

Citation: *R. v. Manning*, 2013 YKTC 94

Date: 20131107
Docket: 12-00413A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Chisholm

REGINA

v.

JOSHUA CONNOR MANNING

Appearances:
Joanna Phillips
Jennifer Cunningham

Counsel for the Crown
Counsel for defence

REASONS FOR SENTENCING

[1] CHISHOLM T.C.J. (Oral): Joshua Connor Manning has entered guilty pleas to three charges: two offences of trafficking in cocaine, contrary to s. 5(1) of the *Controlled Drugs and Substances Act* and one offence of possession for the purpose of trafficking in cocaine, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.

CIRCUMSTANCES OF THE OFFENCE

[2] As a result of information received from confidential sources with respect to alleged drug trafficking by Mr. Manning, the police commenced an investigation on January 12, 2012. Between March 17 and July 9, 2012, undercover police bought a total of 46 grams of cocaine from Mr. Manning for a total of \$5,100. The majority of these purchases were at the gram level, between one and 3.5 grams, although a

significant purchase of one ounce, 28 grams, was made on May 8th. There were seven transactions in total. As an aggravating factor, pursuant to s. 725(1)(b.1) of the *Criminal Code*, the Crown has outlined a January 13, 2012 transaction, where the offender trafficked by holding out a substance to be three grams of ecstasy. The police later determined the substance was not a controlled substance under the *Controlled Drugs and Substances Act*.

[3] Mr. Manning was arrested just after midnight on July 9, 2012, and his residence was subsequently searched. Eleven grams of cocaine were located under the offender's bed. Another 11 grams were located on the fridge, although the Crown acknowledges this amount belonged to the offender's supplier, who was in the residence at the time of arrest.

[4] Just prior to his arrest, when asked by an undercover officer, Mr. Manning indicated he would attempt to obtain from his supplier three ounces of cocaine, as requested by the officer. It is unclear whether this was mere puffery or something more.

POSITION OF COUNSEL

[5] The Crown seeks a global sentence of 18 months to two years less a day incarceration, plus probation. The Crown has strongly submitted that a conditional sentence order is not appropriate in the circumstances of this offence and offender.

[6] The Crown relies on the significant quantity and nature of the drug involved in these offences in submitting that denunciation and deterrence, specifically general deterrence, are the primary sentencing factors. The Crown points to the sophistication

of the operation in which the offender was involved, as well as to his lack of exceptional personal circumstances.

[7] The defence is in agreement that this matter requires the imposition of a jail sentence, however, takes a different position with respect to both the length of sentence and the appropriateness of a conditional sentence order. Considering the time the offender has already served in custody, the equivalent of three months, the defence submits a further 12 months incarceration is appropriate, to be served by way of a conditional sentence. The defence underlines his youthful age, the lack of a prior criminal record, his remorse and early guilty pleas. The defence also points to the strict recognizance to which the offender has been subject for over a year.

PERSONAL CIRCUMSTANCES

[8] Mr. Manning is 22 years of age and comes before the Court with no criminal record. He was born in Nova Scotia, where he lived for the first 15 years of his life until his parents separated. Mr. Manning was raised in a somewhat dysfunctional environment, as his father suffered from substance abuse issues, and, according to Mr. Manning, was violent towards him. Despite his relationship with his father, after his parents' separation, he moved to the Yukon with him. He indicates having done so, in part, to protect his brother. He has always maintained a close relationship with his mother.

[9] By his own admission, the offender had difficulty in school as he had trouble concentrating in class and was prone to behavioural problems. This description is somewhat contradicted by his mother, whose recollection is that although a poor

student, he was not a problematic child and did nothing out of the ordinary. She also recalled his father being mentally, but not physically, abusive to his sons.

[10] When he moved to the Yukon, his peer group in Whitehorse was, for the most part, involved in alcohol and drugs. He became absorbed in this lifestyle, resulting in addictions to various substances. He indicates that although he started smoking marihuana while still in Nova Scotia, within a few years, by which time he was in the Yukon, he had moved on to more serious drugs such as ecstasy and cocaine. His cocaine consumption progressed from infrequent to daily use. He states that between the age of 18 and 21, and up to the time of his arrest, he was addicted to cocaine.

[11] After spending two months incarcerated, upon his release on bail, Mr. Manning began to take positive steps towards dealing with his addiction. He commenced Narcotics Anonymous, as well as seeing a Yukon College counsellor regarding his addiction issues. He has received recognition from Narcotics Anonymous for one year of sobriety. He states that his counselling at Yukon College was for an hour, three times a week, over the course of six months. His counsellor advises that he did meet with her and was determined and motivated, but that his meeting schedule was once a week, and, as time progressed, approximately once every two weeks.

[12] Mr. Manning is self-employed, doing carpentry work for two companies. He has been living with David Bernier, the owner of one of those companies. Mr. Bernier has filed a letter of support for the offender. The offender has also completed the first year of a pre-employment carpentry course at Yukon College.

PRINCIPLES OF SENTENCING

[13] The principles of sentencing are set out in ss. 718, 718.1, and 718.2 of the *Criminal Code*. Section 718 reads:

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 acknowledgement of the harm done to victims and to the community. ...

[14] Pursuant to s. 718.1, “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”.

[15] Section 718.2 states the sentencing court shall take into account certain principles, including: aggravating or mitigating circumstances relating to the offence or to the offender; the fact that a sentence should be similar to sentences imposed on similar offenders for similar offences that are committed in similar circumstances; that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[16] In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court discussed at length the principles of sentencing:

- [39] ... The objectives and principles of sentencing were recently codified in ss. 718 to 718.2 of the *Criminal Code* to bring greater consistency and clarity to sentencing decisions. Judges are now directed in s. 718 to consider the fundamental purpose of sentencing as that of contributing, along with crime prevention measures, to "respect for the law and the maintenance of a just, peaceful and safe society". This purpose is met by the imposition of "just sanctions" that reflect the usual array of sentencing objectives, as set out in the same provision: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, and a recent addition: the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.
- [40] The objectives of sentencing are given sharper focus in s. 718.1, which mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Thus, whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence must respect the fundamental principle of proportionality. ...

The Court also noted that, "a sentence [should] not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence." The Court went on to confirm that sentencing judges have a broad discretion in crafting a sentence.

CASE LAW

[17] Relevant sentencing decisions from the Yukon for trafficking in cocaine or crack cocaine include *R. v. Holway*, 2003 YKTC 75, where the offender had trafficked in two ounces of cocaine. He was a 23-year-old First Nations man with a limited criminal record, but one which included an offence for possession of a controlled substance. He was involved in a commercial operation generating profit. He had pleaded guilty and

was sentenced to 18 months in prison, plus 18 months of probation. Although there was only one transaction, it was noted that this was “clearly not an isolated incident.” A conditional sentence was considered but rejected.

[18] In *R. v. Naiker*, 2007 YKTC 45, the offender was convicted after trial for possessing 95 rocks of crack cocaine for the purpose of trafficking. He was a street level commercial trafficker, who had come to Whitehorse from Surrey, British Columbia, to traffic and to profit from such activity. The sentencing judge took into account that he was a young accused with a supportive family and sentenced him to 14 months jail and one year of probation.

[19] The *R. v. Silver*, 2006 YKTC 32, case involves similar amounts of cocaine to the matter before me. The possession for the purpose of trafficking conviction involved 59.3 grams of powder and crack cocaine (the drug amounts are set out in the conviction appeal decision at 2007 YKCA 4, para. 6). The sentencing judge concluded that a fit sentence for this offender, who was involved in a profitable commercial venture, was 18 to 24 months' incarceration. Mr. Silver had no criminal record, and had attended Yukon College while in custody. Having been given credit for three months of pre-trial custody, the judge imposed a sentence of 15 months' imprisonment on the possession for the purpose of trafficking charge, concurrent to a one year minimum for possession of a loaded firearm.

[20] In *R. v. Hale*, 2007 YKTC 79, on a guilty plea to possession for the purpose of trafficking 57.5 grams of cocaine and 2.7 grams of crack cocaine, as well as 29.3 grams of marihuana, a sentence of 12 months jail, plus 18 months' probation, was given to an

addict-driven trafficker with a 2001 prior related conviction that had resulted in a custodial sentence of 10 months. Particularly aggravating was the fact that Mr. Hale was on release for a trafficking offence at the time of his arrest on this charge. He had sought help for his addiction while in custody awaiting sentence.

[21] In *R. v. Campbell*, 2009 YKTC 87, the offender was sentenced for two trafficking offences in crack cocaine. He was 40 years of age, and had a number of prior convictions, including one that was related. By the time of sentencing, the offender had served the equivalent of 10 months in custody. In terms of his role in the drug trade, he was described as a “profit-motivated drug trafficker” with a drug addiction problem. The Court found that the appropriate sentence was one of 18 months’ custody. In addition to credit for his time spent on remand, the offender was sentenced to a consecutive eight month sentence, which was to be served conditionally.

[22] The decision of *R. v. Boulanger*, 2011 YKTC 39, dealt with a 19-year-old offender who pleaded guilty to possession of cocaine and ecstasy for the purpose of trafficking. The amounts seized by police were not inconsequential: 59.9 grams of cocaine in his vehicle, and 28.4 grams of ecstasy. The offender had no prior criminal record and had support of family and friends. He suffered from an addiction to ecstasy but admitted the drug trafficking he was involved in was for profit. He was sentenced to 14 months’ incarceration to be served conditionally.

ANALYSIS

[23] Pursuant to s. 718.2, I take into account a number of both aggravating and mitigating factors. In mitigation I have considered the following: the offender has

entered guilty pleas and accepted responsibility for these offences; he is a youthful offender; he has the support of his family and friends; he was suffering from some addiction issues; he has performed well on bail under strict conditions; he has taken positive steps towards rehabilitation; he has received a positive Pre-Sentence Report from an experienced probation officer; he has a work history; has started his own company and has completed the first year of a two-year carpentry program; he was not in the possession of any weapons.

[24] In terms of aggravating factors, this was not an isolated incident of selling illicit substances. One of the transactions involved 28 grams of cocaine. The number of transactions revealed a certain commercial structure in which he was involved, and although not a significant player, the offender was a street level trafficker with ready access to drugs. I label him as a street level trafficker as there is no indication he had others working for him.

[25] The primary factors to consider in this sentencing process are denunciation, deterrence, and rehabilitation. As has been repeatedly stated in the Yukon jurisprudence, drug traffickers create untold damage to the communities in which they operate. As stated by Cozens J. in *R. v. Profeit*, 2009 YKTC 39:

[25] Trafficking in drugs, and in particular hard drugs such as cocaine, is a crime whose victims can be found far beyond the individuals who become addicted to the drugs. Families can be torn apart by either the loss of the individual to the addiction itself or to the violence that all too often accompanies the drug trade. In Canadian society this violence has found innocent victims on numerous occasions, whether they be extended family members or passers-by caught in the crossfire of the violence.

[26] Children suffer immense harm from the effects of addiction in their home, whether this addiction be from pre-natal impact or from physical and/or emotional violence in the homes that they should be safe in. The future of these children and their families is damaged and all of society pays the price.

[26] Considering all of these factors, I am of the view the appropriate sentence in this case is one of 21 months incarceration.

THE APPROPRIATENESS OF A CONDITIONAL SENTENCE

[27] The Crown has acknowledged that the offender has some level of drug addiction, but is sceptical as to the extent of this addiction. The Crown quite rightly points to a number of discrepancies which call into question the offender's accuracy as an historian of his own past. It is true that, for example, there are certain discrepancies between what the offender describes as his early home life, and what his mother recounted, as well as his recall as to the frequency of his counselling sessions while on bail compared to the numbers provided by his counsellor.

[28] I do not disagree that Mr. Manning has a tendency to embellish. At the same time, it is clear that some of his supports were aware of his addiction to drugs. On balance, I find that Mr. Manning was addicted to hard drugs, and this addiction influenced his criminal behaviour.

[29] Since his arrest and release from custody, he has taken steps to deal with this addiction, including one-on-one counselling and attendance at Narcotics Anonymous for over a year. According to Mr. David Bernier, for whom the offender has recently worked, he has created a positive support structure, and he was displayed a willingness to start a new life.

[30] Section 742.1 of the *Criminal Code* sets out the criteria a court must consider before deciding to impose a conditional sentence. Although this section has been amended subsequent to Mr. Manning's offences, the criteria to be considered, based on his offence dates, are:

1. the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
2. the Court must impose a term of imprisonment of less than two years;
3. the safety of the community would not be endangered by the offender serving the sentence in the community; and
4. a conditional sentence would be consistent with the fundamental purpose and principles of sentencing, set out in ss. 718 to 718.2.

[31] In *R. v. Proulx*, 2000 SCC 5, the Court stated:

[22] The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence. ...

Later, the Court noted:

[100] ...To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve

the objectives of denunciation and deterrence as effectively as incarceration. ...

[32] I consider it to be an important factor that Mr. Manning spent the equivalent of three months in custody after his arrest. He stated to the Court that he was grateful for having been incarcerated; it allowed him to commence sobriety, and opened his eyes as to what his future held if he continued down the wrong path.

[33] Due to the work that he has done to address his addiction and his performance while on bail, his rehabilitative prospects are positive. I am mindful that he is still a young man, and take into consideration the caselaw dealing with the sentencing of youthful offenders. See *R. v. Biron*, (1991), 65 C.C.C. (3d) 221 and *R. v. Quesnel and Smith*, (1984), 14 C.C.C. (3d) 254 (Ont. C.A.).

[34] After much consideration, I am satisfied that the punitive and restorative objectives in play in this matter are best achieved through the imposition of a conditional sentence.

[35] As a result of the three months credit Mr. Manning is receiving for having been incarcerated after arrest, the remaining global sentence is one of 18 months. It is broken down as follows: 12 months for the May 8 transaction, taking into account the three months remand credit; six months concurrent for the other trafficking offences, as set out in the second count; and six months consecutive on the possession for the purpose of trafficking charge.

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

1. Keep the peace and be of good behaviour;

2. Appear before the Court when required to do so by the Court;
3. He is required to report to a Conditional Sentence Supervisor immediately and thereafter when required by the Supervisor, and in the manner directed by the Supervisor;
4. He is to remain within the Yukon Territory, unless he has written permission from the Supervisor or the Court;
5. He is 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. He is to reside as approved by his Supervisor, and not change that residence without the prior written permission of his Supervisor;
7. For the first 12 months of this sentence, he will be subject to house arrest. He is to remain within his place of residence, except for the purposes of employment, including travel directly to and directly from his employment, and with the prior written permission of his Supervisor. His Supervisor may also provide him with other written permission to be outside his residence for the purposes of appropriate activities;
8. He must carry a signed permission letter on his person at all times that he is permitted to be outside his residence, and present it to a Peace Officer upon request;
9. He must present himself at the door or answer the telephone during reasonable hours to ensure he is complying with his conditions. Failure to do so will be a presumptive breach of this condition;

10. For the remaining six months of this sentence, he is to abide by a curfew between the hours of 9:00 p.m. and 6:00 a.m.;
11. He is to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given by a qualified medical practitioner;
12. He is not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
13. He is to take such drug assessment, counselling or programming as directed by his Supervisor;
14. He is to have no contact, directly or indirectly, with Christopher Brisson.

ANCILLIARY ORDERS

[37] Given the nature of the offence, a mandatory 10 year firearms prohibition applies. Mr. Manning is prohibited from having in his possession any firearm, ammunition or explosive substance for the next 10 years. This order is pursuant to s. 109 of the *Criminal Code*.

[38] Pursuant to s. 16 of the *Controlled Drugs and Substances Act*, the forfeiture of offence related properties outlined by the Crown at the time of the sentencing hearing is granted.

[39] A Victim Fine Surcharge of \$300 is applicable.

[40] MS. PHILLIPS: I'm wondering, because it is a drug related conviction, whether we can have a no possess any drug paraphernalia as well, as a condition on the conditional sentence order.

[41] THE COURT: Yes, I will include that condition.

[42] MS. PHILLIPS: Thank you.

[43] THE COURT: Anything further, counsel?

[44] MS. PHILLIPS: A stay of proceedings on the outstanding charges.

[45] THE COURT: Thank you.

CHISHOLM T.C.J.