

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Syliboy*, 2018 NSPC 83

Date: 20180910
Docket: 8105897
Registry: Halifax

Between:

Her Majesty the Queen

v.

Jason Wesley Syliboy

DECISION ON SENTENCE

Judge: The Honourable Judge Amy Sakalauskas

Heard: August 20, 2018, in Halifax, Nova Scotia

Decision: September 10, 2018

Charge **Section 344 of the *Criminal Code***

Counsel: Christopher Nicholson for the Crown
Jonathan Hughes for the Defence

BY THE COURT:

BACKGROUND

[1] On August 20, 2018, I was presented with a joint sentencing recommendation for Jason Wesley Syliboy, who pleaded guilty to committing robbery on May 18, 2017. The joint recommendation is for a suspended sentence, Probation (3 years), a primary DNA order, a lifetime weapons prohibition, and a \$200 Victim Surcharge with an 8-12-month timeline for payment. The proposed terms for the Probation Order include, among others, 100 hours of community service, a 7 p.m. to 7 a.m. curfew for the first two years, counselling and treatment, and a letter of apology to the victims.

[2] At about 4:00 p.m. on May 18, 2017, Mr. Syliboy walked into the Shopper's Drug Mart at 5524 Spring Garden Road, Halifax, Nova Scotia, and asked the pharmacist for a pen and paper. With those, he wrote a note saying: he wanted hydromorphone, robbery, he didn't want violence. He got the drugs and walked out of the store, not rushing. He waited nearby and identified himself to police officers when they arrived outside the store, saying he was the one they were looking for and showing them the drugs. He cooperated with his arrest and gave the police a 3-page statement.

[3] Mr. Syliboy wanted to be arrested so he would be held at the Burnside Correctional Facility, where his father was on remand. Mr. Syliboy wanted to help his father, who he said had heart issues, and who had never been in jail. He said he felt a sense of relief upon his arrest.

[4] The facts are generally not disputed, although the pharmacy staff member (in her Victim Impact Statement) described Mr. Syliboy as seeming like he was “out of it”, with glazed eyes and slowed movements. Mr. Syliboy maintains he was sober. Either way, the victim noted her concern for the potential for violence.

[5] Mr. Syliboy spent 32 days on remand before his release. The parties tell me that they have considered this in the background of their joint recommendation.

[6] I have the benefit of a Gladue Report dated February 2015, an updated Gladue Report dated August 2018, and a Sentencing Proposal resultant from a Sentencing Circle held in February 2018.

JOINT RECOMMENDATIONS

[7] I am told by counsel that this sentencing submission is a “true joint recommendation”. As per the Supreme Court of Canada in *R. v. Anthony-Cook* [2016] 2 SCR 204, I am to accept it unless it will bring the administration of justice into disrepute or otherwise be contrary to the public interest. I am to ask myself if it falls within an acceptable range of sentence, in these circumstances. The issue is not whether I would have imposed a different sentence, but rather whether the sentence is a fit one. I am not to depart from it absent good reasons, in the public interest. As noted by the Nova Scotia Court of Appeal in *R. v. Marriott*, 2014 NSCA 28:

A trial judge may decline to give effect to a joint recommendation, not simply because she would have imposed a more severe sanction, but where the sentence is clearly unreasonable and then, only if the judge is satisfied there are no other compelling circumstances justifying, as in the public interest, a departure from an otherwise fit sentence.

[8] The decision of Chief Judge Williams in *R. v. E.S.M.*, 2017 NSPC 56 highlights some considerations for judges when faced with a joint recommendation that appears to be well below the usual range of sentence. Chief Judge Williams accepted the joint recommendation before her. In *R. v. d'Eon* 2017 NSPC 22, Judge Burrill was faced with the same question, and decided not to follow the joint recommendation, noting it would bring the administration of justice into disrepute and would be contrary to the public interest. He found that a reasonable and

informed person viewing the circumstances of the offence and that offender would view the joint recommendation as a breakdown in the proper functioning of the justice system. I now ask myself these questions in relation to the joint recommendation advanced for Mr. Syliboy's sentence.

SENTENCING PRINCIPLES

[9] The purpose and objectives of sentencing and the principles to be considered are set out in s. 718, 718.1, and 718.2 of the *Criminal Code*.

[10] Section 718 sets out that the fundamental purpose of sentencing is to protect society and to contribute to respect for the law and maintenance of a peaceful society. It also states that sentences should attempt to do one or more the following: denunciation, deterrence, separation from society where necessary, rehabilitation, reparations to victims/community, promote a sense of responsibility and acknowledge harm done to victims/community.

[11] s. 718.1 mandates that the fundamental principle of sentencing is proportionality, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[12] s. 718.2 provides further sentencing principles, including that:

- aggravating and mitigating factors should be considered;
- parity – a sentence should be like sentences imposed for similar offences and similar offenders in similar circumstances;
- an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances;
- all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims' community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders (s. 718.2(e)).

[13] The decisions in *R v. Gladue* [1999] S.C.R. 688 and *R. v. Ipeelee* [2012] 1 S.C.R. 433, remind me that I must give s. 718.2(e) its intended remedial impact, while also applying all the other sentencing principles in the *Code*. That means considering unique systemic and background factors that may have contributed to bringing Indigenous persons before the Court, as well as sentencing options that might be more appropriate considering their Indigenous heritage or connection to their community. If there is no alternative to imprisonment, I must very carefully consider the length of any jail term. This goes back to the fundamental principle of proportionality.

[14] *R. v. Nasogaluak*, 2010 SCC 6, reminds us that a sentence must not exceed what is just and appropriate, given the moral blameworthiness of the offender and

the gravity of the offence. Judges are to take an individualized approach and use their broad discretion to formulate an appropriate sentence, or when considering the appropriateness of a joint recommendation. Sentencing ranges are important, from a parity perspective, but they are not everything.

[15] As noted by the Alberta Court of Appeal in ***R. v. Swampy*, 2017 ABCA 134**, “It is an error to proceed on the basis that *Gladue* factors do or do not *justify departure from a proportionate sentence*, as the trial judge did. Instead, application of the *Gladue* analysis *achieves* a proportionate sentence” [at para 26]. *Gladue* factors are not an after-the-fact consideration in sentencing, adjusting the sentence that would have been imposed in their absence. These considerations (like all other sentencing principles) are integral to the process in arriving at the sentence in the first place, or in considering the appropriateness of a joint recommendation.

[16] *Gladue* factors do not take on a minimized role in the face of joint submissions. Counsel must turn their minds to them in crafting joint recommendations, and should reference them in their submissions to the Court.

[17] In ***R. v. Chanalquay*, 2015 SKCA 141**, the Saskatchewan Court of Appeal noted:

[36] It is important to recognize that *Gladue* and *Ipeelee* are not unvarnished calls to impose shorter jail terms on Aboriginal offenders. The Supreme Court’s reasoning is far

more nuanced than that. Its approach is very much tied to the concept of restorative justice ... [I]t involves the subtler idea of attempting to limit or minimize jail time by using restorative justice approaches when and if such approaches are appropriate.

...

[52] A sentencing judge should not simply stack up all of the *Gladue*-type considerations at play in the case and, if the list is long or severe, automatically proceed on the assumption such factors have had a substantial limiting effect on the offender's culpability. The required analysis is more demanding than that. To determine the extent to which *Gladue* factors impact an offender's moral culpability, a sentencing judge must examine both the nature of the relevant factors and the particulars of the crime in issue. He or she should then consider the extent to which the unique circumstances of the offender "bear on his or her culpability" (*Ipeelee* at para 83) in the specific context of the case at hand. As mandated by the Supreme Court, the search here is not for a cause-and-effect relationship but for circumstances that cast light on the degree of the offender's blameworthiness for the specific offence in issue. It might be that the *Gladue* considerations impact the offender's culpability a great deal, not at all, or only to some intermediate extent.

[18] A truly restorative approach for Indigenous offenders would see more joint recommendations on sentence. In Mr. Syliboy's case, a Sentencing Circle was facilitated by the Mi'kmaw Legal Support Network in February 2018. It took 5 hours and 14 people attended, including Elders, family members, lawyers on this file, and support persons that included a member of the RCMP detachment on Reserve. Regrettably, I was unable to attend the scheduled date as were several others, including the victim (who was very supportive of the process and passed along her input). As noted in the resultant Sentencing Proposal authored by Shannon Mooney, Customary Law Casework with the Mi'kmaw Legal Support Network:

The Mi'kmaw Legal Support Network's Sentencing Circle takes into consideration the special circumstances associated with Aboriginal persons. The process is respectful of and grounded in Mi'kmaq traditions and philosophies regarding the interconnectedness of all things. In a culturally appropriate manner, the circle addresses the impact of the offender's actions have had on other individuals, families, communities, and between Nations. The Circle's focus is re-building relationships, promoting positive healthy outcomes and social well-being of our people.

...

Preparation for the circle began in November 2017 with the Sentencing Circle referral. A meeting was held with Mr. Syliboy in December 2017 in the community of Millbrook and it was determined that he was eligible for the process. A sentencing circle committee was identified for the purpose of this Circle to assist MLSN staff in retaining local responsibility and to enable the community to be a full partner. The committee composition took into consideration age, gender, and representatives from different sectors of the community. The scheduling of this sentencing circle was lengthy for it took four months to set a date that worked for all parties...

...

The circle process is based on the connectedness of all things by addressing underlying issues that may have caused the harmful act and looks to addressing ways to strengthen relationship and individuals in the process. . .

While the Court maintains the decision-making on sentence in every case, a joint recommendation, especially one with this background, is especially meaningful and helpful.

MR. SYLIBOY'S CIRCUMSTANCES

[19] Mr. Syliboy is a 46-year-old Mi'kmaq man and a member of the Sipekne'katik First Nation. He resides nearby, off reserve. He has two young children who reside with his former partner and has an adult child. His young years

involved witnessing family violence, substance abuse, and criminality in his extended family. He was young when he himself started such behaviors. Most of his maternal relatives from the two generations before him attended Indian Residential School, and his mother attended the Indian Day School. Mr. Syliboy reports that he has been sober since November 15, 2013, having struggled with various addictions since his adolescence. He completed detox and a long-term treatment program on the Eskasoni First Nation in reaching his sobriety.

[20] Mr. Syliboy has a criminal record dating back to his youth. He served time for serious crimes, one of which accidentally caused the death of a close family member. The event and its impact still affects his mental and physical health. He has adult convictions for a wide variety of offences, including thefts, assaults, breaches and failures to comply, weapons offences, fraud, and motor vehicle offences. Other than one conviction for a Failure to Comply in June 2017, he has had none since 2015 and had none in 2014. He started to turn things around.

[21] This progress for Mr. Syliboy is evident from the two Gladue Reports, prepared 3 ½ years apart. In 2015, Mr. Syliboy was clean and was on the road to maintaining that sobriety. Part of that was re-building his support system, which decreased over his years of drug abuse and conflict with the law. His relationship

with his family is close and he is especially close with his father. He attended addictions treatment through his Mi'kmaq community, regularly attends sweat, prays and smudges, and turns to respected members of his community for guidance. He was unemployed and receiving Income Assistance in 2015, and is now in receipt of disability benefits given a back injury and ongoing mental health issues – both of which he is working to address. He has maintained and drawn upon the supports he had in 2015, he is still sober, he is working on his relationship with his children and their mother, and accepts responsibility for the offence before the Court.

DECISION ON SENTENCE

[22] Mr. Syliboy's guilty plea and remorse are mitigating factors. His criminal record is an aggravating factor.

[23] There is no mandatory minimum sentence and the maximum sentence for robbery is life imprisonment. The starting institutional custodial sentence in this province is often 2-3 years, with our Court of Appeal noting an emphasis on deterrence and denunciation. However, sentences outside that benchmark are easily

findable (see, for example: *R. v. McKay*, 2013 NSPC 119; *R. v. Hendsbee*, 2009 NSPC 50; *R. v. Smith*, 2014 NSPC 86).

[24] Our Courts are not formulaic sentencing machines. Judges must consider each offence and each offender individually. In Mr. Syliboy's case, we have his unique circumstances and *Gladue* factors to include in these deliberations. No factor, nor sentencing principle, trumps others.

[25] In *R. v. Barrons*, 2017 NSSC 216, Justice Arnold recognized the significant deterrent and denunciatory effect possible with a suspended sentence, drawing on jurisprudence from our Court of Appeal. Judge Buckle noted the same in *R. v. Rushton*, 2017 NSPC 2.

[26] On these facts, Mr. Syliboy committed a low-end robbery, with exceptional background motive. He is not a first-time offender. He shows rehabilitative progress that has been sustained for years, and a plan to continue. He has a supportive family and community.

[27] The Gladue Report completed August 20, 2018 explains that Mr. Syliboy has experienced the adverse impact of many factors continuing to plaque Aboriginal communities post-colonization, including:

- Loss of identity, cultural, and ancestral knowledge;
- Substance abuse personally, in the family, among peers, and within the general community;
- racism;
- Family deterioration, separation, and breakdown;
- Low educational achievement;
- Trans-generational trauma; and,
- Incarceration.

[28] I accept information from the Gladue Report that Jason Syliboy has been acting out inter-generational grief resultant from unresolved personal and inter-generational trauma. He has a related lack of trust that shows itself most when it comes to policing and maintaining close relationships. Jason Syliboy's father is not Indigenous, and both Mr. Syliboy and his mother have reported racism against the family given this, as well as reported racism against them for being Indigenous. He does not trust police, based on his own past experiences and the culture on his reserve. He is very connected to his Indigenous culture and traditions. He regularly accesses services in his community and regularly attends cultural ceremonies. As noted in the Gladue Report, Mr. Syliboy is most safe and confident when he is surrounded by his Mi'kmaq culture. Despite his distrust of the policing system

generally, he feels respect for First Nation RCMP Officers, community Elders, and cultural advisors.

[29] Our justice system by and large alienates Indigenous communities. Indigenous Courts, Wellness Courts, sentencing circles, Gladue Reports, and other more culturally appropriate responses are aiming to correct this. On the one hand, committing a crime to be incarcerated in the way Mr. Syliboy did is a manipulation of the justice system. It is a careless act done by someone not mindful of the potential impact on victims, while taking up important resources from the criminal justice system. I also see it a different way, in that his moral culpability is reduced given his distrust and alienation from this system, resultant from his experiences as an Indigenous person and the colonial history of the system itself.

[30] Mr. Syliboy's past is one of trauma that he needs to keep addressing. Again, his moral culpability is reduced considering his life circumstances as an Indigenous person. These circumstances include poverty, violence, substance abuse, and mental health concerns on Reserve, suicide of family and his own past contemplation of suicide, family displacement (including for residential schooling), and his mother's loss of Indian status (for a period) after marrying Mr. Syliboy's father. These are direct reflections of the impact of colonialism and

racism on Indigenous communities. Mr. Syliboy needs to heal, and has made great progress in that, but the reality is that factors in his past, his fractured relationships, and his familiarity with jail, all made it easier for him to leave everything behind and seek incarceration.

[31] Mr. Syliboy still needs to be held accountable, but in a more holistic manner than incarceration. His community seeks to do this. Before finalizing the recommendations from the Sentencing Circle, Shannon Mooney wrote:

Mr. Syliboy would like to obtain more education and has a desire to assist others who have had similar stories of being incarcerated. He feels that he could be a mentor for others. While his willingness to be a mentor is an admirable sentiment he would need to reconcile that with the calculated manipulation of the criminal justice system; this was not a victimless crime and the full effect on his daughters was secondary to his needs with respect to his father.

The following recommendations were reached with the support and commitment of all participants. Being cognizant of the collective efforts of the community to assist Mr. Syliboy in recognizing the harmful consequences of his actions and to address the personal circumstances in his life and considered to provide him with a holistic approach to his journey of reintegration and newfound respect within the Mi'kmaw territory where he resides. The Circle facilitators strived to ensure that all interests were addressed and acknowledged in the sentence plan.

[32] The joint recommendation before me is substantially the plan supported by those in the Sentencing Circle. I am accepting the joint recommendation as a fit sentence for this offence, committed by this offender, harming this victim, and in this community. A suspended sentence is a reasonable alternative to custody for Mr. Syliboy. If he breaches the Probation Order attached to it, or gets more

convictions, I can amend it, extend it, or revoke it and impose a new sentence. A Probation term of 3 years is a significant period for Mr. Syliboy to be subject to these possibilities. Furthermore, it is being recommended that he be on a 12 hour per day curfew for the first two years of this term, which will have a denunciatory and deterrent quality, but more importantly will aid in his rehabilitation.

[33] It was a unique situation that caused Mr. Syliboy to walk into the pharmacy that day, and one that is not likely to repeat itself. Mr. Syliboy has recognized that his actions were wrong, and this sentence is meant to help ensure he would not make the same choice again. He needs to be engaged in, and supported by, his community. I commend the lawyers for the Crown and Defence for their approach to this matter and am appreciative of them and the support they had from the Mi'kmaw Legal Support Network.

[34] The terms of the Probation Order (3 years) will be as suggested in the joint recommendation:

- Keep the peace and be of good behavior;
- Appear before court when required to do so by the court;
- Notify the court, probation officer or supervisor, in advance, of any change of name, address, employment or occupation;
- Report to a Probation Officer in Halifax within 5 days from today and when required, as directed by your probation officer;

- Do not take or consume alcohol or any other intoxicating substances;
- Do not take or consume a controlled substance as defined in the CDSA, except in keeping with a medical prescription;
- Complete 100 hours of community service work as directed by your Probation Officer, by December 1, 2019;
- Participate in the Journey of the Two Wolves, and any related counselling or program;
- Do not be within 1 metre of any Shopper's Drug Mart stores in the Halifax Regional Municipality;
- Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer;
- Attend for mental health assessment and counselling as directed by your probation officer;
- Attend for assessment, counselling or a program directed by your probation officer;
- Participate in, and cooperate with any assessment, counselling or program directed by your probation officer;
- Provide an apology to the victims of your offence during the first year of your probation, as organized by your probation officer;
- Curfew – remain in your residence from 7:00 p.m. until 7:00 a.m. the following day, seven days a week until September 10, 2020, except:
 - When at regularly scheduled employment and travelling to and from that employment by direct route;
 - When attending a regularly scheduled education program, which your probation officer knows about, or at a school or educational activity supervised by a principal or teacher, and travelling to and from the education program or the activity by a direct route;
 - When dealing with a medical emergency or medical appointment involving you or a member of your household and travelling to and from by a direct route;
 - When attending a counselling appointment, a treatment program or a meeting of Alcoholics Anonymous or Narcotics Anonymous, at the direction of, or with the permission of, your probation officer and travelling to and from that appointment, program or meeting, by a direct route;

- When in a residential treatment program if your probation officer is told, in advance, where you will be and you agree that the facility can tell your probation officer if you are there, should your probation officer inquire;
 - With written approval of your probation officer given beforehand; and,
 - To attend sweat lodges in Truro, NS and travelling to and from by a direct route.
- Province compliance with the curfew condition by presenting yourself at the entrance of your residence should a probation officer or a peace officer attend there to check compliance.

[35] I grant these Ancillary Orders, as noted in the joint recommendation:

- DNA Order pursuant to s. 487.051 of the *Criminal Code*, and
- Firearms prohibition pursuant to s. 109(3) *Criminal Code* for life.

[36] Mr. Syliboy has one year to pay the Victim Surcharge of \$200.00.

Amy Sakalauskas, JPC