COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kennedy, 2019 ONCA 77
DATE: 20190204
DOCKET: C62784

Watt, Huscroft and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Shayne Richard Kennedy

Appellant

Gregorz Dorsz and Venus Sayed, for the appellant

Surinder S. Aujla, for the respondent

Heard and released orally: January 30, 2019

On appeal from the sentence imposed on September 21, 2016 by Justice Kelly A. Gorman of the Superior Court of Justice, sitting without a jury.

REASONS FOR DECISION

[1] The appellant pleaded guilty before a judge of the Superior Court of Justice to four offences arising out of a sizeable marijuana grow operation. The offences included:

i. production of marijuana;

ii. theft of electricity;

iii. theft of water; and

iv. injury to property, contrary to s. 441 of the *Criminal Code*.

[2] The grow operation consisted of 864 plants capable of producing, it was said, 162 pounds of marijuana. Depending upon how the harvested product was sold, the crop was valued at between $324,000 and $518,000.

[3] The appellant challenged the constitutional validity of the statutory minimum sentence of three years for production of marijuana under s. 7(2)(b)(vi) of the *CDSA.* The sentencing judge dismissed the challenge.

[4] The parties then made a joint submission on sentence. They proposed that the appellant receive the mandatory minimum sentence of three years for the production offence, and concurrent terms of 12 months for each of the remaining counts. The judge also imposed a free-standing restitution order of $15,858.87 to compensate the property owner for damage to his property, as well as other ancillary orders.

The Background Facts

[5] The grow operation in this case was carried out in a house owned by a third party in a residential area. The property was damaged by breaking a large hole through the concrete floor of the garage. Hydro and water meters were bypassed. The operation posed significant safety hazards to the public, and to any first

responders who may have been summoned to the home. These hazards included fire, electrocution, and power disruption.

[6] The appellant was 22 years old at the time of arrest. He is now 27. These are his first convictions. He was not a principal in the marijuana grow operation, but superintended the grow operation, for what would appear to be a substantial time, for financial gain. He and three siblings were raised in a single-parent household without the benefit of financial security. He admits to daily use of marijuana since age 12. He has never sought counselling.

The Positions of the Parties

[7] The parties occupy common ground that the mandatory minimum sentence of three years under s. 7(2)(b)(vi) of the *CDSA* must fall on constitutional grounds. It follows that we must determine a fit sentence for this offender, for this offence, and in these circumstances, having regard to the governing sentencing objectives, principles and factors in Part XXIII of the *Criminal Code*.

[8] The appellant contends that a fit sentence in this case is a term of imprisonment of six to nine months. And the execution of that sentence, he says, should be stayed because of the rehabilitative steps he has taken while on judicial interim release, both before and after conviction and sentence.

[9] The respondent says that a fit sentence in this case is a global sentence of 18 months in custody. Although the respondent acknowledges the prospect of a

"blended sentence", in light of the concurrent sentences of 12 months each for the property crimes, he rejects any suggestion that the execution of the sentence should be stayed.

Discussion

[10] In our view, a fit sentence for the production conviction is a sentence of imprisonment for 14 months.

[11] The predominant sentencing objectives at work here are denunciation and deterrence. That said, we are mindful of the role of rehabilitation in the case of this youthful first offender. On the other hand, the motivating factor here was purely and plainly financial. This was a large, ongoing, commercial operation in which the appellant played an integral role in the production of marijuana. It was also an operation fraught with potential dangers as a result of the hydro bypass. Dangers to others in the residential area. Dangers to first responders. And dangers to the property itself.

[12] The appellant's focus is on the production sentence. He advances nothing that would persuade us that the sentences imposed for what might be termed the "property offences" were unfit. Nor are we persuaded that this is a case in which execution of the sentences should be stayed in light of the time spent in custody, or the rehabilitative steps taken by the appellant whilst out of custody.

[13] We grant leave to the appellant to introduce the fresh evidence on sentence, and admit that evidence.

[14] We grant leave to appeal sentence, set aside the sentence of three years on the production count, and substitute a sentence of 14 months for that offence. We do not disturb the sentences imposed on the other counts, or the order that those sentences be served concurrently. The restitution, s. 109 and forfeiture orders stand. The victim surcharges are set aside.

"David Watt J.A."
"Grant Huscroft J.A."
"L.B. Roberts J.A."