COURT MARTIAL

Citation: *R. v. Thiele*, 2016 CM 4016

Date: 20161102
Docket: 201526

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman Thiele C.R., Accused

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR SENTENCE

Introduction

[1] Leading Seaman Thiele, having accepted and recorded your plea of guilty in respect of all three charges on the charge sheet, the Court now finds you guilty of those charges under section 130 of the *National Defence Act* for trafficking in cocaine (charge No.1) and heroin (charges No.2 and No.3) contrary to section 5(1) of the *Controlled Drugs and Substances Act*.

A joint submission is being proposed

[2] I now need to impose the sentence. This is a case where a joint submission on sentence is made to the court. Indeed, on 24 October, following the Court's decision to dismiss an application by defence to stay the proceedings for unreasonable delay, defence counsel requested an adjournment to discuss with the prosecution. As the court reconvened, just over one hour later, defence counsel announced that the accused was going to plead guilty and that prosecution and defence had come to an agreement as to sentence. Defence counsel withdrew two applications that had been previously notified and filed with the court's administration, and the accused's plea of guilty, on the three

charges appearing on the charge sheet, was entered. The proceedings were then suspended to today, 2 November 2016, for sentencing on the request of the defence supported by the prosecution as such an adjournment was necessary to prepare sentencing material and to allow for the offender to resolve personal issues in anticipation of what the court was told would be a significant period of incarceration.

[3] This morning, both the prosecutor and defence counsel recommended that this Court impose the punishment of imprisonment for a period of 14 months and 28 days. This unusual duration has been arrived at following the decision of the prosecution to agree for a two day credit in recognition of the two days the offender spent in pre-trial custody.

[4] This recommendation of counsel does not oblige me to go along with whatever is being proposed. Indeed, a military judge, as any other trial judge, may depart from a joint submission if the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. This is the test promulgated on 21 October 2016 by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43.

[5] While it is my duty to assess the acceptability of the joint submission being made, the threshold to depart from it is undeniably high. Indeed, as recently recognized by the Supreme Court, joint submissions respond to important public interest considerations. The prosecution agrees to recommend a sentence that the accused is prepared to accept, avoiding the stress of a trial and providing an opportunity for offenders who are remorseful to begin making amends. The benefits of joint submissions are not limited to the accused but extend to victims, witnesses, the prosecution and the administration of justice generally, by saving time, resources and expenses which can be channelled into other matters. The most important gain to all participants is the certainty a joint submission brings, of course, to the accused, but also to the prosecution who wishes to obtain what the prosecutor concludes is an appropriate resolution of the case in the public interest.

[6] The considerations outlined by the Supreme Court are also applicable to the military justice system. Even if the volume of trials by court martial may not be the same as in busy downtown courts, it remains that the resources within the military justice system could be challenged if all of the matters preferred by the Director of Military Prosecutions were contested, especially now that delays in bringing an accused to trial are being curtailed by the application of a presumptive ceiling of 18 months, from the laying of a charge to the end of the trial, as a result of the *R. v. Jordan*, 2016 SCC 27 decision being applied to military tribunals. I see no reason why persons tried by courts martial could not benefit, to the same extent as other accused, from the certainty offered by joint submissions. Accused persons at courts martial who give up their right to a trial on the merits, and all the procedural safeguards it entails, should have the same assurance as any other accused that the judge hearing their case will apply the same test as other judges and, consequently, honour agreements entered into by the prosecution in most instances.

[7] At the same time, the Supreme Court did emphasize that even if certainty of outcome is important for the parties, it is not the ultimate goal of the sentencing process. Where the harm caused by accepting the joint submission is beyond the value gained by promoting certainty of result, judges have to question the acceptability of the proposed sentence.

[8] I must also keep in mind the disciplinary purpose of the Code of Service Discipline and military tribunals in performing the sentencing function attributed to me as military judge. As noted by the Supreme Court in *R. v. Généreux*, [1992] 1 S.C.R. 259, the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces (CAF) but serves a public function as well by punishing specific conduct which threatens public order and welfare. Courts martial allow the military to enforce internal discipline effectively and efficiently. Punishment is the ultimate outcome once a breach of the Code of Service Discipline has been recognized following trial or a guilty plea. The sentencing usually takes place on a military establishment, in public, in the presence of members of the accused unit or former unit.

[9] The imposition of a sentence at the end of court martial proceedings, therefore, performs a disciplinary function. The *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 112.48 provides that a military judge shall impose a sentence commensurate with the gravity of the offence and the previous character of the offender. When a joint submission is made, the military judge imposing punishment should ensure, at a minimum, that the circumstances of the offence, the offender and the joint submission are not only considered but also adequately laid out in the sentencing decision to an extent that may not always be necessary in many busy downtown criminal justice courts.

[10] To be clear, the particular requirements of sentencing at courts martial do not detract from the guidance provided by the Supreme Court on joint submissions. Indeed, at para 54 of *R. v. Anthony-Cook*, 2016 SCC 43, the court emphasized the importance of providing adequate information to trial judges as follows:

> Counsel should, of course, provide the court with a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge. As trial judges are obliged to depart only rarely from joint submissions, there is a "corollary obligation upon counsel" to ensure that they "amply justify their position on the facts of the case as presented in open court". Sentencing — including sentencing based on a joint submission — cannot be done in the dark. The Crown and the defence must "provide the trial judge not only with the proposed sentence, but with a full description of the facts relevant to the offender and the offence", in order to give the judge "a proper basis upon which to determine whether [the joint submission] should be accepted." (citations omitted)

Matters considered

[11] In this case, the prosecutor read a statement of circumstances which was entered in evidence as Exhibit 6, along with other documents provided by the prosecutor as

provided for at QR&O 112.51. The Court also benefitted from three letters submitted in evidence by the defence, highlighting the offender's rehabilitative efforts by seeking counselling and treatment from healthcare resources, joining and contributing to a church community and obtaining full-time employment. The testimony of Leading Seaman Thiele and his girlfriend, Sarah, provided context on those issues. The Court also benefitted from the submissions of counsel that support their joint position on sentence on the basis of the facts and considerations relevant to the case. These submissions and the evidence, including the testimony of witnesses, allow me to be sufficiently informed to meet the requirement of the QR&O to consider any indirect consequence of the sentence, and impose a sentence that is adapted to the individual offender and the offences committed.

The offender

[12] First, the offender, Leading Seaman Thiele is 34 years old and has been a civilian for over nine months. He was released from the CAF on 16 January 2016 under item 5(f) of the Table to QR&O article 15.01 for being unsuitable for further service as a result of the incidents that lead to the charges in this case. He had joined the Navy in July 2010 after having served for a short time with the Army Reserves in Victoria. He served with the Royal Canadian Navy here in Esquimalt on ships and at the Fleet School.

[13] The Court has not been provided with any information relating to Leading Seaman Thiele's contribution or performance as a member of the CAF. He has no conduct sheet and is, therefore, to be considered as a first-time offender. The Court deduces that his arrest for drug trafficking on 18 September 2014 effectively spelled the end of the offender's career with the military.

[14] As for the offender's personal situation, he testified that he started experimenting with alcohol and drugs in his early teens, a time when his parents separated. He consumed cocaine occasionally during his teens and experimented with heroin once. He has four children from a relationship with a woman he had met in high school and from which he separated in 2012. It is at that time that he became heavily involved with cocaine, consuming on a daily basis. He said he stopped consuming drugs in the spring or early summer of 2015. As for alcohol, he stopped consuming as of 29 August 2016. He stated he had obtained addiction counselling and attended "freedom sessions" at church. He used to live in a basement suite at his mother's place but moved to an apartment in May 2016. He has been living in temporary accommodations since September 2016, when he and his girlfriend decided to take a break in their relationship due to his need to take care of his personal issues, especially his drinking problem.

[15] The offender's mother is supporting him, as evidenced by her presence in court at the sentencing hearing. His girlfriend, Sarah, testified that she supports him in his struggles. Since they first met in 2015, she has not seen him consume drugs nor did she note he was under the influence of drugs. She has seen him drink quite heavily in the past but testified that he has made significant efforts to stay well since September 2016,

obtaining professional help in the process. She said that Leading Seaman Thiele attends church regularly, saying he feels welcome and supported by the church community, a fact highlighted in the letter from church pastors at Exhibit 7.

[16] Leading Seaman Thiele is now employed as a painter by a company in Victoria, B.C. and can hope to find employment with that company once he is released from prison. He has been paying child support under the terms of a court order to his ex-spouse who has custody of their four children. He visits them regularly, keeps appraised of their important activities and calls at least every week.

The offences

[17] Turning to the offences. In arriving at evaluating what would be a fair and appropriate sentence, the Court has considered the objective seriousness of the offences as illustrated by the maximum punishment that the Court could impose. Offences under section 130 of the *National Defence Act* involving the trafficking of substances listed at Schedule I of the *Controlled Drugs and Substances Act* are punishable by imprisonment for life. These are offences of significant objective gravity, as evidenced by the fact that Parliament deems them worthy of the most severe maximum punishment available in Canadian law.

[18] This objective gravity is established in the *Controlled Drugs and Substances Act*, legislation prohibiting actions such as those for which the offender is being sentenced today and applying equally to every accused person, civilian or military. It is worth noting, in addition, that courts martial have constantly held that involvement of members of the CAF with drugs is an especially serious matter because of the nature of their duties and responsibilities in ensuring the safety and the defence of our country and of our fellow Canadian citizens. The Court Martial Appeal Court articulated clear reasons why the involvement of drugs, in a military environment, must be treated as a very serious matter. In *R. v. MacEachern*, (1986) 24 C.C.C. (3d) 439, at page 444, the Court said:

> Because of the particularly important and perilous tasks which the military may at any time, on short notice, be called upon to perform and because of the team work required in carrying out those tasks, which frequently involve the employment of highly technical and potentially dangerous instruments and weapons, there can be no doubt that military authorities are fully justified in attaching very great importance to the total elimination of the presence of and the use of any drugs in all military establishments or formations and aboard all naval vessels or aircraft. Their concern and interest in seeing that no member of the forces uses or distributes drugs and in ultimately eliminating its use, may be more pressing than that of civilian authorities.

[19] Despite the interest of military authorities in strictly enforcing prohibitions on the use of illicit drugs, broad statements on the seriousness of such offences must be applied in the context of individual cases. The facts surrounding the commission of the offences in this case are disclosed in the statement of circumstances read by the prosecutor and formally admitted as accurate by Leading Seaman Thiele. These circumstances can be summarized as follows:

(a) On 24 and 25 June 2014, Leading Seaman McManus, a colleague of Leading Seaman Thiele who had served with him on HMCS *Calgary*, contacted him to ask if he knew where she could buy oxycodone and cocaine. Leading Seaman Thiele took her to a person who he knew, from whom Leading Seaman Thiele purchased cocaine, and Leading Seaman McManus purchased cocaine and oxycodone.

(b) On 30 June and 1 July 2014, Leading Seaman McManus asked Leading Seaman Thiele if he could get her oxycodone but they were not able to meet up to purchase drugs. On 10 July, Leading Seaman McManus gave information to the military police to the effect that Leading Seaman Thiele was trafficking drugs. On 2 and 4 August, Leading Seaman McManus told Leading Seaman Thiele that she wanted drugs, specifically, on 4 August, that she wanted to get heroin.

(c) On 6 August 2014, Leading Seaman McManus told the police that Leading Seaman Thiele wanted to sell her heroin. Discussions were held about Leading Seaman McManus becoming a police agent. Following three other attempts by Leading Seaman McManus to obtain drugs from Leading Seaman Thiele, she agreed to become a police agent on 9 September 2014 in relation to an investigation targeting Leading Seaman Thiele.

(d) On 13 September 2014, under the direction of police, Leading Seaman McManus asked Leading Seaman Thiele if he was still good for her to get some cocaine and oxycodone, stating that a buddy of hers wanted drugs as well. On 14 September, again under the direction of police, Leading Seaman McManus contacted Leading Seaman Thiele for the purpose of arranging a drug transaction. Her buddy, an undercover officer (UCO), picked up Leading Seaman McManus in his vehicle and drove to Leading Seaman Thiele's residence. Leading Seaman Thiele and his girlfriend entered the rear of the UCO's vehicle. The group drove to Langford, British Columbia, where they waited for Leading Seaman Thiele's dealer to arrive.

(e) When a brown minivan arrived, Leading Seaman Thiele asked the UCO for $240 to purchase 3 grams of cocaine. Leading Seaman Thiele exited the UCO's vehicle and entered the brown minivan. Approximately four minutes later, Leading Seaman Thiele returned to the UCO's vehicle and gave him three baggies of white powder (weight 3.4 grams), later confirmed to be cocaine following analysis by Health Canada.

(f) On the return drive to Leading Seaman Thiele's residence, the UCO obtained Leading Seaman Thiele's phone number, indicating he wanted to spend over $1000 to $1500 for future drug purchases. Leading

Seaman Thiele indicated that it would not be a problem because his supplier was expecting more drugs.

(g) On 15 September 2014, the UCO contacted Leading Seaman Thiele to arrange another purchase of drugs. Leading Seaman Thiele told the UCO that his dealer had heroin for Leading Seaman McManus. The UCO told Leading Seaman Thiele that he could pick up the heroin for her and that he would actually prefer heroin over cocaine for a value of $2000 worth, later in the week.

(h) On 16 September 2014, the UCO went to Leading Seaman Thiele's residence. Leading Seaman Thiele exited the residence and approached the UCO's vehicle. The UCO provided Leading Seaman Thiele with $200 in exchange for a small baggie of a substance later confirmed to be 0.5 grams of heroin.

(i) The UCO told Leading Seaman Thiele that he had wished to purchase more drugs and that he preferred to deal directly with Leading Seaman Thiele rather than going through the supplier. On 18 September, the UCO exchanged a series of text messages and phone calls with Leading Seaman Thiele to arrange another purchase of drugs. The pair agreed to meet at the Canadian Tire parking lot where they were ultimately joined by Leading Seaman Thiele's dealer. The UCO gave Leading Seaman Thiele $1800. Leading Seaman Thiele left the UCO's vehicle and returned a short time later, at which point Leading Seaman Thiele gave the UCO two bags of a substance later confirmed to be 7.5 grams of heroin.

(j) Leading Seaman Thiele was arrested upon completion of that transaction. There is no evidence that Leading Seaman Thiele sold drugs to anyone else but Leading Seaman McManus and the UCO.

Aggravating Factors

[20] The circumstances of the offences in this case reveal, in my view, two aggravating factors. First, the substance trafficked in charges 2 and 3 is heroin, which has been judicially considered in the past by the Ontario Court of Appeal in *R. v. Sidhu*, 2009 ONCA 81 as "the most pernicious of the hard drugs - it is the most addictive, the most destructive and the most dangerous." Heroin trafficking has been described by the Supreme Court of Canada in *R. v. Pushpanathan*, [1998] 1 S.C.R. 982 as "a despicable crime," one that generates "such grievous consequences that it tears at the very fabric of society."

[21] Secondly, in relation to the first charge, the offender trafficked cocaine to someone he knew was another member of the CAF. This engages directly the military community. Even if Leading Seaman Thiele may not have been on duty at the time, it

remains, as recognized by the Supreme Court of Canada in *R. v. Moriarity*, 2015 SCC 55 at paragraph 52, that "[c]riminal or fraudulent conduct, even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency and morale." In this case, the offences do have an impact on discipline which, at its heart, requires individual members of the CAF to show respect for and compliance with lawful authority, which includes respect for prohibitions stated in the laws of Canada. Indeed, the substances involved here are subject to a prohibition of their possession for a reason: they have been considered to pose a real threat to the health and safety of Canadians.

[22] Furthermore, the prohibition on the use of drugs is clearly laid out in the regulations at Chapter 20 of the QR&O implementing the Canadian Forces Drug Control Program, which provides, at article 20.03, a very complete statement of purpose for prohibiting the use of drugs by members of the CAF. The program includes a significant educational component and consequences of non-adherence are laid out precisely in Defence Administrative Orders and Directives (DAOD) 5019-3. Leading Seaman Thiele should have been well aware of the prohibition on the use of drugs, its importance in the military context and the consequences of a violation of this well-known prohibition.

[23] The circumstances of the offences in terms of the type of substance trafficked, as well as the circumstances of the offender who disregarded a prohibition central to military service, are, in my view, aggravating. The conduct of the offender not only threatened discipline, it potentially placed at risk the health, safety, security and operational effectiveness of the CAF and its personnel.

Mitigating factors

[24] The Court also considered a number of mitigating factors arising either from the circumstances of the offences or the offender in this case. Amongst those highlighted by defence counsel, I especially note the following:

(a) First and foremost, the offender's guilty plea, which avoided the conduct of a lengthy and expensive trial, which I consider as a clear indication that the offender is taking full responsibility for his actions, in this public trial in the presence of members of the military community.

(b) Second, the fact that the offender has no criminal or disciplinary record.

(c) Third, the efforts made by the offender to address his substance abuse issues which date back a number of years, conditioned by early exposure to drugs and alcohol. I consider that the efforts made by Leading Seaman Thiele to refrain from consuming drugs since 2015 and alcohol since August of this year, as substantiated by the testimony of his girlfriend, indicate that he is well engaged on the path to rehabilitation from this condition.

(d) I have also considered the fact that the offender was released from the CAF as a result of the behavior associated with the charges for which he is now being sentenced. Yet, that release was a consequence flowing directly from his conduct, as opposed to an indirect consequence of the finding or of the sentence that I must take into consideration under QR&O 112.48, and therefore, its mitigating effect is minimal.

(e) Finally, it is appropriate to consider as mitigating both Leading Seaman Thiele's past service with the Navy for over six years, as well as the capacity he has shown to obtain gainful employment following his release from the CAF last January, both factors indicating that he has the potential to continue making a positive contribution to Canadian society in the future.

Objectives of sentencing to be emphasized in this case

[25] I find that these circumstances require that, in sentencing the offender in this case, the focus be placed on the objectives of denunciation and general deterrence.

Determination of the appropriate sentence

[26] As alluded to earlier, in determining the appropriate sentence in this case, I first need to assess the joint submission of counsel and its effect. Indeed, the prosecutor and defence counsel both recommended that this Court impose the punishment of imprisonment for a period of 14 months and 28 days to meet justice requirements.

[27] In determining the acceptability of the joint submission, I must apply the public interest test recently imposed by the Supreme Court. I may depart from the joint submission only if I consider that the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[28] As a military judge, the issue for me to assess is not whether I like the sentence being jointly proposed or whether I would have come up with something better. Indeed, the threshold for departing from joint submissions is very high and any opinion I might have on an appropriate sentence is not sufficient to reverse the joint submission that was made to me.

[29] The Supreme Court has required such a high threshold as it is necessary to allow all of the benefits of joint submissions to be obtained. Prosecution and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused. They are highly knowledgeable about the circumstances of the offender and the offences, as with the strengths and weaknesses of their respective positions. The prosecutor who proposes the sentence is in contact with the chain of command. He or she is aware of the needs of the military and civilian communities and is charged with representing the community's interest in seeing that justice is done.

Defence counsel is required to act in the accused's best interests, including ensuring that the accused's plea is voluntary and informed. Both counsel are bound professionally and ethically not to mislead the court. In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest.

[30] How does a trial judge determine whether a jointly proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest? The Supreme Court directs that I must ask myself whether if, despite the public interest considerations that support imposing it, the joint submission is so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the military justice system. Indeed, as any judge assessing a joint submission, I have to avoid rendering a decision that causes an informed and reasonable public, including members of the CAF, to lose confidence in the institution of the courts, including courts martial.

[31] I do believe that a reasonable person aware of the circumstances of this case would expect that an offender who had pleaded guilty to trafficking, on three occasions, substances such as cocaine and heroin would have to serve a sentence of imprisonment. Indeed, the proposed punishment of imprisonment is in line with Parliament's statement as to the gravity of the offence, in providing a maximum punishment of imprisonment for life. Even if deprivation of liberty should be a last resort, the reasonable person would, in my view, expect such a consequence on the facts of this case, as it would seem necessary to denounce the conduct and deter others from engaging in the same type of behaviour.

[32] Counsel presented the Court with cases considered as useful precedents to illustrate the punishments that have been imposed for drug offences in the past, both at courts martial and before courts in British Columbia, in support of their submission to the effect that their position on sentence is justified. Even if the test to be applied does not strictly consider fitness of sentence as a stand-alone reason to reject a joint submission, it remains that I must ask myself whether the joint submission is so markedly out of line with the expectations of reasonable persons. A reasonable person aware of the circumstances of this case is also an informed person about punishments imposed in the past for similar offences and offenders. In that sense, a proposed sentence that seems grossly unfit to a reasonable person aware of the circumstances of the case is likely to be markedly out of line with his or her expectations and would bring the administration of justice into disrepute.

[33] The precedents submitted to my attention are not exactly on point as it pertains to the circumstances of the offences and of the offender. For one thing, counsel could not find a Canadian military precedent dealing with traffic of heroin. As for civilian cases, ranges for first time offenders appear to extend to 18 months. I do not feel the need to analyse these precedents in detail as I have obtained sufficient information to conclude that the proposed sentence is within the range of punishments imposed in the past for similar conduct.

[34] Considering the nature of the offences, the circumstances in which they were committed, the applicable sentencing principles and the aggravating and the mitigating factors mentioned previously, I am of the view that the sentence of imprisonment for a period of 14 months and 28 days, jointly proposed by counsel would not bring the administration of justice into disrepute and is not otherwise contrary to the public interest. The Court will, therefore, accept it.

[35] Counsel agreed that it would be appropriate for the Court, in the circumstances of this case, to make a prohibition order under section 147.1 of the *National Defence Act* to prohibit the offender from possessing any firearms or other weapons, devices, ammunition or explosives for a period of 10 years. Given counsel jointly held views on this issue, I am satisfied that making this order is in the best interest of the safety of the offender or any other person.

[36] Also, counsel agreed that it would be appropriate for the Court, in the circumstances of this case, to make an order for the offender to undergo forensic DNA analysis under subsection 196.14(3) of the *National Defence Act*. Given counsel jointly held views on this issue, I am satisfied that making this order is in the best interest of the administration of military justice.

[37] Leading Seaman Thiele, the circumstances of the charges you pleaded guilty to reveal a pattern of behaviour that is totally incompatible with service in the CAF. This has been recognized by military authorities who ordered your release. There has been some time since you took off the uniform and even more time since you committed these offences. I trust you have had an opportunity to reflect on your behavior and that you have now chosen a path of sobriety that will allow you to complete your rehabilitation once you have served your sentence.

FOR THESE REASONS, THE COURT:

[38] **SENTENCES** you to imprisonment for a period of 14 months and 28 days.

[39] **MAKES THE FOLLOWING ORDERS, NAMELY:**

(a) an order authorizing the taking of bodily substances for forensic DNA analysis pursuant to section 196.14 of the *National Defence Act*;

(b) an order prohibiting you, for a period of ten years starting today, from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, pursuant to section 147.1 of the *National Defence Act*.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander S. Torani

Lieutenant-Commander B.G. Walden, Defence Counsel Services, Counsel for Leading Seaman Thiele