COURT MARTIAL

Citation: *R. v. Smith*, 2018 CM 3001

Date: 20180109
Docket: 201756

Standing Court Martial

Halifax Courtroom, Suite 505
Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman M. Smith, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "*Use of Personal Information in Judgments and Recommended Protocol*".

REASONS FOR SENTENCE

(Orally)

[1] Leading Seaman Smith pleaded guilty to the second, third and fourth charges on the charge sheet. The charge sheet reads as follows:

SECOND CHARGE Section 130 of the *National Defence Act*	**AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, POSSESSION FOR THE PURPOSE OF TRAFFICKING, CONTRARY TO SECTION 5(2) OF THE *CONTROLLED DRUGS AND SUBSTANCES ACT*** *Particulars*: In that he, on or about 5 May 2016, at or near CFB Halifax, Halifax, Nova Scotia, did

possess a substance included in Schedule I, to wit, cocaine (Benzoymethylecgonine) for the purpose of trafficking.

THIRD CHARGE
Section 130 of the *National Defence Act*

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, POSSESSION, CONTRARY TO SECTION 4(1) OF THE *CONTROLLED DRUGS AND SUBSTANCES ACT*

Particulars: In that he, on or about 5 May 2016, at or near CFB Halifax, Halifax, Nova Scotia, did possess a substance included in Schedule I, to wit, to wit, 3,4-methylenedioxyamphetamine (MDA) (amethyl-1,3-benzodioxole-5-ethanamine).

FOURTH CHARGE
Section 130 of the *National Defence Act*

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, 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 OF CANADA*.

Particulars: In that he, on or about 6 May 2016, at 18 Danforth Road, Halifax, 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 Court accepts and records your plea of guilty in respect of the second, third and fourth charges on the charge sheet, and now the Court finds you guilty of these charges.

[3] In this case the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by this Court. They recommended that this Court sentence you to imprisonment for a period of four months and a fine in the amount of $4,500.

[4] In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of the military activity in the Canadian Armed Forces (CAF). The purpose of this system is to prevent misconduct or, in a more positive way, promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. The military justice system also

ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[5] The evidence before this Court includes a Statement of Circumstances which reads as follows:

"STATEMENT OF CIRCUMSTANCES

1. At all material times, LS Smith was a member of the Regular Force employed at CFB Halifax.

2. On 5 May 2016, at approximately 1851 hours, the military police ("MP"), Corporal ("Cpl") Dennie, established a motor vehicle check point at the guardhouse at the main entrance gate to Stadacona. Cpl Dennie was randomly stopping motor vehicles to verify driver's licence.

3. At approximately 1925 hours, Cpl Dennie stopped LS Smith who was driving a black 2011 BMW 335i with licence plate XXXX ("the BMW") just outside the main entrance gate to Stadacona, on Gangway Road, which is on Department of National Defence's property.

4. After confirming that LS Smith was a member of the Canadian Armed Forces, Cpl Dennie asked him to produce his driver's license.

5. LS Smith showed Cpl Dennie his Nova Scotia ("NS") ID card, thinking it was his driver's licence. Cpl Dennie took LS Smith's NS ID card and told LS Smith that it was not a Driver's licence. LS Smith said that made no sense as he had been licenced since he was sixteen years old.

6. Cpl Dennie noticed traffic was lining up and asked LS Smith to pull off to the left side, between the in/out lanes, inside the main entrance gate to Stadacona, so that Cpl Dennie could verify his eligibility to drive.

7. Cpl Dennie took LS Smith's NS ID card to his marked MP vehicle. Cpl Dennie's MP vehicle was parked just in front of the guardhouse, outside the main entrance gate to Stadacona.

8. By radio, Cpl Dennie asked the Commissionaire ("Cmre") at MP dispatch to verify on the Justice Enterprise Information Network ("JEIN") LS Smith's licence status. The JEIN had a record that LS Smith was licensed to drive. However, on his last renewal, he had mistakenly been issued a Nova Scotia Identification Card ("NS ID card") instead of a driver's licence.

9. Because the Cmre did not follow the proper procedure to make a query on JEIN, the Cmre told Cpl Dennie that no records were found.

10. Based on the information he had, Cpl Dennie told LS Smith that he was not licenced. LS Smith insisted to Cpl Dennie that he was licenced, and that he had just been reissued the NS ID card, which he had thought was his licence, around a month ago.

11. Cpl Dennie asked LS Smith if the BMW was his car or if it had been stolen. Cpl Dennie demanded that LS Smith show him proof of insurance and vehicle registration.

12. LS Smith told Cpl Dennie he believed the vehicle permit and insurance were at home on his kitchen table. Cpl Dennie then suggested that most people keep those documents in their glovebox, centre console, or wallet.

13. Cpl Dennie told LS Smith that it was an offence under the Motor Vehicle Act not to produce the vehicle permit and insurance upon demand and asked him if he wanted to check in his vehicle to attempt to find the documents as this could save him from being issued Summary Offence Tickets for failing to produce the documents. Cpl Dennie observed that LS Smith was very short in his answers and appeared nervous. His hands were shaking, his voice had a low quiver and he would not make eye contact with Cpl Dennie.

14. LS Smith proceeded to remove the valet key to unlock the glove box and begin his search. He was very slow and deliberate in his movements, which appeared odd to Cpl Dennie as from his experience, most people would just take the stack of documents from the glove box and go through them on their lap. LS Smith was instead leaning forward, in what Cpl Dennie believed, to be an effort to block Cpl Dennie's view to the glovebox. Cpl Dennie asked LS Smith if something was going on and LS Smith quickly replied "no" without turning his head to look back at Cpl Dennie.

15. Cpl Dennie walked around the rear of the vehicle, while trying to observe what LS Smith was reaching for, and made his way to the passenger's side of the vehicle. From his new position he had a clear view of the glove compartment.

16. Cpl Dennie noticed a number of sandwich bags on the inside left of the glove compartment. LS Smith tried to cover the sandwich bags with his hands. Cpl Dennie asked LS Smith what was in the sandwich bags. LS Smith responded "drugs".

17. Cpl Dennie then placed LS Smith under arrest. Cpl Dennie handcuffed and searched LS Smith, then put him in the back seat of his MP vehicle. Then, at approximately 1929 hours, Cpl Dennie first informed LS Smith of his section 10(a) and 10(b) Charter rights.

18. Between 1934 hrs and 1938 hrs, Cpl Dennie searched the BMW incident to arrest and seized:

a. a wallet containing $200;

b. a Ziploc bag containing 17.1 grams of cocaine (benzoylmethylecgonine), CDSA Schedule I;

c. a small bag with three small rocks totalizing 1.25 grams 3,4-methylenedioxyamphetamine), CDSA Schedule I;

d. multiple blue "dime bags"; and

e. a JSR-100 scale with trace of cocaine.

19. In the center console of the BMW, Cpl Dennie found, but did not immediately seize, LS Smith's cell phone.

20. On 6 May 2016, the investigation was transferred to the Canadian Forces National Investigation Service (CFNIS) - National Drug Enforcement Team (NDET). A Search Warrant was sought and obtained, allowing the vehicle to be fully searched. This led to the seizure of LS Smith's cell phone.

21. Still on 6 May 2016, a second Search Warrant was sought and obtained, permitting the search LS Smith's residence. The Warrant was executed, which led to the seizure of a shotgun belonging to LS Smith. Later analysis confirmed that the seized shotgun was a functional firearm within the meaning of Section 2 of the Criminal Code. The firearm is a non-restricted firearm within the meaning of section 84(1) of the Criminal Code.

22. The firearm was stored by LS Smith 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.

23. On 23 June 2016, the MP, Master-Corporal ("MCpl") Salbalbal sought and obtained a warrant to permit the data extraction of LS Smith's cell phone.

> 24. LS Smith ran, what is commonly referred to as, a "Dial-a-dope" operation. A review of the text messages extracted from the cell phone seized shows that between 5 Feb 2016 and 6 May 2016, LS Smith engaged in multiple transactions where he sold cocaine to at least 12 individuals, including 8 which were identified as being members of the Canadian Armed Forces.
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> 25. Slides with pictures and detail of the seized items are attached to this Statement of circumstances."

[Slides with pictures and detail of the seized items omitted.]

[6] Although the Court is not bound by the joint recommendation made by counsel, it is generally accepted that the sentencing judge should depart from the joint submission only when it is contrary to the public interest, as stated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, at paragraph 32.

[7] The only situation where the Court would depart from the recommendation is where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system, as mentioned in the same decision of *Anthony-Cook* at paragraph 42.

[8] In the same decision at paragraph 25, the Supreme Court of Canada recognizes:

> It is an accepted and entirely desirable practice for Crown and defence counsel to agree to a joint submission on sentence in exchange for a plea of guilty. Agreements of this nature are commonplace and vitally important to the well-being of our criminal justice system, as well as our justice system at large.

And from my perspective, it would include courts martial.

[9] However, lawyers must provide to the Court a full account of the offender's situation and of the circumstances of the offence in the joint submission. Here, the Court is satisfied with the information and explanation provided by counsel. In fact, they provided detailed information for the Court to appreciate the joint submission.

[10] In this case, the principles and objectives of denunciation and specific and general deterrence were an integral part of counsel's discussions and the basis of the joint submission they made.

[11] Leading Seaman Smith joined the Army Reserve in 2006; was transferred with the Regular Force, in the Navy, in 2010; in 2016 he was recommended for immediate appointment as a master seaman; however, he was arrested in May 2016 and since then his career progression has basically stopped. He is single and there is a recommendation by his commanding officer to release him from the CAF.

[12] The suggestion made by counsel reflects, I would say, the judicial approach on such matters, that being trafficking of drugs. Just to remind people, including counsel, that in a decision in 1985, the Court Martial Appeal Court articulated clear reasons why

the involvement with drugs in the military environment must be treated as a very serious matter. In the decision of *R. v. MacEachern*, (1985), 4 C.M.A.R. 447, Addy J. said on behalf of the Court:

> Because of the particularly important and perilous tasks which the military 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 their use, may be more pressing than that of civilian authorities.

[13] And that was in 1985, so I think the judges are well-aware of the importance of prohibiting such things. Just to remind people that in 2010, the Court Martial Appeal Court was of the same opinion and told us that trafficking in drugs in the military is a serious offence and this Court still totally agrees with that position. In *R. v. Lee*, 2010 CMAC 5, the Court said at paragraphs 26 and 27:

> [26] It is clear that trafficking in drugs within the military is a serious offence and that convictions usually result in carceral sentences. The main concern in determining the appropriate sentence is to deter others. As the Court stated in *Dominie* v. *The Queen*, 2002 CMAC 8, "general deterrence requires that the military know that they will be imprisoned if they deal in crack cocaine on military bases" . . . .
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> [27] The same concern was expressed in a case where the accused was charged with a single offence of trafficking in a small amount of cocaine (*Taylor v. The Queen*, 2008 CMAC 1). The Court upheld the Military Judge's sentence of 40 days' imprisonment. The Military Judge justified the sentence by stating that the "use of drugs and the trafficking of drugs are a direct threat to the operational efficiency of our forces and a threat to the security of our personnel and equipment".

[14] So I do not see any breakdown in the proper functioning of the military justice system with the suggestions made by counsel and I will accept the joint submission made by counsel to sentence you to imprisonment for a period of four months and a fine in the amount of $4,500, considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

[15] Now, having said that, I was requested by the prosecution to give consideration to a DNA order, basically to take a sample of your DNA in accordance with section 196.14(3) of the *National Defence Act* (*NDA*). And in order to decide, I had to consider four criteria: first, the nature of the offence; second, the circumstances surrounding its commission; third, any previous conviction; fourth, the impact on the person’s privacy and security.

[16] First, the nature of the offence. The offence, considered being a secondary designated offence, is the offence for possession for the purpose of trafficking in accordance with subsection 5(2) of the *Controlled Drugs and Substances Act.* As I mentioned to you earlier, the maximum punishment for this type of offence is life in

prison because of the nature of the drugs. Section 5 expresses different maximum punishments, depending on the nature of the drug involved. Here, because the drugs seized were included in Schedule I, the maximum punishment is life in prison, which, objectively speaking, indicates to the Court that it is a very serious offence; a very serious matter.

[17] Second, there are the circumstances surrounding the commission of this offence. As exposed in the Statement of Circumstances, there were twelve transactions over two months that the prosecution was able to refer to, which indicate that multiple transactions occurred over a period of two months, most of them involving CAF members, but also civilians. Those transactions were commercial in nature. You were looking to make money, basically, with those transactions. Also, when you were arrested, you were entering into a defence establishment with the drugs.

[18] Thirdly, it is true that you have no previous conviction; you are a first-time offender; however, the impact on your privacy and security appears as being very limited. There is no evidence that would indicate to the Court that it would be different. And finally, you concur with the request made by the prosecution that the circumstances would reveal an opportunity for the Court to issue such order.

[19] So I gave further consideration to that, and I came to the conclusion that I will issue an order authorizing the taking of bodily substances for forensic DNA analysis and I will sign the order accordingly. It must be done in the next 30 days or as soon as possible, and I put conditions for the taking of the samples.

[20] Now, pursuant to section 147.1 of the *NDA*, when a person is convicted of an offence relating to any contravention of any of sections 5 to 7 of the *Controlled Drugs and Substances Act* that involves, or the subject-matter of which is, a firearm, then the court martial shall, in addition to any other punishment, consider whether it is desirable in the interests of the safety of the person or of any other person to make an order prohibiting you from possessing any firearm. So I have to make that consideration. I do not need any request made by either defence or prosecution. So because it involved those two things, I have to pay attention to that.

[21] This decision is discretionary, so it means that there is no obligation for me to issue it. I have to balance different things. The prosecutor suggested that if you were before a different court, a civilian court with criminal jurisdiction, pursuant to the *Criminal Code*, this order would be mandatory; however, he clearly told the Court that it must be used by the Court as guidance and he never suggested that because it is mandatory before a different court, that it is also mandatory for court martial.

[22] Your counsel invited the Court to use its discretion and clearly put to it that Parliament's intent is reflected in both provisions, in two different Acts. In the *Criminal Code* it is mandatory, but it is still a discretion for the Court in the *NDA*. So he invited the Court to act accordingly as there is no obligation to issue such an order.

[23] In addition, I would put as a matter of fact that section 147.1 of the *NDA* was reviewed by Parliament in 2013 and some minor amendments were made, but there was an opportunity for Parliament to give consideration to mandatory orders versus

discretionary orders. Anything of that sort could have been made by Parliament. Amendments to section 147.1 of the *NDA* are in force and they are applicable, but there is nothing suggesting that, in some circumstances, an order is mandatory. So I take it, because I am governed in that area by section 147.1 of the *NDA*, that it is still the duty of the Court to exercise discretion, as suggested by your counsel.

[24] Some of the decisions provided to me were from other judges, but some were from me. And one of them, which is very familiar to your counsel, is *R. v. Vezina,* 2013 CM 3015, because he was representing the offender at the time. And on sentence, I gave consideration in issuing a weapons prohibition order, which I did, for a period of ten years. But there are two things I said at paragraph 44. One, I mention the fact that the personal mental health situation was a concern for me. I would say that the evidence before me was different than the one I have before me today. You have to understand that *Vezina* was a full trial, a contested trial; evidence was put forward regarding the mental health situation of the offender at the time, but also the fact that that this person had substance abuse problems. That was one factor.

[25] The other factor was the fact that, as suggested by the prosecution here, I gave consideration to the fact that under section 109 of the *Criminal Code* and in the context of an offence pursuant to section 5 of the *Controlled Drugs and Substances Act*, usually such an order is mandatory.

[26] For me, as suggested by the prosecutor, the fact that under the *Criminal Code* such an order is mandatory is still a guide. I am not bound by this, and I will always consider this as a factor to put with others in order to make my decision.

[27] What I have to decide is when they use the term "desirable", for me it means, is it necessary in the interest of your safety or the one of any other person to issue such an order? I would say that many things have been put to me as a matter of circumstances to support the joint submission on sentence, but regarding the weapons prohibition order application there is not much evidence. For sure, there is no evidence that there is any issue with safety of the offender or other persons. This has not been put to me that there is some issue. I have evidence regarding your military career, but your personal profile, meaning where you stand as a person in your life, I do not have much. At least I do not have anything that would indicate to me that there is a safety issue for you or for anybody else.

[28] As put by your counsel, the possession of the weapon is unrelated to the other offences concerning drugs, which is possession and possession for the purpose of trafficking. There is no connection. There is also no evidence that you are involved with any criminal gang or that you are involved in some kind of network in relation to drugs or organized crime or such things. There is also no evidence that violence was used at the time of the commission of the offence and I do not have any indication that you used that for any reason in your relationship with people. I do not have anything of that sort.

[29] As raised by your counsel, there was no ammunition and no drugs on the site where the weapon was seized. So it is another indication that the weapon is not something related to the commission of offences concerning drugs. So there is no link

with those other offences. So from my perspective, using my discretion, I do not think it is necessary to issue such an order and I gave consideration to all the criteria and also section 109 of the *Criminal Code* as guidance. But for me, I do not find it necessary, so because of these reasons, I will not issue such an order.

FOR THESE REASONS, THE COURT:

[30] **FINDS** Leading Seaman Smith guilty of the second, third and fourth charges on the charge sheet.

[31] **SENTENCES** you to imprisonment for a period of four months and a fine in the amount of $4,500, payable in monthly instalments of $400, so it is eleven instalments of $400, plus one instalment of $100 at the very end, so it will cover a period of twelve months and it will start on the 15th of January, first payment will be on the 15th of January and it goes on for twelve months. In the event you are released from the Canadian Armed Forces for any reason before the fine is paid in full, then any outstanding unpaid balance will be due the day prior to your release.

[32] **ORDERS** the taking of bodily substances for forensic DNA analysis pursuant to section 196.14(3) of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander D. Reeves

Lieutenant-Commander B. Walden, Defence Counsel Services, Counsel for Leading Seaman M. Smith