

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Blumenthal*, 2019 NSSC 35

Date: 20190129

Docket: CRH No. 464566

Registry: Halifax

Between:

Her Majesty the Queen

v.

Darren Hersh Blumenthal

SENTENCING DECISION

Judge: The Honourable Justice James L. Chipman

Oral Decision: January 29, 2019

Written Decision: January 30, 2019

Counsel: Erica Koresawa, on behalf of the Provincial Crown
Geoffrey Newton, on behalf of Mr. Blumenthal

By the Court (orally):

INTRODUCTION

[1] By decision rendered November 15, 2018 (*R. v. Blumenthal*, 2018 NSSC 282), I found Mr. Blumenthal guilty of:

- (a) Fraud over \$5000.00, contrary to s. 380 of the *Criminal Code*; and
- (b) Theft by person required to account, contrary to s. 330 of the *Criminal Code*.

[2] The sentencing was scheduled on January 11, 2019. On January 7, owing to the offender's recent surgery, the defence wrote to request an adjournment. During a January 9 telephone conference the matter was re-scheduled to today's date.

[3] In preparation for today's sentencing the Court reviewed the following:

1. Pre-sentence report dated December 12, 2018 (PSR) with attached Justice Enterprise Information Network (JEIN) Offender Summary;
2. Christopher Bezanson's Victim Impact Statement dated December 21, 2018;
3. Melanie Pottie's Victim Impact Statement dated December 23, 2018;
4. Crown brief and attachments (I only examined those relevant to today's sentencing and entered as exhibits) received January 18, 2019; and
5. Defence letters of January 25, 2019.

[4] Today I have had the benefit of counsel's oral submissions and Mr. Blumenthal's verbal expression of remorse. As well, a number of the above materials were marked as exhibits S-1 through S-7 at the sentencing hearing.

OVERVIEW

[5] The facts of this matter are contained in my earlier referenced decision convicting Mr. Blumenthal of the two offences. At para. 4 of the decision I provided this overview:

- [4] The matters in issue date back to August, 2015. A young couple purchased a used car and a short while later one of them lost his job. Following

up on a representation made by the accused when they bought the car, the couple returned the vehicle with the understanding he would buy it back. As part of the arrangement, the couple had to obtain further financing to cover off borrowing and other charges from when they purchased the vehicle. In addition to turning in the car, they ultimately handed over the proceeds of their second loan – \$11,500.00 – to Mr. Blumenthal. Neither the buy back amount (approximately \$25,000.00) or the \$11,500.00 was ever applied to the couple’s loan, nor did they receive any part of the \$36,500.00, or retain the vehicle. In the result, the police became involved and ultimately Mr. Blumenthal was charged with the crimes in question. As well, the lending institution, the Royal Bank of Canada (RBC) commenced a civil action against a number of parties, including Mr. Blumenthal.

JOINT RECOMMENDATION

[6] The parties submit that the appropriate sentence is a penitentiary term of two years with ancillary prohibition and restitution orders.

CRIMINAL RECORD

[7] Mr. Blumenthal has 25 prior criminal convictions, 12 of which are theft or property related offences.

VICTIM IMPACT STATEMENTS

[8] Both Ms. Pottie and Mr. Bezanson describe the significant personal and financial stress these crimes have had on them. In Ms. Pottie’s words, “the past 3 years has felt like one long nightmare that never ends”. The victims have provided requests for restitution, discussed further under Ancillary Orders.

PSR

[9] Mr. Blumenthal’s father opined that financial struggles may have contributed to the commission of these offences (p. 4). Mr. Blumenthal’s sister commented that Mr. Blumenthal suffered financial hardship in the last year which resulted in his committing “petty crimes” (p. 4). Unfortunately, there is no information from Mr. Blumenthal as to why the offences were committed or to what end the monies were used.

[10] While Mr. Blumenthal appears to have the support of his family, his parents and sister exhibit skepticism as to Mr. Blumenthal’s guilt (pp. 3 and 4) and Mr. Blumenthal’s father and employer both express concern that Mr. Blumenthal’s

involvement in this matter may have resulted from his being a “follower” (pp. 4 and 5).

[11] To Mr. Blumenthal’s credit, he remains gainfully employed and expressed remorse for how his actions affected the victims (pp. 5 and 6). This sentiment was repeated by the offender when he addressed the Court.

MITIGATING FACTORS

[12] Once again, Mr. Blumenthal has expressed remorse. Further, he has the support of his family.

[13] Maintaining employment while on bail is generally regarded as a mitigating circumstance. Nevertheless, the Court must be cautious about the weight to be given to this in light of the statutory prohibition against considering as a mitigating circumstance “the offender’s employment... if those circumstances were relevant to, or contributed to, or were used in the commission of the offence”: *Criminal Code*, s. 380.2(2). It was during the course of his employment at his car dealership, and as a result of his interacting with customers, that Mr. Blumenthal was able to commit these offences. Therefore, the fact that Mr. Blumenthal has been able to continue to work in the same capacity with a different car dealership is not necessarily a mitigating circumstance.

AGGRAVATING FACTORS

[14] The fact that Mr. Blumenthal has a prior and related record is an aggravating factor for consideration on sentence.

[15] It is statutorily aggravating that the offences had a significant impact on the victims: *Criminal Code*, ss. 380.1(1)(c.1) and 718.2(a)(iii.1). In 2015, Ms. Pottie and Mr. Bezanson were a young couple who were making a significant purchase when they bought the 2013 Subaru BRZ. They were not financially able to maintain payments on the original car loan after Mr. Bezanson lost his job a few weeks later. As a result of these offences, the victims not only suffered stress (as noted in my decision and stated in the Victim Impact Statements) but further hardship from the damage to their credit as a result of the outstanding loan(s).

ANALYSIS AND DISPOSITION

[16] In assessing the joint recommendation I am mindful of the statutory framework and, in particular, s. 718 of the *Criminal Code* which provides:

718 The fundamental purpose of sentencing is 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;
- (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 and to the community.

[17] Section 718.1 sets out the fundamental principle of sentencing whereby a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[18] The maximum sentence for fraud over \$5,000.00 is 14 years imprisonment. There is no minimum sentence. However, a discharge, whether absolute or conditional, is not available given the maximum sentence: *Criminal Code*, s. 730(1). Further, a conditional sentence order (CSO) is not available: *Criminal Code*, s. 742.1(c).

[19] The maximum sentence for theft over \$5,000.00 by person required to account is 10 years imprisonment. There is no minimum sentence. A CSO is not available for this offence either: *Criminal Code*, s. 742.1(f)(viii).

[20] As is often stated, sentencing is a highly contextual process based on the specific facts of the offence and the offender before the Court. As such, prior sentencing decisions are only helpful insofar as they provide guidance in promoting the principle of parity: *Criminal Code*, s. 718.2(b).

[21] In relation to frauds specifically, the amount of the fraud, the degree of planning, and the period of time over which the fraud continued are all relevant sentencing considerations. Therefore, precedents dealing with significantly larger

or smaller sums of money, a significant degree of planning, or lengthy and ongoing frauds will be of less assistance in assessing a fit and appropriate sentence in this case. The below cases (submitted by the Crown) involve amounts in relatively the same range – tens of thousands of dollars – as the case at bar, but the offenders are obviously not in the same circumstances as Mr. Blumenthal.

[22] The offender in *R. v. Tremblay*, 2014 BCSC 901, befriended and defrauded the victim of \$11,900.00 through a fabricated investment scheme. The Court sentenced the offender to 22 months in jail. Mr. Tremblay had a lengthy criminal record – about half of which were property-related offences – and was on parole at the time of the fraud.

[23] In *R. v. Elmadani*, 2015 NSPC 65, Judge Derrick (as she then was) imposed a 12 month jail sentence where the offender defrauded his employer of \$22,700.00. The Court emphasized that Mr. Elmadani had a recent record for defrauding an employer. The significance of his guilty plea was also tempered by the procedural history which cast doubt on Mr. Elmadani’s acceptance of responsibility.

[24] In *R. v. Gliddon*, 2017 ABPC 38, the offender obtained a total of \$34,140.00 from three victims by promising to complete home renovations and failing to do so. The Court imposed a 2 year jail sentence. Mr. Gliddon had a related criminal record but had also “taken several steps to regain control of his life” while on bail: para. 9.

[25] With respect to Mr. Blumenthal, the fraud involved only a minimal degree of sophistication or planning. While the size of the fraud is relatively modest (in comparison to other cases that come before the Courts), the amounts were significant to the victims and had a long-lasting impact that continued three years after the offence was committed.

[26] Restitution orders have been imposed on Mr. Blumenthal on other matters prior to today’s sentencing. Those restitution amounts are contained on the JEIN Offender Summary. Some of the past restitution amounts have been paid, while the most recent orders remain outstanding, as contained in the Monies Owing Case List produced by the JEIN system. The restitution values are summarized below:

Date Restitution Imposed	Restitution Amount	Restitution Paid (as of Jan 3, 2019)	Restitution Owing (as of Jan 3, 2019)
Feb 10, 2011	\$150.00	\$150.00	0.00

Date Restitution Imposed	Restitution Amount	Restitution Paid (as of Jan 3, 2019)	Restitution Owing (as of Jan 3, 2019)
Mar 7, 2018	\$327.74	\$327.74	0.00
Mar 7, 2018	\$315.00	\$315.00	0.00
Mar 7, 2018	\$818.00	\$292.26	\$525.74
Aug 16, 2018	\$799.99	0.00	\$799.99
Aug 16, 2018	\$1,418.00	0.00	\$1,418.00
Aug 16, 2018	\$1,138.00	0.00	\$1,138.00

The payment history of prior fines and restitution is a relevant consideration for both the fitness of the sentence imposed by this Court as well as the imposition of restitution orders.

[27] Given that “substantially the same elements” constitute both offences for which Mr. Blumenthal has been found guilty, “the situation invites application of a rule against multiple convictions”: *Kienapple v. R.*, [1975] 1 SCR 729, p. 751. Accordingly, the Court will enter a judicial stay of the s. 330 count.

[28] In assessing the joint recommendation I have reviewed all of the written and oral submissions. In my view the position on sentence is sound and in keeping with *R. v. Anthony-Cook*, 2016 SCC 43 (see, especially paras. 32 to 34), I hereby adopt the joint recommendation, inclusive of the below discussed ancillary orders.

ANCILLARY ORDERS

Prohibition Order

[29] Pursuant to s. 380.2, the Court imposes an order prohibiting Mr. Blumenthal from seeking, obtaining or continuing any employment, or becoming or being a volunteer in any capacity, that involves having authority over the real property, money or valuable security of another person for a period of 7 years from today’s date.

Restitution Orders

[30] Trial evidence established that while the \$33,577.97 loan was in the name of Ms. Pottie and Mr. Bezanson, that debt no longer appears on their account. The Royal Bank of Canada (RBC) has obtained a default judgment in relation to this matter. Based on this evidence, RBC is “owed” the value of the loan and, therefore, the appropriate recipient of any restitution order in relation to the initial car loan, which remains outstanding pursuant to information supplied by the Crown. RBC advises that the remaining outstanding debt on the loan is \$33,238.66.

[31] Ms. Pottie and Mr. Bezanson have been paying off the \$11,500.00 secondary loan they sought at the behest of Mr. Blumenthal. That money went directly to Mr. Blumenthal. This secondary loan would not have been taken out by Ms. Pottie and Mr. Bezanson but for Mr. Blumenthal’s promise that the primary car loan would be paid off and his insistence that the funds of the secondary loan be provided directly to him. Ms. Pottie and Mr. Bezanson are at a direct loss – and Mr. Blumenthal in a direct benefit from – this secondary loan.

[32] Further, Ms. Pottie and Mr. Bezanson have suffered further loss as a result of the financial strain caused by this incident. As such, Ms. Pottie seeks \$2,434.15 in restitution for wages lost which accrued from her sick benefits and vacation bank being paid out pursuant to the Rosecrest Communities Letter dated July 19, 2016 and Dr. Ellis’ letters dated July 21, 2016 (both supplied by the Crown).

[33] In the result, pursuant to s. 738, there shall be restitution orders as follows:

NAME	ADDRESS	AMOUNT
Royal Bank of Canada C/O Colin D. Piercey	Stewart McKelvey 900-1959 Upper Water Street Halifax, NS B3J 2X2	\$33,238.66
Melanie Pottie and Christopher Bezanson	[address deleted in electronic version of decision]	\$13,934.15

DNA Order

[34] The Crown sought an order authorizing the taking of the number of bodily substances by a peace officer reasonably required for the purpose of forensic DNA analysis and registration in the National DNA databank from Mr. Blumenthal. The

Defence then (per Mr. Newton's January 25, 2019 letters) set out their position that an order for DNA should not be granted. As noted in the Defence's second letter:

It is the Defense's position that an Order for DNA should not be granted in this case as set out in *R. v. Millar*. ([2017] BCJ No. 464)

At paragraph 124 in *Millar* lays out factors to consider for secondary offences.

1. Defense concedes that Mr. Blumenthal has a prior criminal record but none so serious to order a DNA sample.
2. Mr. Blumenthal was found NCR previously.
3. The nature of the offence, while repugnant in a business context, it was not a complicated case where DNA was needed to solve the case.
4. Circumstances, again, DNA was not used nor if DNA was on file would have helped to solve this crime.
5. Impact of such Order would have on the privacy and security of the person. In this case the privacy and security outweighs the granting of the DNA Order, given the nature of these offences.

It is submitted that for this offence, Mr. Blumenthal should not be ordered to provide a sample of his DNA in accordance with the reasoning in *Millar*.

[35] Based on the authorities applied to this case I have determined that given the factors present here, it is not in the best interests of the administration of justice to make an order requiring Mr. Blumenthal to provide a DNA sample.

Victim Fine Surcharge

[36] The Victim Fine Surcharge provision has been declared invalid as of December 14, 2018 and should not be imposed: *R. v. Boudreault*, 2018 SCC 58.

FORFEITURE OF PROCEEDS OF CRIME

[37] Separate from the sentencing proceedings, and thus not subject to the joint recommendation, the Crown seeks forfeiture of proceeds of crime.

[38] Part XII.2 of the *Criminal Code* governs forfeiture of proceeds of crime. These provisions were enacted to ensure that crime does not pay and reflects a Parliamentary intention to give teeth to the general sentencing provisions in Part XXIII: *R. v. Angelis*, 2016 ONCA 675, para. 32. While the purpose of the sentencing regime is to punish a particular offender for committing a particular offence, the

objective of forfeiture is to deprive offenders of proceeds of crime and deter future crimes: *Angelis*, para. 32.

[39] Mr. Blumenthal benefited from \$44,738.66 in “proceeds of crime” as defined in s. 462.3 of the *Criminal Code*. Mr. Blumenthal obtained the 2013 Subaru BRZ from Ms. Pottie and Mr. Bezanson without paying off the car loan. The unpaid amount of the car loan (\$33,238.66) and the secondary loan paid to Mr. Blumenthal (\$11,500.00) were both benefits he obtained through the commission of a designated offence, as defined in s. 642.3 of the *Criminal Code*.

[40] The evidence establishes on a balance of probabilities that the monies are proceeds of crime and that the designated offence was committed in relation to that property as the monies were clearly obtained as a result of the commission of the fraud.

[41] When the monies cannot be made subject to an order of forfeiture – having regard to the circumstances, including those outlined in s. 462.37(3) – the Court may order a fine in lieu of forfeiture. Where an offender advised that he or she does not have the monies and, therefore, there are no proceeds to forfeit, a sentencing judge may impose the fine in lieu: *Angelis*, paras. 3 and 36.

[42] In *Angelis*, Justice Watt distilled a number of principles to guide the decision of whether to order the fine in lieu of forfeiture:

- (a) The principles of Part XXIII of the *Criminal Code* (sentencing) are applicable to only the extent that they are compatible with the specific provisions of Part XII.2 (proceeds of crime): para. 40;
- (b) The imposition of a fine in lieu of forfeiture is not punishment imposed upon an offender: para. 50;
- (c) The fine in lieu of forfeiture is not to be consolidated with sentencing on a totality approach: para. 51;
- (d) [T]he sufficiency of the carceral component of a sentence to satisfy the applicable sentencing objectives and principles cannot justify refusal to order payment of a fine in lieu: para. 53;
- (e) Once the conditions for the imposition of a fine in lieu of forfeiture are met, a sentencing judge has limited discretion to refuse to make the order: para. 72;
- (f) The exercise of discretion to refuse to order a fine in lieu of forfeiture is necessarily limited by the objective of the provision, the nature of the order, and the circumstances in which the order is made: para. 73;

- (g) The provisions of Part XXIII have no say in exercising the limited discretion to refuse to impose a fine in lieu of forfeiture: para. 56;
- (h) The ability of a victim to pursue civil remedies does not militate in favour of refusing to impose a fine in lieu of forfeiture: para. 74;
- (i) Ability to pay is not a factor to consider in deciding to impose a fine in lieu of forfeiture nor in determining the amount of the fine: para. 81; and
- (j) Ability to pay is a factor to be considered in determining the time in which the fine is to be paid: para. 81.

[43] Where a fine in lieu of forfeiture of proceeds of crime is ordered, any payments made pursuant to the fine should be credited to any restitution orders made by the sentencing judge: *Angelis*, para. 18. As such, the offender will not be required to pay twice (i.e. the restitution *and* the fine in lieu of forfeiture). In *Angelis*, the Ontario Court of Appeal allowed the Crown's appeal and imposed a fine in lieu of forfeiture in the amount of the losses suffered by the victims. This fine in lieu of forfeiture was imposed in addition to the restitution order.

[44] In *R. v. Sponagle*, 2017 NSPC 23, Judge Derrick (as she then was) adopted the reasoning in Ontario decisions that the sentencing Court can make both a restitution and fine in lieu of forfeiture order. The Court can explicitly order that restitution take priority over the payment of the fine in lieu of forfeiture and that the fine in lieu be reduced by any amount paid pursuant to the restitution order: paras. 43 and 59. Further, the direction in s. 740 of the *Criminal Code* (to first consider restitution and then consider whether a fine is appropriate) does not apply to the fine in lieu of forfeiture: para. 46.

[45] Ordering both restitution and the fine in lieu of forfeiture fulfills the Parliamentary intention of "giving teeth" to the sentencing provisions. Upon application by the Crown and fulfillment of the conditions precedent, Part XII.2 requires forfeiture be ordered and only provides limited discretion to not order a fine in lieu of forfeiture. When that fine in lieu of forfeiture accompanied by restitution and priority given to restitution, the victims of the offences will receive the "proceeds" upon payments being made by the offender. Restitution orders require the victims to proactively seek enforcement, either through entering the judgment in a civil court or seeking other remedy: *Criminal Code*, ss. 741, 741.2. As such, remedy on an unpaid restitution order relies upon the victims' knowledge and navigation of the legal system. In contrast, failure to pay a fine in lieu of forfeiture within the time period set out by the sentencing Court will result in consecutive default time; there is a tangible consequence for failing to make payments. As a

result, there is a greater impetus on the offender to make payments, the benefit of which goes first to the victims through restitution.

[46] Mr. Blumenthal advised the PSR writer that he is in the midst of bankruptcy proceedings. Accordingly, an order of forfeiture is not possible or practicable. The objective of Part XII.2 would be frustrated if a fine in lieu of forfeiture was not ordered and the circumstances do not justify exercising the limited discretion available to this Court to not order the fine. Accordingly, I hereby order a fine in lieu of forfeiture in the amount of \$44,738.66, pursuant to s. 462.37(3) of the *Criminal Code* which shall state that the restitution order shall take priority over payment of the fine in lieu of forfeiture ordered in this case, and the fine in lieu of forfeiture shall be reduced by any amount paid pursuant to the restitution order. The Court has discretion in the amount of time to be given to Mr. Blumenthal to pay the fine. Further, the Court has discretion to set the amount of default time to be served between twelve months and eighteen months of imprisonment, pursuant to s. 462.37(4)(a)(iii).

[47] In the result, I order that payment be made by Mr. Blumenthal within ten years of today's date. Further, in the unfortunate event that he defaults, there shall be a hearing before this Court to determine next steps.

Chipman, J.