Citation: *R.* v. *Friesen and Motz*, 2008 YKTC 104

Date: 20081211
Docket: 07-10141
Registry: Watson Lake
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

DINAH GRACE FRIESEN

and

WAYNE WILFRED MOTZ

Appearances:
Melissa Atkinson — Counsel for Crown
Robert Dick — Counsel for Accused Dinah Friesen
Gordon Coffin — Counsel for Accused Wayne Motz

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): Wayne Wilfred Motz and Dinah Grace Friesen both entered pleas of guilty to a charge of possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.

[2] In November of 2007, police received information that Mr. Motz would be travelling by car between Hazelton, B.C. and Watson Lake, Yukon, with a quantity of cocaine intended for sale in Watson Lake.

[3] Mr. Motz's vehicle was stopped, and Mr. Motz and his common-law partner, Dinah Friesen, were arrested.

[4] A search of the vehicle revealed 103 Ziploc bags containing 0.3 grams of cocaine in each bag. The total weight of drugs seized was 31 grams. The pair also possessed between them some $2,755 in cash.

[5] Ms. Friesen admitted to assisting in weighing and packing the cocaine but insisted that the venture was primarily under the control of Mr. Motz.

[6] The value of the cocaine seized was subject to some debate. Sold by the bag at Watson Lake prices, the drug, the Crown alleged, could have fetched approximately $10,000 in total. Sold in larger lots, obviously the value would have been significantly less. Whatever the exact value, it is clear that this was a purely commercial, albeit small-scale, operation.

[7] Mr. Motz is 64 years of age. Ms. Friesen is 56. Both have prior criminal records.

[8] Mr. Motz's record is the more serious, containing in excess of 30 entries, extending from 1964 to 2002. The 2002 entries are possession for the purpose of trafficking in marihuana, and producing a scheduled substance.

[9] Ms. Friesen's record contains nine prior entries. Four of them are for drug offences. These include convictions for possession for the purpose of trafficking in marihuana and cultivation of marihuana, which convictions were recorded in 1995. As well, there are convictions for possession for the purpose of trafficking in marihuana and production of a scheduled substance in 2002.

[10] Of significance is the fact that Mr. Motz and Ms. Friesen were partners in crime in the dealings leading to the 2002 convictions.

[11] Given the drug involved, the quantity, the commercial nature of the operation, the prior related record of each offender, and the position the Yukon courts have consistently taken in similar cases, a substantial custodial sentence is inevitable.

[12] In coming to that conclusion, I have not forgotten the background circumstances of each offender as set out in the pre-sentence reports.

[13] The only issue seriously raised is the question of whether or not the sentences can be served conditionally. In this regard the defence strongly relied on the decision of Mr. Justice Veale in *R.* v. *Corcoran*, 2008 YKSC 44.

[14] Corcoran was convicted of possession of cocaine for the purpose of trafficking, and the case can be argued to be somewhat similar, factually. Mr. Corcoran received a conditional sentence of 12 months, in addition to the equivalent of seven months he had already spent in pre-trial custody. In my view, however, the usefulness of *Corcoran* as a precedent for the imposition of a conditional sentence in cocaine trafficking cases is quite limited.

[15] Firstly, there is the obvious factor that Mr. Corcoran had already served the equivalent of seven months in jail. Second, the decision makes it abundantly clear that the Court was accepting a joint submission for a conditional sentence, and doing so on somewhat singular circumstances.

[16] In *Corcoran,* the Court placed considerable weight on the concession by the

Crown that there were deficiencies in the Crown's case that raised questions about the Crown's ability to successfully prosecute the charges against Mr. Corcoran.

[17] Mr. Coffin, displaying considerable ingenuity, submitted that there might be such deficiencies in the present case as well. However, this submission is not one onto which the Court can place any particular weight.

[18] When there is a joint submission and the Crown concedes its difficulties as some or all of the basis on which the Court should accept the submission, the Court will take such matters into account, but would be unwise to do so in other circumstances. To do so would undermine the entire concept of guilty plea as it has been understood both before and after the enactment of s. 606(1.1) of the *Code*.

[19] The concession by the Crown of difficulties in its case is usually put forward as a rationale justifying the imposition of a sentence outside the range normally imposed. Where no such concession is offered, a guilty plea must be taken as it stands, as being unconditional. Where a sentence outside the normal range is sought, there must be other valid reasons advanced for so doing.

[20] It must also be pointed out that, with respect to submissions of this kind, there is no means by which the Court can assess the strength of the assertion that defences have been foregone.

[21] Apart from the *Corcoran* case, there are precious few cases where drug trafficking in this jurisdiction has resulted in a conditional sentence. The reasons for that remain as stated in *R.* v. *Curtis*, [1982] Y.J. No. 4; *R.* v. *Holway*, [2003] Y.J. No. 118; *R.*

v. *Hale*, [2007] Y.J. No. 77, and countless other cases.

[22] A conditional sentence for drug trafficking in hard drugs will not generally be in accordance with the purpose and objectives of sentencing as set out in s. 718, nor would it conform with the principle in s. 718.2(b) that similar sentences should be imposed for similar offences by similar offenders in similar circumstances.

[23] In this case there is the added factor that both offenders have prior and related records, including a prior history of dealing drugs in concert. This makes it extremely difficult to conclude that the safety of the community would not be endangered by the imposition of a community-based sentence.

[24] There is, however, one additional factor to be taken into account in this case, and that is the fact that both Mr. Motz and Ms. Friesen are in poor health.

[25] Mr. Motz suffers from ulcerative colitis to the extent that he has undergone a colostomy. He also has a hernia. There have been many complications from both conditions. He also suffered a serious ankle fracture, which has also produced complications and recurring pain.

[26] For her part, Ms. Friesen was diagnosed with lupus in 1993. In addition to that serious condition, she suffers from colitis, asthma and hypertension.

[27] Both require ongoing medical care and a number of different medications for the management of their medical conditions.

[28] In my view, the health issues are certainly highly relevant to sentencing, but not

to the extent that they mandate an effectively non-custodial sentence. To be blunt about it, if Mr. Motz and Ms. Friesen were well enough to be out trafficking in drugs, they are well enough to face the consequences of their actions. That said, I think some considerable mitigation of sentence is warranted, having regard to the extra burden each is likely to experience while incarcerated in light of the medical conditions each suffer from and the need for ongoing management of those conditions.

[29] I also take into account the pre-trial custody to date, for which I allow 30 days credit.

[30] In the result, Mr. Motz is sentenced to a period of imprisonment of one year.

[31] In view of her subsidiary role, Ms. Friesen is sentenced to a period of imprisonment of six months.

[32] After release from imprisonment, each will be subject to a probation order for a period of one year. The terms of the orders in each case will be:

1. To keep the peace and be of good behaviour;
2. To report to the Court as and when required;
3. To report within two working days after the order comes into force to their probation officer and thereafter as, when and in the manner directed;
4. To advise the probation officer forthwith of any change of name or address, and promptly notify him of any change of occupation or employment;
5. To abstain from the possession or consumption of controlled drugs or substances except in accordance with a prescription from a qualified

medical practitioner;

6. To attend and complete any assessment or counselling as directed.

[33] The surcharge in each case, the Crown having proceeded by indictment, is $100.

[34] Additionally, I am required to, and do, impose a firearms prohibition. Each is prohibited from having possession of any firearm, ammunition, explosive substance, crossbow or restricted weapon for a period of ten years following their release from imprisonment, and possession of any prohibited firearm, restricted firearm, prohibited weapon, prohibited device or prohibited ammunition for life.

[35] As this is a secondarily designated offence for the purpose of a DNA order, I have considered that matter. In light of the substantial criminal records now amassed by each accused, I am of the view that it would be in the overall best interests of justice and not overly detrimental to the privacy interests of the accused to order and require that they provide samples of bodily substances for the purpose of DNA analysis and banking.

[36] Does either offender wish time to pay the surcharge, or would they like to serve in default?

[37] MR. DICK: I understand, Your Honour, that there's bail money that may be available.

[38] THE COURT: I can direct that the surcharges be paid out of the funds that were posted for bail.

[39] MR. DICK: Good.

[40] MR. COFFIN: Yes, that would be appropriate.

[41] THE COURT: I believe there was an application by the Crown for forfeiture of the items seized.

[42] MS. ATKINSON: That's correct.

[43] THE COURT: That order will go.

[44] MS. ATKINSON: Your Honour, one remaining matter with respect to the probation order. It would be of some use to have a condition that they sign the consents of a release of information so the adult probation office can access their information if they are directed to attend programming or counselling.

[45] THE COURT: Any submission on that, counsel?

[46] MR. COFFIN: Yes, that’s fine. Thank you. That really seems to be in order.

[47] THE COURT: I will add that condition.

[48] MS. ATKINSON: With respect to the outstanding counts, the Crown directs a stay of proceedings.

[49] THE COURT: Stay of proceedings.

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FAULKNER T.C.J.