

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Herritt*, 2019 NSSC 13

**Date:** 20190109

**Docket:** CRH No. 472498

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Anthony Robert Herritt

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**SENTENCING DECISION**

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**Judge:** The Honourable Justice James L. Chipman

**Conviction**

**Entered:** October 24, 2018

**Oral Decision:** January 9, 2019

**Written Decision:** January 9, 2019

**Counsel:** David Schermbrucker, on behalf of the Federal Crown  
Joshua Nodelman, on behalf of Anthony Robert Herritt

**By the Court (orally):**

**INTRODUCTION**

[1] Mr. Herritt initially pled not guilty to the following one count Indictment:

ANTHONY ROBERT HERRITT, on or about the 31<sup>st</sup> day of May 2017, at or near Lower Sackville in the Province of Nova Scotia, did unlawfully have in his possession for the purpose of trafficking, cocaine, a substance included in Schedule I of the *Controlled Drugs and Substances Act*, SC 1996, c 19 and did thereby commit an offence contrary to section 5(2) of the *Act*.

[2] The parties subsequently reached a resolution involving this matter and a break and enter conviction in Provincial Court, for which Mr. Herritt is expected to be sentenced on January 22, 2019. In the result, the parties appeared on October 24, 2018 when the following Agreed Statement of Facts (ASF) was read into the record and entered as exhibit 1:

On May 31, 2017 at 3:08 in the afternoon the HRP responded to a call about a liquor offence at 1597 Bedford Highway, HRM. The location identified in the complainant was at the Sunnyside Mall.

Sgt. Martin arrested Anthony Herritt at the scene for public intoxication. Mr. Herritt was obviously under the influence of alcohol and/or drugs, his speech was slurred, his eyes were glossy and he was saying things that didn't make sense. Mr. Herritt had a black and grey backpack in his possession. Sgt. Martin began to search the backpack incident to arrest, at which point Mr. Herritt questioned the police authority to search the backpack.

Around the same time two females arrived on the scene. The first one, later identified as KP, said the backpack belonged to her and she also asked about the police authority to search the backpack.

Sgt. Martin removed a can of beer and a bottle of liquor from the backpack. KP then became belligerent with the police. Sgt. Martin told the females to move away or they'd be arrested for obstruction. They went across the hall but gradually moved back towards the police. Cst. Head was assisting Sgt. Martin.

Cst. Head stayed with Mr. Herritt while Sgt. Martin spoke to KP about the ownership of the backpack and alcohol since she was under 18. She insisted the backpack was hers. Mr. Merritt said the alcohol belonged to him. At some point, the backpack was given to KP by the police.

Cst. Rubarth arrived on the scene and he and Cst Head escorted Mr. Herritt to the police vehicle and searched him incident to arrest. They located \$940 in Mr.

Herritt's left front pocket, most in \$20 denominations. They also located a Samsung cell phone in Mr. Herritt's left sweater pocket.

The females then came outside to where the police were searching Mr. Herritt and KP again became belligerent. Cst. Head told her to leave or she'd be arrested for breach of the peace. The two females began to walk away and KP started kicking the steel railing and sign outside a bar. Cst. Head arrested her for causing a disturbance.

The backpack was further searched, incident to KP's arrest. KP was screaming profanity, kicking and yelling. Inside the backpack, Cst. Head found a zip lock bag containing 67.8 grams of cocaine and score sheets.

The cell phone located on Mr. Herritt was his personal phone and contained text messages indicative of recent cocaine trafficking.

The 67.8 grams of cocaine was in Mr. Herritt's possession on May 31, 2017 for the purpose of trafficking.

[3] On the basis of exhibit 1, the Defence invited the Court to enter a conviction. The Court accordingly did so, and today's sentencing date was set.

[4] A Pre-Sentence Report (PSR) was ordered and subsequently received on December 19, 2018 as well as a written submission from the Crown on December 21 and from the Defence on December 31.

### **JOINT RECOMMENDATION**

[5] The parties submit that the appropriate sentence is a penitentiary term of two years with ancillary weapons, DNA and forfeiture Orders. In addition, the Defence asks for waiver of the victim fine surcharge.

### **ANALYSIS AND DISPOSITION**

[6] In assessing the joint recommendation I am mindful of the statutory framework as set out in the *Criminal Code*, RSC 1985, c. C-46 and the *Controlled Drugs and Substances Act*, SC 1996, c. 19 (CDSA). With respect to the former, I refer to ss. 718 to 718.3:

718 The fundamental purpose of sentencing is 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 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.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

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, and, without limiting the generality of the foregoing, [...]
- (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. [...]

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, [...]

[7] As for the *CDSA*, I refer to s. 10:

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.

[8] In terms of caselaw, the parties have submitted:

1. *R. v. Boudreault*, 2018 SCC 58

2. *R. v. Oickle*, 2015 NSCA 87
3. *R. v. Cisneros*, 2014 BCCA 154
4. *R. v. Forward*, 2017 NSSC 190
5. *R. v. Chaisson*, 2013 NSSC 168
6. *R. v. Christmas*, 2017 NSPC 48

[9] Nova Scotia caselaw emphasizes that general deterrence is a primary concern when sentencing drug traffickers, especially when “hard drugs”, such as cocaine (as is the situation here) are involved. In *Oickle*, the trial judge imposed a suspended sentence in a matter involving 11 grams of cocaine and 23 morphine pills. The Nova Scotia Court of Appeal found the sentence to be manifestly unfit as it did not adequately address the need for denunciation and deterrence and the suspended sentence was replaced with two years custody (para. 48). Justice Scanlan noted in the final para:

[61] ... it would be the rare case that would not justify a period of incarceration, even for first offenders, who traffic in, or possess Schedule I narcotics for the purpose of trafficking, especially with the presence of weapons as in this case. This is the message that should be sent to those who choose to traffic in such dangerous drugs.

[10] In assessing the joint recommendation I have reviewed the ASF, PSR, briefs, cases and oral submissions along with Mr. Herritt’s remarks. In my view the parties’ submissions are sound and in keeping with *R. v. Anthony-Cook*, 2016 SCC 43 (see, especially paras. 32 to 34), I hereby adopt their joint recommendation. In doing so, I am particularly mindful of the nature of the offence and the following mitigating and related circumstances as emphasized by the Defence:

- Non-violent circumstances of the offence
- Mr. Herritt’s relative youth and lack of a significant prior record
- His acceptance of responsibility such that a trial was avoided
- Mr. Herritt’s sincere expression of remorse
- The strong prospects of rehabilitation for the offender
- Family support and encouragement

**DISPOSITION**

[11] In all of the circumstances I hereby impose the following sentence:

1. Incarceration of 24 months in a federal institution;
2. Weapons prohibition pursuant to s. 109 of the *Criminal Code* (mandatory);
3. DNA Order pursuant to s. 487.05 of the *Criminal Code* (secondary designated offence); and,
4. Forfeiture of the items indicated on the Forfeiture Order pursuant to s. 16 of the *CDSA*.

[12] With respect to the victim fine surcharge, I am mindful of the Defence's submissions along with the PSR (see p. 6) outlining Mr. Herritt's precarious financial situation. Keeping in mind the Supreme Court of Canada's recent decision in *Boudreault*, I hereby waive the victim fine surcharge.

Chipman, J.