

Citation: *R. v. Boulanger*, 2011 YKTC 39

Date: 20110617
Docket: 10-00771
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Cozens

REGINA

v.

SHANE MIKE BOULANGER

Appearances:
Kevin MacGillivray
Kimberly Hawkins

Appearing for the Crown
Appearing for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C. (Oral): Shane Michael Boulanger has entered a guilty plea to an offence under s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, in that on February 3, 2011, in Whitehorse, he possessed the Schedule I substance of cocaine, and the Schedule III substance of Ecstasy, for the purposes of trafficking.

[2] An agreed statement of facts was filed. I do not intend to go through it. Based on information the RCMP received about Mr. Boulanger's involvement in the trafficking of cocaine, Ecstasy, and marihuana, surveillance was conducted on Mr. Boulanger and during this period of surveillance on February 3rd, they observed him in his vehicle in

the McCrae area of Whitehorse, involved in what they believed was an interaction with another individual consistent with a street-level drug transaction.

[3] Mr. Boulanger's vehicle left and was stopped by the RCMP. He was arrested for the possession of drugs for the purpose of trafficking. He was searched incident to the arrest. Two mobile phones were on him, and, in his vehicle, there were two plastic bags of cocaine weighing 29 and 29.9 grams, and \$310 in cash, as well as a metal grinder.

[4] Mr. Boulanger cooperated with the RCMP and provided a warned statement, in which he admitted that, in addition to the cocaine in his car, there were other drugs at his apartment. Based on the information that he provided, the RCMP obtained a search warrant for his residence, and seized 47.1 grams of marihuana, 28.4 grams of Ecstasy, 30 tablets of Ecstasy, .5 grams of cocaine, two scales, Ziploc baggies, and a score sheet.

[5] Mr. Boulanger spent approximately 14 days in custody from February 3rd to February 16th, when he was able to perfect his bail.

[6] Crown counsel suggests a jail sentence of 14 months with a period of probation to follow as appropriate in the circumstances. This sentence should be served in the Whitehorse Correctional Facility and not be served conditionally in the community. Defence counsel suggests a sentence between 14 to 16 months served conditionally in the community as appropriate.

[7] Mr. Boulanger is 19 years of age. He turned 19 approximately three months before the date of this offence. A pre-sentence report has been filed, along with numerous letters of support. Mr. Boulanger has no prior criminal record. He was raised

by his mother who struggled with alcoholism, and has never had his father involved in his life. He failed to complete his education. The pre-sentence report notes that there were continuous family stressors that included caring for an intoxicated parent or a sick grandparent.

[8] He has been employed in the past, and filed in the court today were two letters from previous employers, one letter of which defence counsel was unable to speak to the author. This was from the Great [sic] Canadian Superstore, where, according to the author, Mr. Boulanger worked. It is a positive letter with respect to his work ethic. I do not know any of the circumstances around his work there other than he worked for about a year, and left in order to go into the drywall trade. His second employer was Up Town Interior Drywall. Mr. McInerney provided a letter dated June the 8th that indicates that he has employed Mr. Boulanger periodically since July 2010, when he had the work for him. He indicates that presently, and in the near future, he has enough to keep Mr. Boulanger and another worker employed. He noted him to be reliable, hardworking, and dependable. Defence counsel was able to speak to Mr. McInerney to confirm this information.

[9] Mr. Boulanger also has applied, he indicates, to three other companies in town, and is hoping that with all of these opportunities, that he would be able to maintain steady employment.

[10] During the time that he has been released from custody and on bail conditions, Mr. Boulanger has taken some courses in order to obtain some Workplace Hazardous Materials Information System training and some Red Cross First Aid. He has also been enrolled at the Individual Learning Centre of the Department of Education as a Grade

12 student, and is in the process of completing the courses that were necessary for his adult graduation program to be successfully concluded. This is scheduled to be continued into the fall towards completion.

[11] Mr. Boulanger has been living with his sister-in-law, Tamara Spinks, since February 2011. Ms. Spinks was present in court today for most of the hearing, having to leave before it concluded. She had provided a letter that is very supportive of Mr. Boulanger, stating she has known him since he was 10, basically saying that this is somewhat out of character for him, and that she is very supportive of his efforts to change behaviours from this incident. She offers her home as a place for him to live without need for him to provide any financial contribution if he is not working.

[12] Mr. Boulanger does not have a drinking problem, in large part, because of what he saw it do to his own family. He did start using marihuana when he was nine. However, he states he has stopped as of his period of incarceration in February of this year. He admits to having a serious Ecstasy problem, which lasted for three years, until just prior to getting arrested for these charges. He is quite candid in his admission that this was for-profit drug trafficking that he was involved in.

[13] On the evidence, he does not appear to have been a high level trafficker, raking in lots of money, but more the sort of day-to-day financial benefactor of the trafficking. The drug screening test indicates a moderate level of problems related to drug abuse. The Criminogenic Risk Assessment places him at the medium range, with a 48 percent probability of reoffending. This is elevated due to a lack of employment or education or leisure or recreation activities, and criminal activities associated with family and friends.

[14] I note in the summary and recommendations portion of the pre-sentence report

that the writer states that most of Mr. Boulanger's risk factors on the LS/CMI are not static, and can be quickly altered should Mr. Boulanger make a number of healthy choices.

The writer feels that with the proper guidance and supervision, Shane could eliminate some or all of the risk factors that contribute to recidivism and avoid the attraction to easy money by way of illicit drug activity. Guidance should be in the direction of furthering his education and the development of effective employment readiness skills.

[15] With respect to remorse, we are dealing with an early guilty plea, and acceptance of responsibility for the trafficking. I note this started with the early admissions to the RCMP once he was arrested. There was some discussion and submission by counsel with respect to the extent to which he may have accepted responsibility for his full role in what was occurring. I do not intend to get into that, as I do not consider really, that at the end of the day, and on the submissions that I heard, that anything turns on it. I have the agreed statement of facts, and it is quite clear that Mr. Boulanger was, for at least a period of time, trafficking in cocaine and Ecstasy, as charged, on a for-profit basis.

[16] I have other letters of support that were provided. Mr. Aaron Wagner, who is a friend of Mr. Boulanger's for several years and has worked with him, as I understood it from his submission to me in court today, is very supportive. Mr. Wagner made arrangements to offer up his snowmobile to Mr. Wiens (phonetic) in order to receive the \$5,000 necessary to post bail so that Mr. Boulanger could be released, which shows more than a passing commitment to a friendship. There is a letter from Krysta Freeman, who defence counsel was unable to speak to, and she has been a friend of

Mr. Boulanger's for about a year, and her letter is positive as well. I appreciate that she is not in town, was not present in court today, and no one has spoken to her, but her letter is generally comparable to other similar letters that we have received, and while letters such as these are not going to mean a lot in the absence of the person present for discussions, if they are the sole thing that a person is going to be relying upon, it is certainly part of the information I can consider before me. Mr. Boulanger's brother, John, also wrote a letter, and is in court today, and providing support for his younger brother.

[17] Mr. Boulanger spoke briefly to the Court, and indicated that this is a turning point in his life, and he has plans that will not involve his involvement in the drug trade any more, that he has learned from his mistakes. He has also written a letter that was provided to the Court that is the same, that speaks of his change in life, and he states that, "Today is a new day and I learn fast from my mistakes."

[18] He said that he actually has goals and plans now. Before his arrest, he had nothing good going for him at all. He feels that being in jail and arrested opened his eyes to change himself, that he has been doing a lot of volunteer work when he has not been working, and putting other things into his life to better himself.

[19] It is not unusual for individuals before this Court facing lengthy jail sentences to say that; that does not mean that they are not true. The truth of what Mr. Boulanger says, in the extent of its truthfulness, will be borne out by the extent to which he is able to be successful. But, based on what I have seen in court, heard from others, and in

reviewing his actions since this offence, these are not at all inconsistent with what he says. I have no reason to disbelieve his intent.

[20] With respect to s. 742.1 of the *Code*, it is clear we are dealing with a sentence under two years, as defined in the first requirement. I must be satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in s. 718 to 718.2. There is a clear record in Yukon case law that in cases involving the trafficking of drugs such as cocaine, the principles of deterrence and denunciation are paramount. Repeatedly, cases in the Yukon have stated the impact of hard drugs in the Yukon upon people in the Yukon, whether they are users, whether they are the family of users, whether they are the individuals and businesses affected by the crime that associates itself with the use of cocaine. Without comparing our problems to southern jurisdictions, I again repeat what Judge Faulkner said in *R. v. Holway*, 2003 YKTC 75, that at the end of the day, “The last thing we need in the Yukon is more drug traffickers.” Trafficking in hard drugs is a serious crime that causes great destruction, pain and harm, and being a part of this in any way helps sustain the business that causes all of this damage. So, denunciation and deterrence are significant factors. They are not the only factors and although paramount, there are other factors as well that must be taken into account.

[21] The long-term interests of society can on some occasions be considered when deciding that a particular individual should serve a sentence in the community or not in the community. I say, “can be considered;” it should always be considered that sometimes the separation of the individual from society is going to be necessary to

protect society, notwithstanding that it may be the view of some people that that might not be the best thing for that person. At the end of the day, sometimes the risk is too great and such a person needs to be incarcerated. At other times, the long-term benefit to the community can best be met by having the individual embark on a different life path that will keep them away from crime. That, again, requires that there cannot be a risk to the community in imposing a conditional sentence. The *Code* states that:

718.2(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;

[22] The concerns raised by Crown with respect to the imposition of a conditional sentence in this case relate primarily to the fact that we are dealing with a Schedule I substance in cocaine as well as a Schedule III substance in Ecstasy, that this is a for-profit crime, that the admission of remorse is not as full as it could be, and that there is a lack of clear employment. Certainly, based on the reasoning of Judge Faulker in *Holway*, some of those factors, at least the for-profit aspect, the nature of the Yukon community and the nature of the drug, raise the threshold for the risk. I am satisfied that the issue of employment is not as remote so as to not exist at all. It appears to me that there are some solid prospects for employment, not as solid as we see in some cases, but solid in the context that he also has a place to live with Ms. Spinks, which will not require him to come up with significant monies each month. That does not answer all of the questions; it is only one factor, but that militates somewhat against that concern.

[23] We are dealing with a young man with no prior criminal history, no prior experience in jail, from a somewhat difficult youthful upbringing who has, in my opinion,

strong community support and who has taken steps since his arrest to set his life on a better path. I am satisfied that service of the sentence in the community is in accordance with the principles of sentencing, and that there is not a risk to the community and in particular, that there is not a risk to the community of Mr. Boulanger engaging in the trafficking of drugs again. While it is not possible to completely eliminate any risk, I am satisfied that any such risk is greatly reduced by the steps that he has taken and the support that he has. He has been on conditions since February, and I appreciate it is not a long period of time, but there have been no breach allegations or concerns that I am aware of, and the pre-sentence report is supportive of the fact that Mr. Boulanger would benefit from a community-based disposition which, in the context of the whole report would seem to be a positive indicator of his ability to comply with conditions.

[24] I am satisfied on the case law that has been filed, and there was a substantial amount of it filed, covering a lot of principles and separate cases. I have not referred to them because I do not feel it necessary to do so in this case. Every case stands on its own and its own unique circumstances, but I am satisfied that a sentence of 14 months to be served conditionally in the community is within the appropriate range of sentence. This is taking into account that he has spent 14 days in custody for which he is receiving no credit. I am not giving any credit; I am just simply taking that into account. So, without trying to delineate between what the sentence would have been had it been in Whitehorse Correctional Centre and in the community, the 14 months suggested is within the range and in these circumstances, that is what I will impose.

[25] The terms of the conditional sentence will be as follows:

1. You are to keep the peace and be of good behaviour;
2. You are required to appear before the Court when required to do so by the Court;
3. You are to report to a Supervisor immediately upon your release from custody, and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
4. You are to remain within the Yukon Territory unless you have written permission from your Supervisor or the Court;
5. You are to notify the Supervisor or the Court in advance of any change of name or address, and promptly notify the Court or the Supervisor of any change of employment or occupation;
6. You are to reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;
7. At all times you are to remain within your place of residence except for the purposes of employment, including travel directly to and directly from your employment, and except with the prior written permission of your Supervisor. You must present yourself at the door or answer the telephone during reasonable hours to ensure you are complying with this condition. Failure to do so will be a presumptive breach of this condition.

[26] House arrest is normally imposed on conditional sentences, although not entirely. However, in cases where general deterrence and denunciation are at the forefront, the courts have made it clear that one of the aspects of a conditional sentence that helps to meet the need for deterrence and denunciation is the house arrest clause. These can be difficult to comply with, but there is, within them, the ability to work and if permission exceptions are needed for other things such as education and counselling, those permissions can be granted.

8. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner;
9. You are to not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
10. You are to take such alcohol and drug assessment, counselling or programming as directed by your Supervisor;

[27] THE ACCUSED: For -- you know the pool hall, billiards, there is -- their primary sale, they do sell alcohol --

[28] THE COURT: Their primary use is to facilitate people that are playing billiards or pool, so that is not a bar or tavern or off-sales.

[29] THE ACCUSED: Because I've been staying away from there the whole time, thinking it was part of my probation.

[30] THE COURT: Well, if that is where your friends --

[31] THE ACCUSED: Because no, I just like to go and play pool. Like, we spend a lot of time playing pool, and I haven't been there for a long time.

[32] THE COURT: Its primary purpose is not the sale of alcohol, as I understand it. Its primary purpose is to facilitate playing pool, but, you cannot drink or possess alcohol.

[33] THE ACCUSED: No, definitely.

[34] THE COURT: But you are on a conditional sentence, so you would have to get permission from your Supervisor to go and play pool before you would be allowed to do that, and I am not thinking that that would necessarily be coming quickly. I will let you know at this time that there can be reviews of conditional sentence orders and, depending on how a person is doing, house arrest can sometimes be changed to curfews. The Court has the ability, upon application, to make such changes, but they require the individual to be doing very well and have the support of their Supervisor, generally, so. However, in this case it will start as house arrest, and unless there is a good reason to change it that is what it will stay.

11. You are to take such other assessment, counselling and programming as directed by your Supervisor;
12. You are to make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts;

13. You are to participate in such educational or life skills programming as directed by your Supervisor including attendance at the Job Ready Program offered at the Justice Wellness Centre;
14. You are to provide your Supervisor with consents to release information with regard to your participation in any programming, counselling, employment or educational activities you have been directed to do pursuant to this conditional sentence order;

[35] Those are all the terms I intended to put on that. Yes?

[36] THE ACCUSED: Yeah, one more question, you didn't say anything about a cell phone on that, on the conditions?

[37] MS. HAWKINS: Mr. Boulanger is currently on a condition not to have a cell phone.

[38] THE ACCUSED: At my sister's house, she does not currently have a landline.

[39] THE COURT: I did not put a cell phone on it.

[40] THE ACCUSED: But would it be possible to get one of mine out of -- out of custody?

[41] MR. MACGILLIVRAY: Well, the Crown's bringing an application for forfeiture of the items as offence-related property.

[42] THE COURT: Right. Now there were two cell phones, I assume?

[43] MR. MACGILLIVRAY: Yeah, yes.

[44] THE COURT: That were there, right.

[45] Is defence applying to have one of those cell phones released?

[46] MS. HAWKINS: Certainly -- certainly Mr. Boulanger would like to have one of those cell phones released. I have advised him I'm not sure if we're in a position to oppose my friend's application.

[47] THE COURT: Yes.

[48] MR. MACGILLIVRAY: The forfeiture order's already drafted up and everything. I -- frankly, I thought this stuff would have been ironed out in turning my attention to that particular issue, that a person can get a cell phone for a few bucks now, and it is offence-related property. So off the top of my head, I can't imagine revisiting the Crown's decision.

[49] THE COURT: Well, it is the cost of doing business, illegal business. I am not putting on a cell phone ban, but those phones will be forfeited, and you will have to make arrangements to get another one. Like I say, it is just one of the consequences; one of the more minor consequences.

[50] MR. MACGILLIVRAY: Before departing from the CSO, I have discussed this issue with you before on a CSO.

[51] THE COURT: Carrying permission?

[52] MR. MACGILLIVRAY: Pardon me?

[53] THE COURT: No, go ahead.

[54] MR. MACGILLIVRAY: My only concern is travelling to employment, and returning. When he does get a job, may I suggest, Your Honour, that he provide the hours of employments to his employer. I'm not sure if you said that, but --

[55] THE COURT: I did not say that, but that is fine. One of my concerns is the time of day that we are going to be dealing with here and the possibility of employment prospects. I do not know, but it is good, so you are to provide your Supervisor with your hours of employment.

[56] MR. MACGILLIVRAY: Yes.

[57] THE COURT: Now, with respect to drywall work, it is likely to be sporadic, so that is going to have to be worked out, right?

[58] MR. MACGILLIVRAY: Yes.

[59] THE COURT: But I will say, and I am not certain whether that can always be worked out in advance. Now then, I think his Supervisor is going to have to deal with, if he knows he is working with Mr. McInerney and Mr. McInerney says we have an on-call, we need to go out tonight and do it, I do not want to preclude that from happening. He may not be in a position to provide that information or get that beforehand, but he will need to provide that afterwards, yes.

[60] MR. MACGILLIVRAY: Yes, and there seems to be a few job options out there for him right now, and it's just for his protection more than anything. I find it gets left behind and then they get arrested in their car coming back from a camp or whatever, some kind of bizarre hours. So I -- that's all.

[61] THE COURT:

15. You are to provide your Supervisor with written confirmation of the hours you have worked, for who you have worked, and the time it took to travel to and from work.

[62] MR. MACGILLIVRAY: I was thinking of something prospective, so in the event that he gets a job he picks up the phone at the very least and tells his Supervisor where he's going to go.

[63] THE COURT: What that is going to entail is you may not be able to get a hold of your Supervisor on a weekend if something comes up. However, if you are going to work at a time when your Supervisor has not been previously made aware of those hours, you will call the Adult Probation Office and leave a message outlining the above information, all right? So that means if you get a call-out and you cannot get a hold of your Supervisor, well, there is a voice mail and you can call and you can leave that information there. You also have the ability, once you have had contact and have established a relationship with the Supervisor to get a more blanket permission exception that covers, they may say, "Look at any time you're with this employer, you're good," and then you will be able to carry that with you.

[64] I am going to suggest this instead of ordering it, I am going to suggest that you carry a copy of any permission that you have at all times when you are outside of your residence with permission. That way if the police stop you, you will have your permission with you, and this is why it is going to be very important for you to sort out your work thing quickly and get that dealt with.

[65] Those are all the terms on the conditional sentence order.

[66] There will be a mandatory s. 109 firearms prohibition for a period of ten years prohibiting you from possessing any firearm, cross-bow, prohibited weapon, restricted weapon or prohibited device, ammunition, prohibited ammunition and explosive substance.

[67] There will be an order of forfeiture of all the drug-related items that were seized. Do you have a copy of that order?

[68] MR. MACGILLIVRAY: Yes.

[69] THE COURT: You have seen a copy of the order, Ms. Hawkins, yes?

[70] MS. HAWKINS: Yes, yes, no issue.

[71] THE COURT: For the record, these will be the \$310 in currency, the packing material, the two mobile telephones, the two digital scales.

[72] Do you need a destruction order for the drugs?

[73] MR. MACGILLIVRAY: I've never asked for a destruction order for the drugs.

[74] THE COURT: Forfeiture under --

[75] MR. MACGILLIVRAY Yeah.

[76] THE COURT: That is fine.

[77] MR. MACGILLIVRAY Yeah, no, that -- maybe the -- maybe people have been doing it without --

[78] THE COURT: Yes, the drugs will be destroyed, I am assuming.

[79] The victim fine surcharge will be imposed in this case, you are not working now, you will be working, and it will be \$100 which is what it is. You will have three months, is that sufficient time to pay that?

[80] (No audible response).

[81] THE COURT: You need to appreciate that any breaches of the conditional sentence order would result in you being brought back before the Court, and you have the risk of being ordered to serve the rest of your sentence at WCC, and you should assume that the first breach could very well carry that risk. I am not saying it always does, but that is a presumption that you would be working against. It is not a probation order, not that you have been on probation before, but this is jail served in the community. It is restrictive, it is intended to be restrictive, but it lets you get on with the positive steps in your life in a manner that you may not be able to do the same way had you been at Whitehorse Correctional Centre. But you need to take this very

seriously, I believe you will or you would not have gotten it, but you need to take it seriously every day. All right.

[82] MR. MACGILLIVRAY There's just the DNA order for the Court to consider.

[83] THE COURT: I considered that, I meant to address it. Given his age, lack of criminal history and the information, I am not going to make an order that he provide a sample of his DNA.

[84] THE CLERK: And the outstanding charges?

[85] MR. MACGILLIVRAY The Crown directs a stay of proceedings.

[86] THE COURT: Those charges will be stayed. There will be some paperwork, I am not sure, but he has to report immediately. It may take up to an hour for the paperwork. He is going to need to make contact with them while he is waiting and you can assist with that, Ms. Hawkins, I expect.

[87] THE CLERK: And Your Honour, if I could just clarify that you wanted the written confirmation of employment to be past tense?

[88] THE COURT: What did I say?

[89] THE CLERK: That you are to provide to your Supervisor -- you are to provide your Supervisor with proof [indiscernible] confirmation of the hours you have work, with you who have work with.

[90] THE COURT: Okay. The hours that you work or have or intend to work, just change it to that so that it covers both.

[91] I am going to make it clear that the \$5,000 in bail can be returned.

COZENS C.J.T.C.