

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Withrow*, 2019 NSSC 270

Date: 20190903

Docket: CRH No. 469587

Registry: Halifax

Between:

Her Majesty the Queen

v.

Kirk Edward Withrow

<p>SENTENCING DECISION</p>

Judge: The Honourable Justice Kevin Coady

Heard: August 30, 2019 in Halifax, Nova Scotia

Oral Decision: September 3, 2019

Written Decision: September 11, 2019

Counsel: Scott Millar, Crown Counsel
Kevin Burke, Q.C., for the Defendant

By the Court:

Introduction:

[1] Mr. Withrow comes before the Court as, essentially, a 54-year-old male without a criminal record. Two minor convictions over 35 years ago are not probative to this hearing.

[2] The Pre-Sentence Report suggests that, until 2015, he lived a pro-social life without legal conflict.

[3] However, that all changed in the summer of 2015 when Mr. Withrow became involved in a conspiracy to traffick British Columbia cannabis in Eastern Canada and to deliver the cash proceeds back to British Columbia.

[4] The circumstances of that venture are spelled out in detail in an Agreed Statement of Facts filed with this Court as Exhibit 1. It is not necessary to review that document, as it speaks for itself.

[5] There are, however, several factors that warrant specific mention:

- The conspiracy involved a dozen individuals both here in Halifax and in British Columbia.
- In a three-month period in 2015 there were 52 return trips between Vancouver and Halifax.
- Police conducted 26 covert searches of suitcases and found marijuana going east and cash going west.
- The total amount of cannabis transported in that three-month period was between 1450 lbs. and 1885 lbs.
- The total amount of criminal proceeds in that three-month period amounted to approximately 3.5 million dollars.

[6] It was not long before the police got wind of this ongoing enterprise. The investigation established that Mr. Withrow was not the architect of this enterprise.

[7] The investigation established that Mr. Withrow played a critical role in Halifax and Dartmouth. Essentially, he worked with other conspirators in Halifax and Vancouver to meet couriers at the airport and collect suitcases of cannabis for

delivery to the purchasers. He then collected suitcases of cash and drove that cash and the courier back to the Halifax airport.

[8] When the police curtain came down, Mr. Withrow acknowledged knowing what was in the suitcases going each way.

[9] Mr. Withrow was a critical player in this conspiracy. It just would not work without his role on the ground. He attracts significant culpability for the entire enterprise. I suspect his share of the spoils was far less than that of the architects of this conspiracy. This factor does not lessen Mr. Withrow's culpability for his actions.

[10] On May 8, 2019, Mr. Withrow entered guilty pleas to the first five counts on the Indictment:

- Conspiracy to traffic marijuana (life)
- Conspiracy to launder proceeds of crime (ten years)
- Conspiracy to possess proceeds of crime (ten years)
- Trafficking marijuana (life)
- Laundering proceed of crime (ten years)

[11] A Pre-Sentence Report was ordered.

[12] The Crown advocates for the following sentence:

- 3.5 years' incarceration;
- Forfeiture of all offence-related property;
- A ten-year weapons prohibition; and
- A \$15,000 fine in lieu of forfeiture pursuant to s. 462.37(3) of the *Criminal Code*.

[13] The Defence advocates for the following sentence:

- A 90-day intermittent sentence followed by two years' probation;
- Forfeiture of all offence-related property;
- A ten-year weapons prohibition; and
- No fine in lieu of forfeiture.

[14] There is ample authority that, absent exceptional circumstances, deterrence and denunciation are the primary considerations when sentencing offenders

involved in large-scale commercial cannabis operations (*R v. Banfield*, 2011 NSSC 56).

[15] This is also ample authority that denunciation and deterrence are primary considerations when sentencing those involved in money laundering (*R v. Garnett*, 2017 NSCA 33).

[16] It appears as if the range for this kind of case is from 1 to 4.5 years' incarceration – cases the Courts have described as “significant cannabis trafficking cases.”

[17] In the *Jones* case (*R. v. Jones*, 2003 NSCA 48) the Court identified the range of sentence and stated:

Absent exceptional circumstances, a person involved in a small wholesale or large retail operation should generally attract a sentence in the range that will take into account factors personal to the offender and his degree of involvement. Any suggestion that there is a separate and lower range of sentence for couriers within a commercial operation is rejected.

[18] I accept the Crown's submission that the effect of the *Cannabis Act*, in October 2018, has little to no bearing on sentencing in a large-scale commercial operation (*R v. Strong*, 2019 ONCA 15).

[19] I have reviewed the sentencing decisions involving co-conspirators Lockett, Pilling and Germaine. Mr. Lockett's sentence (three years, three months) is in the range. Mr. Pilling's sentence was based on “exceptional circumstances”. Mr. Germaine's sentence was also in the range.

[20] I do not find any “exceptional circumstances” in the case of Mr. Withrow that would displace the usual range for this type of large-scale operation.

[21] The purpose of sentencing is addressed at section 10 of the *CDSA*. In many respects it mirrors the principles of sentencing set forth at section 718 of the *Criminal Code*. Some of the stipulated aggravating factors are not in place, i.e., weapons and violence and exploitation of a youth.

[22] The courts, in many cases, have interpreted section 10 of the *CDSA* to mean that “except in highly unusual cases a custodial sentence is required for narcotic trafficking even in cases involving cannabis.”

[23] In assessing a fit and proper sentence for Mr. Withrow, I must be guided by section 718 of the *Criminal Code*. It states as follows:

718 The fundamental purpose of sentencing is to protect society and 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 and the harm done to victims or to the community that is caused by 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 or to the community.

[24] The caselaw strongly supports the principle that in large-scale cannabis cases, denunciation and deterrence must be given preference to the other stated purposes.

[25] This is not to suggest that these penal purposes should displace rehabilitation. Mr. Withrow has plenty of rehabilitative potential and that must be reflected in his sentence.

[26] The Pre-Sentence Report is positive. Mr. Withrow has, until 2015, lived a normal working man's life. Since his release on bail (four years), he has avoided conflict with the order and the community.

[27] I am also guided by section 718.1 of the *Criminal Code*, which requires me to craft a sentence that is proportionate to the gravity of the offence and the offender's degree of responsibility.

[28] In *R. v. Lacasse*, 2015 SCC 64, the Court held that the more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be.

[29] While Mr. Withrow's involvement in this conspiracy was different than that of the architects of the plan, he played a critically-essential role. While he, no doubt, earned less than some others, what he did earn was driven solely by greed.

[30] I am also guided by section 718.2 of the *Criminal Code* which sets forth “other sentencing principles”. The most relevant phrase appears in subparagraph (a), which states: “A sentence should be increased or reduced to account for any relevant aggravating circumstances relating to the offence or the offender.”

[31] Subparagraph (a) sets forth a menu of items that can come into play in drafting a fit and proper sentence. Most have no application to this case. The only item on the menu that is relevant is item (iv): “evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization.”

[32] This is clearly an aggravating circumstance.

[33] I find the following aggravating factors apply to Mr. Withrow:

- The scale of the operation.
- The critical roles he played in the ongoing conspiracy.
- That his motivations were rooted in greed. He just wanted a new standard of living.

[34] I find the following mitigating factors at play in Mr. Withrow’s sentencing. I must say, however, that many apply with limitations:

- For the purpose of this proceeding Mr. Withrow does not have a criminal record.
- While Mr. Withrow’s guilty pleas are mitigating, such mitigation is diminished due to the lateness of those pleas.
- Mr. Withrow indicates remorse in his Pre-Sentence Report. I find that mitigation is diminished by the words “he is remorseful for the pain and suffering he has put his parents, siblings and children through.” While that is admirable, it is not true remorse.
- Mr. Withrow’s Pre-Sentence Report is positive. It presents him as an industrious citizen who has led a generally pro-social life until June, 2015.
- He enjoys much family support.

- He has been on bail for four years without incident.

[35] Section 718.2(b) advances several other principles: “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.”

[36] I have reviewed the circumstances surrounding the sentencing of Messrs. Lockett, Pilling and Germaine -- all co-conspirators. I am satisfied that the sentence I give today will not offend this principle.

[37] I want to take a moment to address Mr. Burke’s submissions as to where Mr. Withrow stood in the larger picture.

[38] I accept that often some of the “big fish” are insulated from detection and prosecution. These are the real money-makers.

[39] They are essentially downloading the risk. For reasons of greed, Mr. Withrow stepped into the breach to perform absolutely critical roles.

[40] I accept there are other co-conspirators who contributed to the national scheme in ways greater than Mr. Withrow. That, however, does not relieve him of responsibility for his actions.

[41] He acted on his own free will and not as a result of external forces such as vulnerability, addiction, poverty and the like.

[42] The probe in Mr. Withrow’s car tells the Court that he knew in 2015 that this day would ultimately arrive. It was a calculated gamble.

Conclusion:

[43] After considering all the principles and factors enumerated in this hearing, I have determined the following to be a fit and proper sentence for Mr. Withrow:

- Count No. 1 – Conspiracy to traffick marijuana – 30 months
- Count No. 2 – Conspiracy to launder proceeds – 30 months concurrent
- Count No. 3 – Conspiracy to possess proceeds – 30 months concurrent
- Count No. 4 – Trafficking marijuana – 24 months concurrent
- Count No. 5 – Laundering proceeds – 24 months concurrent
- Count No. 6 – Dismissed

The total sentence is 30 months.

[44] I have signed an order forfeiting all offence-related property.

[45] I have signed an order setting a ten-year weapons prohibition pursuant to section 109 of the *Criminal Code*.

[46] The Crown also seeks a \$15,000 fine in lieu of forfeiture pursuant to section 462.37(3) of the *Criminal Code*. This is a discretionary remedy.

[47] Subsection 3 states as follows:

(3) If a court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made in respect of any property of an offender but that the property or any part of or interest in the property cannot be made subject to an order, the court may, instead of ordering the property or any part of or interest in the property to be forfeited, order the offender to pay a fine in an amount equal to the value of the property or the part of or interest in the property. In particular, a court may order the offender to pay a fine if the property or any part of or interest in the property

(a) cannot, on the exercise of due diligence, be located;

(b) has been transferred to a third party;

(c) is located outside Canada;

(d) has been substantially diminished in value or rendered worthless; or

(e) has been commingled with other property that cannot be divided without difficulty.

(a) There is no evidence of property not being located;

(b) There is no evidence of property being transferred to a third party;

(c) There is no evidence of property located outside Canada;

(d) There is no evidence of property becoming diminished in value; and

(e) There is no evidence of commingling.

[48] This is not surprising given that Mr. Withrow was a fee-for-hire guy and not an investor entitled to dividends.

[49] Further, I am left with the impression that, since arrest, Mr. Withrow's income is derived from driving a taxi.

[50] He will lose his only source of income while he serves the custodial part of his sentence.

[51] It does not appear as if he possesses any valuable assets.

[52] I am not prepared to issue a fine in lieu of forfeiture. I see such an order as counter-productive to Mr. Withrow's rehabilitation, the prospect of which is significant.

[53] The Crown has dismissed all remaining counts on the Indictment, and there will be no Victim Fine Surcharge payable.

Coady, J.