PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Terris*, 2019 NSPC 11

Date: 2019-04-25
Docket: 8213177
Registry: Pictou

Between:

Her Majesty the Queen

v.

Matthew William Terris

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	2019: 8 March, 25 April in Pictou, Nova Scotia
Charge:	Subsection 5(2) *Controlled Drugs and Substances Act*
Counsel:	Bronwyn Duffy for the Public Prosecution Service of Canada Andrew O'Blenis for Matthew William Terris

By the Court:

[1] Matthew William Terris elected trial in this court and pleaded guilty to a single count of possession of cocaine for the purpose of trafficking, contrary to sub-s 5(2) of the *Controlled Drugs and Substances Act (CDSA)*. This case follows soon after the sentencing decisions which I rendered in *R v AL*, 2018

NSPC 61 (*AL*) and *R v Livingstone*, 2018 NSPC 62 (*Livingstone*), which also involved possession of Schedule I substances for the purpose of trafficking.

[2] There are some differences between this case and those earlier two as to the circumstances of their offences and their personal biographies; however, the seriousness of their offences and their levels of moral culpability are pretty much equivalent.

[3] I intend imposing the same sentence upon Mr Terris as I did in *AL* and *Livingstone* for the same reasons: petty retailing in small quantity of a Schedule I substance; cooperation with police; no violence or weapons implicated in the offence; timely guilty plea; no record; good rehabilitative prospects; community-based sentence sufficiently deterrent and rehabilitative. And, now, sentence parity. I adopt the reasons I used in those cases. I recognize that there is some hazard in this: *AL* and *Livingstone*—along with a number of similar sentencing decisions—are on appeal to the Court of Appeal. One case has been argued already and is on reserve, as I understand it. If any one of those previously imposed sentences is found unfit, there might be a cascading effect which might sweep up Mr Terris, given the likelihood of a sentence appeal being brought in this case. One could wait to see if the matter on reserve might get decided soon. However, this court has an obligation under ss 720(1) of the

Code to conduct and conclude a sentencing hearing as soon as practicable after making a finding of guilt; holding my decision in suspension in anticipation of an outcome in another court—albeit one with binding authority—would not accord with the statute.

[4] I shall set out some details about the offence and Mr Terris to provide context for my decision.

Circumstances of the offence

[5] The statement of fact read into the record by the prosecution in accordance with ss 723-4 of the *Code* was brief: Mr Terris was arrested by police on 6 April 2018 during the execution of a s 11 *CDSA* residential search. Police found 52 g of cocaine belonging to Mr Terris. Defence counsel did not dispute the facts.

Circumstances of Mr Terris

[6] Almost all the biographical information the court received about Mr Terris came from a presentence report dated 4 March 2019.

[7] Mr Terris is only 28 years old.

[8] He has no record, either as an adult or as a young person. Family and friends were shocked by his involvement in this offence as it was so very much out of character.

[9] His childhood and adolescence were unremarkable, and he enjoys abundant family support. He advanced through school to graduation tracking normal milestones, and he was a good student with perfect attendance.

[10] Mr Terris has been in a stable, common-law relationship for two years; his partner just gave birth to their child. He has a 4-year-old son with a former companion and he exercises parental access recurrently.

[11] Mr Terris has a consistent work record. He holds a job right now as a cleaner; his employer described him in the PSR as a reliable and punctual worker.

[12] Mr Terris' health is good, although he experiences anxiety—he has been prescribed a sedative for it—and suffered panic attacks when he was younger. He has used alcohol and cannabis, but not to a level of morbidity. He maintains a high level of physical fitness.

Aboriginal status

[13] The presentence report informs the court that Mr Terris holds a status card from the Confederacy of Nova Scotia Métis. The report notes that Mr Terris has never resided in an Aboriginal community; he does not speak an Aboriginal language and is not connected to Aboriginal culture.

[14] Counsel did not address this issue in making sentencing submissions.

[15] It is not for the court to scrutinise minutely the Aboriginal status of a person before the court for sentencing for the purposes of applying appropriately the provisions of ¶ 718.2(e) of the *Code*: *R v McInnis*, 2019 PECA 3. Recall that this provision of the *Code* states:

> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders.*
>
> (Emphasis added.)

[16] Sentencing courts must give special consideration to restorative approaches to sentencing, particularly in cases involving Aboriginal persons: *R v Gladue*, [1999] 1 SCR 688 at ¶ 43; *R v Ipeelee*, 2012 SCC 13 at ¶ 59.

[17] However, the must follow other elements of the law, as well. The law informs me that a person's Aboriginal status depends on more than producing a card.

[18] In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, (*Daniels*) the Court held that Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*, that the Crown in right of Canada owes a fiduciary duty to Métis and non-status Indians, and that Métis and non-status Indians have the right to fair consultation and negotiation regarding their rights and interests as might be impacted by government action.

[19] This comes with a qualification: *Daniels* makes clear that aboriginal rights are community-held rights inherent in a distinct, rights-bearing collective. At this point, the Mi'kmaq are the only First Nation in Nova Scotia to have asserted those rights credibly and to have had them recognized officially. Accordingly, it is not clear to me the extent to which the last clause of ¶ 718.2(e) of the *Code* is applicable to Mr Terris. Further, based on the submissions of defence counsel, it is not clear that Mr Terris self identifies as Aboriginal.

[20] In saying this, it is important that I be mindful of the fact that one component of the historic injustices suffered by First Nations in Canada was the arrogation by settler authorities of the power—often exercised capriciously, opportunistically and abusively—to decide who are First Nations, a power antithetical to the rights of First Nations to sovereignty and self-determination,

recognized internationally in the *UN Declaration on the Rights of Indigenous Peoples*: GA Res 61/295 (13 September 2007), Canadian objector status rescinded A/RES/61/295, particularly Art 33. Governments, of whichever branch, need to act with restraint when making decisions in this area.

[21] I will point out at once that this does not appear to be the case of someone asserting a status opportunistically. Rather, the author of the presentence report asked Mr Terris a question that is a standard inquiry in gathering information for a PSR, and Mr Terris answered it. As I observed earlier, Mr Terris' status was not argued or advanced by defence counsel. In my view, it is not necessary for the court to decide the validity of it. As in all cases, the court remains alive to the broadly applicable principles of restraint.

Submissions of counsel

[22] The prosecution relies on the authorities it presented to the court in *AL* – particularly *R v Oickle*, 2015 NSCA 87—in support of what I took to mean a recommendation for a substantial term in a provincial prison; that would comprehend a sentence of less than two years in virtue of s 743.1 of the *Code*.

[23] Defence counsel seeks a suspended sentence with a 3-year term of probation. This would be a legal sentence, in virtue of ¶ 731(1)(a) of the *Code*.

Defence counsel relies on a recent line of authorities which I referred to in *AL*; in those cases, persons charged with low-level, Schedule I trafficking-related offences—who fell in the petty-retailer category, with good antecedents and good prospects for rehabilitation—received community-based sentences.

[24] Counsel are *ad idem* on ancillary orders.

Conclusion

[25] I would observe that, unlike the *AL* case, there is no evidence of Mr. Terris being pressured into dealing by an intimate partner; further, Mr. Terris matches the more typical profile of a low-level, petty retailer: adult-but-youthful male dealing in small quantities of Schedule I substance; this might suggest a greater need for general deterrence. Additionally, there is no evidence of Mr Terris getting ensnared in dealing to help support a drug habit, so that his conduct might be seen as more voluntary and calculated for profit, less driven by dependency or need.

[26] Still, I reckon this case as being strikingly similar to *AL* and *Livingstone*:

- First-time offender;
- Petty-retail possession of small quantity of Schedule I contraband;

- Solid employment history and good family support;
- No aggravating factors under the statute;
- No evidence of weapons or violence;
- Cooperation with police;
- Early guilty plea;
- Bail compliance;
- Good prospects for rehabilitation.

[27] Based on these findings of fact, and adopting the legal analysis I used in *AL*, I suspend the passing of sentence, and place Mr. Terris on probation for three years with these conditions:

- Keep the peace and be of good behaviour;
- Appear before the court when required;
- Notify the court or the probation officer, in advance, of any change of name, address, employment or occupation;
- Report to a probation officer at the community corrections office in New Glasgow no later than 4:00 p.m., 30 April 2019;

- Not possess, take or consume any controlled substance as defined in the *CDSA* except in accordance with a physician's prescription for you;

- Complete 100 hours of community-service work within the first 24 months of probation;

- Attend for substance use, assessment and counselling as directed by the probation officer;

- Attend for any other assessment, counselling or programming directed by the probation officer;

- Participate in and cooperate with any assessment, counselling or programming directed by the probation officer, and you must report immediately to the probation officer any missed assessment or counselling appointments;

- Comply immediately with any demand for urinalysis made of you by a peace officer or probation officer in accordance with the terms of ¶¶ 732.1(3)(c.1) and (c.2) of the *Code*;

- Sign immediately all consents for release of information required by your probation officer to arrange services;

- For the first six months, be subject to a daily 10:00 p.m. to 7:00 a.m. curfew and the court will allow exceptions set out in the checklist;

[28] The court imposes a s 16 *CDSA* order of forfeiture.

[29] There will be a secondary-designated offence DNA-collection order which shall refer to the specific charge and the specific substance.

[30] There will be a 10-year/lifetime s 109 order under the *Code*.

[31] In *R v Boudreault*, 2018 SCC 58 the Supreme Court of Canada held that s 737 of the *Criminal Code*—which deals with the imposition of victim-surcharge amounts in sentencing cases adjudicated under the *Code* and the *CDSA*—violated s 12 of the *Charter*, and was not saved by s 1; section 737 was declared invalid in its entirety with immediate effect. In doing so, the majority opinion of the Court held as follows at ¶¶ 98-99:

> [98] I would declare s. 737 to be of no force and effect immediately, pursuant to s. 52(1) of the *Constitution Act, 1982* . I reject the respondent federal Crown's argument that this Court ought to suspend its declaration of invalidity for a period of 6 to 12 months in order to give Parliament time to adopt conforming legislation. The respondents have not met the high standard of showing that a declaration with immediate effect would pose a danger to the public or imperil the rule of law: *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 167. Rather, in my opinion, a suspended declaration in this case would simply cause more offenders to be subject to cruel and unusual punishment.

> [99] *I also reject the argument, advanced by the Tinker appellants, the Attorney General of Ontario, and (in the alternative) Mr. Eckstein, that this Court simply ought to read back in the judicial discretion to waive the surcharge that was abrogated in 2013. This is the wrong approach in this case for two reasons.*
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> [100] First, in 2013, Parliament clearly expressed its desire to eliminate judicial discretion to waive the surcharge. In relation to mandatory minimum sentences, this Court held that Parliament is presumed to intentionally remove any discretion to order a sentence that is less than the mandatory minimum: *R. v. Ferguson*, at para. 54. For this reason, constitutional exemptions from unconstitutional mandatory minimum sentences are considered a highly intrusive remedy: *Ferguson*, at paras. 50-51; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 628. The same logic militates against this Court reading the terms of the prior discretion back into s. 737 today.
>
> [101] The second reason why reading in is an inappropriate remedy in the instant case is that Parliament ought to be free to consider how best to revise the imposition as well as the enforcement of the surcharge. Section 737 is invalid by reason of all of its effects, from mandatory imposition on a charge-by-charge basis through committal hearings, threats of imprisonment, and the denial of rehabilitation. Because of this, a number of possible legislative options, that do not replicate the previous provision, are open to Parliament to bring s. 737 into compliance with s. 12 .
>
> (Emphasis added.)

[32] Accordingly, there remains in law no valid statute authorizing the imposition of a victim-surcharge amount and none can be imposed.

JPC