

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Burgoyne*, 2019 NSPC 2

Date: 2019-02-05

Docket: 8097951,08097953

8097952

Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Wanda Jane Burgoyne

and

Andrew Donald Veinot

Editorial Notice: *The electronic version of this judgment has been modified to remove identifying information.*

Judge: The Honourable Judge Paul Scovil, JPC

Heard: May 14, 2018, June 26, 2018, in Bridgewater, Nova Scotia

Decision February 5, 2019

Charge: 5(1) and 7(1) of the **Controlled Drugs and Substances Act**

Counsel: Joshua Bryson, Crown Attorney
Nicholas Fitch, Defence Attorney for Wanda Burgoyne
Michael Power, Defence Attorney for Andrew Veinot

By the Court:

[1] Wanda Burgoyne was found guilty after a trial of production of marijuana, contrary to section 7(1) of the **Controlled Drugs and Substances Act**, as well as a further count under section 5(1) of the same **Act**. Burgoyne's common-law partner, Andrew Veinot, was convicted under section 5(1) of the **CDSA** for trafficking. This is the sentencing of the two. The offences occurred between October 1, 2016 and January 7, 2017.

Facts:

[2] Wanda Burgoyne and Andrew Veinot were common-law partners. Burgoyne shared parenting duties with her estranged husband concerning their 13-year-old son, S.B. S.B. was 13 at the time of the offences.

[3] In the Burgoyne/Veinot household there was a culture of marijuana use. The door to the room where Burgoyne had two marijuana plants growing had a sign stating, "Mum's Grow Op". S.B. was invited to, and given marijuana, to smoke regularly on weekends. Both accused provided S.B. marijuana. S.B. indicated he would smoke marijuana six to seven times every weekend he spent at his mothers. At times, if he coughed when smoking he was called a "pussy".

[4] The situation came to the attention of S.B.'s father when S.B. was found in the basement of his father's home trying to smoke catnip. When asked about this, S.B. indicated that he had smoked marijuana at his mother's home a number of times each weekend.

Background:

[5] While the production of the number of plants that Burgoyne had in 2016 may be legal now, that production was illegal then. Providing marijuana to a 13-year old was illegal then. It is illegal now.

[6] Sentencing both the accused requires this court to examine a number of factors personal to each accused. I will outline them here.

Andrew Veinot:

[7] Veinot is a 31-year-old offender. His Pre-Sentence Report indicates what was an ordinary childhood. He and the co-accused, Wanda Burgoyne, were in a 14-year common-law relationship, which dissolved after the charges before the court was laid.

[8] Veinot has a grade nine education and at the time of the writing of the PSR, was unemployed. He is currently in receipt of Workmen's Compensation due to a

back injury. As a result of the injury, he has been prescribed medical marijuana. Veinot denies, as he is entitled to, the offence for which he stands convicted.

[9] Mr. Veinot has a criminal record. It includes a breach of probation, under section 733(1) from November of 2005, for which he received a suspended sentence; a mischief to property, under section 430(3), for which he received probation for one year; a theft under \$5000, under section 334(b)(ii) for which he was again placed on a period of probation; and most importantly, convicted of a prior count, under section 5(2) of the **CDSA** from September 2012, for which he received a custodial sentence that was served on a Conditional Sentence basis.

[10] Ms. Burgoyne's Pre-Sentence Report shows a 39-year-old female with a grade nine education. She described her upbringing as dysfunctional.

[11] Ms. Burgoyne is currently unemployed and reported to have never maintained any long-term employment.

[12] In relation to marijuana use, she advised the writer of the pre-sentence report that she smokes cannabis on a casual basis twice a week. She reported having a valid marijuana prescription at the time of the offence but that the same had lapsed.

[13] Ms. Burgoyne accepted responsibility for the production charge but denied, as is her right, the allegation of trafficking marijuana to her son.

[14] Ms. Burgoyne has a prior record which includes a possession charge under 4(1) of the **CDSA** for which she was placed on a 12-month period of probation. At the same time, she was convicted of breaching an undertaking, contrary to section 145(5.1) and received a concurrent one-year period of probation. In August 2011, Ms. Burgoyne was sentenced for a breach of probation, contrary to 733.1 and a charge for resisting a police officer under section 129(1). She received a 60-day custodial sentence. In January 2011, she was convicted of two assault charges under 266 and a resisting a peace officer, under 129(a). Ms. Burgoyne was placed on 15 months probation. In addition, there was a breach of probation, under 733.1(1) from November 2007, for which she received 13 months probation; a mischief charge under 430(3) from April 2007, 6 months probation and finally a theft charge under 334(b)(ii) in November 2006, for which she was fined.

Crown Position:

[15] The Crown stressed that the index offences regarding both accused was the provision of cannabis to a 13-year-old, who was Ms. Burgoyne's son and Mr. Veinot's step-son. The Crown also advised that S.B.'s older brother, Dominique, had been a co-accused who had previously pled guilty to trafficking by providing S.B. cannabis. Dominique Burgoyne received a 12-month Conditional Sentence Order.

[16] Aggravating features pointed out by the Crown, were the position of trust and authority the two accused had over the victim. Further, that the two accused were promoting a culture of cannabis use to Ms. Burgoyne's 13-year old son.

[17] In relation to Mr. Veinot, the Crown pointed out he had a prior record for trafficking.

[18] The Crown argued for Mr. Veinot that, in these circumstances, a conditional sentence order would not be appropriate. Given that position, the Crown argued that a range of custodial sentence would be approximated of six months custody.

[19] Regarding Ms. Burgoyne, the Crown put forward that the 7(1) charge does not allow a conditional sentence order. Given she had no related record and taking into account the aggravating features set out above, a sentence of three months custody would be in order.

[20] The Crown addressed the issue of how the recent legalization of marijuana should affect those being sentenced for offences prior to the changes. The Crown cited *R. v. Strong*, 2019 ONCA 15, which stressed that for serious trafficking charges of marijuana there is no real change.

Defence Position:

[21] Mr. Veinot appeared to argue that as this provision of illegal drugs was within a family unit was a factor that would assist in mitigating a sentence. Mr. Veinot pointed out that sentencing is a highly individualized process. Mr. Veinot is disabled. He also underlined that in his PSR it was acknowledged that he was compliant with past sentencings and with interaction with Correctional Services.

[22] This activity, argued Mr. Veinot, was a moral breach and only a technical violation of the law. Regarding caselaw on sentencing, Mr. Veinot put forward the cases of *R. v. Lounsbury*, 2007 NSPC 80; *R. Rushton*, [2017] N.S.J. No. 23; *R. v. Raj*, [2014] B.C.J. No. 2733 and *R. v. Brady*, [2016] N.S.J. No. 449.

[23] In addition, Mr. Veinot forwarded to the Court *R. v. Murphy* [2018] N.J. No. 395 as an example of sentencing for trafficking in cannabis, which occurred prior to the legalization of the product but sentenced post legalization.

[24] Mr. Veinot reiterated that the trafficking here resulted in no financial gain. In his submission of January 24, 2019, Mr. Veinot also argued the “without offending the sensibilities of society at large or the court specifically, this accommodation should not attract a penal sanction as requested by the Crown.”

[25] Ms. Burgoyne put forward that she was the subject of a good pre-sentence report. She comes from a difficult background. She stressed the low level of production of cannabis for which she was charged currently would be legal. Ms. Burgoyne recognized she is not eligible for a Conditional Sentence Order but instead stresses probation or in the alternative, an intermittent sentence of custody would be in order. In relation to the caselaw, Ms. Burgoyne also spoke to sentences of trafficking post legislation of cannabis. In that regard, she drew to the court's attention the comments of Judge Marc Chisholm in the unreported case of *R. v. Ricky LeClerc*, who was sentenced in Truro, Nova Scotia on November 8, 2018. I will address this case further in my analysis.

Law:

[26] Sentencing, in part, is codified in both the **Criminal Code** and the **Controlled Drugs and Substances Act**. Also, important, is an examination of the facts, the individual and other sentences handed down for similar offences. At the end of the day, a sentencing judge is tasked with crafting the right sentence to fit both the singular individual and societies needs for proper sanctions.

[27] The **Controlled Drugs and Substances Act** states the following regarding sentencing:

10.(1) 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 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.

(2) If a person is convicted of a designated substance offence for which the court is not required to impose a minimum punishment, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person

(a) in relation to the commission of the offence,

(iv) trafficked in a substance included in Schedule I, II, III or IV, or possessed such substance for the purpose of trafficking, to a person under the age of eighteen years;

(b) was previously convicted of a designated substance offence; or

(c) used the services of a person under the age of eighteen years to commit, or involved such a person in the commission, of a designated substance offence.

(3) If, under subsection (1), the court is satisfied of the existence of one or more of the aggravating factors enumerated in paragraphs (2)(a) to (c), but decides not to sentence the person to imprisonment, the court shall give reasons for the decision.

[28] A court must also consider the principle set out in section 718 of the **Criminal Code**. They are as follows:

718. The fundamental purpose of sentencing is to protect society and to contribute, along with the 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, 1995, c.22, s.6; 2015 c.13, s. 23.

718.1 goes on to state:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. 1995, c. 22, s. 6.

[29] 718.2 put forth additional sentencing principles. Those related to this matter are:

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, without limiting the generality of the foregoing,
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

shall be deemed to be aggravating circumstances;

- (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, with particular attention to the circumstances of Aboriginal offenders. 1995, c.22, s. 6; 1997, c. 23, s. 17; 2000, c. 12, s. 95(c); 2001, c. 41, s. 20; 2005, c. 32, s. 25; 2012, c. 29, s. 2; 2015, c. 3, s. 24; c. 23, s.16.

[30] Neither counsel nor this court could find prior cases that are similar to the facts here. Most cases of trafficking in marijuana are concerned with those trafficking for profit and in larger amounts. That having been said, it is clear from s. 10 of the **CDSA** that Parliament has specific concerns regarding the provision of drugs of any kind to children.

[31] The Crown, quite rightly, pointed out that cases such as *R. v. Knickle* relating to trafficking a schedule I drug are not particularly helpful. Further, categories of traffickers as set out in *R. v. Fifield* may be somewhat instructive but does not clearly capture the fact situation here.

[32] Mr. Veinot referred to *R. v. Lounsbury*, where a Conditional Sentence Order was imposed for delivering drugs to prison. The accused had no prior record and gave a small amount of marijuana to her boyfriend.

[33] Likewise, in *Ruston*, the accused was a first-time offender. There the accused was trafficking in cocaine, which would normally result in a prison term. There the

court found, taking in account all factors, that a conditional sentence was appropriate.

[34] In *Raj*, the accused was a 28-year-old immigrant from Fiji. He was trafficking in cocaine and cannabis to support his own drug habit. He was remorseful and was commencing some recovery programming. He also had been doing charitable work in his community. There, a Conditional Sentence was ordered.

[35] *R. v. Brady* was, in relation to an accused, convicted of trafficking cannabis. Brady was in possession of over 9,000 grams of marijuana. He had a prior **CDSA** charge. He also had a positive PSR. There an 18-month CSO was granted.

[36] Mr. Veinot also brought to the Court's attention *R v. Murphy* [2018] N.J. No. 395. There, Justice Burrage of the Newfoundland Supreme Court dealt with a first-time trafficker of cannabis. The accused received a Conditional Sentence Order. Mr. Veinot stressed that paragraphs 127 to 141 of that decision in relation to Justice Burrage's comments on sentencing in the era of post legalization of cannabis.

[37] I note the comments made by Justice Burrage in paragraph 132:

132 It is true that there remains a societal interest in ensuring that the quality of legalized **cannabis** is preserved and that this drug does not find its way into the hands of young people. The illegal production, sale and distribution of **cannabis** runs contrary to this interest. Hence the continued need for general deterrence through "appropriate sanctions and enforcement measures" (**Cannabis Act**, section 7(d)).

The new Canadian world of legalized **cannabis** is not a world where anything goes. Of course, the same may be said for two of this country's other legalized drugs, alcohol and tobacco.

[38] Ms. Burgoyne also provided a recent Nova Scotia Provincial Court case where the sentencing judge, His Honour Marc Chisholm briefly spoke regarding charges in the law relating to cannabis. In *R. v. Ricky LeClerc* (unreported November 8, 2018) from Truro the accused was running an illegal dispensary for cannabis products. There, Judge Chisholm at 14:10 of the sentencing, expressed concern that unregulated sale of cannabis could end up being trafficked to young people.

[39] All of the above cases express the concept that general deterrence of illegal trafficking in drugs is a primary objective in sentencing and continues to be so.

Analysis:

[40] I wish to make it very clear, the legalization of cannabis does not lessen the concern of society in making this product available to minors. To quote Justice Burrage in *Murphy*, "it is not a world where anything goes". It was not legal to give a 13-year old recreational cannabis at the time of the offence, it is not legal now and it is highly unlikely this it ever will be.

[41] The general deterrent of trafficking drugs to minors continues to be a paramount objective in sentencing.

[42] In relation to Mr. Veinot, I have considered that he is a repeat trafficker. Mr. Veinot was in an authoritative position vis-à-vis his partner's son. That his partner's son was 13 years of age when this occurred. I also note that amounts provided were low but consistent. Mr. Veinot's PSR was not negative nor overly positive.

[43] I do not find, in this case, that a Conditional Sentence Order is appropriate given the above and that the same would be inconsistent with the fundamental purposes and principles of sentencing.

[44] I do not find that the principle of general and specific deterrence, in this matter, require the custodial period requested by the Crown.

[45] I will instead impose a custodial period of 90 days on Mr. Veinot, which can be served intermittently. I will also impose a 12-month period of probation. In addition to the statutory term of probation, I would also order that he report to Correctional Services within two days and thereafter as directed by his probation officer. Further, he is to have no contact, direct or indirect, with S.B. He is also not to possess or consume any intoxicating substances, including cannabis marijuana while in the presence of any person under the age of 19.

[46] In relation to Ms. Burgoyne, I have considered that she has no prior record for trafficking, as did Mr. Veinot; the small amount of plants she was cultivating; her PSR and her parental role in this matter. In relation to all factors, I will order a concurrent custodial sentence on both charges of 45 days, which can be served intermittently. During that period of her intermittent sentence and for one-year period thereafter, she will be placed on probation. The terms of the probation order will include the statutory terms, together with a term that she report within two days from the date of this sentence to Correctional Services and thereafter as directed. Additionally, she will not consume or possess cannabis products while in the presence of anyone under 19 years of age.

Paul B. Scovil, JPC