

Citation: *R. v. Bourne, Auclair and Devellano*,
2007 YKTC 81

Date: 20070911
Docket: T.C. 07-00073A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Faulkner

REGINA

v.

**JOHN WAYNE BOURNE,
KELLY RYAN AUCLAIR,
and MATTHEW DAVID DEVELLANO**

Appearances:
Eric Marcoux
Daniel Geller

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] FAULKNER C.J.T.C. (Oral): John Wayne Bourne and Kelly Ryan Auclair have entered guilty pleas with respect to charges they face following a police raid on a residence in the Riverdale area of Whitehorse back in May of this year. The residence was that of Mr. Bourne, and Mr. Auclair was staying there from time to time.

[2] In various locations in the residence, was a significant amount of cocaine, most of it in crack form, some of it in powder, and much of it having already been divided up into what are commonly called rocks or small amounts for street sale. In total, between the powder cocaine and the crack cocaine, some 40 grams of cocaine was found.

[3] There also were some scales in the residence, a number of cell phones, and in Mr. Bourne's bedroom, some \$20,000 in cash and another \$660 dollars on his person. Mr. Auclair was also there and had some \$1200 on his person.

[4] Also in the residence were found an arsenal of weapons; most significantly there was an AK-47 assault weapon, which is a prohibited weapon, and a MAK-10 machine pistol, which is also a prohibited weapon. In addition to these prohibited weapons there was a shotgun and a number of rifles of various calibers, as well as ammunition for one of the rifles.

[5] Also found were two Pyrex measuring cups containing cocaine residue. It may be surmised that these had been used for the purpose of mixing up crack cocaine, and Mr. Auclair's fingerprint was found on one of the measuring cups.

[6] At the end of the day, Mr. Bourne accepts primary responsibility for the drugs and the weapons that were found, and he has entered guilty pleas to a charge of possession of cocaine for the purpose of trafficking, as well as nine charges relating to the possession of the prohibited and other weapons, the specific allegations being that he had possession of these items without having a proper licence, contrary to s. 91(1) of the *Code*, and/or 92(1) of the *Code*.

[7] Mr. Auclair, for his part, admits that he was somewhat involved in the cocaine trafficking operation, as is made obvious by the presence of his fingerprint on the mixing cup. The Crown concedes that the extent of his involvement beyond that admitted is difficult to determine.

[8] With respect to both Mr. Bourne and Mr. Auclair, I have been presented with a joint submission of counsel. With respect to Mr. Bourne, who is now 35 years of age and has a criminal record, including two prior drug possession offences, the joint submission is that he should receive a global sentence of 33 months in addition to the four and a half months he has already spent in pre-trial custody.

[9] With respect to Mr. Auclair, on the basis of his lesser involvement, the submission is that he should be sentenced, essentially, to time served, which again is four and a half months, and in addition be subject to a probation order for a period of two years.

[10] I have decided to accede to the joint submission of counsel and deal with the matters in the manner proposed. Reviewing the Yukon sentencing precedents, particularly with respect to the possession for the purpose aspect of the matter, would suggest a range for Mr. Bourne of something in the range of two years, more or less, on that charge. It is suggested that, in effect, 18 months of the proposed sentence be attributed to that particular charge. So it is at the low end of the range but not out of the range.

[11] With respect to the charge of possession for the purpose of trafficking, Mr. Bourne, you are sentenced to a period of imprisonment of 18 months. With respect to the charges relating to the possession of the prohibited weapons, being the assault rifle and machine pistol, 15 months consecutive, for a total of 33 months. With respect to the remaining counts, which relate to the possession of the other firearms without the proper permits and licences, I will allow credit for the time already served, which as I

say is four and a half months, giving credit at the usual rate of roughly one a half times, would give just around seven months credit. So with respect to those charges, I sentence you to a period of imprisonment of one day in addition to time served.

[12] The drugs which were seized are to be forfeit. The weapons which were seized are to be forfeit. Additionally, there will be an order whereby for a period of ten years following your release from imprisonment you will not have in your possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance. You are directed to surrender to the R.C.M. Police at Whitehorse any such items now in your possession and to do so forthwith.

[13] In the circumstances, the surcharges are waived.

[14] There is also the question of the monies that were seized from Mr. Bourne and I will return to that later.

[15] With respect to Mr. Auclair, in light of the lesser involvement provable, the Crown is seeking an effective sentence in the range of seven months, again, grossing up the pre-trial custody at the usual one and a half times rate. Again, this is at the low end of the range but not so significantly outside of the range that I would be justified in departing from the joint submission of counsel. Accordingly, with respect to the offence of possession for the purpose of trafficking, Mr. Auclair, you are sentenced to a period of imprisonment of one day in addition to time served, which I calculate at seven months.

[16] Following your release from imprisonment you will be subject to a probation order for a period of two years. The terms of that order will be that you will keep the peace and be of good behaviour. You will report to the Court as and when required. You will report forthwith to a probation officer and thereafter as, when and in the manner directed. You will advise the probation officer forthwith of any change of name or address, promptly notify him of any change of occupation or employment. During the period that the probation order is in force, you are not to be within the Yukon Territory, except with the prior written permission of the probation officer for the purposes of employment or education, but not otherwise.

[17] Following your release from imprisonment you will be prohibited from having in your possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, for a period of ten years. I direct that you surrender to the R.C.M. Police at Whitehorse any such items now in your possession.

[18] Any of the drugs seized which might be attributable to Mr. Auclair are declared forfeit.

[19] With respect to the monies seized from Mr. Auclair, the Crown did not seek the forfeiture of those monies. They are directed to be returned to Mr. Auclair.

[20] The surcharges are waived. That leaves the matter of the monies.

[21] MR. GELLER: Your Honour, if I might raise one point. I don't know whether or not it's necessary for the Court to make an order with respect to Mr. Auclair's

probation order being transferred to the probation services of British Columbia.

Obviously, that will have to happen, but I don't know whether or not that can happen without a court order.

[22] THE COURT: It happens subject to a desk order, which is readily given. If you want me to clarify on the record that I am prepared to grant such an order, I will do so. Obviously, it is necessary in this case.

[23] Now, that leaves the matter of the monies seized from Mr. Bourne, totalling, as I understood it, some \$20,660. At this point, I am told of the possibility of an application under s. 462.34. No such application has been made to date. I will retain jurisdiction with respect to that matter for a period of 30 days. Should Mr. Bourne be advised to make an application, I will hear it. In default of that application being made, the entire sum will be forfeit.

[24] The remaining counts?

[25] MR. MARCOUX: So the remaining counts for Mr. Auclair are stayed; for Mr. Bourne are stayed, and in light of the plea agreements of Mr. Auclair and Mr. Bourne, in the circumstances of this case, the Crown is ready to stay the proceedings against Mr. Matthew Devellano.

[26] THE COURT: Very well. Thank you.