

Date: 2001/12/11
Docket: CR 99-162018

IN THE SUPREME COURT OF NOVA SCOTIA
(Cite as R. v. Provo, 2001 NSSC 189)

BETWEEN:

HER MAJESTY THE QUEEN

-and-

Brian PROVO

DECISION (*Sentence*)

Heard before: **The Honourable Associate Chief Justice Michael MacDonald**
 at Halifax, Nova Scotia on March 5 and 6, 2001

Oral Sentence Decision: **August 13, 2001**

Written Release
of Oral Decision: **December 11, 2001**

Counsel: **Mark Covan, (James Martin present for trial only) *Department of Justice***
 (Canada)
 for the Crown

Michael Taylor, *Pink Murray Graham*
for the Defendant

[1] On March 6th, 2001, Brian Provo, was found guilty of trafficking in crack cocaine. Mr. Provo is before the Court today for sentencing.

BACKGROUND

[2] Paragraphs 2 - 6 of the Crown's brief accurately reflect the facts of this case:

2. **On February 17, 1999, shortly before 8:00 p.m., a police agent, David Kelly, acting on behalf of the Halifax Regional Police Services, was directed to the Green Gables Convenience Store located in Highfield Park. AT this location, Mr. Kelly was to contact a Mr. Simmond's for purposes of purchasing crack cocaine. Accompanying Mr. Kelly was Cst. Veniot acting in an undercover capacity.**
3. **Upon arriving at the Green Gables Convenience Store in Highfield Park, Mr. Kelly placed a telephone call to Mr. Simmonds cell phone (488-2338) and placed his order for crack cocaine.**
4. **Approximately six minutes later, a red pick-up truck arrived. Mr. Kelly approached the driver's side of the vehicle, and was asked by the defendant, Mr. Provo, what he wanted. Mr. Kelly replied that he wished to purchase crack cocaine, advising Mr. Provo he had \$50, following which he handed over the aforementioned sum of money. Mr. Provo reached between his legs, removed an object wrapped in tin foil, handing it over to Mr. Kelly. The item provided by Mr. Provo was later analyzed to be crack cocaine, weighing approximately .67 grams outside of the foil wrapping.**
5. **After departing the Green Gables Convenience Store in Highfield Park, the pick-up truck being operated by the defendant was stopped a short distance away on Crystal Drive by Csts. Fris and MacNeil. Cost. Fris obtained the names of the three occupants of the vehicle, and on the following day, February 18th, identified the defendant in a photo line-up as the driver of the pick-up truck.**
6. **On February 23, 1999, Mr. Kelly was provided with a photo line-up by Cst. Barrett, identifying the defendant as the driver of the pick-up truck who sold him the aforementioned crack cocaine for \$50.**

[3] Mr. Brian Provo is a twenty-eight year old male born on July 17th, 1973. He has a grade eleven education. He is presently running his own business and is

living in a common-law relationship. Mr. Provo is responsible for the support of several children presently living with him and with others.

The Principles of Sentencing

[4] Sentencing remains one of the most difficult tasks for judges despite the recent codification of the sentencing principles. I refer to those principles in the *Criminal Code of Canada* relevant to the case at bar.

718 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;**
- (b) to deter the offender and other persons from committing offences;**
- (c) to separate offenders from society, where necessary;**
- (d) to assist in rehabilitating offenders;**
- (e) to provide reparations for harm done to victims or to the community; and**
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.**

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigation circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,**
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, color, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor, or**
 - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,**
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or**

- (iv) **evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization**

shall be deemed to be aggravating circumstances;

- (b) **a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;**
- (c) **where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;**
- (d) **an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and**
- (e) **all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.**

Aggravating Factors

[5] While not exhaustive, the following aggravating factors have particular relevance to the case at bar.

1. The offender has a lengthy criminal record setting out sixteen offences which are detailed in *Exhibit #1*, and which have been supplemented by Crown counsel reading further information into the record.
2. The very nature of this offence signifies a significant amount of premeditation. Clearly from the time the phone call was made, to the time they took delivery of the drugs, there would have to be optimum efficiency. The offender was an integral part of this efficient operation.
3. Another aggravating factor is the fact that unlike offenders in other cases such as *R. v. Cameron*, [2000] N.S.J. No. 81 the offender in the case at bar is not a drug addict and therefore was involved in this transaction purely for monetary gain.

Mitigating Factors

[6] Turning to mitigating factors, while not exhaustive the following mitigating factors in particular have relevance to the case at bar:

1. Mr. Provo has received a very positive pre-sentence report.

2. During the last couple of years Mr. Provo has been operating his own business.
3. Mr. Provo has solid family support and he appears to be presently involved in a stable relationship.

Deterrence

- [7] Clearly in crimes of this nature involving the sale of the devastating drug of crack cocaine general deterrence must be the most significant consideration to the Court. This has been reflected not only repeatedly by the Nova Scotia Court of Appeal but it can also be seen from the fact that this offence carries a maximum of life imprisonment.
- [8] The Nova Scotia Court of Appeal in *R. v. Huskins*, [1990] N.S.J. No. 46 has made it clear that federal time is to be the norm in cases such as this, saving and excepting those rare circumstances where a period of something less than federal time is warranted. MacDonald, J.A. for the Court at page 4 noted:
- No one can seriously dispute that cocaine is an extremely dangerous drug and that society demands that those who are involved in selling it must be dealt with severely. Rare indeed will it be the case where less than federal time should be considered as a proper sanction for such offence.**
- [9] Therefore, the first fundamental question for me to ask is whether or not there are exceptional circumstances in the case at bar that warrant a deviation from the statement set out in *R. v. Huskins, supra*.
- [10] With that background and in light of the very positive pre-sentence report, the Court as is often the case, is faced with a dilemma. If the Court orders federal time under the direction of *Huskins, supra* then I find from the facts that clearly Mr. Provo will lose his business which will not only affect him directly, it will affect his dependants, his common-law spouse and will very seriously jeopardize the positive steps he has taken in the past couple of years to turn his life around.
- [11] Thus, if he loses his business through a period of federal incarceration, then the risk becomes very real that he will re-engage in the type of criminal activity that he was engaged in prior to two years ago. This may provide indirectly a very serious risk to the public. On that basis this case may very well be considered an exception to the *Huskins* case as was determined in numerous other cases since *Huskins* including *R. v. Talbot* (unreported, judgment of

Kelly, J. released May 28, 1999, Cr. 146445) and *R. v. Robins*, [1993] N.S.J. No. 152.

- [12] At the same time if a term of federal incarceration is not imposed, then the danger will be that the community will receive the wrong message *vis à vis* general deterrence.
- [13] I resolve this dilemma by directing a community sentence that will contain strict punitive terms; terms that will reflect as much as possible a period of institutional incarceration while at the same time allowing Mr. Provo to keep his business and hopefully to continue to be a positive member of the community.
- [14] I have reached this conclusion because the appropriate disposition, in light of the pre-sentence report and in light of Mr. Provo's business, is a sentence of less than two years.
- [15] Mr. Provo has made significant changes in his life and I find that he is no longer a threat to the community. Therefore a disposition of a community sentence would be appropriate in the circumstances. However in ordering a community sentence I will attempt to maximize the punitive aspect of the same. Therefore the period of community incarceration shall be two years less a day. It will include a full term of House Arrest with no adjustment for what would have been parole eligibility.
- [16] Mr. Provo shall be permitted to leave his home only for the purposes of maintaining his business and his health upon conditions that will be detailed later in this judgment. Such a period of House Arrest I find represents sufficient deterrence to him and others while at the same time allowing him to keep his business and become a productive member of society. I do so in spite of his recent convictions which I must say are troubling to the Court but less serious than the earlier string of convictions that he committed prior to the beginning of his business.
- [17] I further order that Mr. Provo perform one hundred hours of community service as directed by his supervisor.
- [18] I decline to order a term of probation.
- [19] I order the mandatory firearms order and victims fine surcharge. I invite the Crown to prepare the relevant orders for my signature.
- [20] The Conditional Sentence Order shall contain the mandatory conditions as set out in s. 742.3(1)(a) to (e) of the *Criminal Code* as follows:
- 742.3(1) The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:**
- (a) keep the peace and be of good behaviour;

- (b) appear before the court when required to do so by the court;**
- (c) report to a supervisor**
 - (i) within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and**
 - (ii) thereafter, when required by the supervisor and in the manner directed by the supervisor;**
- (d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and**
- (e) notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.**

[21] One of those conditions is that he report to a supervisor at Halifax Probation Services 5670 Spring Garden Suite 700 on or before a certain date. I set that date within two weeks of today's date.

[22] The additional conditions include:

-Mr. Provo is not to take or consume alcohol or other intoxicating substances.

-Mr. Provo is not take or consume drugs except in accordance with a medical prescription.

-Mr. Provo is to perform one hundred hours of community service under the direction of the supervisor or somebody in his or her stead. The place and times when the work is to be performed is to be arranged with your supervisor alternatively, designated by the supervisor. All the work is to be completed to the reasonable satisfaction of the supervisor not later than one year from today's date.

-Mr. Provo shall not associate with Benny Simmonds or any one reasonably designated by the supervisor including anyone known to have a criminal or youth record, or a record for drug offences, or who is on probation or parole.

-Mr. Provo shall as well keep a copy of this Order on his person at all times as a condition of the Conditional Sentence Order.

- [23] The following conditions shall apply to his House Arrest:
- Mr. Provo shall remain at his residence 3873 Novalea Drive, Halifax, Nova Scotia and be available for telephone calls from the supervisor at 453-9000 as well as visits to his residence by the supervisor.

 - Mr. Provo, shall be under house arrest at all times except when specifically permitted to be outside or absent from the residence as provided in this Order.
- [24] Mr. Provo, you may be absent from your residence for the following reasons only:
- To continue at your place or places of business including addresses for customers where services will be performed.

 - To attend at any health related appointments as may be directed for you or your dependants provided you have advised your supervisor in advance of such appointments.

 - To respond to any medical emergency situations that require you to be absent and thereafter you are required to return to your residence forthwith and notify your Supervisor of your absence as soon as possible and with out delay upon being aware of such emergency.

 - To attend Court, meet with your lawyer or to perform the mandatory community service at all such times and meetings to be pre-arranged with the Supervisor and for such other reasons as may be approved and pre-arranged by your supervisor as determined by your supervisor as being necessary to conduct your personal affairs.

 - Mr. Provo may be permitted outside your residence and within the boundaries of your property on the conditions prescribed as follows: For fifteen minutes from 11:00 a.m. to 11:15 am on days approved by your supervisor. For one hour on days approved by your Supervisor to attend to ordinary maintenance and repair to your home and at such other times as may be approved by your supervisor.
- [25] The provisions I have just set out apply only after advance written permission is provided by your supervisor.
- [26] For any absences from his residence Mr. Provo is to travel by way of the most direct route, and he is to have with him at all times a copy of this Conditional

Sentence Order, including any amendments thereto, and any approvals required by this Order.

- [27] During the term of this house arrest condition, Mr. Provo's supervisor may attend at any time at his residence and be on his property to solicit his attention at any door of his residence used to exit or enter the residence.
- [28] Mr. Provo is not permitted to have any alcohol or non-prescription drug in his residence or on his property. He is not to have more than one visitor at his residence or property at any one time and he is not permitted to have any visitors whatsoever between 10 p.m. and 6 a.m.

Michael MacDonald
Associate Chief Justice