Citation: *R. v. Moore*, 2005 YKTC 10 Date: 20050204
Docket: T.C. 04-00393
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Lilles

R e g i n a

v.

Clayton Andrew Moore

Appearances:
Michael Cozens Counsel for Crown
Edward Horembala, Q.C. Counsel for Defence

REASONS FOR SENTENCING

[1] Mr. Moore has entered early guilty pleas to two charges: the possession of a prohibited weapon, namely, "brass knuckles", contrary to s. 91 of the *Criminal Code*; and the possession of approximately one-half kilogram of marihuana for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.

Facts

[2] On September 3, 2004, the arresting officer was parked facing north along the Alaska Highway, completing some paperwork. The officer observed a small grey vehicle driving south bound pull over to the side of the highway. Believing that the driver wished to speak to him, the officer turned his vehicle around and pulled in behind the grey vehicle. When the officer spoke to the driver and asked him for his driver's licence, the officer smelled the odour of cannabis marihuana

from the car. As Mr. Moore exited the vehicle, the officer saw what looked like cannabis marihuana buds on the console.

[3] Mr. Moore was arrested and upon being searched, a set of “brass knuckles” was found on his person. A subsequent search of his vehicle resulted in the discovery of three bags of marihuana totaling 512 grams, or a little more than a pound, with a bulk value of approximately $3,000.00.

[4] Mr. Moore indicated a guilty plea at the earliest opportunity, within two months after his first appearance.

The Law

[5] Through the combined effect of s. 5(4) and Schedule VII of the *Controlled Drugs and Substances Act*, (1996) S.C. ch. 19, trafficking in cannabis in quantities less than three kilograms has a maximum sentence of five years less-a-day imprisonment. In this case, the amount was one-half kilogram. This provision represents an important change to the law, such that the reduction in maximum sentence from life imprisonment pursuant to the predecessor legislation means that earlier cases have less persuasive value. It also means that a conditional discharge is now available for trafficking in a small amount of marihuana. This legislation also codifies the distinction previously drawn by the courts between “soft” and “hard” drugs. The former includes cannabis and marihuana while the latter includes drugs such as cocaine, heroin and methamphetamine. Traffickers in hard drugs usually can expect tougher sentences, most often a term of incarceration.

[6] The quantity of the drug is also relevant to sentencing, as the amount involved can indicate the size and scope of the commercial enterprise. The amount of the drug may also suggest participation in an organized distribution scheme. Where the offender is engaged in a commercial operation reaching the level of organized distribution, a period of incarceration, sometimes substantive,

is often imposed. In the case at bar, the amount of marihuana is modest and I am satisfied that Mr. Moore was not part of an organized distribution scheme.

[7] Some drugs are closely associated with violence. As a result, a judge may take into account that crack cocaine is often linked to incidents of violence and consider it to be an aggravating factor: *R. v. Goulet* (1995), 97 C.C.C. (3d) 61 (Ont. C.A.). In my experience, marihuana is not similarly associated with violence and in the absence of evidence on point, I am not prepared to make such an inference in this case.

[8] Section 10(2)(a)(i) of the *Controlled Drugs and Substances Act* makes possession of a weapon an aggravating factor. Moreover, pursuant to s. 10(3), if an aggravating factor is present, the court must give reasons for a decision not to impose a period of imprisonment. Obviously the nature of the weapon, its location, and whether it was used, threatened to be used or merely in possession are factors to be considered.

[9] Neither the Crown nor the defence offered an explanation for the presence of the “brass knuckles”. Nor were the “brass knuckles” described to me. Taking into account the circumstances of the offence and the accused, I am satisfied that the “brass knuckles” were probably in his possession to give him confidence, I might add a false sense of confidence. While “brass knuckles” are prohibited weapons as defined in the *Criminal Code*, their possession is not nearly as serious or aggravating as possession of a firearm, or even a knife.

[10] I have not been able to locate any reported cases involving marihuana trafficking with “brass knuckles” as an aggravating factor. The few cases I have been able to identify involving “brass knuckles” consider them at the low end of the continuum of seriousness relating to prohibited weapons. In *R. v. Boyce*, [2002] O.J. No. 3707 (Ont. Ct. of Justice) a storekeeper was convicted of 34 counts of possession of various prohibited weapons, including “brass knuckles”.

Finding that Boyce was reckless in not checking his stock and willfully blind in not making the appropriate inquiries, he received an absolute discharge. In *R. v. Pulley*, [1990] O.J. No. 941 (Ont. Dist. Ct.) the accused was arrested and the police found him carrying “brass knuckles”. He was convicted after trial. He would have received a conditional discharge were it not for his previous criminal record. The court instead imposed a fine.

Personal Circumstance

[11] At the time of his arrest, Mr. Moore was 18 years old and lived at home with his mother. Mr. Moore does not have a previous criminal record. He graduated from high school a year earlier, at age 17 and plans to go to college. As Mr. Moore’s marks were not high enough to gain admission to the post-secondary institution of his choice, he remained in Whitehorse to upgrade his marks at Yukon College. Mr. Moore has recently finished his first term during which he took three courses. Mr. Moore is continuing his upgrading in the current semester. In addition, he is enrolled in a Real Estate course.

[12] Mr. Moore’s mother and father are separated but both are supportive of their son. Mr. Moore’s mother attended court with Mr. Moore. When Mr. Moore’s mother told me that these offences were out of character for her son and that she was simply devastated by the charges, Mr. Moore began to cry. Mr. Moore also spoke, explaining how his recreational use of marihuana lead to trafficking on a small scale, in part to pay for his own habit. Mr. Moore was forthright and contrite. I am satisfied that Mr. Moore feels deep remorse for the hurt he has caused his mother. I believe that he now has a better understanding of the charges before the court.

Early Guilty Pleas

[13] Mr. Moore indicated a guilty plea at the earliest opportunity, within two months of his first appearance. It is a time honoured principle that an early guilty plea is to be considered a mitigating factor, and even greater weight is to be

assigned to such pleas when they are entered very early in the proceedings, as in this case. This favourable treatment recognizes that early guilty pleas avoid inconvenience and cost to witnesses and result in considerable savings of court time, not just at trial, but also by eliminating the numerous court appearances and paperwork involved in setting a matter down for trial.

[14] An early guilty plea often provides evidence of remorse by the offender, although sometimes it is also a reflection of the strength of the Crown's case. In this case, I heard from Mr. Moore and his mother directly and indirectly from seven other individuals who wrote letters of support. Considering his background, his aspirations for higher education and noting the absence of a previous criminal record, I am satisfied that he understands that he made a terrible mistake, exercised poor judgment and is very sorry for what he did. In particular, Mr. Moore understands how his actions have devastated his parents and have impacted on him. I am satisfied that this incident was out of character for him.

The Offender's Youth

[15] It is a well understood principle that an offender's youth is generally held to be a mitigating factor. A young adult has limited life experience on which to make informed judgments. He is more easily influenced by negative peers. His first offence is more likely to be as a result of a poor decision rather than as a result of a commitment to a life of crime. Keeping a youthful first offender out of the criminal justice system altogether is often more rehabilitative than imposing a jail term.

[16] It is for that reason that the *Youth Criminal Justice Act* limits the use of custodial sentences to exceptional circumstances: see s. 39(1)(d) of the *Act*. In *R. v. J.F.,* [2004] O.N.C.J. 142, a 17-year-old youth pleaded guilty to three counts of trafficking in cocaine, selling cocaine valued at $4,250.00 to an undercover police officer. He received a conditional discharge, probation and a requirement

to make a significant financial contribution to a community drug treatment program.

[17] In the case at bar, Clayton Moore was 18 years old at the time of the offence, a few months older than J.F. in the case cited above. Although not a "young person" within the meaning of the *Youth Criminal Justice Act,* it is appropriate for this court to recognize that maturity and responsibility do not automatically vest on a persons 18th birthday, nor does good judgment. In the case of a young adult, it is important to distinguish between an error in judgment that is unlikely to repeat and an offence that is indicative of a criminal mindset. In my opinion, Clayton falls into the former category.

A Supportive Family

[18] The fact that a young adult has the support of responsible family members should be given favourable weight in sentencing: see *R. v. Kerr*, [2001] O.J. No. 5085 (C.A.) at para. 2 (per Abella J.A. as she then was). Where that young adult is living at home, that support is even more important. Mr. Moore lives with his mother, but has a close relationship with both parents. Mr. Moore's mother advised that he is not a problem at home and that his conduct leading to the charges before the court are out of character.

First Offender

[19] As a matter of law and common sense, first offenders are entitled to favourable treatment at sentencing. Although *R. v. J.M.*, [2001] O.J. No. 3752 (C.A.) is a young offender case, the Court of Appeal's reasoning in substituting a conditional discharge in the case of a serious school yard assault causing bodily harm is applicable to young adult offenders (at para. 21):

> We agree that an absolute discharge was not appropriate. We also agree that the sentence had to send the appropriate message to the school community. We think, however, that a conditional

> discharge followed by probation on the same terms that were imposed by the Trial Judge would just have effectively sent that message to the school community. All other considerations favour a discharge. J.M. has no criminal record and is by all accounts a peaceable and well regarded member of the community. His prospects are bright and a criminal record could adversely affect those prospects. It is also significant that J.M. did not attempt in his evidence in any way to diminish his role in the altercations.

[20] It is noteworthy that J.M. was convicted after trial while Mr. Moore pleaded guilty at the earliest opportunity. Mr. Moore, like J.M., has no criminal record, is by all accounts a peaceable and a well-regarded member of the community, his prospects are bright and a criminal record could adversely affect those prospects.

Letters of Reference

[21] The court received a number of personal references on behalf of Mr. Moore from the following individuals: an instructor at Yukon College; the mother of Mr. Moore's girlfriend and a friend of the family; an adult co-worker; a long-time friend of the family; a long-time friend and scuba instructor; an adult friend of the family; and a girlfriend.

[22] These letters are all supportive and emphasize the following points:

- Clayton is honest, personable and well intentioned;
- Clayton will grow out of this difficulty to become a productive, law abiding citizen;
- Clayton has a loving and supportive family;
- Clayton has learned a lot from the poor choices he has made and will make smarter, positive decisions in the future;
- at work he was always helpful with other staff and the customers;
- he has made a mistake and has learned very much from it;
- he is genuinely remorseful and this will never happen again;

- he has had a wake up call and is now ready to be serious about finding a suitable career and direction in life;
- Clayton is a good responsible person; and,
- with a little guidance, Clayton will become a very productive and compassionate member of society.

Sentencing Issues

[23] Defence counsel urged the court to consider the exceptional circumstances of this case and impose a conditional discharge. Crown counsel did not directly state that a discharge was inappropriate, but asked the court to consider the seriousness of the offence, the presence of the "brass knuckles" as an aggravating factor and the need for general deterrence. I did not understand Crown counsel to object to a community based disposition. The live issue is simply the suitability of a conditional discharge on the facts of this case.

Eligibility for Conditional Discharge

[24] The offences to which Clayton Moore has pleaded guilty have maximum penalties of five years less-a-day imprisonment. As a result, he is eligible for consideration of a conditional discharge. I am directed by s. 730(1) of the *Criminal Code* to consider whether it is in the best interests of the accused and not contrary to the public interest to discharge the accused either absolutely or on conditions.

[25] The court in *R. v. Sanchez-Pino*, [1973] O.R. 314 (Ont. C.A.) provided guidelines for the imposition of a discharge, as follows:

…

> The granting of some form of discharge must be "in the best interests of the accused". I take this to mean that deterrence of the offender himself is not a relevant consideration, in the circumstances, except to the extent required by conditions in a probation

> order. Nor is his rehabilitation through correctional or treatment centres, except to the same extent. Normally he will be a person of good character, or at least of such character that the entry of a conviction against him may have significant repercussions. It must not be "contrary to the public interest" to grant some form of discharge. One element thereby brought in will be the necessity or otherwise of a sentence which will be a deterrent to others who may be minded to commit a like offence – a standard part of the criteria for sentencing.

[26] Another case frequently cited in relation to eligibility for conditional discharges is *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A):

> a. The section may be used in respect of *any* offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
> b. The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
> c. Of the two conditions precedent to the exercise of the jurisdiction, the first is that the court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
> d. The second condition precedent is that the court must consider that a grant of discharge is not contrary to the public interest.
> e. Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
> f. In the context of the second condition the public interest in the deterrence of others, while it must be

> given due weight, does not preclude the judicious use of the discharge provisions.
> g. The powers given by s. 662.1 [now s. 730] should not be exercised as an alternative to probation or suspended sentence.
> h. Section 662.1 [now s. 730] should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[27] On the facts of this case I make the following findings:

i. specific deterrence of Clayton is not of significant concern;
ii. rehabilitation is not in issue, apart from providing support and structure to a young adult going through the sometimes difficult transition to adulthood;
iii. Clayton is a person of good character, with no prior convictions and as attested to by numerous individuals who wrote letters of reference in his support;
iv. it is not necessary to enter a criminal conviction against him in order to deter or rehabilitate him;
v. the circumstances as they relate to the offender are quite exceptional, and as a result, previous decisions involving possession of marihuana for the purpose of trafficking are of little guidance.

1. My principal concern relates to the public interest requirement, namely the public interest in deterring others. This concern is particularly acute in the case of trafficking or possession for the purpose of trafficking in drugs. Where the drug is marihuana and the quantities are small, Parliament has determined that the punishment should be less than for “hard drugs”. I infer that the offence is thus less serious and that the public interest concern in deterring others is therefore less acute in such instances.

2. The importance of general deterrence as it relates to the public interest test in this case should not be overstated. It is an important consideration, but I defer to Vancise J.A. in *R. v. McGinn* (1989), 49 C.C.C. (3d) 137 (Sask. C.A.) at page 157 (also cited with approval in *R. v. Delafosse,* [1991] Y.J. No. 55 (Yuk. Terr. Ct.))

> Thus it would appear that general deterrence is a limited consequence of a sentencing; it does not achieve specific goals such as curbing the use of drugs, or an outbreak of armed robbery of convenience stores. The principle of general deterrence is used to justify a custodial term, but in reality it is punishment of the offender for what others might do.

3. I interpret Vancise J.A. to say that the court should examine carefully what it purports to achieve in the name of general deterrence when sentencing an accused and should be open to considering alternative dispositions to achieve the same ends.

4. It would be wrong to suggest that a discharge with appropriate conditions could not have a general deterrent effect. For example, curfew restrictions as part of a probation order can have a general deterrent effect similar to a conditional sentence of imprisonment. Other terms can be crafted that will send a clear message to Clayton's peer group that possession for the purpose of trafficking in marihuana is a serious criminal offence and can result in substantive consequences including limitations on his freedom.

5. Although no evidence has been lead on the subject, I am prepared to take notice of the fact that a criminal record, particularly one involving drugs, can have a disproportionate negative impact on employment opportunities, travel to other countries and choice of professions. Once a criminal conviction is registered in another country, there is no way to ensure that it is removed from its computer records, even where the accused is pardoned. In the exceptional circumstances

of this offender and this offence, these negative consequences outweigh any public interest in entering a conviction.

6. In coming to the conclusion that a conditional discharge is the appropriate disposition in this case, I have taken into account the “brass knuckles” that were found on his person when Mr. Moore was arrested. Although clearly an aggravating factor, the circumstances indicate that it is not a significant one.

7. As I mentioned earlier, the Crown has not suggested that the “brass knuckles” were in his possession for any specific purpose. There was no evidence that he used or threatened to use them in any way.

8. In the exceptional facts of this case, I choose to place greater weight on Clayton’s personal circumstances, his early guilty pleas, his youth and academic potential, the role of his supportive family, the fact that he is a first offender and the supportive letters of reference.

9. In coming to this conclusion I have reviewed the sentencing decision of my brother Judge McGivern in *R. v. Bouquot*, [2004] YKTC 87. In that case, the accused was convicted after trial of possession of about two pounds of marihuana, packaged in numerous zip-lock bags ready for distribution. Although Bouquot did not have a criminal record, the other circumstances of the case precluded a finding of exceptional circumstances justifying a conditional discharge. Instead, he received a six month conditional sentence.

10. There will be a conditional discharge. You will be placed on probation for a period of 12 months. You are advised that in the event of a willful breach of the terms of this probation order, pursuant to s. 730(3)(c) of the *Criminal Code*, this order can be revoked and you can be re-sentenced as if you had been convicted instead of discharged.

11. The terms of the probation order will be as follows:

1. The statutory terms will apply.

2. You will report to a probation officer forthwith, but in any event within 24 hours, and thereafter when required by the probation officer and in the manner directed by the probation officer.

3. You will abstain from the consumption of alcohol or other intoxicating substance, and in particular from the consumption of drugs except in accordance with a medical prescription. Should a peace officer or probation officer have a reasonable suspicion that you are in breach of this order, you will comply with any demand for a breath or urine sample.

4. You will not attend at any licensed bar or tavern or any other premises whose primary purpose is that sale of alcoholic beverages.

5. You will reside at the residence of your mother on Annie Lake Road, and abide by the rules of that house as established by her. You will not change that address without the prior written permission of your probation officer.

6. You will abide by the following curfews by remaining in your residence
    a) for the first month of this order (i.e. to and including the last day of February 2005), between the hours of 6:00 p.m. and 7:00 a.m.
    b) until the end of June 2005 or the last day of your examinations at Yukon College (whichever comes first), between the hours of 9:00 p.m. and 7:00 a.m. every Sunday through to and including Thursdays.

c) Your probation officer may provide exceptions to these curfews provided you are in the direct company of a responsible adult person approved by your probation officer or as otherwise approved in writing in advance by your probation officer.
d) You will answer the telephone and attend at the door of your residence for the purpose of curfew checks. Failure to do so will be a presumptive breach of this probation order.

7. You will use your best efforts to find part-time employment during the school year and full-time employment during the summer period.
8. You will perform 50 hours of community service, preferably for a youth group, as and when directed by your probation officer, but in any event to be completed by July 31, 2005.

9. You will not associate with anyone known to you or identified by your probation officer as a drug user or trafficker.

10. You will attend for a performance review of this order at 11:30 a.m. on April 1, 2005.

_____

LILLES C.J.T.C.