

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Gabriel, 2010 NSSC 76

Date: 20100222
Docket: CR. No. 318257
Registry: Halifax

Between:

Her Majesty the Queen

-and-

Kyle Albert Gabriel

LIBRARY HEADING

Judge: The Honourable Justice Robert W. Wright

Heard: February 22, 2010 in Halifax, Nova Scotia

Oral

Decision: February 22, 2010

Written

Decision: March 1, 2010

Subject: Sentencing - conspiracy to transfer weapons - ss. 101 and 465(1)(c) of the Criminal Code.

Summary: The accused plead guilty to one count of conspiring to transfer weapons, namely, a variety of handguns to another individual. There was no evidence that any of the planned transactions were ever carried out.

Issue: The determination of a fit and proper sentence for this offender in the circumstances of this particular offence.

Result: Having regard to the seriousness of the offence and the aggravating factors present, namely, the involvement of handguns, the offender's criminal record and the commission of this offence while subject to a ten year weapons prohibition order, the

court accepted the Crown's position that a fit and proper sentence to be imposed was a federal term of 30 months imprisonment, less credit for time spent on remand on a 2 for 1 basis. The court also imposed a lifetime weapons prohibition order pursuant to s.109(3) of the Code.

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Sentencing Decision

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Oral Decision: February 22, 2010

Written Decision: March 1, 2010

Counsel: Crown Counsel - Greg Lenehan
Defence Counsel - Donald Murray

Wright J. (Orally)

[1] In a revised two count indictment dated February 18, 2010 the accused, Kyle Albert Gabriel, was charged with conspiracy to transfer weapons and conspiracy to traffic weapons, contrary to ss. 101, 99 and 465(1)(c) of the Criminal Code respectively. In his appearance before me today, Mr. Gabriel entered a plea of guilty to the first count of conspiring to transfer weapons whereupon the Crown withdrew the second count of conspiring to traffic weapons. Counsel then indicated their intention to proceed straight to sentencing.

[2] The essential facts are that pursuant to an Order earlier obtained from another justice of this court, the police intercepted a number of text messages between Mr. Gabriel and Tyrell Ramone Beals with whom Mr. Gabriel was jointly charged in the original indictment. The gist of those text messages was the planned transfer of various handguns at various prices by Mr. Gabriel to Mr. Beals.

[3] The police were unable to gather any evidence that any of those gun transfers being discussed were ever carried out. However, by virtue of his guilty plea, Mr. Gabriel has essentially admitted that there was a conspiracy to commit the indictable offence of the transfer of weapons and that he was a member of that conspiracy.

[4] Under s.718 of the Criminal Code, the fundamental purpose of sentencing is to contribute 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.

[5] Section 718.1 goes on to state that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[6] When it comes to sentencing for gun crimes, the principles of sentencing to be emphasized, as both Crown and defence counsel have acknowledged, are denunciation and both specific and general deterrence. Two recent affirmations of this, albeit in cases involving the actual use or possession of firearms, are found in the cases of **R. v. Muise** 2008 NSSC 340 and **R. v. Johnston** 2009 NSSC 218. In the latter case, Justice Cacchione, after referring to recent statistics in Halifax Regional Municipality showing that gun related shootings are on the rise, expressed the following conclusion (at para. 49):

The risk posed by such shootings to law abiding citizens who are going about their daily business is high and increasing. A clear message must be sent to those in our community who believe in living by the gun and settling their disputes through the use of a gun. The message is that there will be severe consequences for those who behave in such a fashion.

[7] Similar observations and conclusions were well articulated by Justice Trafford of the Ontario Superior Court of Justice in **R. v. Villella** reported at 2006 CarswellOnt 7834, a case in which the accused was convicted on charges of conspiracy to import firearms into Canada. The trial judge there spoke at length about the evils of importation, distribution and possession of firearms as the very foundation of all crimes involving the use of firearms. As such, they are properly characterized as exceptionally serious crimes mandating a sentence that emphasizes denunciation and deterrence. Because of a number of strong mitigating factors in that case, however, the accused was sentenced to two years in jail.

[8] Under s.718.2 of the Criminal Code, a sentencing court is also required to take into consideration other sentencing principles, notably here, any aggravating or mitigating circumstances relating to the offence or to the offender as well as the principle of parity (having regard to sentences imposed on similar offenders for similar offences committed in similar circumstances).

[9] There are essentially three aggravating factors to be taken into account in the present case. The first is that the subject weapons were powerful handguns of various types whose known purpose was for the use of violence or threatened violence.

[10] Secondly, the accused, at only 23 years of age, already has a significant

criminal record (dating back to youth crimes in 2001) involving crimes of violence or threatened violence and including two gun related offences committed in 2005. He has already done one stretch of federal time for a conviction in 2006 under s.5(2) of the *Controlled Drugs and Substances Act*. His most recent convictions were entered in September of 2009 for the offences of resisting or obstructing a peace officer, uttering threats to cause death or bodily harm, causing a disturbance in a public place, and breach of release conditions.

[11] Thirdly, and of particular note, is the fact that Mr. Gabriel committed the present offence while subject to two overlapping firearms prohibition orders of 10 years' duration which were imposed as part of the sentences he received for the 2005 and 2006 offences above mentioned. He clearly has demonstrated a complete lack of respect for the law and the orders of this Court.

[12] As for mitigating factors, there is little to be said other than his youth and the fact that he plead guilty to the offence of conspiring to transfer weapons without the necessity of a trial. This change of plea appears to have developed only within the past fortnight or so. In addressing the court before the passing of sentence, Mr. Gabriel acknowledged that he made the wrong choice in doing what he did but explained that he did it out of fear for himself and his family and the inadequacy of police protection. That explanation does not sway the court whatsoever as a mitigating factor. Acquiring more guns is not the answer to the maintenance of a safe society.

[13] The objective seriousness of this crime is established by Parliament through

its penal provisions. Through a combination of s.465.1(c) and s.101(2), the maximum penalty for this offence is a term of imprisonment not exceeding five years (the offender being liable to the same punishment for the conspiracy offence as if the transfer of weapons had actually occurred). Neither counsel was able to provide much direct assistance to the court in establishing a range of sentence within that maximum, there being very limited case authority for sentences imposed for this particular offence.

[14] It was the submission of Crown counsel, having regard to the sentencing principles of deterrence and denunciation to be emphasized, and the aggravating factors present, that a fit and proper sentence for Mr. Gabriel would be federal time of 30 months, less credit for time spent on remand on a 2 for 1 basis. By the Crown's calculation, this would leave an additional 464 days of imprisonment to be served from today onward. The Crown also seeks a lifetime weapons prohibition order pursuant to s.109(3) of the Code.

[15] Crown counsel also mentioned in passing that Mr. Beals, the other member of the subject conspiracy, earlier plead out in a consolidation of charges which resulted in a plea of guilty being entered for the weapons trafficking offence for which he received the minimum statutory sentence of 3 years' imprisonment. There is no minimum punishment in the case of Mr. Gabriel.

[16] Defence counsel acknowledged that this offence warranted a sentence of

federal time but submitted that a fit and proper sentence for this offender was 2 years' imprisonment, less credit for time spent on remand on a 2 for 1 basis. This would result in Mr. Gabriel's serving an additional 9 months imprisonment from this day onward. Defence counsel also agreed that it was in order to impose a lifetime weapons prohibition order under s.109(3) of the Code.

[17] Bearing in mind the seriousness of this offence, and the aggravating factors earlier noted, I accept the position of the Crown that the appropriate sentence to be imposed on Mr. Gabriel today is an overall sentence of 30 months' imprisonment, less credit for time spent on remand on a 2 for 1 basis. That means that Mr. Gabriel is to now serve the remaining term of imprisonment of 464 days from this day onward. The Court also imposes a lifetime weapons prohibition order pursuant to s.109(3) of the Criminal Code. I will await the presentation of the necessary order from Crown counsel at an early date.

J.