

Citation: *R. v. Bourne*, 2010 YKTC 90

Date: 20100818
Docket: 10-00146
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Chief Judge Ruddy

REGINA

v.

JOHN WAYNE BOURNE

Appearances:
Bonnie Macdonald
Gordon Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Mr. Bourne is before me in relation to two counts to which he has entered pleas of guilty. Both are possession for the purposes of trafficking. The first of those is cocaine, the second is Ecstasy.

[2] Mr. Bourne came to the attention of the police in early May of this year as a result of information received from informants. They provided the police information indicating that Mr. Bourne was trafficking in cocaine. The information provided included the vehicle that he was using, how he was packaging the cocaine, where he was storing it, and the fact that he was using cell phones to set up transactions. As a result of the information received, the police commenced surveillance on Mr. Bourne between May 3rd and May 26th of this year. During that time he was observed to be driving a red

vehicle, using a cell phone and also engaging in a number of brief meetings consistent with drug transactions.

[3] On the 28th of May, 2010, the police observed Mr. Bourne and an unnamed female, who appears to have been the registered owner of the red vehicle, both in the vicinity of the red vehicle, when they were approached by a male who attended in the area by taxi. They observed what appeared to be a drug transaction in progress and intervened, arresting the three individuals, although I understand that Mr. Bourne was the only individual who was subsequently charged as a result of the incident, there having been an indication that the owner of the vehicle had not been involved in possessing drugs for the purposes of trafficking.

[4] In any event, as a result of the arrest, searches were made both of Mr. Bourne's person and of the vehicle. On his person they located money in the amount of \$980. They also found a couple of cell phones on Mr. Bourne. I believe others were located in the vehicle, for a total of five. A search of the vehicle located, secreted in the roof lining of the vehicle, 9.9 grams of cocaine divided into 24 individual packages for resale, the additional three cell phones, a police-like extendable baton and, in a can of Liquid Wrench, the police located, after removing a false bottom, two additional ounce bags of cocaine, an additional 7.2 grams of cocaine in a separate bag, crack cocaine in the amount of 2.8 grams, 2.6 grams of marijuana and 26 tablets of Ecstasy.

[5] The cocaine, which appears to have been just shy of three ounces in total, has been valued at approximately \$10,000 by the Crown today. I understand that in doing so, they are basing that on the prices which the informants indicated to the police Mr.

Bourne was asking for the sale of said items. I am also advised that appears to be somewhat less than what would normally be considered the going rate here in Whitehorse. The tablets of Ecstasy are valued somewhere in the range of \$10 to \$20 per tablet, which would put a range of \$260 to \$520.

[6] Mr. Bourne was transported to the RCMP detachment and over the course of the next period of time the RCMP intercepted a number of phone calls on the cell phones, which they indicate, based on language, could be interpreted as requests for the purchase and sale of narcotics.

[7] Mr. Bourne comes before the Court with a prior criminal record. There are related offences. It is a somewhat unusual record in that one of those offences for which he was sentenced, in April of 2007, was an offence for possession of Tylenol IVs. I understand from the information provided to me today in terms of previous decisions relating to Mr. Bourne, that that offence had originally been charged as possession for the purpose of trafficking with respect to 43, I believe, Tylenol IVs. Mr. Bourne, it appears, then provided a prescription indicating that most of those pills had lawfully been in his possession as a result of that prescription. He was then sentenced for the excess, which was a nominal amount, and the offence for which he was sentenced was simple possession.

[8] Subsequent to that sentence being passed, it having been a fine, it was learned that the prescription provided by Mr. Bourne had in fact been a forgery and he was subsequently sentenced in 2008 for obstruction of justice, for which he received 15 months in addition to credit for ten months spent in pre-trial custody. It was noted in

that decision that his having produced a prescription had a significant impact on the sentence that he might otherwise have served as a result of the initial offence of possession for the purpose.

[9] In addition to that somewhat unusual set of circumstances, Mr. Bourne was also sentenced in September of 2007 for possession for the purpose of trafficking. I believe that was for cocaine as well. He received 18 months for that particular offence. There was also a consecutive term of 15 months in relation to a number of weapons charges. His record suggests two convictions, although the actual sentencing decision indicates nine charges relating to unauthorized possession of firearms in relation to those offences.

[10] So Mr. Bourne does come before the Court with a related history, and a history which essentially arises within the relatively recent past, the majority of drug-related offences having arisen in 2007.

[11] In terms of Mr. Bourne's background, I am advised that he is now 38 years of age. While born in Vancouver, he has been in the Yukon for the past three years. As indicated, this appears to be the period of time where he has made choices to actively traffic in drugs in the Yukon area. He is single, although he does have one child for which he has some financial obligations. He is in significant arrears as it relates to those obligations, though I am advised he is planning to take steps to apply to vary, but it appears at this point there is some \$6,000 in arrears of maintenance.

[12] As indicated, he has spent penitentiary time in relation to some recent offences and I am advised while in the facility he did take the opportunity to pursue some work-

related tickets and to do some upgrading.

[13] In terms of his motivation for the trafficking offences before me, it appears the motivation was entirely financial. His counsel advises that when originally released on the 2007 possession for the purpose of trafficking in cocaine offence he did obtain work in Vancouver, but was subsequently arrested and returned to the Yukon as a result of a warrant on the obstruction of justice charge relating to the forged prescription. When released in the Yukon last November, he was unsuccessful in obtaining work, was relying on social assistance and, given his limited income, chose to return to the practice of trafficking in drugs as a means of augmenting the limited income he was receiving from social assistance.

[14] In terms of the appropriate sentence, I have positions of both counsel, which are not particularly far apart. Counsel for the Crown is suggesting that a global sentence of three years on the two offences would be appropriate, consecutive to any sentence being served. Defence is suggesting that that would be a somewhat excessive jump from his previous sentence of 18 months and that a sentence in the range of 26 to 30 months would be more appropriate.

[15] I also have the issue before me of how I deal with the time that he has spent in custody since his arrest. It is my understanding that he was on parole at the time of these offences. When brought into custody, his parole was revoked. Defence suggests that he should be entitled to some credit, his having lost the opportunity to serve the remainder of his parole in the community. Crown is suggesting that he ought not to receive any credit.

[16] In terms of considering how to deal with those two issues, I have viewed three cases filed by the Crown. They do indicate to me that the positions of counsel are well within the range for such offences in the Yukon. I have also considered both the aggravating and mitigating factors in this particular case.

[17] On the mitigating end, Mr. Bourne has entered a guilty plea. It appears to be, quite frankly, the only real mitigating factor in this particular case. I am advised he made the decision to traffic due to his financial circumstances, but we are talking about an individual who, by virtue of his background, knew full well the potential implications and consequences of trafficking, should he be arrested and convicted. He chose, nonetheless, to make those very poor choices. In such circumstances I find I have little sympathy for the financial constraints that led him to make such a poor choice.

[18] In terms of aggravating factors, there are numerous aggravating factors in this particular case. Firstly, there is the prior criminal record with related offences. Again, I note the fact that those prior related offences are very close in time to the offences that are before me today. Secondly, the fact that he was on parole at the time that the offences were committed. Thirdly, there is the amount and variety of drugs he appeared to be trafficking in and the value of what was recovered. It appears that he had created for himself a fairly well-organized commercial operation, designed solely for personal gain.

[19] In addition, I do note as an aggravating feature the impact of these offences on the North. There are numerous cases in the North which refer to the impact of drug trafficking on northern communities. In particular, I would note that each of the

decisions that have been filed before me, all decisions of His Honour Judge Faulkner, point to it as an aggravating factor, noting that in the North, the limited resources that we have to combat the impact of drug trafficking are such that it is oft considered a significantly aggravating factor in the North. I would echo those comments that are consistently made in various cases.

[20] Mr. Coffin, on behalf of Mr. Bourne, has suggested that perhaps there are other perspectives on the lack of resources in the North that might mitigate the way that it is viewed as an aggravating feature; including the fact that government makes certain choices about how to use its resources. He suggests that if they choose not to use those resources in a way to combat the impact of drug trafficking in the North, then it perhaps is not necessarily something that is or ought to be considered an aggravating factor in the way in which we do. It is a somewhat interesting argument, but the bottom line for me, at the end of the day, is that drug trafficking has a devastating impact on this community, and on members of this community, particularly those suffering from drug addictions. When I consider that fact, I am left with the conclusion that deterrence can and must be the primary sentencing principle in determining an appropriate sentence in a case of drug trafficking.

[21] That being said, in considering the positions of counsel, I am satisfied that the position as suggested by Crown in this case is appropriate, given the aggravating features in this particular case. Accordingly, I am satisfied a sentence of three years is appropriate.

[22] This leaves me with the issue of how I deal with, if at all, credit for the time spent

in custody since Mr. Bourne's arrest on these particular offences. As Mr. Coffin has pointed out, His Honour Judge Faulkner, with respect to the sentencing on the attempted obstruction of justice for Mr. Bourne did allow him credit for remand in very similar circumstances, those circumstances being that he has lost the opportunity to complete his prior sentence on parole in the community as a result of these offences, though His Honour Judge Faulkner did note that he was leaving for another day, and further and fuller argument, the issue of whether or not there ought to be credit in such circumstances. He did, however, credit him, and it appears to have been credit at what was then the usual rate, of one and a half to one.

[23] I am not in a situation where I have much fuller or more complete or more in depth argument on the issue here today. We are talking about what amounts to roughly three months in custody between his arrest and today's date. I do accept that there are arguments on both sides of the issue. Mr. Bourne is in custody instead of serving the remainder of his parole in the community, as a result of these charges. As Mr. Coffin argues, the question is, ought he to receive some credit to reflect that lost opportunity. On the other hand, I would note that the opportunity has been lost due to his behaviour in choosing to traffic in the first place, though I suppose the same can be said of virtually everyone who is spending time in remand; they are there as a result of their behaviour.

[24] At the end of the day, and again noting, it is in the absence of fuller or more complete argument on this particular issue, and the opportunity to consider it at more length, what I have decided to do is to provide some credit for the time that has been spent in custody since Mr. Bourne's arrest. I am not of the view that that ought to be full credit for the time spent, but I am going to credit him in the amount of two months,

which I believe is reasonable. So at the end of the day, the sentence of 36 months is going to be reduced by two months, for a sentence of 34 months remaining to be served.

[25] What I am going to do with the two offences before me as they are different in nature. The possession for the purpose of trafficking in cocaine being significantly more serious, given the nature of the drug and the impact that it has on this community, I am satisfied that that sentence ought to be one of 34 months consecutive to any other sentence being served. With respect to the second count of possession for the purpose of trafficking in Ecstasy, that will be a sentence of 24 months concurrent to the first sentence but consecutive to any other sentence being served.

[26] There are a number of remaining issues and orders which must be addressed, given the nature of the offences before me. The first of those is a firearms prohibition. In the circumstances, there having been a previous mandatory firearms prohibition for a period of ten years in September of 2007, with respect to the offences before me there will now be a lifetime prohibition with respect to firearms, ammunitions and explosive substances, pursuant to s. 109.

[27] These are also primary designated offences as it relates to the DNA provisions, so there will be an order requiring Mr. Bourne to provide such samples of his blood as are necessary for DNA testing and banking.

[28] Given his custodial status, the victim fine surcharges will be waived.

[29] That leaves us with the issue of forfeiture. There does not appear to be an issue

with the majority of items which were seized, including the drugs and drug paraphernalia and the money which was seized. There does, however, appear to be a question about one of the five cell phones. I am advised that Mr. Bourne would like one of those cell phones to be exempted as a result of the fact that it contains approximately ten photographs of his child, which appear not to be downloadable. There is no information before me, as this issue was raised for the first time today, to confirm whether or not that is in fact the case, but I am advised by the Crown that the particular cell phone in question was actively used with respect to the offences that are before the Court today. In those circumstances, I am satisfied, given that the phone was actively used in the offences, that, notwithstanding the fact that there are some photographs that are contained on it, it nonetheless ought to be forfeited as a result of the charge. Accordingly, I am going to make an order that all items which were seized pursuant to the investigation with respect to these offences are hereby forfeit to the Crown to be disposed of in due course.

[30] Is there anything still outstanding? The remaining count?

[31] MS. MACDONALD: Yes, Your Honour. On Count 3, the Crown enters a stay of proceedings.

[32] THE COURT: Okay, thank you.

RUDDY C.J.T.C.