

Case Name:
R. v. Herold

Between
Her Majesty the Queen, and
Joseph Roy Herold, Accused

[2015] A.J. No. 955

Action No.: 140712159P1

E-File No.: ECP15HEROLDJ

Alberta Provincial Court

M.G. Stevens-Guille Prov. Ct. J.

May 29, 2015.

(74 paras.)

Criminal law -- Sentencing -- Non-Criminal Code and regulatory offences -- Controlled drugs and substances -- Trafficking -- Other substances -- Particular sanctions -- Imprisonment -- Concurrent sentences -- Probation -- Conditions -- Sentencing considerations -- Deterrence -- Denunciation -- Rehabilitation -- Time already served -- Previous record -- Lengthy -- Guilty plea -- Sentencing precedents or starting point -- Addicts -- Drugs -- Seriousness of offence -- Employment -- Availability of treatment -- Sentencing of accused, who pled guilty to two counts trafficking methamphetamine -- Accused sentenced to 99 days' imprisonment and one year probation -- Accused was addict who sold 0.2 grams methamphetamine to undercover officer at cost, then arranged sale of another 0.2 grams for no financial benefit -- 33-year-old accused in and out of jail since adolescence -- Accused had been steadily employed since 2009 -- This was not even low-level commercial trafficking, which would attract three-year starting point, but denunciation and deterrence still needed, and supervision needed for accused to be successful -- Accused credited with 21 days served.

Sentencing of the accused for two counts of trafficking methamphetamine. The accused sold 0.2 grams of methamphetamine to an undercover officer, whom he perceived to be a fellow addict in need, at cost. The accused then arranged a meeting with a seller so the officer could purchase another 0.2 grams. The accused derived no direct financial benefit from the transaction. The 33-year-old accused had been in and out of jail since

adolescence, serving a total of 13 years, and had a record including over 20 break and enters. The accused's last offence was in 2009, he had held steady employment since, and his employer would take him back after his release from jail. The Crown sought nine months' imprisonment, concurrent for both counts. The defence sought a fine and probation.

HELD: Accused sentenced to 99 days' imprisonment and one year probation. This was not even low-level commercial trafficking, which would have attracted a starting point of three years, but denunciation and deterrence were still needed. The accused likely would have benefitted from drug court, had they been accepting new cases, and required supervision in order to succeed. Considering the guilty plea, facts of the case, the accused's history, his community support and fact the offences were fuelled by addiction, the accused was sentenced to 120 days, less 21 days served. Intermittent imprisonment was not appropriate because the period of custody would give the accused the opportunity to detox. After his release from jail, the accused was to report back to the court about his progress with programming and treatment. Sentence: 99 days' imprisonment; one year probation; DNA order; lifetime firearms prohibition; forfeiture order; \$400 victim fine surcharge.

Counsel:

R. Kunitz, for the Crown.

Y.R. Ziv, for the Accused.

Sentence

1 M.G. STEVENS-GUILLE PROV. CT. J.:-- Before me I have Mr. Herold who pled guilty on May 26th to two counts of trafficking in methamphetamine, both occurring on June 19, 2014. I reserved judgment after hearing both counsel and hearing evidence called by the accused consisting of evidence from the accused himself and his supervisor at his work, Mr. Stevens.

2 Crown counsel submits that a fit sentence on both counts are concurrent sentences of 9 months imprisonment, along with ancillary orders, and takes the position that a lower sentence than that cannot be imposed in accordance with the jurisprudence of our courts with respect to the trafficking in this kind of drug even on this scale.

3 Defence counsel points to the accused's long history of addiction, the fact that he has served 13 years in prison at the age of 33, virtually his entire adult life, and as that spills into his youth he has, essentially, been in and out of gaol since he was an adolescent. His record is appalling, I note over 20 offences of break and enter, some driving offences, no violence, with the exception of one assault, which is noted to be an institutional charge

occurring in Drumheller and which I do not take in the normal way.

4 I had hoped -- I reserved because I found the situation difficult and I wanted to read the case law that counsel had provided to me and I wanted to test the proposition put forward by Crown counsel -- I apologize, I should come back, defence counsel submits that high fines are appropriate here, along with probation.

5 I did want to review the case law that has been provided by both counsel. I have reviewed all of the cases provided. I had hoped in the last two days to have time to really commit to writing the reasons for my decision and I have not had that opportunity, and although I have made my decision it, I suspect, will lack eloquence. I hoped to explain to you why I have taken the decision I have.

6 I also, however, last evening did have an opportunity to note up, or, in other words, review all of the cases that have looked at and considered in this jurisdiction the decision of *McCulloch* of our Court of Appeal, 2011 ABCA 124, and I have read all of those, as well.

7 The situation is this: on the date in question the accused was in the downtown area at the time the police were conducting an undercover operation which targeted open-air, small, or low-level trafficking in the downtown area. The undercovers were walking down the street in the inner core. The accused was walking the other way. The accused asked if they needed any weed, they indicated no, asked for a different type of drug, the accused ended up selling what is called "one point" or 0.2 grams to the undercover for \$10. I am advised that the street value of that amount of methamphetamine is \$10 to \$20. I take from that the accused sold it at cost or under cost.

8 There being no evidence, and in fact the evidence is to the contrary, that he is a large-scale or is a source of a quantity of drugs. He is a buyer, typically, not a seller. So he sold one of the three points, as I gather they are called, to someone he perceived to be in need, a fellow addict like himself.

9 Later that same day the same undercover along with another ran into the accused, asked if he had anymore, the accused did not, but they exchanged phone numbers, and after some subsequent texts the accused made efforts to find, essentially, a seller for the undercover, did so, told the uncover by telephone where he should come. The undercover went to that address and the accused, essentially, connected him to the seller who then sold one hit or one point, 0.2 grams, of methamphetamine to the undercover. The accused derived no direct financial benefit.

10 On those facts, I find that the starting point for even low-level commercial trafficking is not engaged. Crown counsel has conceded or took the position that this is at the very low level of commerciality. I do not accept this submission. I find that this is a situation of non-commercial, very minimal trafficking. That is not to say that there might not be some benefit that the accused received, whether it was, as he testified, friendship with someone he thought was someone he thought he would like to get to know, or even to get in better with someone who is his normal supplier, but no commercial benefit. In other words, there was no profit.

11 That distinguishes him even from the accused in *McCulloch* who the Court of Appeal found was not acting commercially, but it was clear that *McCulloch* did, in fact, profit financially from the sale he made and, in fact, one of the facts in that case were that he got more than his typical for the low-level sale that he made. So I find that these facts are even less -- or even more clearly non-commercial than the facts in *McCulloch*.

12 *McCulloch* does tell us, however, that despite the fact that it does not fit the *Maskill-Ruth* starting point category, the starting point does not become meaningless, and I take from a careful review of that decision that what that means is that the starting point does inform us about the seriousness with which the offence should be treated.

13 And, as I've already noted, sir, even non-commercial distribution of methamphetamine is to be deplored. You know yourself how serious and dangerous and debilitating this drug is, and contributing to its distribution, even as one addict to someone you perceived to be a fellow addict, must be deterred and denounced and those are the major principles which inform this sentence.

14 I note your history. I do accept, as I think Crown counsel did, that generally speaking you were honest in your testimony before me. I found a certain lack of insight. The discussion about when or if you were addicted, for example, to methamphetamine I found to be uninformed, but that reflects, I believe, the fact that you are in need of treatment. You are still providing rationales and excuses, although you purported not to, for the situation you are in and you have a history which shows predation. I didn't find predation here from these offences, but clearly you have been a serious problem.

15 I also note, however, that the last offences occurred in 2009 and that you've held steady employment with someone who -- from the community who I accept is a law abiding and upstanding person. You have held steady employment under him and have earned his trust.

16 He testified that he is aware, generally, or was aware, generally, of your history, and it is actually quite remarkable to me that somebody like him would allow someone who has committed more than 20 break and enters in their past into his home, left you alone in their home and has trusted you not to steal from him, but apparently you have proved worth of that trust and have not stolen from him either in his home or at work. I do find that a remarkable show of confidence in you and somebody who knows you sees something in your character that I think on first look your record would not -- from your record it would not be evident.

17 I accept that, and I also accept that because of the way you work, because of the way you have told him the truth, because you have not lied to him, as far as he knows, either about your history, or your addictions, or your struggles, that he will hire you the minute you get out of gaol.

18 So having considered in the end both submissions and noting that you have not embarked on a treatment course, and I really did not hear clearly from you on the stand a cry for help, but your counsel tells me that that is the position you are in and that you are

going to need the support and the supervision of the court to be successful. I am making a probation order a part of your sentence.

19 I cannot help but note, counsel, and I haven't been completely confident as to how to deal with it, but I am aware just as a member of this Court that the drug court, for which I believe he may well have been eligible had those efforts been made, was not able for funding reasons to take new people in the last -- new candidates in the last I think six or eight months, and that something like drug court for this accused might well have made a significant difference.

20 So have I decided that I should not impose a gaol sentence? No, I have not. I have decided I must impose a gaol sentence and I have taken into account that for a commercial trafficking of this nature you would be looking at more than a year on the application of a 3-year starting point.

21 In all of the circumstances, given the guilty pleas, the facts of the case, your history, the fact that these offences are very much informed by addiction, the fact that you have testified, you have support in the community and you appear to have made some strides with respect to your past, I am imposing a sentence of 120 days. From that I will give you credit for 14 days of actual custody at 1 to 1.5 of 21 days, so that leaves a sentence of -- actually, I was going to say 100, but I believe it is 99, 99 days in custody. You will do, as you know, two-thirds of that, so you will be out in just over two months.

22 You have told me that you can do the time, you have done time a lot of times before. Well, it is not a lot of time, but it is some time, and while I have considered an intermittent sentence, the sentence I have imposed is greater than that.

23 And one of the reasons I have not imposed 90 days and an intermittent sentence given your employment is because I do think you need to detox and you need a break, so there are going to be opportunities in custody for you to make the connections you say you need to make. So over the next 65 days, or so, you need to recognize -- first of all, you need to commit to no drugs. They are available in gaol; although, it is difficult you need to commit to this, this is your detox. You need to connect with a treatment program outside.

24 I am going to place you on probation and one of the terms is going to be that you will appear before me for a review within two weeks of release. I will set a fixed date because I am going to predict when you are going to be released so that you will be brought whether you are released or not, but assuming you don't get into any trouble you should be out.

25 You know perfectly well when you hit the street drugs will be immediately available to you with the connections you have. You need to have connected with an appropriate treatment program and your supervisor while you are in custody. It is difficult to get to the phone, but you need to talk to your caseworker and you need to make it plain as soon as you get there that you know you aren't going to make it without help, you have the support of your employer, you need residential treatment. You need to at least make those calls while you are in there and take those two months to detox and get yourself in better health.

26 So the terms of probation will be you will placed on probation for one year. I am not going to make them complicated. I want you to focus on one thing: one, stay out of trouble and, two, get treatment. Too, you will attend for such assessment, treatment, or counselling as your supervisor deems appropriate. And I am recommending residential treatment.

27 Three, you will report to court on -- I apologize for not having actually done this math. I take two months from now to be July 28th. I am going to make it -- you will come back to court before me for review on August 7th. You know that I will remember you, and I will want to hear about how you've done while in gaol and I will want to here what -- both what is being done for you by your supervisor in terms of programming and treatment, and I will want to hear from you about what steps you took while in gaol to take those first steps.

28 THE ACCUSED: Who is the supervisor?

29 THE COURT: Your supervisor will be your probation officer.

30 THE ACCUSED: Oh, okay.

31 THE COURT: But you will have a caseworker assigned to you while in gaol.

32 THE ACCUSED: Okay.

33 THE COURT: And they will have many people assigned to them, but you need to make it known immediately that that is what you are hoping to do, and you might want to mention that you are going back to court to talk to the judge about what programs or program you have accused while you have been in gaol, and that that is on August 7th, so that that is communicated as a matter of priority.

34 MR. ZIV: I will have an agent here that day. I am away, but (INDISCERNIBLE).

35 THE COURT: Thank you.

36 THE COURT CLERK: And did you want it at 9:00 AM or at 1:30?

37 THE COURT: I would suggest 9:00 AM, thank you.

38 THE COURT CLERK: Are you making a reporting condition that he reports to (INDISCERNIBLE) within two days of release?

39 THE COURT: Yes, of course. My apologies, yes, there will be a reporting condition, so you will report within two days of your release and thereafter as required. You will provide an address and not change that address without the permission of your supervisor. I believe there will be no other terms. There will also be the DNA order requested. There will also be a lifetime firearms prohibition. Are there any other ancillary orders?

40 MR. KUNITZ: Just, you know, I believe there was just the forfeiture order. I don't believe that was contested by my friend.

41 THE COURT: Of course not, no.

42 MR. KUNITZ: No.

43 THE COURT: And forfeiture, of course.

44 MR. KUNITZ: And we need to deal with the victim fine surcharge. There was some discussion over when the date was there.

45 THE COURT: Yes.

46 MR. KUNITZ: The Crown takes no position, of course.

47 THE COURT CLERK: That is June 2014 they would be applicable.

48 THE COURT: Yes, both by Indictment, so the minimum is -- on each one the victim fine surcharge is \$200, so a total of \$400. You are working, you can pay that. I will give you time. So I will give you about the same amount of -- sorry, two months from the time of your release, so that is May 27th, July -- end of July. I will give you until the end of September, September 30th to pay.

49 THE ACCUSED: What if I'm in --

50 MR. ZIV: Residential treatment.

51 THE ACCUSED: -- sorry, residential treatment.

52 THE COURT: I don't believe the law permits me to give you more than 60 days upon -- after release.

53 MR. KUNITZ: I can advise there is a possibility to ask for an extension. I am not sure on these particular -- the new law. I have seen it where individuals have gone and requested -- I believe counsel may be able to assist with this, and I've sat in on some hearings where --

54 THE COURT: We can talk about that on the 7th.

55 MR. KUNITZ: It is not impossible, I believe, Your Honour.

56 THE COURT: Allright.

57 MR. ZIV: Okay, thank you.

58 THE COURT: Anything else on this matter, counsel? Do you have any questions?

59 THE COURT CLERK: The remaining counts?

60 THE ACCUSED: Thank you very much.

61 MR. KUNITZ: Crown does apply to withdraw the remaining counts.

62 THE COURT: I will see you in August, then.

63 MR. KUNITZ: Your Honour, I just have one brief question, and I don't mean to take my friend's time. It is an academic point and this may not be the best time, but a very short question. I have reviewed *McCulloch*, I have reviewed the case (INDISCERNIBLE). This obviously in the case an accused was believable, we are dealing with circumstances that I've mentioned (INDISCERNIBLE) street level, but were you able to find guidance in those cases? No? So I didn't mean to put this on the record, but the Crown finds itself in the same place often with these. Again, this is a different case because we've had the -- the testimony, but because of that we are often searching in these cases, so I thought if you had maybe found something.

64 THE COURT: Yes. No, I have found some cases which predate *McCulloch* where the sentence is of, you know, 30 days, 90 days, even a suspended sentence, so -- but they really haven't attracted appellate (INDISCERNIBLE).

65 MR. KUNITZ: No.

66 THE COURT: And since *McCulloch* there is a number of cases that talk about non-commercial trafficking and just making the point that a lower sentence than was imposed there, 18 months, is fit but --

67 MR. KUNITZ: Right, and it is for this reason -- definitely a case-by- case basis and individualized, but often I know our office is -- is struggling with ranges for these. So we did have an individualized case here, but I just thought I'd check. Thank you for your time, Your Honour.

68 If there is nothing else if I might be excused, as well?

69 THE COURT: Yes. Thank you, Mr. Kunitz.

70 MR. KUNITZ: Thank you.

71 MR. ZIV: Thank you, Your Honour.

72 THE COURT: Mr. Ziv.

73 MR. KUNITZ: Thank you, madam clerk.

74 THE COURT CLERK: Thank you.