduct, as found by the court, is in the lowest category described in *Fifield*. Defence counsel refers the court to the analysis in *Rushton* and *Scott*.

[36] In reply, crown counsel says that *Rushton* is a "outlier" decision, and outside the range. She notes that there are ranges, but submits there is nothing in the circumstances of this case that merits a sentence outside the usual range.

Conclusion

[37] Mr. Forward carries a high degree of moral blameworthiness. He alone is responsible for these offences. He does not have the excuse of an addiction. Common sense says his only motive was profit – profit at the expense and health of users, in circumstances that create serious risk to the safety of the community.

[38] The only mitigating circumstance in this case is the absence of a related record. It is particularly concerning that he was dealing in Schedule I drugs and cannabis marihuana. Those, often young people, to whom he may sell marihuana may be persuaded to graduate to much more dangerous hard drugs if so inclined or encouraged when these drugs are 'on the same shelf' as the soft drugs.

[39] Ranges for sentences do not form rigid fences; they are only guidelines to be applied to an individualized sentencing analysis. They reflect the parity principle. The range for possession for the purposes of trafficking in hard drugs is from two to five years – more or less.

[40] Mr. Forward was more than an accommodator of friends. Mr. Forward was a retailer. He was in business. I agree with both counsel that, based upon the principles of parity and proportionality, his sentence should be in the low end of

the range. No circumstances related to the offence or Mr. Forward merit a sentence outside the range.

[41] Specific deterrence of Mr. Forward, as well as general deterrence and denunciation, will be served by a period of incarceration of 24 months in a federal institution.

[42] Mr. Forward is sentenced to 24 months in a federal institution.

[43] The Crown asks for several ancillary orders. I grant: (1) a DNA order, (2) the requested order for forfeiture, pursuant to s. 16 of the *CDSA*, of the prohibited drugs, the paraphernalia and the money, and (3) the requested mandatory order under s. 109 of the *Criminal Code* prohibiting Mr. Forward from possession of firearms.

Warner J.