PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Macdonald*, 2019 NSPC 14

Date: 2019-05-13
Docket: 8164124, 8215840-43, 8226602, 8230294, 8225548, 8229993, 8309346-49, 8308972-73
Registry: Pictou

Between:

Her Majesty the Queen

v.

Melissa Jane Macdonald

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	2019: 7, 13 May in Pictou, Nova Scotia
Charge:	Sections 129, 145(5), 254(5), 333.1, 334(b) *Criminal Code of Canada*
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Stephen Robertson for Melissa Jane Macdonald

By the Court:

Preamble

[1] From time to time, everyone is vulnerable to feeling swamped. For some, those feelings may be manageable. People may have support networks—friends, family, coworkers, health professionals, EAPs and others—and may have developed over time constructive coping strategies that help promote resilience in times of difficulty.

[2] What happens to people who are overwhelmed all the time, and who—because of family history, dint of circumstance, illness, or, yes, poorly informed choices—have few if any sources of support? The problems might arise from conflict at home, at work or in the community; serious illness can inflict great stress; job loss and poverty can ensnare people in an tangle of troubles, limiting access to housing, health care, education and other social necessities. Stress can make people feel profoundly unhappy and can lead to isolation or stigmatization. (For a good discussion of the value of happiness, see Bernard van Praag & Ada Ferrer-i-Carbonell, "Inequality and Happiness" in Weimer Salverda, Brian Nolan & Timothy M Smeeding, eds, *The Oxford Handbook of Economic Inequality* (Oxford, UK: Oxford University Press, 2009) at 364-383.

[3] When stressors are acute, and easily resolved, personal crises might pass quickly.

[4] But what if the problems are chronic, and must be confronted day after day after day. Some might cope badly, through self-medication or other steps that bring people into conflict with the law. That's when things can really start falling apart.

[5] This is where Melissa Macdonald finds herself.

[6] Since 2017, Ms Macdonald has accumulated fifteen criminal charges against her, as follows:

Case #	Sum/Indict	Date	Charge	Precis
8164124	Summary	19 Sep 2017	354(1)(a)	Possession of stolen plate.
8215840	Indictable	6 Apr 2018	333.1	Drove motor vehicle without consent of owner.
8215841	Indictable absolute juris.	6 April 2018	733.1	Breach of probation.
8215842	Indictable	6 April 2018	254(5)	Refusal to provide breath sample.
8215842	Indictable	11 April 2018	145(5)	Fail to appear for ident.
8226602	Summary	7 April 2018	334b	Theft of liquor.

8230294	Summary	12 April 2018	334b	Theft of liquor.
8225548	Summary	13 April 2018	334b	Theft of food.
8229993	Summary	16 April 2018	334b	Theft of liquor.
8309346	Summary	18 June 2018	145(5)	Fail to appear in court.
8309347	Summary	18 June 2018	145(5)	Fail to appear—same date, different process.
8309348	Summary	18 June 2018	145(5)	Fail to appear—same date, different process.
8309348	Summary	18 June 2018	145(4)	Fail to appear—same date, summons.
8308972	Summary	29 Jan 2019	129(a)	Obstruct, false name.
8308972	Summary	18 June 2018	145(4)	Appears to be duplication of 8309348.

[7] Matters took a long time to get sorted out, as Ms Macdonald kept dropping off radar. The court had to issue warrants. Ms Macdonald got arrested, let go, rearrested, and so on. There were many interim-release documents. After entering elections and guilty pleas to these charges, Ms Macdonald failed to show up for her presentence-report interview, so that we have to go with a report from 2017.

[8] The prosecution seeks a sentence of 10-12 months in prison, followed by a 12-15 month term of probation. Defence counsel seeks a so-called time-served sentence, reckoning the 20 days Ms Macdonald has spent on remand as entitling her to 30-days' credit in accordance with *R v Carvery*, 2014 SCC 27, and *R v Stewart*, 2016 NSCA 12 at ¶ 35.

[9] For the reasons that follow, I place Ms Macdonald on probation for a term of 18 months, I prohibit her from driving for one year

Circumstances of the offences

[10] With the exception of the vehicle theft and the refusal, the charges rank on the low scale of seriousness: shoplifting of food and liquor, none of it recovered; possession of someone-else's licence plate; failing to appear in court, but remaining in Pictou County, and being easily located; trying to pass herself off as a twin sister to evade arrest, but fooling no one. None of this was done with much in the way of calculation or imagination.

[11] The theft of the vehicle and the refusal are of somewhat greater gravity: Ms Macdonald ended up driving, without permission, a car that had gotten left behind by its owner at a party; she ended up off the road. Police responded to the report of an accident. Ms Macdonald was somewhat difficult to handle, but agreed to

participate in a drug-recognition evaluation. Police decided to go with the DRE procedure, as they had found three hypodermic syringes as they searched Ms Macdonald following arrest. When it came time to provide a sample of her breath as part of the evaluation process, she first feigned sleep, and then refused. She was on probation when all this happened. She was released on process that required her to return to the police station the following week for pictures and prints in accordance with the *Identification of Criminals Act*; she never showed up. The vehicle theft was significant, as there was damage done. The seriousness of the refusal is elevated somewhat, as Ms Macdonald was not cooperative. She was on probation at the time; however, Ms Macdonald has pleaded guilty to breaching probation, and so that factor can not be repeatedly tallied as an aggravating factor in assessing the seriousness of the vehicle-theft and refusal counts: *R v Stewart*, 2016 NSCA 12 at ¶ 27; *R v Macdonald*, 2018 NSPC 25 at ¶ 25, aff'd 2019 NSCA 5.

Circumstances of Ms Macdonald

[12] Ms Macdonald is 35 years old. She was raised by her mother. School was a struggle, but Ms Macdonald succeeded in earning a GED at community college. She has two children—ages 11 and 2—with her partner, Mr Lochead. A third child is being cared for by Ms Macdonald's mother.

[13] Ms Macdonald has worked intermittently, babysitting and doing other cash-paying jobs; she receives income assistance and the child tax credit.

[14] Ms Macdonald has been diagnosed with depression and is medicated for it. She experienced what she described in the presentence report as a "bad Dilaudid problem" between the ages of 15-25. The 2017 report describes her entering the Opioid Treatment Program about 10 years ago and getting weaned off drugs over the course of two years, with no relapses until the start of the current flurry of incidents. Defence counsel informed the court at the sentencing hearing that Ms Macdonald is back on methadone, and has had trouble getting access to it while on remand.

[15] Ms Macdonald burst onto the criminal justice scene in the fall of 2002, not long after her Dilaudid use had started. Between then and 2008, she accumulated 40 findings of guilt for what appear to have been offences resembling those before the court now, as well as two charges involving sex work. Coinciding with her participation in the Opioid Treatment Program, Ms Macdonald remained offence free from 2008, up until 2017 when she was found guilty of three counts of theft and placed on probation in September of that year. The charges before the court began to pop up soon after that.

Statutory ranges of penalty

[16] None of the charges before the court carries a mandatory-minimum prison term.

[17] The refusal count carries a mandatory-minimum penalty of a $1000 fine and a one-year term of prohibition in virtue of ¶ 255(1)(a)(i) and ¶ 259(1)(a) of the *Code*. As was decided in *R v Denny*, 2017 NSSC 127 at ¶ 36 (var'd on unrelated grounds 2018 NSCA 11) (*Denny*), ¶ 255(1)(a)(i) does not prescribe a mandatory sentence; a $1000 fine is the mandatory minimum; a sentence for a first-time refusal offence will be legal if it is equal to or greater than the minimum, and does not exceed the maximum. In deciding upon an appropriate sentence, a court may consider remand time as a credit against a mandatory-minimum penalty: *R. v. Wust*, [2000] 1 SCR 455 at ¶ 33.

[18] As the s 333.1 count was prosecuted by indictment, it is ineligible for a conditional sentence, in virtue of sub ¶ 742.1(f)(vii).

[19] Apart from those exceptions, the charges are eligible for the full array of sentencing outcomes under the *Code*, including, except for the refusal count, suspended sentences.

General sentencing principles

[20] I have outlined in a number of recent written decisions those general principles applicable to sentencing decisions, and do not need to repeat them. See *R v AJL*, 2018 NSPC 61 and *R v Moore*, 2018 NSPC 48.

[21] Ms Macdonald's actions are not evil or malicious. They are not cunning or calculated; rather, they are impulsive and impetuous. She is not cruel. But for the car theft and putting the car off the road, her actions do not endanger people's safety.

[22] Ms Macdonald is dealing with a chronic illness: substance-use disorder. Her coping drug of choice has been Dilaudid, which is a brand name for hydromorphone, a powerful Schedule I opioid under the *CDSA*. Unprescribed opioid abuse has become a major public-health emergency in Canada: Special Advisory Committee on the Epidemic of Opioid Overdoses, *National report: Apparent opioid-related deaths in Canada (January 2016 to March 2018)* (Ottawa: Public Health Agency of Canada, September 2018) accessed online at <https://infobase.phac-aspc.gc.ca/datalab/national-surveillance-opioid-mortality.html> (*National Report*).

[23] Very recently, the Public Prosecution Service of Canada, taking account of the *National Report*, amended its *Deskbook* to add Guideline 3.19; the purpose of the new measure was to minimize or limit the advocated use of abstain-from-possession-and-use bail conditions for persons with substance-use disorders. The guideline recognized that these sort of conditions set persons admitted to bail on a crash-and-burn trajectory for failure and arrest. The guideline accepts as being well founded the reality that persons with use-disorders are at elevated risk of overdosing following release from custody due to altered and reduced substance tolerances that will have set in while being barred from illegal-substance supplies in prison. Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (Ottawa: Attorney General of Canada, 2014, updated 1 April 2019) at 349-351.

[24] Ms Macdonald is part of the epidemic population; she runs that elevated risk.

[25] In Erik Svensson, "Legal Dogmatics, Theory and the Limits of Criminal Law" in Antje du Bois-Pedain et al eds, *Criminal Law and the Authority of the State, E-Reader version* (Oxford and Portland, OR: Hart Publishing, 2017) at Chapter 7, the author reminds us of some basic principles of penal justice:

> Within the framework of criminal law, the state deprives citizens of their freedom, physical as well as economic, for reasons that involve laying claim to moral authority and/or the social necessity of imposing hard treatment to convey censure. The purposes for which criminal law is used are not straightforwardly benevolent, aimed at enabling legal subjects to lead better, safer and more successful lives, and the same is true of the purposes for which punishment is inflicted on those who violate the criminal law's prohibitions. Criminal law, in this sense, is repressive. Repressive measures cannot be accepted unless there is sufficient justification to use them.
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> (Footnotes omitted)

[26] The modified migration from what might be described as repressive sentencing to our current model, which includes, expressly and prominently, concepts of restraint and restoration, began with the reform of Part XXIII of the *Code* in SC 1995, c 22, s 6, in force 3 Sep 1996 in virtue of SI/96-79. These amendments carried into effect, among other provisions, s 718.2, which, as explained in *R v Gladue*, [1999] 1 SCR 688 at ¶ ¶ 39 and 48, was part of the first significant reform of sentencing principles in the history of Canadian criminal law; it helped carry into effect Parliament's intention to reduce the use of prisons for non-violent persons, and its resolve to expand the use of restorative-justice principles in sentencing. See also, *R v Proulx*, 2000 SCC 5 at ¶ 15.

[27] The sentencing recommendation made by the prosecution is not unreasonable; however, in my view, Ms Macdonald's circumstances cry out for a restorative approach. Ms Macdonald has proven that she can make good decisions in life. Her voluntary involvement in the Opioid Treatment Program helped keep

her out of conflict with the law for almost a decade. She poses no risk of violence. She does not calculate her illegal behaviour, but acts impulsively. She can cope badly sometimes, using self-medication; however, she exercised discipline over the course of years, participating voluntarily in a closely monitored substance-abuse-prevention program. Restorative approaches were designed for cases such as these.

[28] I shall deal with the refusal charge first. As I stated earlier, Ms. Macdonald has been on remand for 20 days and is entitled to 30 days of credit. I give Ms Macdonald 30-days' credit for the refusal count, case 8215842. I order and direct that the information, 767479, be endorsed to that effect, and that there be a JEIN entry recorded to that effect as well. In my view, that credited time accounts appropriately for the gravity of that charge. Further, a 30-day credit is equal to or greater than the mandatory-minimum fine prescribed in ¶ 255(1)(a)(i). Applying *Denny*, what is essentially a 30-day sentence is most definitely greater than the mandatory minimum, so that the mandatory-minimum fine is rendered obviated. There has in the past been some controversy over whether a time-served sentence is one authorized under the *Code*. In my view, it is. Consider that section 719 has been interpreted as obligating sentencing courts to consider the effect of remand time; if the credit to be given a person who has been remanded equals or exceeds

the penalty the court would otherwise have imposed, it seems to me that a time-served sentence is a legal outcome. "Time served" was considered a legal sentence in *R v Fead*, 2017 ABCA 222 ¶ 16. In *R v Dunbar*, 2019 NSSC 96 at ¶¶ 22-35, the Court reviewed the existence of conflicting authorities on this point. I would note that, of those cases canvassed in *Dunbar* that would appear to have held a time-served sentence illegal, all appear to have predated *Carvery*; the one that postdates it—*R v Brown*, 2014 BCCA 439—does not mention *Carvery* at all. This apparent problem may be more a matter of semantics, which I resolve to solve in this way: The court sentences Ms Macdonald to a 30-day term of imprisonment for the refusal count; however, the court grants a 30-day credit for her remand time, so that the sentence is deemed to have been served in full. The court prohibits Ms Macdonald from operating a motor vehicle on any street, road, highway, or other public place for 12 months, beginning immediately. The statutory waiting period for the interlock program will apply; this will be recorded under "remarks" in the prohibition order.

[29] In relation to all remaining charges before the court, I suspend the passing of sentence, and place Ms Macdonald on probation for 18 months, beginning immediately, with these conditions:

- Keep the peace and be of good behaviour;

- Appear before the court when required to do so by the court;
- Notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation;
- Report in person to a probation officer at the community corrections office in New Glasgow by 4:00 pm 16 May 2019, and thereafter when required by the probation officer, in the manner directed by the probation officer;
- Not enter any Nova Scotia Liquor Corporation store or agency, or the Atlantic Superstore in New Glasgow;
- Take reasonable steps to re-establish participation in the Opioid Treatment Program, advise your probation officer of your progress as required by your probation officer;
- Take reasonable steps to attend any other substance-use counselling or mental-health counselling arranged by your probation officer;
- Notify your probation of any missed counselling or treatment program appointments;

- Sign all consents to release of information required by your probation officer to arrange services under this order.

[30] I decline to order restitution. Ms Macdonald has no means whatsoever to pay it, and that is unlikely to change very much very soon. I apply *R v Kelly*, 2018 NSCA 24 at ¶ 55.

JPC