

Citation: *R. v. Kasperavicius*, 2009 YKTC 93

Date: 20090217
Docket: 08-10009A
Registry: Watson Lake

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Lilles

REGINA

v.

MICHELLE LOUISE KASPERAVICIUS

Appearances:
Jennifer Grandy
Gordon Coffin

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral): I am dealing with Michelle Louise Kasperavicius. She is a 44-year-old woman who is before the Court having entered a guilty plea to a count contrary to s. 7 of the *Controlled Drugs and Substances Act*, namely that she did unlawfully produce a substance included in Schedule 2 of that act, to wit: cannabis, marihuana.

[2] The facts indicate that there was an intermediate-sized grow operation in her house. She lived in that house. A total of over 80 plants were seized, half of them being clones or very small cuttings. There were a number of seven-foot tall plants and a number of smaller two-foot tall plants. Clearly, this is consistent with a grow operation that was intended to produce a continuous supply of marihuana.

[3] Not only did she allow this grow operation to occur in her residence, there is evidence that she was more than a passive participant. Had she been purely a passive participant, she could possibly have accepted responsibility for a possession charge as opposed to active cultivation, with which she was charged. I am advised that she did, from time to time, provide some care for these plants by watering them.

[4] Michelle comes to court with a very limited and dated record. There is only one entry. It goes back to 1994. We are talking about 15 years ago. It was for driving with more than 80 milligrams of alcohol in her blood. This was dealt with by a fine.

[5] Without going into a lot of detail, I note that her parents were divorced when she was very young. Her mother then entered into a number of relationships. Ms. Kasperavicius was victimized in at least one of those relationships by her mother's male partner. More recently, her mother has been in a relationship for approximately 15 years; a relationship that could be described as a stable and good relationship. Her mother's partner and her mother own businesses in town: the Downtown trailer park and Archie's Fast Food. Michelle works at Archie's Fast Food, and during the wintertime is the main employee looking after the family businesses as her parents often go to California for the winter.

[6] She has a grade 12 education. She is doing some additional course work. Although she has a limited education, she earns a good salary, a good income, and is able to look after herself very easily.

[7] In my discussion with counsel, I referred to the fact that Michelle appears to be a very needy individual socially. She has a history of partnering up with individuals who

are less than desirable. This is reflected partly by her marital history. She has had a number of relationships in the past that have broken up including, more recently, with her co-accused, Slade Flahr. She has been in a relationship with him for two years. Mr. Flahr is handicapped, physically handicapped, and her friends note that Michelle has a history of finding partners who are needy as she has a “big heart”.

[8] Her friends believe that she would not be before the Court today if it was not for her relationship with Mr. Flahr. The Crown believes this as well. I believe that as well. It is evident to me that Mr. Flahr is clearly the ringleader who has taken advantage of Michelle and, in my opinion, continues to take advantage of her to this day. I am advised that Michelle has moved in to live with her mother, while allowing Mr. Flahr, who is on bail, to live in her residence.

[9] I am going to say this to Michelle now; she has probably heard it from others. I do not think this is a good idea. I think it is a very bad idea. I think you continue to be taken advantage of and it is the main reason why I am not going to adhere or follow the recommendation made by your counsel. If I was satisfied that you had broken, clearly terminated, any relationship with Mr. Flahr, who had manipulated you and used you in the past, I would have much greater confidence that you would not get into any trouble at Mr. Flahr’s insistence in the future. But, to me, there is a real issue of whether or not you have learned your lesson with respect to your experience with Mr. Flahr. You need to be more discriminating in terms of who you associate with and who you “adopt”.

[10] It is important to observe that the pre-sentence report indicates that Michelle has no alcohol or drug problems, so that is not an issue.

[11] It is possible that Michelle persuaded herself that in fact this marihuana was for Mr. Flahr's personal use. Mr. Flahr, as I said, is physically handicapped and has recently had a significant operation from which he is recovering. Forty plants and another 41 clones, various stages of growth, indicate a significant degree of naivety on her part if she honestly believed that all of this was for personal use. One seven-foot plant, by it's size in itself, would indicate that this belief was false. At very best, in my view, she was wilfully blind and reckless. I find it also difficult to believe that this marihuana was for personal use, considering that she has lived in Watson Lake for some time. A person would have to live a very isolated life in Watson Lake not to know something about marihuana and what volumes could be used for personal use.

[12] I mentioned earlier that her continued involvement with Mr. Flahr is of concern to me. She is susceptible to his influence, or has been susceptible to his influence in the past and I am concerned that this might continue. She has used poor judgment in the past. As I indicated previously, I believe she continues to show poor judgment by supporting Mr. Flahr, who has used her badly in relation to this grow op in her home.

[13] In my opinion, in all of these circumstances, the suggestion by the Crown with respect to sentence is appropriate. I would not say it was generous, but it does reflect the realities of the situation that brings Michelle before the Court.

[14] There will be a jail term of three months for the reasons indicated by the Crown, and I have reviewed those in my Reasons today. She will be allowed to serve that sentence conditionally in the community. I will hear from Crown and from defence for their suggestions after I do the first draft on this, but to begin with, the statutory terms

will apply, and those statutory terms include:

1. Report to your supervisor;
2. Remain within the jurisdiction of the Court;
3. Notify your supervisor of any change of name or address or employment or occupation;

[15] As indicated in my Reasons and in the pre-sentence report, she does not abuse alcohol or drugs herself, so many of the terms one would normally include in a conditional sentence would not be applicable. The main term will be the curfew term, and the curfew term will require you to:

4. Remain within your residence between the hours of 4:00 p.m. and 10:00 a.m. except if you have the prior permission of your supervisor. Such permission would normally be given for employment or work purposes, for educational purposes, for attendance at family or cultural events, for religious purposes and for any other purpose your supervisor considers to be rehabilitative.
5. Not have any in-person contact with Slade Flahr except with the previous permission of your supervisor and in the presence of another adult, responsible individual approved by your supervisor;
6. Take such assessment, counselling and programming as directed by your conditional sentence supervisor;

[16] Mr. Esler, is there anything else that you think would be helpful in this case? It is an unusual case. It is not the kind of case we often see.

[17] MR. ESLER: No. And it's going to be interesting in how to work some of them out. No, I think that's --

[18] THE COURT: With respect to the curfew, Madam Clerk, a normal knock and talk term should be there. That is to say:

4. ... You are to answer the telephone or the front door during reasonable hours for the purpose of checking the curfew.

[19] Michelle, If you were in court earlier when I dealt with a conditional sentence, I had mentioned to that individual that Mr. Esler should be that person's best friend. It applies here, too. He has a lot of discretion. You sit down, meet with him, maybe even later today, tomorrow, tell him what your plans are. If they make sense to him, he can allow you to do that. He can accommodate your work.

[20] THE ACCUSED: Yeah. 'Cause I work from 9:00 in the morning 'til 8:00 at night.

[21] THE COURT: Yes, and if he thinks that is appropriate, he will allow you to do that. He is going to tell you that you have to go directly from your home to your place of employment, from your place of employment home, and not stop anywhere in between.

[22] DUANE ESLER: Have we -- will there be a reside as directed condition, or are we going to let that --

[23] THE COURT: There is a term, statutory term --

[24] DUANE ESLER: To let me know when she --

[25] THE COURT: -- that requires her to notify you in advance of any change of name or address. If that is not sufficient, I am content to, and it may make sense in light of the other concerns I have with respect to her co-accused, to include a term, Madam Clerk, what would be the:

7. Reside at such place as is approved by your supervisor and not change that residence without the prior written permission of the conditional sentence supervisor;

That may be helpful in the facts of this case.

[26] DUANE ESLER: Yes.

[27] THE COURT: Now, there was the term with respect to limiting your contact with Mr. Flahr; are you going to be able to make that work?

[28] THE ACCUSED: Yep.

[29] THE COURT: So you cannot meet with him in person alone. I do not prevent you from contacting him by telephone. But you have to have an adult person with you when you meet with him, and that individual has to be approved by Mr. Esler in advance.

[30] DUANE ESLER: One question: since we'll be probably caught up in court most of the afternoon, I don't know whether I'd get a chance to meet with Michelle until tomorrow. Her curfew, can that start tomorrow, 'cause she's probably working

tonight?

[31] THE COURT: I am prepared to indicate that. With respect to tonight - you do not have to record this, Madam Clerk, but I am directing you that you will be excused from the curfew until -- what time are you working today?

[32] THE ACCUSED: Eight o'clock.

[33] THE COURT: Eight o'clock, at which point you should be at your place of employment until eight o'clock and you will go directly home. And tomorrow morning you will be excused from your curfew by allowing you to go to work, at what time?

[34] THE ACCUSED: Nine.

[35] THE COURT: Nine o'clock in the morning, provided you go directly from your home to the place of work. After that, Mr. Esler, you will meet with her and be able to sort out --

[36] DUANE ESLER: Yes. We can --

[37] THE COURT: -- what you --

[38] DUANE ESLER: -- make an appointment time.

[39] THE COURT: -- and give her in writing what she can do and cannot do.

[40] DUANE ESLER: Yeah. We'll need to figure out a meeting time for

tomorrow. I was going to book an appointment for 10:00, but if she's just helping at that -- would you be able to make it at 10:00?

[41] THE COURT: Well, have a word with her before she leaves and you can sort that out. Victim fine surcharge \$50; time to pay that?

[42] THE ACCUSED: Well, I can pay it now.

[43] THE COURT: Okay. Paid forthwith.

[44] MS. GRANDY: Your Honour, the s. 109 order?

[45] THE COURT: Yes. An application for a firearm prohibition. That application is mandatory and I grant that application in the normal terms. Do you have any firearms or ammunition in your possession?

[46] THE ACCUSED: I have three rifles

[47] THE COURT: Do you?

[48] THE ACCUSED: They're at my mother's.

[49] THE COURT: They are at your mother's. Well, you will not be able to possess them. You will have 24 hours to make arrangements for someone else who is entitled in law, that is to say they have an FAC, to receive and hold those rifles or for you to sell them. If you are unable to do that in 24 hours, you should turn them over to the RCMP and they will hold them for a maximum of 60 days. You will still have the permission to make arrangements to dispose of them or to transfer them to someone else in that 60-day period. If not done in 60 days, then they will be forfeited to the

RCMP and they can deal with them as they see fit, including to destroy them.

[50] There are provisions in the *Criminal Code* that allow you to apply to have exemptions made to this order or to reduce the time of the order. Those exemptions are based on use for subsistence purposes. So you might want to speak to counsel at some point to figure out whether or not you fit those exemptions.

[51] Madam Crown, anything else from you?

[52] MS. GRANDY: No. I guess I'd just, out of an abundance of caution, I take it Your Honour would be -- would've been content to order the forfeiture of the items seized were they not required.

[53] THE COURT: Yes, absolutely, and in fact I am happy to. The items seized, marihuana plants, the paraphernalia directly associated with the grow op, that is what you have seized?

[54] MS. GRANDY: Yes, I just -- I guess I don't want the order, in the unlikely event that we do end up needing it for evidentiary purposes, but also don't want to end up back here again with some opposition.

[55] THE COURT: Right. So the order I am -- I just want to make sure that what you have seized is clearly related to the grow op.

[56] MS. GRANDY: Yes, with the exception of a couple of documents which link the two individuals to the residence.

[57] THE COURT: Right. Let me try this, Mr. Coffin, and I will get your

input when I am done. I am prepared to make an order that the items seized by the RCMP in relation to Ms. Kasperavicius's residence and the grow op be forfeited to the Crown, those items that are directly related to the grow op be forfeited to the Crown, 30 days after all other related charges, including appeals, have been completed. Can you live with that or can you suggest some better wording? I am just drafting off the top of my head here.

[58] MR. COFFIN: Yeah. No, I think that that makes sense.

[59] MS. GRANDY: That's fine, yeah. I think the other option is to just declare that it's offence-related property, in which case s. 16 of the *CDSA* takes effect. And then the other --

[60] THE COURT: If at some point you think we should go that way, you are not precluded from bringing an application to that effect.

[61] MS. GRANDY: I don't -- I don't foresee an issue there.

[62] THE COURT: No.

[63] MS. GRANDY: All of the items are fairly clearly offence-related property.

[64] THE COURT: Let me just say one additional thing. I want Ms. Kasperavicius to come back to Court on April the 7th at ten o'clock for a review of her performance under this conditional sentence order.

[65] Sorry, Ms. Grandy, you were going to say?

[66] MS. GRANDY: I was just going to ask if the charges, the remaining charges as they relate to Ms. Kasperavicius only, if those could be marked as withdrawn.

[67] THE COURT: So noted.

LILLES T.C.J.