

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R v Smith*, 2019 NSPC 60

**Date:** 20190927

**Docket:** 8275273, 8283955, 8283956, 8286970  
8289910, 8289912, 8366290

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Scott Alexander Smith

<b>Judge:</b>	The Honourable Judge Elizabeth Buckle,
<b>Heard:</b>	September 27, 2019, in Halifax, Nova Scotia
<b>Decision:</b>	November 21, 2019
<b>Charge:</b>	CC 348(1)(b) x3; CC349; CC145(3) x3
<b>Counsel:</b>	Tiffany Thorne, for the Crown Godfred Chongatera, for the Defence

## **Introduction**

[1] Scott Smith has pleaded guilty to 7 offences, occurring between May 2018 and July of 2019:

- May 23, 2018 – June 1, 2018
  - break, enter and theft, from a dwelling (s. 348(1)(b))
  - unlawfully in a dwelling (s. 349)
- May 30, 2018
  - break, enter and theft from a business (s. 348(1)(b))
- November 11, 2018
  - break and enter with intent, from a church (s. 348(1)(a))
  - fail to comply with a Recognizance (s. 145(3))
- November 20, 2018
  - fail to comply with a Recognizance (s. 145(3))
- July 26, 2019
  - fail to comply with a Recognizance (s. 145(3))

[2] I now have to determine a fit and proper sentence in circumstances where the guiding sentencing principles appear to call for mutually exclusive results. The offences are serious and call for a sentence that denounces the conduct and deters others from committing similar offences. That usually requires a custodial sentence. However, Mr. Smith is a young man with no previous criminal record who struggles with mental illness and addiction. He has an education, a supportive

family and a demonstrated desire to overcome his addiction. A custodial sentence would be detrimental to his prospects for rehabilitation.

### **Position of the Parties**

[3] The Crown and Defence agree that Mr. Scott should be given credit for the time he has spent in custody pending sentence. He has now served 85 days. With the normal enhanced credit, that is the equivalent of a sentence of 128 days, just over 4 months.

[4] The Crown seeks a global sentence of 29 months less credit for the time Mr. Scott has spent in pre-trial custody for a go forward sentence of approximately 25 months. In seeking that sentence, the Crown acknowledges the absence of a criminal record and recognizes that in the circumstances, a noncustodial sentence would be best for Mr. Smith's rehabilitation. However, the Crown argues that the number and nature of the offences require a strong message of denunciation and deterrence and relies on the consistent message from the Nova Scotia Court of Appeal that a custodial sentence of 3 years is the benchmark for the offence of break and enter.

[5] The Defence seeks a suspended sentence with probation or a short period of incarceration. In doing so, the Defence argues that long term protection of the

public is best accomplished through rehabilitation and that the circumstances justify emphasizing that objective over denunciation and deterrence.

[6] The Crown also seeks two ancillary orders:

- restitution in the amount of \$800 for the business who was the victim of the May 30<sup>th</sup> break and enter; and,
- a DNA Order.

[7] The Defence takes no position on these orders.

### **Circumstances of the Offences**

[8] On May 23, 2018, Mr. Smith broke into a residence through a basement window. It was daytime and no one was at home. The homeowner, a woman who lived there alone with her children, returned to the residence to find many of their belongings missing, including items that belonged to the children and items that had sentimental value. Mr. Smith's mother discovered the suspicious items in a bag and confronted him. He admitted they were stolen, and she contacted police. As a result, he was charged, and the items were returned. It is not clear whether all the stolen items were returned but the victim has not requested restitution.

[9] Between May 24, 2018 and June 1, 2018, Mr. Smith and some other people were apparently staying at the apartment of an acquaintance who was away. They did not have permission to be there. When the victim returned, her apartment was

a mess and some items were missing. Mr. Smith's mother knew the victim and compensated her for the missing items.

[10] On May 30, 2018, overnight, Mr. Smith broke into a business by breaking a window. He stole \$800 which has not been recovered. There has been no request for restitution, however the Crown seeks a restitution order.

[11] Mr. Smith was arrested for these offences and, on June 4, 2018, released on a Recognizance which included a condition not to possess or consume alcohol. On November 11, 2018, police responded to a break and enter in progress at a church. When they arrived, they found a broken window and Mr. Smith inside the church. He exited at their request. Two bottles of wine were discovered on the floor and it was apparent to police that Mr. Smith had been consuming alcohol.

[12] On November 13, 2018, Mr. Smith was again released on a Recognizance, this time with a condition that he abide by house arrest. On November 20, 2018 at approximately 11:40 p.m., he was seen on Gottingen Street in Halifax. Police went to his residence where his mother checked his bedroom and discovered that he was not there. He had put pillows in the bed to hide his absence. She had last seen him at 11:00 p.m. and he arrived home at 2:00 a.m.

[13] On December 5, 2018, he was released on a Recognizance with two sureties. On July 26, 2019, in the early morning, his mother, who was one of his sureties, noticed that her vehicle was missing and was concerned about her son. She reported it to police who found Mr. Smith in the vehicle on Maynard Street in Halifax.

[14] None of the victims chose to file victim impact statements

#### **Mr. Smith's Circumstances**

[15] Information about Mr. Smith's background and current circumstances has been provided through: a Pre-Sentence Report; a treatment report and update from Ian Smith, a counselor (no familial relationship to Scott Smith); correspondence from Kevin Uba, admission counselor at Bellwood Health Services, dated December 3, 2018; a Nova Scotia Mental Health Court Program screening report, dated September 17, 2018; a psychiatric assessment from Dr. Gosse, dated September 19, 2018; NS Mental Health and Addictions documents; a letter of support from Jayne Smith, Mr. Scott's mother; a letter of support from Ben Smith, Mr. Smith's brother; and, a letter of support from Shawna Burgess, Mr. Smith's aunt.

[16] I also had the benefit of: testimony from Mr. Ian Smith who was qualified, with the consent of the Crown, as an expert in “addiction, substance abuse, treatment and treatment placement”; testimony from Ms. Jayne Smith; submissions of counsel; Mr. Scott Smith’s comments at the end of the sentencing hearing; and, a statement written by him and filed during the hearing.

[17] Mr. Smith has been in custody since his arrest on July 26, 2019. He is now 26 years old and was 25 years old when he committed most of these offences. He has no previous criminal record. His mother described him in her testimony as outgoing, intelligent, fun loving, a wonderful family member and a nice person. That description is consistent with reports from other family members. His pre-sentence report was very positive. He expressed remorse and said he was ashamed of his behaviour. The probation officer described him as “polite”, “cooperative” and “honest”.

[18] He was raised in a loving and supportive home. His parents were able to provide him with all the necessities of life and did everything possible to ensure he had what he needed to thrive. He and his father were particularly close. They had common interests and his father coached him in sports. He played basketball and football and did well in school. He completed high school and an undergraduate

university degree. He planned to do graduate work but decided to take time off to work and save money. Unfortunately, his plans were derailed when he became addicted to crack cocaine and committed the offences before the court.

[19] The testimony and exhibits filed at the sentencing hearing provide information about his mental health and addiction struggles. His mother testified that as a child he was high strung and emotional. She was not aware at the time that he had been sexually abused in day care and was experiencing significant bullying throughout elementary school. However, she saw that he struggled socially and had to learn to control his temper and cope with social rejection. He appeared to be doing better in junior high school and high school. Sports provided him with an outlet for his emotions, discipline to control himself and an accepting social group. She was not aware that he was also using marijuana and drinking, apparently to ease his anxiety and fit in with a peer group. As he got older, he continued to struggle with anxiety and depression. He has a significant family history of both. While in university, he experienced the sudden death of his father and a difficult break-up, both of which challenged his mental health.

[20] His parents (and his mother after the death of his father) appear to have been attentive to his mental health, ensured treatment was available and encouraged his



participation. He appears to have always been willing to accept help for his mental health issues and his addiction. He was first referred for a mental health assessment in 2008 when he was in grade 9/10. He had been experiencing some anxiety over school and sports, concern over his brother who had threatened suicide, and was having difficulty controlling his emotions. By the time he met with a professional for the assessment, he appeared to be doing better. In 2013/14, he again saw a psychologist and began taking an anti-depressant. This was after the death of his father. His mother testified that she thought he was coping well. When he came home for the summer, she became concerned that he was depressed so encouraged him to get help and he did. In 2014, in his fourth year of university, he again saw a psychiatrist following a difficult break-up. At that time, he was diagnosed with adjustment disorder and depression with mixed anxiety. His dosage of anti-depressant was increased. He again experienced an acute depressive episode in 2017 while in a residential treatment program for addictions. At that time, his dosage of anti-depressant was again increased.

[21] His struggles with mental health and his use and eventual addiction to street drugs are intertwined. He began using marijuana and alcohol at a young age and this worsened during university when he reports daily use. After he graduated, his use of alcohol and street drugs continued. He reports that in the fall of 2016, he

tried cocaine and then crack cocaine. He quickly became addicted and there was a rapid downward spiral. He had been living with his brother, but when his family saw that he was not doing well, he moved in with his mother. She arranged for an addictions “intervention” in July of 2017 and he agreed to immediately go into a residential treatment program at Ledgehill Treatment and Recovery Centre. He completed their program and was released, but relapsed. Between July of 2017 and January of 2018, he was in and out of Ledgehill a couple of times. While at Ledgehill he met Ian Smith, who was completing a practicum there.

[22] After leaving Ledgehill in January of 2018, Mr. Smith moved in with his mother. He began attending meetings of Narcotics Anonymous and, in March, contacted Ian Smith for individual counselling. Unfortunately, in mid-April of 2018 he relapsed, and his mother kicked him out. Over the course of one week at the end of May, he committed the first cluster of offences that I am sentencing him for: the break, enter and theft from a residence; the unlawfully in a dwelling; and, the break, enter and theft from a business. At that time, he was unemployed, homeless and using cocaine. He had stopped seeing Ian Smith and stopped taking his prescription medications. He says he was stealing to get money for drugs.

[23] His mother testified that she feels that her decision to evict him from her home in 2018 was a mistake and takes some responsibility for the circumstances that led to the commission of the offences in May of that year. Mr. Smith does not blame his mother. He takes full responsibility for the behaviour that resulted in her decision to evict him and that resulted in the charges.

[24] At the time she evicted him, she felt it was the right thing to do. Since then, she has worked hard to educate herself about addictions; she has attended conferences and seminars, read extensively, received counselling and joined support groups. As a result, she feels much more able to deal with all the challenges that come with living with a person with addiction. She remains committed to the belief that Mr. Smith has to experience the consequences of his behaviour and has repeatedly put that belief into action. However, she is steadfast in her love for him and her willingness to provide him a home with her.

[25] After his release from custody on June 4, 2018, he completed another residential treatment program, this time at Crosbie House. Upon his release from Crosbie House he continued to attend Narcotics Anonymous meetings, reconnected with Ian Smith for individual therapy and was admitted to “Alcare Place”, a supervised sober living facility in Halifax. He could have remained there

for a year. Unfortunately, in November of 2018, he relapsed and committed another break and enter, this time into a church, and a week later, a breach of his Recognizance. Both Jayne Smith and Ian Smith, testified that a drawback to “Alcare Place” is that it is located on Robie Street, with nearby access to crack cocaine. At the early stage of Mr. Smith’s recovery, this close proximity would have been too much for him. Ian Smith testified about the addictive qualities of crack cocaine; users become addicted quickly and continue to have psychological and physical urges for it longer than other substances.

[26] According to Ian Smith, Mr. Smith had been progressing well in therapy from June to November of 2018. He was still engaged in addiction recovery through Narcotics Anonymous and Alcoholics Anonymous, however, the focus of his individual therapy was now on trauma. By this time, Mr. Smith had disclosed the sexual abuse he’d experienced in daycare and more fully disclosed the extent of the childhood bullying he’d experienced. In Ian Smith’s opinion, the addictions and anxiety were symptoms of the previously unresolved trauma. Mr. Smith’s previous treatment at Ledgehill and Crosbie House were focussed on addiction recovery. Ian Smith believed the trauma had to be addressed before addiction treatment was likely to be successful.

[27] After Mr. Smith's release from custody in December of 2018, he again went to a residential treatment program, this time at Bellwood in Ontario. He was there from January to March of 2019. After his release, he had his longest period of sobriety since he started using cocaine, 8 months. He was living at home with his mother and aunt, continuing to attend Narcotics Anonymous and continuing individual therapy with Ian Smith. Ian Smith testified that he had made sufficient progress in the trauma therapy that they were ready to move on to tackle the addiction more directly. He observed, and Mr. Scott reported, a lessening of his anxiety. Unfortunately, at the end of July 2019, Mr. Smith breached the house arrest condition of his Recognizance, was arrested and has been in custody since. There is no direct evidence that he was using drugs when he breached his condition, but, given the geographic area of the city where he was seen, it is reasonable to infer that his purpose in breaching was to find drugs. His mother testified that she felt the breach was related to fear and anxiety surrounding his pending sentencing hearing.

[28] Ian Smith testified about addictions in general and about Mr. Smith's circumstances. In his opinion, the root of Mr. Smith's addiction is a combination of innate traits and trauma. He started out life as someone who was prone to anxiety and low emotional resilience. The childhood and adolescent trauma he

experienced exacerbated his anxiety so as an adolescent he “couldn’t live in his own skin”. He turned to drugs to medicate. Once he became addicted to cocaine, he used it intensely for a year, creating a well-embedded dependency - the relationship between trigger, craving and use.

[29] He testified that slips or relapses are expected during recovery from any addiction and should not be viewed as an indication that the person will not ultimately be successful. In Mr. Smith’s circumstances he sees reason for optimism:

- Mr. Smith fully admits that he is addicted to drugs;
- He recognizes that drugs are a problem and genuinely does not want to use them;
- He has never declined treatment, has sought out treatment and been an active participant;
- He has honestly reported slips in therapy;
- He has made very good progress in therapy for his underlying trauma; and,
- The time between relapses has been increasing – during the fall of 2018 there were a number of slips, then 3 months of sobriety from January to April of 2018, then 5 months of sobriety from June to

November of 2018, and, finally, 8 months of sobriety from early December, 2018, to late July 2019.

[30] He testified that Mr. Smith has had good addiction education through the residential programs he has taken and does not require intensive addiction programming. He understands what his triggers are so knows what he needs to stay away from. He requires ongoing maintenance and support to help him cope with the triggers that can't be avoided. That assistance can be provided in 12-step programs. In the past he was very engaged in those programs and they appeared to be helpful to him. The next step in his treatment would ideally be a lengthy (6 – 12 months) stay in a long-term care facility without triggers where he can abstain.

[31] Both Ian Smith and Jayne Smith testified about the limited options available for that kind of program. A place like “Alcare Place” would be ideal if it were not located in an urban environment, blocks from where he would go to buy drugs when using. Jayne Smith has researched options, including a program in Ontario and Talbot House in Cape Breton.

### **Sentencing Principles**

[32] In sentencing Mr. Smith, I have to apply ss. 718, 718.1 and 718.2 of the *Criminal Code*. These contain the general principles and factors relevant to

sentencing. The overall purposes of sentencing are protection of the public and to contribute to respect for the law and the maintenance of a safe society. Those purposes are to be addressed by imposing just sanctions that have, as their goal, one or more of the following: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

[33] The weight to be given to each of these principles and objectives will vary depending on the circumstances of the case.

[34] There is no doubt that for serious offences, like break and enter, denunciation and general deterrence are important objectives. However, even when denunciation and deterrence have to be emphasized, rehabilitation continues to be a relevant objective (*R. v. Lacasse*, 2015 SCC 64, at para. 4). That is particularly so when sentencing youthful first offenders. This principle has been recognized and applied by courts even in cases where the nature of the offence requires that denunciation and deterrence be paramount (*R. v. Priest*, (1996), 30 O.R. (3d) 538 (C.A.); *R. v. Bratzer*, 2001 NSCA 166; and, *R. v. Espinosa*



*Ribadeneira*, 2019 NSCA 7). In *Priest*, a case of break, enter and theft from a church, Rosenberg, J.A. said:

The primary objectives in sentencing a first offender are individual deterrence and rehabilitation. Except for very serious offences and offences involving violence, this court has held that these objectives are not only paramount but best achieved by either a suspended sentence and probation or a very short term of imprisonment followed by a term of probation. In *R. v. Stein* (1974), 15 C.C.C. (2d) 376 (Ont. C.A.) at p. 377, Martin J.A. made it clear that in the case of a first offender, the court should explore all other dispositions before imposing a custodial sentence:

It is the view of the Court that the sentence imposed upon the appellant does reflect an error in principle. In our view, before imposing a custodial sentence upon a first offender the sentencing Court should explore the other dispositions which are open to him and only impose a custodial sentence where the circumstances are such or the offence is of such gravity that no other sentence is appropriate. In our view, this offence does not fall within the category of offences where a custodial sentence is the only appropriate sentence to be imposed upon a first offender, nor are there other circumstances which require the imposition of a custodial sentence.

In *Bratzer*, Bateman, J.A. wrote:

There is ample authority for the proposition that sentences for youthful offenders should be directed at rehabilitation and reformation, not general deterrence. (*R. v. Leask* [1996 M.J. No. 587 (Q.L.) (C.A.); *R. v. Demetr and Whitmore* (1976), 32 C.C.C. (2d) 379 (Ont. C.A.); *R. v. Casey*, [1977] O.J. No. 214 (Q.L.) (Ont.C.A.) This is common sense. A youthful offender, particularly one such as Mr. Bratzer, who has an interest in a vocation and can be equipped with the tools to earn an honest living, is more likely to be diverted from a life of crime than would a career criminal. (para. 40)

[35] I recognize that in both of these cases, the offenders were younger than Mr. Smith, barely adults at the time they committed the offences. I also recognize that neither case stands for the proposition that youth and absence of a criminal record will justify ignoring the objectives of denunciation and deterrence in very serious cases or cases involving violence.

Proportionality

[36] The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[37] Assessment of the gravity of the offences requires consideration of their gravity in general and the relative gravity of Mr. Smith's specific conduct. Break and enter, particularly into a residence, is a very serious offence. This is reflected in the fact that Parliament has set the maximum sentence at life imprisonment. It is viewed as serious because: as a society we put a great deal of weight on the sanctity of private property, especially our homes; a break-in has a significant psychological impact on the residents who often no longer feel safe in their home; and, there is a very high risk of danger to the public when private property is invaded.

[38] In this case, all three locations were unoccupied when Mr. Smith entered. However, he accepted a risk that the private residence would be occupied when he entered. I have no victim impact statement, but it is reasonable to conclude that a person living alone with three children would be significantly impacted by the knowledge that someone had entered their home. There is no evidence that he possessed any weapons, there was no malicious destruction of property, the break-

ins were not sophisticated, there is no evidence of planning and, when caught in the act at the church, Mr. Smith was co-operative with police when told to exit the property.

[39] The offence of being unlawfully in a dwelling is less serious, objectively and subjectively, than the break and enter offences. However, Mr. Smith had been friends with the person who lived in the apartment, so his behaviour was a betrayal of that friendship.

[40] Finally, the breaches of court orders are serious offences. Particularly, the breach on November 20<sup>th</sup>, which occurred within a week of Mr. Smith being placed on the Recognizance and involved some attempt at deception.

[41] The other aspect of proportionality is the degree of responsibility of the offender. Mr. Smith is solely responsible for these offences. The offence of being unlawfully in a dwelling involved other people, but it appears he was the person who had the prior relationship with the victim so is more accountable. It is impossible to discuss his moral blameworthiness without discussing his addiction. At the time of the offences and for about a year before the first offence, Mr. Smith was addicted to cocaine. He also has a history of alcohol use and abuse. His offences are directly related to his addictions, in the sense that they were

committed during times when he was relapsing and were committed either while he was under the influence of drugs or alcohol or for the purpose of stealing to obtain drugs. That is not an excuse, but it puts his behaviour in context and lessens his moral culpability.

### Aggravating and Mitigating Factors

Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender:

#### Aggravating Factors

- the number of offences;
- the inferred impact on the peace of mind and feeling of safety of the victim of the residential break-in;
- the fact that most were committed while Mr. Smith was in the community on conditions.

#### Mitigating factors:

- Mr. Smith has pleaded guilty;
- He has no criminal record;
- He has expressed genuine remorse and taken full responsibility for his actions;

- He struggles with addictions and was using substances during the period of the offences;
- He has tremendous family support;
- Up until 2018, he was fully engaged in education or employment;
- He has demonstrated that he is prepared to work hard and has the ability to succeed in education and employment; and,
- He wants to recover from his addiction and, if successful, has all the tools to achieve rehabilitation.

Parity / Range of Sentences

[42] Section 718.2 also requires that I consider the principle of parity. Within reason, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Each sentence has to reflect the unique circumstances of that offence and that offender, however, where a sentence is different from other sentences imposed for the same offence, that difference has to be understandable (*R. v. LaCasse, supra*; and, *R. v. Chase*, 2019 NSCA 36, at para. 41).

[43] Any consideration of the range for the offence of break in enter, has to start with the Nova Scotia Court of Appeal decision in *R. v. Zong*, [1986] 72 N.S.R. (2d) 432. In that case, the Court instructed that for break and enter, “three years’ imprisonment is a benchmark from which a trial judge should move as the circumstances in the judgment of the trial judge warrant”. That benchmark has been more recently confirmed in *R. v McAllister*, 2008 NSCA 103, and *R. v. Adams*, 2010 NSCA 42.

[44] A review of subsequent decisions demonstrates how circumstances have caused judges to move up or down from that benchmark.

[45] In *R. v. Perrin*, 2012 NSCA 85, the Court of Appeal upheld a sentence of 30 days for break, enter and theft into a summer cottage. The offender had broken into a cottage with others, causing damage by removing copper piping. He was 21 years old, had a limited criminal record, but was serving a conditional sentence at the time of the offence. In upholding the sentence, Beveridge, J.A. noted that the Court of Appeal had “imposed or upheld non-custodial sentences or short jail sentences for break and enters over a wide range of circumstances” (para. 22). He then summarized 5 such cases from 1976 to 1991: *R. v. Palmer* (1976), 17 N.S.R. (2d) 236; *R. v. Guye et al.* (1981), 50 N.S.R. (2d) 205; *R. v. Rogers* (1985), 70

N.S.R. (2d) 390; and, *R. v. Bursey* (1991), 104 N.S.R. (2d) 94 (C.A.); *R. v. Schrader* (1991), 104 N.S.R. (2d) 91 (C.A). The circumstances of the offenders in these cases were varied. Some were youthful or had no prior record, others had prior related records, and some were on parole at the time of the offences.

[46] More recently, suspended sentences with probation were imposed for break and enter in *R. v. Brandon Boucher*, (unreported decision, NSPC, September 25, 2013) and *R. v. Barrons*, 2017 NSSC 216. In *Boucher*, a youthful offender pleaded guilty to 5 offences, including two counts of break and enter into dwellings and one count of armed robbery. The break-ins were not sophisticated but, considerable damage was done, and irreplaceable items stolen and not recovered. The offender had no previous record and, at the time of the offences, was severely addicted to drugs. Prior to sentencing, he had started rehabilitation and remained drug and crime free, pending sentencing.

[47] In *Barrons*, Justice Arnold imposed a suspended sentence with three years probation on a young man who pleaded guilty, mid-trial, to break and enter into an occupied dwelling and assault. He was 21 years old, was a successful university student, committed the offences while under the influence of alcohol, took psychological counselling, did not consume alcohol and complied with strict terms

of release pending sentence and was previously of good character. The offence had a significant psychological impact on the victim, who was his former girlfriend.

[48] The common thread in these decisions appears to be that the court saw real hope for rehabilitation. In many of the cases, that hope came from a combination of youth, limited or no criminal record, and post-offence behaviour.

[49] Where those circumstances don't exist, the most likely sentence continues to be a penitentiary term, sometimes lengthy.

[50] In *R. v. Kirk*, 2013 NSPC 55, a sentence of 6 years and 10 months was imposed following guilty pleas to 4 break and enters, into two churches and two firehalls. Significant property damage was caused. The offender was 26 years old but had a lengthy criminal record and was on parole at the time of the offences.

[51] *R. v. Izzard*, 2013 NSCA 88, a sentence of 3 years, less time served was upheld on appeal. The offender had been found guilty after trial of break and enter and breach of probation. He and others had broken into four cottages. He was 32 years old, had 34 prior criminal convictions, and was on probation at the time. His pre-sentence report was not positive.



[52] In *R. v. Dewolfe*, 2016 NSSC 14, a sentence of 5 years was imposed following guilty pleas to two break, enter and thefts from pharmacies and two counts of possession of Schedule I drugs. The offences involved premeditation. The offender was 37 years old and had a long record. He had a drug addiction and co-operated with authorities.

[53] In *R. v. Marriott*, 2015 NSPC 5, two brothers were sentenced in relation to more than 26 break, enter and thefts. The brothers were youthful and had no previous criminal records. However, the break-ins were sophisticated. One brother was sentenced to 3 years custody and the other to 3 ½ years.

[54] In *R. v. Smith*, 2014 NSPC 72, Judge Tax imposed a 23 month conditional sentence for four offences, including break, enter and theft into a residence. The offender was 25 years old but had a criminal record for serious offences, including kidnapping and assault with a weapon and had breached his recognizance.

### Restraint

[55] Finally, s. 718.2 requires me to consider restraint. 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 and consistent with the harm done to victims or to the community should be considered for all offenders.

[56] This principle of restraint is particularly important when sentencing a first offender (*R. v. Colley*, [1991] N.S.J. No. 62; *R. v. Priest*, [1996] O.J. No. 3369); *R. v. Best*, [2005] N.S.J. No. 347 (S.C.), para. 25).

### **Analysis**

[57] Break and enter, especially into a dwelling, is a serious offence which requires a sentence that both denounces the conduct and deters others from repeating it. The court of appeal has repeatedly said that it should attract a sentence of 3 years in custody unless the circumstances and proper application of sentencing principles justifies a departure, up or down. Based on my review of sentences imposed for break and enter, both pre- and post - *Zong*, the range for break and enter is broad, from lengthy periods of incarceration down to non-custodial dispositions.

[58] In this case, Mr. Smith committed multiple break-ins and repeatedly breached the conditions of his release. However, none of the offences were planned or sophisticated. They were committed out of desperation, not greed. They were not accompanied by violence or significant property damage. He is a

relatively young man who is burdened by mental illness and addiction, is remorseful, has no criminal record, has a university degree, has both the interest and ability to pursue graduate studies, desperately wants to stop using drugs, has taken advantage of every treatment opportunity provided to him, has tremendous family support and a truly remarkable resource in his mother.

[59] I recognize that his rehabilitation is dependent on him overcoming his addiction, but I am satisfied that he has the tools and desire to do that. I say this because of the evidence from Ian Smith and because of the unwavering support from his mother. I was very impressed with her. She has been and continues to be supportive of her son, sees the good in him and loves him despite his behaviour. That is not uncommon for parents. What is uncommon is the efforts she has made to educate herself and her “tough love” approach. I believe she truly wants what is best for him and recognizes that attaining that may involve short term pain. She has held him accountable for his actions and demonstrated respect for the law and the rights of others, even when that had negative consequences for him. I have faith that she will continue to work to ensure that he has access to treatment and will continue to hold him accountable for his actions.

[60] Mr. Smith has served the equivalent of 128 days in custody, mostly since his arrest at the end of July. That is equivalent to a “short sharp” sentence which can be effective in dealing with a person who has never been in custody before and a crime that doesn’t involve violence (*Perrin*, at para. 18)

[61] The nature and number of offences require that the sentence address the objectives of denunciation and deterrence. Those objectives require a custodial disposition or other punitive sanction. However, I am satisfied that Mr. Smith has tremendous prospects for rehabilitation and that a lengthy custodial sentence would be detrimental to those prospects. Therefore, based on the particular circumstances in this case, I conclude that the principles and purpose of sentencing, including denunciation and general deterrence do not require a lengthy custodial sentence. I am satisfied that those principles can be accomplished through the combination of the custody he has already served together with a suspended sentence and probation.

[62] By suspending the passing of sentence and placing Mr. Smith on probation, I can provide him with a meaningful incentive to continue his efforts toward rehabilitation. If he complies with the terms of probation, he can continue his rehabilitation and work toward being a productive member of society. If he does

not, then he can be brought back before me to be sentenced for these offences. In this way, it can provide deterrence and denunciation while allowing him to continue his treatment. The probation order will include conditions that will continue his rehabilitation but will have a collateral punitive benefit, including a curfew and substantial community service hours. I will also impose a condition that he attend back before me at regular intervals so that his progress can be monitored.

### Restitution

The Crown has applied under s. 738 for a restitution order in the amount of \$800 to Uncommon Ground, the victim of the May 30, 2018 break and enter. The victim has not submitted a request. Section 737.1 requires me to consider ordering a restitution order and allows a victim to apply for restitution. Section 738 allows me to make a restitution order on application of the Crown or on my own motion. It does not appear to require a request from the victim. It does require that the amount be “readily ascertainable”. In this case, the facts admitted by Mr. Smith include reference to the fact that \$800 was taken from the business during the break-in and that amount has not been recovered. Therefore, the amount is “readily ascertainable”. Mr. Smith does not have the current ability to make

restitution, however, that does not in and of itself prevent the order (s. 739.1). In the circumstances, restitution is appropriate.

[63] Therefore, globally, the sentence will reflect the time spent in custody of 128 days along with a suspended sentence and probation for three years. The bulk of that time was accumulated only after the most recent offence. However, the Crown sought revocation of his earlier releases and he has been consenting to remand as a result of the weight of all of the charges. Therefore, I am satisfied that his remand time is “as a result” of all charges, so is available to be credited against any of the offences. His probation will have the following conditions:

- Keep the peace and be of good behaviour;
- Appear before the court every 6 months;
- Notify the probation officer in advance of any change of name or address, and promptly notify the probation officer of any change of employment or occupation;
- Report to a probation officer within 2 days and thereafter as directed;
- Sign whatever releases and consents the probation officer needs in order to check on your cooperation with treatment including residential treatment
- Reside with your mother, Jayne Smith, unless in a residential treatment facility which your probation officer approves of and provided you give the facility permission to communicate with your probation officer about your attendance and progress;
- Not possess or consume alcohol or any other intoxicating substances;

- Not possess or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* except in accordance with a physician's prescription for him or a legal authorization;
- Attend for, participate in and complete any assessment, counselling or treatment as directed by probation, including mental health counselling and substance abuse counselling;
- Submit to urinalysis or other screening to determine the presence of alcohol or drugs in his system;
- For the first 12 months of this Order, comply with a curfew from 10:00 PM to 6:00 AM daily, except when in the immediate company of your mother Jayne Smith or your aunt Shawna Burgess, or when in a residential treatment facility;
- Prove compliance with the curfew by presenting yourself at the door of your residence should your probation officer or other authorized person attend to check; and,
- Complete 200 hours of community service within the first 24 months of this Order.

[64] I also impose the following ancillary Orders

- DNA Order for databank
- A stand-alone Restitution order in the amount of \$800 to be paid within 5 years.

[65] The sentence will be apportioned as follows

**Information 1 - May 23, 2018 – June 1, 2018**

- break, enter and theft from a dwelling (s. 348(1)(b)) – time served (120 days) plus probation for 3 years & DNA Order
- unlawfully in a dwelling (s. 349) - concurrent

**Information 2 - May 30, 2018**

- break, enter and theft from a business (s. 348(1)(b)) – time served (120 days) concurrent and restitution order in the amount of \$800 to be paid within 5 years

**Information 3 - November 11, 2018**

- break and enter with intent from a church (s. 348(1)(b)) – suspended sentence with 3 years probation
- fail to comply with a Recognizance (s. 145(3)) – suspended sentence with 3 years probation

**Information 4 - November 20, 2018**

- fail to comply with a Recognizance (s. 145(3)) – time served (4 days)

**Information 5 - July 28, 2019**

- fail to comply with a Recognizance (s. 145(3)) – time served (4 days)

Elizabeth Buckle, JPC.