



COURT MARTIAL

Citation: *R v Humphrey*, 2011 CM 1009

Date: 20110927

Docket: 201108

Standing Court Martial

Canadian Forces Base Wainwright
Wainwright, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Ex-Private B. Humphrey, Offender

Before: Colonel M. Dutil, C.M.J.

REASONS FOR SENTENCE

(Orally)

[1] Ex-Private Humphrey has entered a plea of guilty to two counts of possession of a substance pursuant to s. 4(1) of the *Controlled Drugs and Substances Act*, that are punishable under s. 130 of the *National Defence Act*. One count involves the possession of a very small but undetermined quantity of cocaine, where the other count refers to a similar quantity of cannabis (marihuana).

[2] It is now incumbent upon me to determine what shall be an appropriate, fair, and just sentence. Counsel for the prosecution recommends that the court impose a sentence that would include a severe reprimand and a fine of \$2,000. Defence counsel suggests that such punishments would be excessive considering the specific circumstances of the offender. In the context of sentencing an offender under the Code of Service Discipline a court martial shall guide itself with the appropriate sentencing purposes, principles, and objectives, including those enunciated in ss. 718.1 and 718.2 of the *Criminal Code*. The fundamental purpose of sentencing at court martial is to contribute to the maintenance of discipline and the respect of the law by imposing punishments that meet one or more of the following objectives: the protection of the public and it includes the inter-

est of the Canadian Forces; the denunciation of the unlawful conduct; the deterrent effect of the punishment, not only on the offender but also upon others who might be tempted to commit such offences; and, the reformation and rehabilitation of the offender.

[3] The sentence must also take into consideration the following principles: the sentence must be commensurate with the gravity of the offence, the previous character of the offender and his/her degree of responsibility; the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A court must also respect the principle that an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances, because punishments in the form of incarceration should be used as a last resort. Finally, the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. However, the court must act with restraint in determining sentence in imposing such punishments that should be the minimum necessary intervention to maintain discipline.

[4] The Court Martial Appeal Court and numerous courts martial have constantly held 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 Canadian Forces member in ensuring the safety and the defence of our country and of our fellow Canadian citizens. The military community cannot tolerate breaches to its strict and well-known policy prohibiting the use of illicit drugs. However, these broad statements must be applied in the context of individual cases and the appropriate sentencing principles and objectives.

[5] In the context of the Canadian Forces the unauthorized possession of drugs should normally attract punishments that promote the principles of denunciation of the conduct and the punishment of the offender as well as general and individual deterrence. It must also allow for the rehabilitation of the offender, including treatment in appropriate circumstances. The fact that a military offender has been administratively released from the Canadian Forces prior to his court martial for his or her involvement in the unauthorized possession of drugs is one of many factors that must be taken into account in determining sentence.

[6] The facts surrounding the commission of the offences were provided to the court in a Statement of Circumstances that indicate the following key elements:

- (a) Ex-Private Humphrey was a member of the Regular Force posted to Land Forces Western Area Training Centre at Canadian Forces Base Wainwright, Alberta. He enrolled as an infantryman in January 2009 and completed the Basic Military Occupation course on 2 October 2009. He was released from the Canadian Forces on 26 August 2010 under the release item 5(f);

- (b) Ex-Private Humphrey was aware of the Canadian Forces Drug Control Programme and Policy. He signed a declaration to that effect on 17 November 2008;
- (c) In April 2010 Canadian Forces National Investigation Service became aware of drug activity at Canadian Forces Base Wainwright. As a result of their investigation video recordings were seized. The recordings depict various Canadian Forces members engaged in a variety of activities, including drug activities, in and around the area of Canadian Forces Base Wainwright. Ex-Private Humphrey is shown on a number of these videos engaged in the use and possession of controlled substances, most notably cannabis (marihuana) and cocaine;
- (d) On the first video ex-Private Humphrey was seen riding in a car with other Canadian Forces members. He was holding a takeout food box upon which another Canadian Forces member was seen rolling a cigarette of cannabis (marihuana), a substance included in Schedule II of the *Controlled Drugs and Substances Act*. Ex-Private Humphrey was seen moving some of the cannabis (marihuana) around on the top of the box with his finger. The vehicle stopped in a field in the area of Canadian Forces Base Wainwright. All the occupants were seen to exit the vehicle. The group then shared a cigarette of cannabis (marihuana). Ex-Private Humphrey was seen in possession of the cigarette of cannabis (marihuana) and was seen smoking it while discussing the prospect of being searched for drugs by the military police;
- (e) Another video was recorded on 10 April 2010. In this video a small amount of powder cocaine, a substance included in Schedule I of the *Controlled Drugs and Substances Act*, was seen on a magazine that was on a table in a room in building 626, an accommodation building at Canadian Forces Base Wainwright. An individual was sitting on a chair next to the table, that person was seen inhaling a portion of cocaine. The individual left the seat and ex-Private Humphrey took his place. Ex-Private Humphrey was seen cutting or dividing the cocaine with a military identification card. As he was cutting the cocaine voices were heard discussing the amount of cocaine that they had received. All parties agreed that they got "jewed" because the amount was not what they had paid for. Ex-Private Humphrey was seen on the video separating out a small portion of the cocaine and inhaling it with a rolled five dollar bill which he used as a straw. As ex-Private Humphrey finished inhaling, the person filming said, "Ah, the coke goes in the nose." Ex-Private Humphrey then got up from the chair;
- (f) On 3 June 2010 ex-Private Humphrey met with investigators and he was cooperative throughout the interview. He admitted to having been addicted to various substances including ecstasy and Valium. Prior to

seeking treatment he was smoking cannabis (marihuana) on a daily basis. He indicated to the investigators that he only used cocaine three or four times while in Wainwright because it was not readily available;

- (g) After being showed the videos ex-Private Humphrey admitted that the substance observed in those videos were first cannabis (marihuana) and second cocaine; and
- (h) Ex-Private Humphrey completed a 42-day drug rehabilitation programme at the Sunshine Coast Health Centre in Powel River, British Columbia. He attended that programme from 19 April 2010 to 31 May 2010.

[7] The aggravating factors in this case are the following:

- (a) The objective gravity of the offences for which the offender has pleaded guilty. For example, a person found guilty of possession of cocaine, a substance included in Schedule I of the *Controlled Drugs and Substances Act*, is liable to imprisonment for a term not exceeding seven years if prosecuted by indictment, where the possession of cannabis (marihuana) could attract imprisonment for a term up to five years less a day. However, it is fair to say that the maximum punishments are significantly reduced when a person is found guilty of similar offences on summary conviction;
- (b) Another aggravating factor is the fact that ex-Private Humphrey knew expressly the Canadian Forces Drug Control Programme and Policy;
- (c) In addition the court considers to be aggravating the fact that the offences were committed on and near Canadian Forces Base Wainwright, a defence establishment; and
- (d) Finally, the court considers to be aggravating the fact that ex-Private Humphrey was found in possession in the presence of other service persons.

[8] However, the important mitigating factors consist of the following:

- (a) The pleas of guilty at the first opportunity in combination with the full cooperation with police authorities during the investigation. In the context, I accept these facts as a genuine acceptance of responsibility and remorse;
- (b) The fact that ex-Private Humphrey had taken steps prior to the completion of the investigation and has completed a rehabilitation programme

with regard to substance abuse and addiction prior to be released from the Canadian Forces in August 2010;

- (c) The young age of ex-Private Humphrey as well as his personal and financial situation. He is 21 years old and has no income. The evidence filed with the court reveals that ex-Private Humphrey is unemployed and continues to rely entirely on his mother and his brother for financial support. To his credit, he employed his time to obtain his high school diploma after being released from the Canadian Forces. This will prove to be an important investment, because ex-Private Humphrey testified that he now intends to further his education at Western University;
- (d) The fact that ex-Private Humphrey has been released from the Canadian Forces under Item 5(f) in August 2010 for reasons related to his drug abuse and prior to the completion of this court martial. This decision by the chain of command may have been totally appropriate and the court does not question those reasons, but it constitutes a fact that caused serious consequences to the offender that the court must take into account; and
- (e) Finally, the fact that ex-Private Humphrey had no prior criminal or disciplinary record.

[9] I have reviewed the case law provided to the court by the prosecution in support of its recommendation. As in *R v Johnstone*, 2007 CM 4007, delivered on 20 February 2007, this case involves a young private who pleaded guilty to possession of small quantities of cocaine and marihuana who cooperated with investigative authorities. In the case of *Johnstone*, the offender had a previous record but not related to drug abuse. Both offenders had addiction problems and attended at a rehabilitation programme prior to the judicial proceedings. The significant difference in these cases lies in the documented decision of the unit to recommend retention pending the results of the court martial. The court is not aware if in *Johnstone* the person was released or not after the completion of the proceedings. Like in *Johnstone*, the prosecution recommends that the sentence must emphasize denunciation and general deterrence. In *Johnstone*, the court agreed with that proposition in accepting a joint submission on sentence that consisted in a fine in the amount of \$1500. In accepting this recommendation the military judge expressed the view that rehabilitation was not to be considered as an important factor since the evidence suggested that the offender had rehabilitated himself through the use of the available addiction counselling services provided by the Canadian Forces.

[10] I strongly believe that the rehabilitation of persons suffering from drug addictions is normally an ongoing process. It may well be that the evidence offered in *Johnstone* could satisfy the military judge that the offender was definitely cured of his addiction. However, it must be understood that the principle of rehabilitation in the sentencing process does not refer to the cure of an individual. That is not what rehabilitation means, it is part of rehabilitation but it is not the full expression. Rehabilitation refers to

a broader concept; that is, the reintegration of the offender in society, i.e., military and civilian. It is particularly important for youthful and first offenders that should receive punishments that promote individual deterrence and rehabilitation. These principles apply equally to this case along with the principles of general deterrence and denunciation.

[11] Ex-Private Humphrey's experience in the Canadian Forces was certainly inconclusive. He enrolled at 18 years of age after completion of three years at high school. Less than a year after completion of Basic Military Qualification he was released from the Canadian Forces for his violation of the Canadian Forces Drug Control Programme. He now stands here after having pleaded guilty to two counts of possession of small amounts of marihuana and cocaine. Ex-Private Humphrey is now 21 years old with nothing to look forward, although some may say that it is largely self-inflicted. Ex-Private Humphrey may have committed these offences while subject to the Code of Service Discipline, it remains that he is a young adult and first offender who must now integrate civilian society and be provided with the opportunity to contribute to our Canadian society in a positive way. In these circumstances, I see no valid reason or purpose that would support a sentence more severe than the one imposed in *Johnstone*.

FOR THESE REASONS, THE COURT:

[12] **FINDS** the offender, ex-Private Humphrey, guilty of the fourth and sixth charges for possession of substances; namely, cocaine and cannabis (marihuana), pursuant to S. 4(1) of the *Controlled Drugs and Substances Act*, that are punishable under s. 130 of the *National Defence Act*.

[13] **SENTENCES** the offender, ex-Private Humphrey, to a fine in the amount of \$1500. The fine is payable in three equal payments of \$500 each. The first payment will be no later than the 1st of March 2012, the second payment no later than 1 Aug 2012, and the last and final payment no later than 1st January 2013. These payments have to be made by certified cheque to the Receiver General of Canada at the attention of: Canadian Forces Legal Advisor/Claims at 305 Rideau Street, Ottawa, Ontario, K1A 0K2.

Counsel:

Lieutenant-Commander S.C. Leonard, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major D. Berntsen, Directorate of Defence Counsel Services
Counsel for ex-Private B. Humphrey