COURT MARTIAL

Citation: *R. v. Wright*, 2012 CM 2008

Date: 20120726
Docket: 201210

Standing Court Martial

Canadian Forces Base Wainwright
Wainwright, Alberta

Between:

Her Majesty the Queen

- and -

Ex-Corporal M.D. Wright, Accused

Before: Commander P.J. Lamont, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Having accepted and recorded your pleas of guilty to two charges, a charge of possession of cannabis marijuana contrary to section 4 of the *Controlled Drugs and Substances Act* (*CDSA*), and in the third charge a charge of unlawfully producing a Schedule III substance, Dimethyltryptamine (DMT) contrary to section 7 of the *CDSA*, and having considered the alleged and admitted facts of these offences, this court now finds you guilty of the two charges.

[2] It now falls to me to determine and to pass a sentence upon you. In so doing I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have as well considered the facts of the case as disclosed in the materials submitted during the course of the sentencing hearing, as well as the submissions of counsel, both for the prosecution and for the defence.

[3] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in each individual case. The sentence should be broadly commensurate with the gravity of the offence and the blameworthiness or degree of responsibility and character of the offender. The court is guided by the sentences imposed by other courts in previous similar cases, not out of a slavish adherence to precedent, but because it appeals to our common sense of justice that like cases should be treated in similar ways. Nevertheless, in imposing sentence the court takes account of the many factors that distinguish the particular case it is dealing with, both the aggravating circumstances that may call for a more severe punishment and the mitigating circumstances that may reduce a sentence.

[4] The goals and objectives of sentencing have been expressed in different ways in many previous cases. Generally, they relate to the protection of society, of which of course the Canadian Forces is a part, by fostering and maintaining a just, a peaceful, a safe, and a law-abiding community. Importantly, in the context of the Canadian Forces, these objectives include the maintenance of discipline, that habit of obedience which is so necessary to the effectiveness of an armed force. The goals and objectives also include deterrence of the individual so that the conduct of the offender is not repeated, and general deterrence so that others will not be led to follow the example of the offender. Other goals include the rehabilitation of the offender, the promotion of a sense of responsibility in the offender, and the denunciation of unlawful behaviour. One or more of these objectives will inevitably predominate in crafting a fit sentence in an individual case, yet it should not be lost sight of that each of these goals calls for the attention of the sentencing court, and a fit and just sentence should reflect an appropriate blending of these goals, tailored to the particular circumstances of the case.

[5] As I told you when you tendered your pleas of guilty, section 139 of the *National Defence Act* prescribes the possible punishments that may be imposed at court martial. Those possible punishments are limited by the provision of the law which creates the offence and provides for a maximum punishment. Only one sentence is imposed upon an offender whether the offender is found guilty of one or more different offences, but the sentence may consist of more than one punishment. It is an important principle that the court should impose the least severe punishment that will maintain discipline.

[6] In arriving at the sentence in this case, I have considered the direct and indirect consequences for the offender of the findings of guilt and the sentence I am about to pronounce.

[7] The circumstances of these offences are set out in writing in Exhibit 7, the statement of circumstances. On 23 April 2010 members of the Canadian Forces National Investigation Service (NIS) discovered a production or extraction facility for the drug known as DMT in an unassigned locker across the hall from a room occupied by the offender in a barracks building on the base at CFB Wainwright. The facility consisted of a number of chemicals and items of equipment used to extract DMT from the bark of the mimosa tree. At some unspecified time prior to April of 2010 the offender acquired a quantity of mimosa bark through the mail, and stored it in the locker with the

chemicals and equipment used to obtain the DMT from the tree bark. Upon the discovery the building was evacuated, the hazardous materials handling unit was called in, and the materials were removed.

[8] MrW.K. Jeffery, a toxicology consultant in Burnaby, British Columbia, assisted the NIS in the investigation. In his opinion the "clandestine laboratory" discovered by the NIS would be classified as a non-sophisticated extraction laboratory. The quantity of mimosa bark seized in this case would yield approximately 1,870 milligrams of drug, or about 37 individual average street level doses. Mr Jeffery opines that "Dimethyltryptamine (DMT) is classified as a powerfully short acting hallucinogenic drug similar to LSD." In addition to the above, a small quantity of cannabis marijuana, 16 grams, was found in the locker used by the offender.

[9] Counsel before me jointly submitted that a fit sentence in this case is dismissal from Her Majesty's Service and a fine in the amount of $1,000. The prosecution also seeks a weapons prohibition order and an order for the collection of DNA samples, and the defence does not oppose the making of these ancillary orders.

[10] The sentence to be pronounced is, of course, a matter for the court, but where, as in this case, both parties agree on a recommended disposition, that recommendation carries considerable weight with the court. The courts of appeal across Canada, including the Court Martial Appeal Court in the case of *Private Chadwick Taylor*, 2008 CMAC-1, and in other cases, have held that the joint submission of counsel as to sentence should be accepted by the court unless the recommended sentence would bring the administration of justice into disrepute, or is otherwise contrary to the public interest.

[11] Counsel before me were unable to find any previous sentencing case authorities dealing with the drug DMT, either in a military or a civilian context. At the conclusion of their addresses on 5 June 2012 I stated that on the evidence and submissions before me I had considerable difficulty with the sentence jointly proposed, and I gave counsel the opportunity to add any information by way of evidence or submissions that they thought appropriate. The invitation was declined. I then intimated that the evidence and submissions on the nature of the substance DMT were not entirely consistent. For example, while Mr Jeffery characterized DMT as being similar in some ways to LSD, counsel for Mr Wright invited the court to analogize for sentencing purposes to cases dealing with soft drugs such as marijuana. I therefore required the production of further evidence to address this concern, and since 5 June prosecution counsel has diligently sought and obtained a report from Dr Hanan Abramovici, a highly qualified neuroscientist presently employed by Health Canada. Dr Abramovici's report was filed as exhibit 9.

[12] From a review of the scientific literature Dr Abramovici concludes that LSD appears to be the most potent of four Schedule III hallucinogens studied, followed by Psilocybin. DMT is much less potent than LSD and Mescaline the least potent of the four. The physiological effects of the four hallucinogens are similar, as are the psychotropic or psychological effects. For DMT these include vivid alterations of visual, audi-

tory and tactile perception, illusions, and abnormal somatic sensations, auditory and visual hallucinations, paranoia, disordered thought and changes in mood. There is a small risk of direct physical harm resulting from the use of hallucinogens, but there is a greater risk of short-term psychological harm. DMT does not pose serious long-term psychological harm, except perhaps for persons suffering from psychiatric or mood disorders. Dr Abramovici states "persons under the influence of hallucinogens, including DMT, may be unable to properly interact or communicate with others. Their cognitive and motor skills may also be compromised and as such they may be more prone to self-harm or to harm others." Like the other hallucinogens studied, DMT is not considered to be addictive.

[13] It is apparent therefore that the use of DMT or other hallucinogens in a military environment poses substantial risks not only to the user but also to other persons. In the case of *Ordinary Seaman Ennis* I referred to a passage from the judgment of Mr Justice Addy speaking for the Court Martial Appeal Court in the 1985 case of *R v Maceachern* (1985) 24 C.C.C. (3d) at page 439:

> [Because] of the particularly important 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 the 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.

[14] In *Ennis* I said of this particular passage "in my view, those statements are as true today as they were when they were first made in 1985. These considerations fully justify a sentence involving incarceration even for a first disciplinary [drug] offence in the interests of general deterrence."

[15] This is not to say that drug offences in a military context will always attract a term of incarceration. Incarceration is a punishment of last resort, and there are many cases where first-time military offenders against the drug laws have been punished without either detention or imprisonment. It is trite to say that one must have regard for all the circumstances both of the offence and of the offender, and weigh the efficacy and appropriateness of all of the applicable sentencing options.

[16] In the present case I am forced to the conclusions that a sentence of incarceration is called for and that the proposed sentence of dismissal and a fine is not only wholly inadequate to vindicate the principles of deterrence, but also is so inadequate a sen-

tencing response as to bring the administration of justice into disrepute were it to be imposed.

[17] I do not come to this conclusion lightly. The proposed sentence is advanced by competent and experienced counsel after, no doubt, mature deliberation and perhaps a process of negotiation. The offender has knowingly traded his right to a trial, with its attendant uncertainties, for the relative certainty offered by an arrangement with the prosecutor for an agreed sentence.

[18] Against these considerations I must weigh the seriousness of the offences. DMT is one of the hallucinogens proscribed in Schedule III. For sentencing purposes the *CDSA* classifies DMT with other substances the production of which can attract a maximum punishment on indictment of ten years imprisonment. Judging by the paucity of case law this particular drug is relatively rarely brought before a civilian court, and is entirely unknown, until now, in the context of military justice. In the British Columbia case of *R v Van der Heyden* [1998] B.C.J. No. 2891 a five-year penitentiary sentence was imposed on an individual who supervised what was described as a massive lab engaged in the production of DMT and other Schedule III substances. A four year sentence was imposed in the Manitoba case of *R v Grace* 2007 MBQB 143 for the large-scale production of three Schedule III substances, not including DMT. In that case the sentencing court heard expert evidence on the risk of explosion and fire posed by the operation of secret laboratories for the production of these substances. While there is no evidence before me of a risk of explosion or fire from the use of chemicals and processes in the production of DMT, one cannot ignore the tendency in the reported cases for the operators of secret drug laboratories to apply their expertise to the production of several different illegal substances.

[19] The offence of production of this substance involves a conscious decision to engage in illegal behaviour with some element of forethought and planning. And in the present case, the offender was also in possession of a second less serious drug, cannabis marijuana.

[20] All these factors lead me to the conclusion that in this case the production of DMT in a secret laboratory on a military base must result in a sentence involving incarceration.

[21] I am mindful, of course, of the personal circumstances of the offender. He was 20 years of age at the time of these offences, and had only been in the Regular Force for less than a year and a half after a short period of Reserve Force service. He was released as unsuitable for further service within two months of the offence being discovered. He has now made the transition to civilian life in Toronto where he hopes to become an electrician. He has no dependents. He appears to have been of good behaviour throughout the lengthy period from the time of these offences until final disposition in court, although he has one previous conviction in the civil court for an offence of assault.

[22] I have considered whether the punishment of incarceration should be suspended. In my view this is a proper case to order suspension principally for the following reasons:

1. The lengthy delay from the date of the offences until final disposition;

2. The good behaviour of the offender through-out that lengthy period; and

3. The relatively small scale and lack of sophistication of the secret laboratory in this case.

[23] There will be an order in the usual terms prohibiting the possession by the offender of weapons. Were these offences prosecuted in the civilian courts a weapons prohibition order for at least 10 years would be mandatory under the provisions of section 109 of the *Criminal Code*. I order pursuant to section 147.1 of the *National Defence Act* that the offender be prohibited from possessing weapons for a period of 10 years.

[24] The offence of producing DMT contrary to section 7 of the *CDSA* is a "secondary designated offence" within the meaning of section 196.11 of the *National Defence Act*. In this case I consider it to be in the best interests of the administration of military justice to order the giving of suitable samples for DNA analysis, and I so order in the usual terms.

FOR THESE REASONS, THE COURT:

[25] **FINDS** you guilty of the first charge, for an offence under section 130 of the *National Defence Act* and guilty of the third charge, for an offence under section 130 of the *National Defence Act*.

[26] **SENTENCES** you to imprisonment for a period of four months and dismissal from the Canadian Forces.

[27] **SUSPENDS** the carrying into effect of the punishment of imprisonment.

Counsel:

Major D. Curliss, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major D. Hodson, Directorate of Defence Counsel Services
Counsel for ex-Cpl Wright