CANADA
PROVINCE OF NOVA SCOTIA

CASE NO. 2028419,
2028420, 2028421

IN THE PROVINCIAL COURT
Cite as: R. v. Seguin, 2015 NSPC 95

HER MAJESTY THE QUEEN

versus

GREGORY LEO SEGUIN

DECISION ON SENTENCE

HEARD BEFORE: The Honourable Judge Frank P. Hoskins

PLACE HEARD: Provincial Court
Dartmouth, Nova Scotia

DATE OF DECISION: February 12, 2015

COUNSEL: Peter Dostal — Crown Attorney
Robert Stewart, QC — Defence Attorney

INDEX OF PROCEEDINGS

PAGE NO.

SENTENCE

HOSKINS, J.P.C. (Orally):

This is the sentencing decision of Gregory Seguin, who was found guilty of possession of child pornography and accessing child pornography in 2009. He possessed thousands of pictures, photographic, video or other visual representations of young female children under 18 years of age depicted as in the nude, posing and/or the dominant characteristics of which depict, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years.

Mr. Seguin possessed and/or accessed thousands of pictures of child pornography, as stated in my reasons for finding Mr. Seguin guilty of the offences. He downloaded the child pornography and viewed the images, then deleted them. Therefore, this is not a case where the offender has been involved in collecting and storing the material and/or distributing it to others. Nor is it a situation where Mr. Seguin is alleged to have shown interest in distributing the material accessed and/or possessed or had an intention of storing the material for future personal use. Nonetheless, it is a serious indictable offence which imposes a minimum sentence of 45 days incarceration.

The positions of the Crown and defence have been well articulated by counsel. As I said, the minimum sentence for these indictable offences is 45 days by virtue of section 163.1(4.1) of the *Criminal Code* as it then was in 2009.

SENTENCE

The position of the Crown is that a fit and proper punishment for these offences and for this offender, Mr. Seguin, is 90 days, having amended its earlier position of four months incarceration for each offence to run concurrently: this was the result of a recent unreported decision of *R. v. Keating*. Crown counsel has fairly changed its position.

Also, the Crown is asking for an imposition of a SOIRA order for life. The other ancillary orders which are requested are a DNA order and a forfeiture order.

It is the position of the defence that the minimum sentence of 45 days, to run concurrently, is the appropriate and just disposition for Mr. Seguin and for the offences.

Let me address the aggravating and mitigating factors surrounding the circumstances of the offences and the offender. There are several aggravating circumstances of the offences, which include the following: the offences here involve images that were numbered in the thousands; and Mr. Seguin has, by accessing and possessing the child pornography, contributed to the market of illicit pornography.

The mitigating factors are: Mr. Seguin possessed the child pornography for a relatively short period of time before he deleted it; he did not attempt to store the material or collect it; nor did he attempt in any way to distribute to others; most of

the illicit material involved sexually explicit poses of nude young female persons; there was very little, if any, hard core porn, to borrow the phrase used by Crown counsel, wherein young female persons are engaged in explicit sexual activity. In other words, if one could put these kind of cases on a scale, then the depictions in this case were on the lower end of the scale of depravity; to borrow again, the phrase of Crown counsel.

Mr. Seguin apologized to the court when he addressed the court following counsel submissions. He struck me as being sincere in expressing his remorse and his insight gained from the prosecution of this case. I believe him when he says that he has been thinking about this matter for several years and he has felt the effect of public shame, and has hopefully gained some more insight from this process.

Further mitigating factors are that: Mr. Seguin fully cooperated with the police throughout their investigation and did not deceive them during his interview; as he provided an inculpatory statement to the police; he complied with the conditions of his bail order for an extended period of time; Mr. Seguin professes that he has more insight into his behaviour and promises that his misconduct will never be repeated as he has felt the effect, as I said, of public shame and knows that this is clearly illegal, to borrow his term.

SENTENCE

I am also mindful of Mr. Seguin's level of intellectual functioning as described in a medical letter dated October 2nd, 2012. I will make comments about that in a few moments. It is also a mitigating factor that Mr. Seguin is motivated and willing to obtain an assessment for counselling and/or treatment as necessary. So, those are the mitigating factors that I have considered.

The circumstances surrounding Mr. Seguin. Mr. Seguin is 39 years of age and has, according to the medical opinion as discussed in the medical report dated October the 2nd, 2012, has an overall level of intellectual functioning in the low average range. Mr. Seguin's father, Leo Seguin, expressed his opinion, that his son, Gregory, has the mental ability of a teenager and is very mild mannered. He also disclosed that his son has suffered with substance abuse issues, particularly with alcohol. He added that his son's mental health is currently the best it has been in several years.

As discussed in the pre-sentence report, Mr. Seguin has been in a common-law relationship for approximately nine to ten years. He professed her support for him in the pre-sentence report. Mr. Seguin completed his grade eight education in Ontario. He attempted to return to school on several occasions. He is currently unemployed and has been so since he was charged with the offences. Prior to being charged, he worked as a brick mason. He also informed the author of the

pre-sentence report that he has been attending the Yarmouth Office of Mental Health on a regular basis for the last three years; when that report was written. As noted at page 8 of the pre-sentence report, Mr. Seguin accepts responsibility for the fact that he made a mistake in downloading certain files. He stated:

> I didn't really pay attention to the sites I was downloading and I believe these things shouldn't be accessible.

The pre-sentence report author also notes that Mr. Seguin on occasion regrets his actions based on the situation in which he finds himself at present and the impact that his actions have had on his family and on his common-law partner.

Mr. Seguin has struggled in the past with addiction issues involving the misuse of alcohol and drugs. Indeed, he reported to the author of the pre-sentence report that he attended rehabilitation centres in Northern Ontario when he was younger; in his teens and twenties. According to the pre-sentence report, Mr. Seguin does possess a criminal record for unrelated offences.

With respect to the purpose and principles of sentencing; the Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v. M.(C.A.)* (1989), 105 C.C.C. (3d) 327, and Parliament has enacted legislation which specifically sets out the purpose and principles of sentencing. Thus, it is to these sources and the common law jurisprudence that courts must turn in determining the

proper sentence to impose. Parliament has articulated the fundamental purposes and principles of sentencing in s. 718 of the *Code*. Section 718 provides that:

> The fundamental purpose of sentence is to contribute, along with crime prevention issues, 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 the victims and to the community.

The purpose of sentencing is achieved by blending the various objectives identified in 718(a) to (f). The proper blending of those objectives depends upon the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objective or combined deserves priority.

Section 718.1 directs that the sentence imposed must fit the offence and offender. Section 718.1 is the codification of the fundamental principle of sentencing, which is the principle of proportionality. This principle is deeply rooted in the notions of fairness and justice. Section 718.1 provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Section 718.2 sets out the other sentencing principles that the sentencing court is mandated to take into consideration, which for the purposes of this case are:

(a) sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;

(b) the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) an offender should not be deprived of liberty if less restrictive sanctions can be appropriate in the circumstances; and

(d) all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered.

SENTENCE

I am mindful that this sentencing involves a minimum sentence. Notwithstanding that, the principle of restraint is still applicable as it as it underlies s. 718.

It is trite to say that the imposition of a just and appropriate sentence can be a difficult task, as any, faced by a trial judge. However, as difficult as a determination of a fit sentence can be, that process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Sentencing is not based on group characteristics but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings.

Generally, it is recognized that a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender. Although the sentencing process is necessarily an individualized process, the judge must take into account the nature of the offence, the victims and the community. As Lamer, C.J., as he then was, noted in *M.C.A.*, *supra*, a sentence requires an individualized focus not only of the offender but also the victim and the community as well.

The fundamental purpose to be pursued in sentencing offenders is to contribute to respect for the law and the maintenance of a just, peaceful and safe

society, which includes taking into account rehabilitation and, where appropriate, the treatment of offenders and acknowledging the harm done to the victims and to the community.

As stated, given that sentencing is highly contextual and necessarily an individualized process, I must impose a sentence that addresses two elements of proportionality; that is, the circumstances of the offence and the circumstances of Mr. Seguin and thereby reach a sentence that fits not only the offence but also the offender, Mr. Seguin. The court must fashion the disposition from among the limited options available which takes both sides of the proportionality inquiry into account.

Let me just briefly comment about the sentencing principles in relation to child pornography. As stated in *R. v. Sharpe*, 2001 S.C.C. 2, child pornography involves the exploitation of children and, accordingly, it is in society's interests to protect children. While possessing or accessing child pornography may not be as serious as the making or distributing of it in terms of the link with the direct abuse of children, nevertheless, the market for child pornography derives from the production of it, which, in turn, results in abuse of children. At paragraphs 93 and 94 the court observed:

SENTENCE

It is argued that even if possession of child pornography is linked to harm to children, that harm is fully addressed by laws against the production and distribution of child pornography. Criminalizing their possession, according to this argument, adds greatly to the limitations on free expression but adds little benefit in terms of harm prevention. The key consideration is what the impugned section seeks to achieve beyond what is already accomplished by other legislation, *R. v. Martineau* [1990] 2 S.C.R. 633. If other laws already achieve the goals, new laws limiting Constitutional rights are unjustifiable. However, an effective measure should not be discounted simply because Parliament already has other measures in place. It may provide additional protection and reinforce existing protections. Parliament may combat an evil by enacting a number of different and complimentary measures directed to different aspects of the targeted problem. See, for example, *R. v. Whyte*, [1988] 2 S.C.R. 3. Here the evidence amply establishes that criminalizing possession of child pornography does not only provide additional protection against child exploitation, exploitation associated with the production of child pornography for the market generated by possession and the availability of material for arousal and attitudinal change and grooming, but also reinforces the law criminalizing production and distribution of child pornography. . . . possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.

Given the serious nature and the prevalence of offences of possession of child pornography and accessing child pornography, the principles of deterrence and denunciation predominate the sentencing matrix, as evidenced in a trilogy of cases from the Ontario Court of Appeal: *R. v. Folino*, [2005] O.J. No. 4737; *R. v. Jarvis* (2006), 211 C.C.C. (3d) 20; and *El-Jamel*, [2010] O.J. No. 3737. More recently the court reaffirmed this proposition in *R. v. Woodward*, 2011 ONCA 610, at paragraph 76:

> . . . when trial judges are sentencing adult sexual predators who have exploited innocent children, the focus of the sentence hearing should be on the harm caused to the child by the offender's conduct and the life altering consequences that can and often do flow from it. While the effects of a conviction on the offender and the offender's prospects for rehabilitation will always warrant consideration, the objectives, denunciation and deterrence and the need to separate sexual predators from society for society's well being and the well being of our children must take precedent.

Similarly in *R. v. Innes*, 2008 ABCA 129, the Alberta Court of Appeal at paragraph 10, observed:

> In crimes of this sort general deterrence and denunciation have considerable weight. Specific deterrence refers to convincing this accused not to re-offend. It is often little needed by the time of sentencing. General deterrence refers to inducing others tempted to commit this offence not to do so. It is especially important with crimes

> involving premeditation or planning or persistent and with crimes which are fairly common. Denunciation refers, in part, to convincing all of the public that the offence in question is a true crime, a serious crime, one which respectable people would shun and not obsolete, technical or minor. It also reassures the law abiding and informs everyone that the relationship between crime and punishment is considered logical and just.

While the principles of deterrence and denunciation predominate the sentencing matrix involving internet child luring and possession of child pornography offences and accessing offences, they do not exclude consideration of other principles in section 718 of the *Code*, including the prospect of rehabilitation. While the paramount sentencing objectives at work in the present case are denunciation and deterrence, I must not lose sight of the prospect of rehabilitation. In *R. v. Kwok* [2007] O.J. No. 457 (Ont. S.C.), Malloy, J., at paragraph 7 summarized the relevant factors that should be taken into account in sentencing offenders convicted of child pornography offences wherein it was stated:

> Not surprisingly, each case turns on its own particular facts. However, an analysis of the case law does reveal an emerging consensus on the relevant factors to be taken into account. See in particular *R. v. Parise,* [2002] O.J. No. 2513 (Ont. C.J.); *R. v. Mallett,* [2005] O.J. No. 3868 (S.C.J.). Generally speaking, any of the following are considered to be aggravating factors: (i) a criminal record for similar related offences; (ii) whether there was a production or distribution of the pornography; (iii) the size of the pornography collection; (iv) the nature of the

> collection, including the age of the children involved and the relative depravity and violence depicted; (v) the extent to which the offender is seen as a danger to children (including whether he is diagnosed a paedophile who has acted on his impulses in the past by assaulting children); and (vi) whether the offender has purchased child pornography, thereby contributing to the sexual victimization of children for profit as opposed to merely collecting it by free downloads from the internet. Generally recognized mitigating factors include: (i) the youthful age of the offender; (ii) the otherwise good character of the offender; (iii) the extent to which the offender has shown insight into his problem; (iv) whether he has demonstrated genuine remorse; (v) whether the offender is willing to submit to treatment and counselling or has already undertaken such treatment; (vi) the existence of a guilty plea; (vii) the extent to which the offender has already suffered for his crime (for example, his family, career or community).

As fairly and accurately stated in the Crown's written submission, in Nova Scotia there is a dearth of published sentencing decisions for possession of child pornography, as most are joint recommendations. Thus, it is difficult to discern a range of sentences for the offences of possession and accessing child pornography. As Justice Fichaud commented, at para. 31 in *R. v. E.M.W.* 2011 NSCA 87:

> In assessing the similarities of precedents for the parity principle, it is useful to recall Chief Justice Lamar's statements in *R. v. M.(C.A.)*, paragraph 92 [above paragraph 7]. The Chief Justice said, "There is no such thing as a uniform sentence for a particular crime," and, "sentencing is inherently an individualized process, and the search for a single appropriate sentence for a similar

> offender and a similar crime will frequently be a fruitless exercise of academic abstraction." From a similar perspective, *R. v. A.N*. this court recently said:
>
> > 30. An assessment of the gravity of Mr. N's offence with Mr. N's culpability for them is, as Chief Justice Lamar said, an inherently individualized process, not an exercise in academic abstraction. I say this here because Mr. N's parity submissions on this appeal appear to assume that sentences in other cases established a binding matrix of precedent into which the case must be slotted."
>
> To the same effect in *R. v. LeBlanc*, 2011 NSCA 60, para. 26. The sentencing judge is not expected to idealize the sentence that perfectly conforms to a hypothetical symmetry in the body of precedent. That would be a futile assignment because the actual precedents are not always consistent. It is not uncommon to find similar sentences in cases with significant factual differences. The overarching factor is the *Code's* "Fundamental principle" of proportionality, section 718.1, that the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender," *R. v. L.M.*, paragraph 36 (quoted above paragraph 8), *Nasogaluak*, paragraph 44.

An example of cases, which are somewhat similar to the case at bar, were provided by Crown counsel. The first is *R. v. Decker* 2008 NSPC 43. In Decker MacDonald, C.F., of this court sentenced an offender to a 90 day intermittent sentence for possession of child pornography. In that case the offender had no prior record and pleaded guilty. The offender was 46, lived with his disabled

mother and was her primary caregiver. The offender was diabetic and had other health problems. He was cooperative with the police in handing over the material to the police. There was no evidence that he ordered the images from a club or video source. He downloaded the images from the internet. He was found in possession of 4,900 images and a collection of child pornographic stories.

More recently, as submitted by Crown counsel, the February 9th, 2015, unreported decision by Judge Sherar of this court. He imposed a 90 day intermittent custodial sentence followed by a three year term of probation for a single count of child pornography. In that case, *R. v. Keating*, the accused was found in possession of an external hard drive at his office containing over 2,000 images of nude females between the ages of 11 and 16 years of age posed in a sexual manner with the focus on the genital region. A small number of videos were also present, and all of the depictions were on the low end of the scale of depravity. The occurrence dates ranged between 2010 and 2012, and the accused was otherwise of good character; working in a professional capacity in the shipping container industry as an engineer. He had no prior record. He was convicted after trial. The Crown proceeded by indictment and the defence asked for 90 days and the Crown asked for a range of four to six months. I should note

this was submitted to me by Crown counsel, as I do not have any further particulars of that case.

It should be stressed that, while I recognize the importance of considering the parity principle in sentencing, I am mindful that sentencing is highly contextual and necessarily an individualized approach. Again, I am mindful that the cases that I have considered can be distinguished either by the circumstances surrounding the offence or the offender but, nonetheless, are helpful. They are helpful in the sense that they provide some guidance in applying the relevant principles of sentencing. In this case, the primary purpose of sentencing is to deter and denounce this type of behaviour. The court must ensure its sentences are perceived by the public as strong condemnations of this type of behaviour.

Having considered the totality of the circumstances surrounding the offences and the offender, Mr. Seguin, I have reached the conclusion that a custodial sentence of 75 days to be served intermittently, coupled with a three year term of probation is a fit and proper punishment. In reaching that conclusion, I have considered the aggravating and mitigating factors in this case, including the length of the time that Mr. Seguin has been on release on bail conditions as this case has taken an inordinate amount of time, some of which was the result of Mr. Seguin discharging counsel as well as his mental health condition, which impacts his

moral blameworthiness to some degree. There are a number of mitigating factors here that I have considered; otherwise the range of 90 days to four months is within that range.

Let me be clear, but for the number of mitigating factors surrounding the commission of the offences and the offender, a sentence of three to four months would have been appropriate, in that range. So, I do not believe that 90 days is by any means out of the question, but I have reduced it to 75 days. I do find that the number of photographs here is what moves it from 45 days to 75 days.

Mr. Seguin, would you please stand. Mr. Seguin for all the foregoing reasons I sentence you to a 75 day period of incarceration to be served intermittently, coupled with a three year period of probation. Now, let me explain this, during the three year period of probation, there will be a status update in 24 months. The reason for that, Mr. Stewart will explain that process to you that under section 732 of the *Criminal Code*, which permits you to make an application during your probationary term to either vary a probation term or have the term itself terminated or shortened with the support of your probation officer. In other words, if you are doing extremely well during the probationary period, nothing precludes you from making an application here to vary a term of the probation

order, or you can apply to shorten the probationary period. I require that you to come back in 24 months, so that I can see how you are doing.

It is not uncommon, in this court, for individuals to come to court with a very positive report from Probation Services and have a term or a condition of their probation varied or terminated. You can have a seat, sir.

Now, the ancillary orders, the SOIRA, having read *R. v. Burns* 2012 SKCA, a decision of the Saskatchewan Court of Appeal and *R. v. R.R.D.G*. 2014 NSSC 384, a decision of the Nova Scotia Supreme Court, which I find both instructive and, like in those decisions, I find the meaning of the section is plain. That is the wording of section 490.013(2.1) of the *Criminal Code* clearly states that offenders who commit multiple designated offences will be subject to a lifetime SOIRA compliance order. Nothing in the *Criminal Code* suggests the lifetime duration of the order rests on the offender being sentenced separately for each offence. Accordingly, I will follow those decisions and impose a lifetime order with the understanding, again, that Mr. Stewart will explain to you, there are provisions in the *Criminal Code*, I believe, that apply to have that period adjusted or terminated. In any event, that is the decision because as I am following the decisions in *Burns, supra* and *R.R.D.G., supra*.

I will impose the DNA order, which is not being contested, as it is appropriate in these circumstances. I am satisfied that it would be in the best interests of the administration of justice to impose it. Given the nature of the offences and the circumstances surrounding the commission of them. I have looked at the terms and conditions. Mr. Stewart, you are satisfied that that order is fine.

Now, just let me set out the probationary terms in a moment. So, Mr. Seguin, sir, the sentence is 75 days to be served at the Southwest Nova Scotia Regional Correctional Facility on an intermittent basis. You will go in on Friday at 6:00 p.m. and you will be discharged on Monday mornings at 6 a.m.

Now, these are the other terms: you must keep the peace and be of good behaviour; appear before the court when required to do so by the court; notify the court probation office supervisor in advance of any change of name, address, employment or occupation. The probation will commence today and you are directed to report to the Probation Office today and thereafter as directed by the probation officer or supervisor. So, we do that today here, and then you can tell them where you live and they will probably start transferring your file down to Yarmouth for administration purposes.

SENTENCE

Now, these are the following conditions that I am imposing from what I have read and from what I heard. They are meant to assist you in your rehabilitation. As I said, you can always bring an application later to have them varied or changed if they are no longer necessary, but at least you are going to be assessed. So Mr. Stewart can explain that process to you.

You are not to possess, take or consume alcohol or other intoxicating substances until after an assessment. I want to make sure that there is no issue in that regard. Also, you are not to possess, take or consume a controlled substance as defined in the *Controlled Drugs and Substances Act*, except in accordance with a physician's prescription for you or legal authorization.

The only other conditions are, and I am being inclusive here, because I want a full assessment, if necessary. You are to make reasonable efforts to locate and maintain employment or educational program as directed by your probation officer; you will attend for mental health assessment and counselling as directed by a probation officer; attend for substance abuse assessment and counselling as directed by your probation officer; attend for assessment, counselling or programming directed by a probation officer; and participate in and cooperate with any assessment, counselling or program directed by the probation officer. I am

going to delete "pay the cost or a portion of the cost as directed by the probation officer" because of his financial situation.

You are to report back to court for a status update after 24 months of probation. So I would like to see you after 24 months on February 14, 2017, to see how you are doing.

So, those are the terms and conditions. Those terms and conditions are meant to assist Mr. Seguin in his rehabilitation, as I accept that he has more insight into what has happened. He apologized to the court. I accept his expression of remorse. He struck me as being sincere.

Now, the other order that I have here is the DNA, the SOIRA order for life, and a forfeiture order, so I will issue those orders. The last thing is the victim surcharge, which I will waive, as I am satisfied that to impose it would cause an unnecessary hardship.

HOSKINS, J.P.C.