Citation: *R. v. ex-Ordinary Seaman C.A.E. Ellis*, 2009 CM 4008

Docket: 200812

STANDING COURT MARTIAL
CANADIAN FORCES BASE ESQUIMALT
BRITISH COLUMBIA
CANADA

Date: 28 March 2009

PRESIDING: LIEUTENANT-COLONEL J-G PERRON, M.J.

HER MAJESTY THE QUEEN
v.
EX-ORDINARY SEAMAN C.A.E. ELLIS
(Offender)

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

SENTENCE
(Rendered orally)

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[1] Ex-Ordinary Seaman Ellis, you have been found guilty of two charges of trafficking in cocaine and of two charges of having used cocaine. I must now impose a fit and just sentence.

[2] In determining the appropriate sentence, the court has considered the circumstances surrounding the commission of these offences, the mitigating circumstances raised by your counsel, the aggravating circumstances raised by the prosecutor, and the representations by the prosecutor and your defence counsel, as well as the applicable principles of sentencing.

[3] The court is required, in imposing a sentence, to follow the directions set out in article 112.48 of Queen's Regulations and Orders, which obliges it in determining a

sentence to take into account any indirect consequences of the finding or of the sentence, and impose a sentence commensurate with the gravity of the offence and the previous character of the offender.

[4] The purpose and principles of sentencing, which are common to both courts martial and civilian criminal trials in Canada, have been expressed in various ways. Generally, they are founded on the need to protect the public, and the public, of course, includes the Canadian Forces. The court has considered the guidance set out in ss. 718 to 718.2 of the *Criminal Code of Canada*. Those purposes and principles annunciated at these sections serve to denounce the unlawful conduct, to deter the offender and other persons from committing offences, to separate the offender from society where necessary, to assist in rehabilitating offenders, to provide reparations for harm done to victims or to the community, and to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community. The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation, or a combination of those factors.

[5] The court is also guided by the provisions of ss. 129, 130, 139 and 215 of the *National Defence Act* and ss. 5(1), 5(3) and 10(1) of the *Controlled Drugs and Substances Act* in its determination of the lawfully permissible sentence in this case. A sentence may be composed of more than one punishment.

[6] The court has given consideration to the fact that sentences of offenders who commit similar offences in similar circumstances should not be disproportionately different. The court must also impose a sentence that should be the minimum necessary sentence to maintain discipline. The ultimate aim of sentencing is the restoration of discipline in the offender and in military society.

[7] You have been found guilty by this Standing Court Martial of having trafficked in cocaine on a military establishment on two occasions and of having used cocaine on two occasions. You did not plead guilty to these charges, but you admitted under Military Rule of Evidence 37(*b*) the facts necessary to prove these four offences.

[8] The prosecution submits that a sentence of imprisonment for a period of nine to twelve months is the appropriate sentence in this case. Your defence counsel suggests a sentence of dismissal with disgrace from Her Majesty's Forces and a suspended sentence of imprisonment for six months.

[9] I will now review some of the facts of this case that are not in contention and that are relevant to this sentencing decision. Exhibit 6, the Member's Personnel Record Résumé, provides me the following information:

XX XXX XXXX - your date of birth;

XX XXX XXXX - the date of birth of your son;

16 November 2006 - your date of enrolment in the CF;

16 March 2007 - approximate date of arrival at CFB Esquimalt;

28 November 2007 - you are placed on terminal leave; and

5 December 2007 - the date of release from the CF under item 2A.

[10] Exhibit 3, the admissions made by ex-Ordinary Seaman Ellis, pursuant to Military Rule of Evidence 37(*b*), provides the following information:

On 19 March 2007, ex-Ordinary Seaman Ellis signed MARPACORD 19-5, entitled, "Illicit Drug Involvement in Maritime Forces Pacific";

On 20 June 2007, ex-Ordinary Seaman Ellis approached the CFNIS undercover operator (UCO) and said, "Hey, you're Lee's friend, and that is the only reason we are talking." Ex-Ordinary Seaman Ellis told the UCO that he could get 2 grams of cocaine for $100 or an eight-ball for $160. Ex-Ordinary Seaman Ellis also told the UCO that he is the only guy in Nelles Block selling drugs, and that he deals to six other people in the quarters. The UCO then gave ex-Ordinary Seaman Ellis $100 for 2 grams of cocaine. Ex-Ordinary Seaman Ellis said that he did not keep his stuff in his room, so he had to go out to get it, and that he would return to Nelles Block with the drugs at around 2330 hours that evening. At 2333 hours, ex-Ordinary Seaman Ellis gave the UCO one small clear plastic bag containing cocaine.

On 22 June 2007, at approximately 1340 hours, the UCO attended ex-Ordinary Seaman Ellis' room at Nelles Block and asked him if he could purchase an eight-ball of cocaine, which is approximately 3.5 grams of cocaine. Ex-Ordinary Seaman Ellis told the UCO that it would cost him between $160 and $180. The UCO gave ex-Ordinary Seaman Ellis $180 for the purchase. At approximately 1703 hours, ex-Ordinary Seaman Ellis knocked on the UCO's barrack room door and told him that there was a lot of heat in the shacks and that he was going to get his cocaine now as it was very close. A few minutes later, a playing card package was slid under the door. The playing card package contained a small baggy of cocaine.

On 27 June 2007, ex-Ordinary Seaman Ellis is arrested for trafficking cocaine.

[11] Your conduct sheet, found at Exhibit 5, contains a total of 15 charges. You were found guilty of being absent without leave for a period of five hours on 10 May 2007. This is the only offence that occurred before the offences of trafficking in cocaine and the use of cocaine. Between 15 July and 18 October 2007, you were found guilty of being absent without leave on nine occasions for periods of time that ran from thirteen minutes to five hours, and you were found guilty of five charges of conduct or acts to the prejudice of good order and discipline for conduct relating to the punishment of confinement to barracks.

[12] You testified that you did not seek employment immediately upon your return to Lower Sackville because you were still receiving approximately $500 to $600 per month from the Canadian Force for the first few months after your release. You began to seek employment when this source of income disappeared. You then worked as a manual labourer for different companies or installed drywall for cash payments most of 2008, except for when you were laid off for lack of work or when you had a tooth infection. You worked during the month of January 2009, and have been unemployed since February 2009. You are presently looking for work and a friend of yours might be able to help you get a job in the near future. You stated that you had not been on social assistance since your return to Lower Sackville.

[13] You testified that you have lived in the home of your girlfriend's mother for approximately one year and that you have had a relationship with your current girlfriend for approximately 14 months. You pay approximately $200 per month for room and board. You stated that you and your present girlfriend are talking about marriage, having children, and moving to your own residence when you can afford it.

[14] You have a 4-year-old son. Your ex-spouse has custody of your son, but you see him approximately two nights per week at your parents' house or at your residence, and every second weekend. You say that your relationship with your ex-spouse has improved recently and that you do not provide any financial support for your son, other than paying for his food and clothes when your son spends time with you.

[15] Your relationship with your parents was not very good upon your return to Lower Sackville, but it improved since you have moved out of their residence. You say you see your parents two to three times a week and that they live approximately ten minutes from your present residence.

[16] You explained that you had not completed your high school education because you had started living with your ex-spouse while at high school and you could not complete your studies because you had to work to pay the bills. You need one credit to obtain your high school diploma. You stated you had not yet been able to complete the correspondence course to obtain that credit, because you could not yet afford the $200

cost of that course. You then stated that your parents and grandparents would help pay for the correspondence course.

[17] You testified that you had trafficked in cocaine for personal gain; that is to say, so you would not have to pay for your own cocaine. You testified about addiction and "problems and stuff". You testified that your turning point was returning to Lower Sackville and leaving the drug environment that you had found at CFB Esquimalt. You said that being near your son and meeting your present girlfriend made you realize that there were more important things in life than yourself. You also testified that you did not know where to get drugs upon your return to Lower Sackville. You said that you stayed home with your girlfriend and that kept you away from drugs.

[18] You would have seen your family doctor, concerning your addiction to drugs, but were put on a waiting list for therapy. You stated you could not afford the costs associated with seeing a therapist that is not funded by the provincial medical coverage. You would have attempted to join a 12-step group, but it would appear the nearest one is not near your residence and you would not have any means of transportation to attend that group. You have not seen a therapist or attended any group therapy since your return to Lower Sackville.

[19] When asked by the court when you started to use cocaine, you answered that you had not used cocaine before your arrival at CFB Esquimalt. When asked by the court when was the last time you had used cocaine, you replied that it was on the day of your arrest.

[20] I will now comment on the case law presented by counsel. Firstly, in *ex-Private Constantin*, a SCM held in 2005, the accused pled guilty to one charge of trafficking in marijuana and one charge of having used marijuana. The aggravating circumstances in that case were:

> a. the objective severity of the offence of trafficking in marijuana, that carries a maximum sentence of five years' imprisonment for quantities of less than 3 kilograms, and the punishment of dismissal with disgrace from Her Majesty's Service for the s. 129 offence of having used marijuana;
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> b. the fact that the transactions occurred over a period of approximately one and a half months in single quarters;
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> c. that the offender was selling marijuana at the request of purchasers and that he was selling this marijuana to finance his own consumption;
>
> d. the premeditation involved in the transactions; and

e. the overall negative atmosphere present within the holding platoon and the widespread use of drugs by certain members of that platoon.

[21] The mitigating factors of that case were:

a. the guilty plea and his cooperation with the police;

b. the fact that marijuana is a "soft" drug;

c. no conduct sheet or criminal record linked to drugs;

d. the offender was going through a difficult period at the time of the offences;

e. the psychological addiction to the drug;

f. documentary evidence of the treatment for addiction to drugs;

g. within two months of his release from the Canadian Forces, the offender had obtained and maintained permanent employment with the same company;

h. the offender resided with his parents and he had acquired a level of maturity and judgement that was not apparent at the time of the offences;

i. the offender had been released from the CF because of his involvement with drugs;

j. the young age of the offender at the time of the offences; and

k. the delay since the offences.

[22] Having considered these aggravating and mitigating factors, the Standing Court Martial sentenced the offender to 45 days of imprisonment and a fine in the amount of $2500. The court suspended the sentence of imprisonment. The Standing Court Martial was of the view that the Court Martial Appeal Court decision in *R. v. Dominie*[1] did not mandate that the offender serve a sentence of imprisonment for the trafficking and use of marijuana in the specific circumstances of that case. The Standing Court Martial felt that the rehabilitation and the reinsertion into society of ex-Private Constantin was very convincing. Incarceration would mean the probable loss of his employment. This loss of employment could lead to a lack of motivation and make the

[1] 2002 CMAC 8.

offender a financial and social burden. The court was impressed by the evidence it had received on the efforts of rehabilitation.

[23] In *R. v. Ennis*, a 2005 Standing Court Martial, the offender was found guilty of three charges of trafficking in cocaine and in ecstacy. The offences involved two separate transactions and the second transaction involved cocaine and ecstacy. The quantities were not large, but the transactions were done for a commercial purposes. The offender had a conduct sheet for absence without leave and for drunkenness. The offender was 21 years old at the time of the offence and had taken active steps to deal with his drug problem before the offences but had been unsuccessful. He had since changed his lifestyle considerably, he was not associating with the drug world, and had not used drugs for many months. He was unemployed and lived with relatives. He attended a bible study group and a narcotics anonymous group. He had been of some assistance to the authorities in identifying other individuals involved in drug use.

[24] Although the profit he made from these transactions was small, the court regarded as a serious matter that he would willingly expose other persons to the peril of such dangerous drugs to provide for his own profit and consumption. He was sentenced to 12 months of imprisonment.

[25] I will now examine the mitigating factors in this case. You were 22 years old at the time of the offences. Although you have a conduct sheet, I do note that the present offences occurred after the first offence on your conduct sheet. This first offence deals with an absence without leave. You have no drug-related offences on your conduct sheet. You do not have a criminal record involving drugs. While these 15 offences tend to demonstrate that you never mastered the concept of discipline while you were in the Canadian Forces, I do not consider these offences to have much impact on the present sentencing phase since they are totally unrelated to these charges.

[26] You did cooperate with the military police. While you did not plead guilty to these charges, you did make admissions that provided this court with the facts that proved beyond a reasonable doubt that you had committed these offences. Your counsel explained that you chose this route because you wish to conserve your right of appeal should you decide to do so. These admissions mean that witnesses do not have to appear before this court martial and probably means a saving of time and money.

[27] It would appear that you do not have any contact with the world of drugs and that you have established a serious relationship and have developed a good social network. You have attempted to work on a permanent basis since your return to Lower Sackville.

[28] I will now examine the aggravating factors of this case. The Parliament of Canada considers that trafficking in cocaine is an extremely serious offence since it has decided that the most severe punishment under Canadian law, life imprisonment, is the

appropriate maximum punishment for this offence. Trafficking in cocaine is condemned by Canadian society because of the harm it causes to individuals and to Canadian society. You had joined the CF only a few months before these offences were committed. Every Canadian citizen knows that the trafficking in cocaine is a serious criminal offence. You were fully aware of the strict CF drug policy.

[29] There is not much in the evidence before me that would make me conclude that you are a responsible person who is actively seeking to improve himself. You only began to look for work when you stopped receiving a monthly income from the Canadian Forces. You described how you only need to complete one correspondence course to obtain your high school diploma and that you could get assistance from your parents and grandparents to pay the $200 fee. Yet you provide no real evidence that demonstrates to this court that you have made any effort to take this course, to obtain your high school diploma, and consequently, hopefully, find yourself a better and permanent job.

[30] You speak of your addiction, yet I have not been provided with any evidence that you would have attempted to use the numerous resources available to CF members that help these CF members deal with addictions. You described your attempts to deal with this addiction since your return to Lower Sackville. You stated that you had not used drugs since your arrival in Lower Sackville, in part, because you did not know where to get drugs. It would appear that you had one visit with your family doctor and would not have yet seen a therapist because you are too low on the waiting list. I can understand that you cannot afford to pay $200 an hour to see a private therapist. You say you could not join a 12-step group, because the meetings were held at a certain distance from your residence and you did not have any means of transportation. Your testimony does not strike as one of a person who truly needs or wants to deal with an addiction to drugs.

[31] You testified that you sold drugs to the UCO to feed your own consumption of cocaine. You were willing to sell drugs on a Defence establishment to another CF member, whom you never met before. You sold drugs to the UCO because Ordinary Seaman Lee had told you the UCO wanted to buy drugs. This was not a case of "social trafficking". This was a case of a person who wanted to benefit from the transaction. You wanted to make money to pay for your own cocaine. You told the UCO you were the only "guy in Nelles Block selling drugs" and that you dealt to six other people in the quarters. By your admissions, you sold drugs to other people on a Defence establishment. Although you are not being sentenced today for the possible sale of cocaine to other residents of Nelles Block, this evidence does tend to demonstrate that, at least, you wanted to present yourself to a relative stranger as a main character in the drug world of Nelles Block. These words represent a higher level of blameworthiness in the

financial transaction of cocaine. Your testimony has not convinced me that you fall in the category of addict as a trafficker that was discussed in *R. v. Lebovitch.*[2]

[32] I find that the prosecutor has not provided the court with the evidence indicting the exact quantity of cocaine that was sold to the UCO on 20 June 2007 and on 22 June 2007. The exact quantity of cocaine to be purchased was discussed between the UCO and ex-Ordinary Seaman Ellis on both occasions, but the admissions or the evidence presented during the sentencing phase of this trial or during the *Charter* motion does not clearly indicate the exact quantity that was actually sold on each occasion. At p. 30 of the sentencing decision in *R. v. Ordinary Seaman Lee*, it is indicated that the actual quantity of drugs sold to the UCO by ex-Ordinary Seaman Ellis on 20 June 2007 was 0.9 grams, although the discussions had been for a quantity of 2 grams and the UCO had paid ex-Ordinary Seaman Ellis $100. Therefore, based on this information found in the *Ordinary Seaman Lee* sentencing decision and the lack of precise evidence in the present case, the court is not ready to conclude the ex-Ordinary Seaman Ellis did in fact sell 3.5 grams of cocaine to the UCO on 22 June 2007, although that was the quantity requested and paid for by the UCO. Nonetheless, the evidence does indicate that you were quite willing to sell increasing amounts of cocaine to another CF member for your personal gain.

[33] Ex-Ordinary Seaman Ellis, stand up. The *Constantin* Standing Court Martial is factually different in important ways from this Standing Court Martial. Ex-Private Constantin pled guilty to one charge of trafficking in marijuana and to one charge of using marijuana. Marijuana is a soft drug, and the maximum sentence for this offence is 5 years' imprisonment for a quantity less than 3 kilograms, and not life imprisonment, as is the case here. Parliament, by this important distinction in maximum sentence, sends a clear message on the severity of the offence of trafficking in cocaine. I do not find that this case offers the same level of mitigation as was present in the *Constantin* Standing Court Martial. While you have made some efforts in rehabilitation and reintegration in society, they fall well short of the evidence found in the *Constantin* Standing Court Martial. You were willing to sell cocaine to other CF members that you did not know for your personal benefit. Your situation falls much closer to the *Ennis* Standing Court Martial.

[34] The Court Martial Appeal Court decisions in *R. v. Dominie* and *R. v. Taylor* provide me the guidance on sentencing an offender guilty of trafficking cocaine.[3] Imprisonment is the appropriate punishment unless extreme mitigating circumstances point to a suspension of the sentence.

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[2](1979) 48 C.C.C. (2d) (Que C.A.).

[3]*Supra* note 1; 2008 CMAC 1 .

[35] I believe this sentence must focus primarily on the denunciation of the conduct of the offender and on general and specific deterrence. It has been said many times by the Court Martial Appeal Court, and by numerous courts martial, that the use and the trafficking of drugs is more serious in the military community because of the very nature of the duties and responsibilities of every CF member in ensuring the safety and the defence of our country and of our fellow Canadian citizen. Our military community cannot tolerate breaches to its strict and well-known policy prohibiting the use of illicit drugs.

[36] I do note that although you have not pled guilty, you did admit all the facts of this case and you did testify and you have expressed some remorse. While you attempted to explain your actions by speaking of an addiction, this court was not presented evidence of any serious attempt to deal with this self-described addiction. The aggravating factors, specifically your willingness to sell increasing quantities of cocaine to another CF member on a Defence establishment for personal gain, lead me to believe that the court must impose a sentence that will provide a clear message to you and to others, and assist you in taking responsibility for your offences. That sentence must include a punishment of imprisonment. This court was not provided with any compelling mitigating evidence that convinces it that a suspension of that punishment is appropriate in the specific circumstances of the offence and of the offender.

[37] Ex-Ordinary Seaman Ellis, the court sentences you to imprisonment for a period of 9 months. You may sit down. This sentence was passed at 1053 hours on 28 March 2009.

[38] I have not considered the making of an order under s. 196.14 of the *National Defence Act* for the taking of DNA samples of the offender because this type of order was not requested by the prosecutor. Also, the prosecutor did not ask the court to make an order prohibiting the offender from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or all such things. Having reviewed the provisions of s 147.1 of the *National Defence Act* and the evidence presented in this trial, I have concluded that such an order is not required in the interests of the safety of any person.

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