



## COURT MARTIAL

**Citation:** *R. v. Burrell*, 2017 CM 2010

**Date :** 20171101

**Docket :** 201722

Standing Court Martial

14 Wing Greenwood  
Greenwood, Nova Scotia, Canada

**Between :**

**Her Majesty the Queen**

- and -

**Aviator N. Burrell, Offender**

**Before :** Commander S.M. Sukstorf, M.J.

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### **REASONS FOR SENTENCE**

(Orally)

[1] Aviator Burrell, today you admitted your guilt to three charges.

- (a) The first count, under section 130 of the *National Defence Act (NDA)*, that is to say, production of a substance, contrary to section 7(2)(a.1) of the *Controlled Drugs and Substances Act (CDSA)*:

In that he, on or about 09 Nov 2015, at or near Greenwood, Nova Scotia, did unlawfully produce a substance included in Schedule II, to wit, cannabis resin.

- (b) The third count, also contrary to section 130 of the *NDA*, that is to say, Possession for the Purpose of trafficking, contrary to section 5(2) of the *CDSA*:

In that he, on or about 14 May 2016, at or near Greenwood, Nova Scotia, did possess a substance

included in Schedule II, to wit, cannabis (marihuana) for the purpose of trafficking.

- (c) And the seventh count, under section 130 of the *NDA*, that is to say, stored a firearm in contravention of the storage, display, transportation and handling of firearms by individuals regulations, contrary to section 86(2) of the *Criminal Code*:

In that he, on 14 May 2016, at or near Greenwood, Nova Scotia, did without lawful excuse, stored a firearm, to wit, a shotgun, in a manner contrary to regulations made under paragraph 117(h) of the *Firearms Act*.

[2] The Statement of Circumstances and the Agreed Statement of Facts that were provided to the Court are reproduced in their entirety so there is a complete understanding of what the Court considered today.

### **“STATEMENT OF CIRCUMSTANCES**

1. At all material times, Avr Burrell was a member of the Regular Force employed at CFB Greenwood.
2. On 10 February 2016, the Military Police received information from the Royal Canadian Mounted Police Detachment in Kingston, Nova Scotia containing the allegations from an informant.
3. The Military police officer summarized the information writing that the informant was alleging that Avr Burrell was “trafficking in multiple substances. Pounds of weed, plus pills, most anything”.

### **INVESTIGATION, SEARCH AND SEIZURE**

4. The Canadian Forces National Investigation Service (CFNIS) - National Drug Enforcement Team (NDET) then commenced an investigation. Information obtained by the NDET led to a search warrant for Avr Burrell’s residence, which was issued on 13 May 2016.
5. The warrant was executed on 14 May 2016, shortly after midnight. Upon entry, an odor of Cannabis (marihuana) was perceived by the officers on scene. The house was fully searched. A number of items were seized. These included:
  - a. 514 grams cannabis (marihuana) contained in more than 7 plastic bags;
  - b. \$3650 in cash;

- c. Scales;
  - d. Cannabis resin production equipment;
  - e. Other cannabis related accessories;
  - f. Cell phones;
  - g. A computer; and
  - h. A 16 gauge, Multi Barrel Shot gun bearing serial number 133804.
6. Slides with pictures and detail of the seized items are attached to this Statement of circumstances.
7. On 20 May 2017, warrants were obtained to permit the data extraction of the cellphones and other electronic devices seized at Avr Burrell's residence.

## **DETAIL OF EACH OFFENCES**

### **FIRST CHARGE**

8. Amongst the item seized on 14 May 2016, a glass container with a scraper, was found to contain residue of Cannabis resin.
9. The Data extraction of one of the cell phones (Samsung S6) led to the discovery of a group of home-made videos made by Avr Burrell in November and December 2015. These videos show Avr Burrell:
- a. Packing Cannabis (marihuana) plant product in the "Honey Bee Extractor" depicted on slides 12313 and 12314;
  - b. Verbally explaining that he will force through a full can of 99.9% butane, like the one depicted on slides 12315;
  - c. Scraping cannabis resin from a glass dish using the scraper and glass dish depicted on slides 12307 and 12308;
  - d. Transforming cannabis resin using the pressure cooker with the pump depicted on slides 12331 and 12332;

- e. Consuming Cannabis resin using a variety of accessories depicted on slides 12369 to 12392.

10. On or about 9 Nov 15, Avr Burrell did produce cannabis resin using a process similar as to what was depicted on the videos summarized above and using the equipment seized and depicted on slides 12313, 12314, 12315, 12307, 12308, 12331 and 12332.

### **THIRD CHARGE**

11. Avr Burrell ran, what is commonly referred to as, a “Dial-a-dope” operation.

12. On numerous occasions, between 24 June 2013 and 13 May 2016, Avr Burrell engaged in transactions where he sold Cannabis (marihuana) to at least 35 individuals, including 9 which were identified as being members of the Canadian Armed Forces. Transactions were initiated via text messages. Once a place for the exchange was agreed upon for a specific transaction, Avr Burrell met the buyer for the exchange of Cannabis (marihuana) for money.

13. A review of the text messages extracted from the cell phones seized shows that between 24 June 2013 and 13 May 2016, Avr Burrell engaged in several distinct transactions, often many times per week with multiple individuals, in the course of which he sold from a gram to a few grams of Cannabis (Marihuana), each time.

14. The Cannabis (Marihuana) seized on 14 May 2016 was kept by Avr Burrell both for personal use and for the purpose of future sales to his various customers.

### **SEVENTH CHARGE**

15. The 16 gauge, Multi Barrel shotgun bearing serial number 133804 was found unlocked in Avr Burrell’s master’s bedroom, as depicted on slide 12363. Two expended shells were in the chambers when it was found.

16. The shotgun is a non-restricted firearm.

17. It was confirmed to be fully functional following analysis.

18. It was stored by Avr Burrell in a manner contrary to the regulations made under paragraph 117(h) of the Firearms Act in that it was not:

- a. rendered inoperable by means of a secure locking device,
- b. rendered inoperable by the removal of the bolt or bolt-carrier, nor
- c. stored in a container, receptacle or room that is kept securely locked and that is constructed so that it cannot readily be broken open or into.”

### **“AGREED STATEMENT OF FACTS**

1. On 14 Mar 16, Avr Burrell was tested for cause for suspected use of marijuana. On 16 May 16, Avr Burrell was put under counselling and probation for twelve months due to a positive test for marijuana use.
2. Avr Burrell sought from Simcoe Holistic Health Ltd and was granted on 12 May 16 a prescription for access to three grams of medical marijuana per day for 12 months.
3. On 12 Sep 16, an administrative review was commenced due to permanent medical employment limitations that had been assigned on 9 Sep 16 to Avr Burrell.”

### **Joint submission**

[3] In a joint submission, both the prosecution and defence counsel recommend that I impose a sentence of five months’ imprisonment to be served in a civilian correctional facility.

[4] The joint submission before the Court is reviewed in the context of the current Supreme Court of Canada (SCC) guidance in *R. v. Anthony-Cook*, 2016 SCC 43. In that decision, the SCC clarified that a trial judge must impose the sentence proposed in a joint submission “unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest”.

[5] As background, a plea bargain occurs when counsel come together, outside the court, to discuss their respective positions in a quid pro quo manner which in this case, resulted in a joint recommendation to this Court. In essence, 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, such as Aviator Burrell, to begin making amends. By encouraging plea deals, the burden on the court is reduced and the prosecution benefits directly by not needing to take every matter to a full court martial.

[6] Logistically, coming to a meaningful resolution in a discipline matter, victims and witnesses are not required to travel and appear before the court martial. In the case of the military justice system, the systemic benefits of joint submissions also extend

directly to the unit. The accused's unit is responsible for providing the administrative support to both the member and the court martial. When the matters can be dealt with quickly, the unit benefits directly.

[7] The most important gain to all participants is the certainty that a joint submission brings to the process. The accused person has a lot to lose. As you heard when I verified the guilty pleas earlier, by entering into a plea bargain, the constitutional right to be presumed innocent is given up and this should never be done lightly. Thus, in exchange for making a plea, the accused must be assured high level of certainty that the Court will accept the joint submission.

### **Assessing the joint submission**

[8] In rendering its decision, the SCC highlighted the professional responsibility of both the prosecutor and defence counsel. They are key players in the administration of our military justice system. Prosecution and defence counsel are well placed to arrive at a joint submission that reflects the interests of the public, the Canadian Armed Forces (CAF) and the accused. Counsel are highly knowledgeable about the circumstances of the offender and the offences, as well as the strengths and weaknesses of their respective positions.

[9] The prosecutor who proposes the sentence has been in contact with the chain of command. He is aware of the needs of the military and its surrounding community and is responsible for representing those interests. Defence counsel acts exclusively in the accused's best interest, including ensuring that the accused's plea is a voluntary and informed choice and unequivocally acknowledges his guilt.

[10] As members of the legal profession and accountable to their respective law societies, the Court relies heavily on the professionalism and judgement of the prosecution and defence counsel as well as their duty to the court.

### **Evidence**

[11] In this case, the prosecutor read the Statement of Circumstances and an Agreed Statement of Facts and then provided the documents required at the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.51.

[12] Further, the Court benefitted from submissions from counsel to support their joint position on sentence, highlighting the considerations relevant to Aviator Burrell. In addition, both counsel made submissions with respect to the Court's mandatory consideration of a weapons prohibition under *NDA* section 147.1(c).

[13] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed of Aviator Burrell's personal circumstances, allowing me to consider any indirect consequence of the sentence, so I may impose a punishment adapted specifically to his circumstances and the offences committed.

**The offender**

[14] Aviator Burrell is 29 years old. He enrolled in January 2010 and, by all accounts, he appears to have served his country well and has no previous conduct or criminal record for the Court to consider.

[15] As noted in the Agreed Statement of Facts, Aviator Burrell has already had an administrative review commenced due to permanent medical employment limitations. His military career is now limited.

**Objectives of sentencing to be emphasized in this case**

[16] The prosecution has emphasized that, in their negotiations, both he and defence counsel closely considered the objectives of sentencing. On the facts of this case, both the prosecution and defence stated that the objectives they considered most important are those of general and specific deterrence as well as denunciation which, on the facts before the Court, I agree with.

[17] In making the joint submission, counsel advised the Court that they also took into account all relevant aggravating and mitigating factors. After hearing the submissions of both counsel, the Court highlights the following aggravating and mitigating factors for the record:

**Aggravating Factors:**

- (a) Offence of Trafficking – In this case, it is understood that the accused was engaged in trafficking for a period of at least three years. Based upon the evidence discovered in May of 2016, and set out in the Statement of Circumstances, Aviator Burrell engaged in transactions where he sold cannabis (marihuana) to at least 35 individuals, including 9 which were identified as being members of the CAF. The fact that he was trafficking to members of the CAF is perhaps the most significant aggravating factor for the Court.

The military community is a small one that must remain operationally focused at all times. Trafficking within the military community can have disastrous effects both for safety of personnel as well as a significant negative impact on the morale and cohesiveness of the units. Whether supporting, maintaining or operating aircraft, ships or weapon systems, military members must be able to rely upon and trust the professional work of their colleagues at all times; 24 hours a day, 7 days a week. It is for this reason, QR&O 20.04 sets out a prohibition on the use of drugs that all military members must comply with.

**20.04 - PROHIBITION**

No officer or non-commissioned member shall use any drug unless:

1. the member is authorized to use the drug by a qualified medical or dental practitioner for the purposes of medical treatment or dental care;
2. the drug is contained in a non-prescription medication used by the member in accordance with the instructions accompanying the medication; or
3. the member is required to use the drug in the course of military duties.

The QR&O sets out a usage prohibition which effectively, when charged under the military justice system, criminalizes the use of prohibited substances for CAF members. There is no similar charge in either the *CDSA* or in the *Criminal Code* that replicates such a “usage” prohibition as is set out in QR&O 20.04 for CAF members.

The prosecution referred the Court to the case of *R. v. Beswick*, 2015 CM 3005 (*Beswick*) where my colleague d’Auteuil MJ referred to guidance from the Court Martial Appeal Court on why the involvement of drugs in a military environment must be treated as a very serious matter. In 1985, in its decision of *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 teamwork 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.

- (b) Presence of a weapon - Generally, as the prosecution submitted, the Court must send a message that serious consequences flow from weapons offences combined with drug offences. The purposes of the firearms legislation and storage provisions are to restrict the possession of dangerous weapons to properly licensed persons and to ensure that firearms are not readily accessible to thieves or emotionally distressed or violent people.

However, in this case, the Court accepts that the shotgun was given to Avr Burrell as a gift and, as argued very successfully by your defence counsel, the lack of ammunition or evidence of any use of the firearm reduces this aggravating factor for the Court.



Mitigating Factors:

- (a) Guilty Plea - Your pleas of guilty for the offences as described in the Statement of Circumstances, must be given their full weight. You genuinely show remorse and your courage in accepting responsibility early in this process cannot go unnoticed by the Court. As both counsel submitted, your plea has saved the Court at least three weeks of trial time.
- (b) Previous Good Conduct - The Court recognizes that you have no previous record; and
- (c) Age - you are a young man with a great deal of potential ahead of you. I have given your young age, very strong consideration. I hope that you will see this as a turning point in your life enabling you to move forward in a most positive way.

**Weapons prohibition order**

[18] Pursuant to section 147.1 (c) of the *NDA*, because the charges to which Aviator Burrell has pleaded guilty involve sections 5 and 7 of the *CDSA*, the Court is required to consider whether it is desirable, in the interests of safety of the person or of any other person, to make an order prohibiting Aviator Burrell from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, and where the court martial decides that it is so desirable, the court martial shall so order.

[19] I note that under section 109(1) of the *Criminal Code*, where a person is convicted of an offence relating to the contravention of subsection 5(2) of the *CDSA*, the Court shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the person from possessing any firearm or other weapons and ammunition as described above. Both counsel have presented submissions on how the Court should exercise its discretion under the *NDA*.

[20] As counsel have both noted, section 147.1 of the *NDA* makes it mandatory for the judge to consider such an order, but it does not compel a judge to make such an order. Clearly, section 147.1 of the *NDA* is inconsistent with section 109(1) of the *Criminal Code*. However, the fact that Parliament has granted military judges discretion under the *NDA* as to whether or not such a prohibition order should be imposed, then I must exercise my discretion appropriately.

[21] I have considered whether this is an appropriate case for a weapons prohibition order as stipulated under section 147.1 of the *NDA*. The prosecution did not advocate strongly for the Court to impose such a prohibition and was clear in stating that there was absolutely no evidence that linked the shotgun to any trafficking activity. Defence reiterated the fact that there was no evidence that either Aviator Burrell's or any other

person's safety was in question. He stated that there was no evidence of any ammunition or recent use of the shotgun. Further, in exercising his right of allocution under section 726 of the *Criminal Code*, Aviator Burrell told the Court that the shotgun was given to him as a gift and it had been his intention to eventually have it mounted and displayed as an antique. It was clear on the evidence put before the Court that pursuant to the various searches, there was no ammunition found in the house.

[22] In my opinion, such an order is neither desirable nor necessary for the safety of the offender or any other person and I will exercise my discretion and not make an order to that effect.

### **Conclusion**

[23] After considering counsel's submissions in their entirety and considering all the evidence before the Court, I must ask myself whether the proposed sentence would be viewed by the reasonable and informed CAF member, as well as the public at large, as a breakdown in the proper functioning of the military justice system. In other words, would the acceptance of the proposed sentence cause the CAF community and the public to lose confidence in the military justice system?

[24] In considering this, the prosecution has referred me to five cases (*R. v. Corporal M.J. Ballard*, 2005CM28, *Beswick*, *R. v. Smith*, 2014 NSSC 124, *R. v. JT*, 2014 ONSC 6946 and *R. v. Smith*, 2010 CM 2018 (*Smith*) and defence referred me to an additional four cases (*Smith*, *R. v. Bradley*, 2017 YKTC 18, *R. v. Wright*, 2015 NSPC 63, *R. v. Brushett*, 2014 0814 A00186 and *R. v. Delafosse*, 2008 YKTC 82) where courts have considered a range of similar drug cases and sentences.

[25] Considering all of the factors, the circumstances of the offence and of the offender, the indirect consequence of the finding or the sentence, the gravity of the offence and the previous character of the offender, I am satisfied that counsel have discharged their obligations in making their joint submission. The punishment of five months' imprisonment sends a message that this type of conduct will not be tolerated in the CAF. The recommended sentence is in the public interest and does not bring the administration of justice into disrepute.

### **FOR THESE REASONS, THE COURT:**

[26] **FINDS** you not guilty of charges 2, 4, and 5, guilty on charges 1, 3 and 7 and the sixth charge is stayed.

[27] **SENTENCES** you to five months' imprisonment in a civilian facility.

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### **Counsel:**

The Director of Military Prosecutions as represented by Major D. Martin

Lieutenant-Commander B. Walden, Defence Counsel Services, Counsel for Aviator N.  
Burrell