



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Summers*, 2017 NLCA 20

Date: March 17, 2017

Docket: 201601H0061

BETWEEN:

BLAIR SUMMERS

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201501G2680

Appeal Heard: March 10, 2017

Judgment Rendered: March 17, 2017

Reasons for Judgment by Welsh J.A.

Concurred in by White and Harrington JJ.A.

Counsel for the Appellant: Stephen P. Orr

Counsel for the Respondent: Vikas Khaladkar

Welsh J.A.:

[1] Mr. Summers was sentenced to three years in prison after being convicted of breaking into a pharmacy with two accomplices and stealing narcotics. He applies for leave to appeal against sentence and, if granted, appeals the sentence.

Leave to Appeal

[2] Leave of the Court is required where a convicted person appeals against sentence only (section 675(1)(b) of the *Criminal Code*). The test to be applied is whether the appeal is “frivolous in the sense of having no arguable basis or sufficient merit” (*R. v. Murphy*, 2011 NLCA 16, 304 Nfld. & P.E.I.R. 266, at paragraph 8).

[3] In this case, I would grant leave to appeal on the basis that, given the submissions of counsel, there appears to be some uncertainty as to the appropriate range of sentence where the commercial building that was broken into is a pharmacy and the object is the theft of narcotics.

The Appeal

Background

[4] Mr. Summers was charged under section 348(1)(b) of the *Criminal Code*, which provides:

Every one who

...

(b) breaks and enters a place and commits an indictable offence therein, ...

is guilty

...

(e) if the offence is committed in relation to a place other than a dwelling house, of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.

[5] The relevant facts are set out in an Agreed Statement of Facts. In summary, between 5:30 and 6:00 a.m. on February 6, 2011, with their faces concealed, Mr. Summers and two accomplices broke into a pharmacy by

smashing a door. They stole a quantity of drugs including narcotics which were kept in a locked cupboard located behind the druggist's counter. In June 2014, based on DNA analysis of blood left at the scene, Mr. Summers was charged. He admitted he had participated in the break and entry and theft and entered a guilty plea. He was sentenced on May 13, 2016.

[6] The stolen drugs were not recovered and the names of the accomplices were never divulged. For purposes of sentencing, Mr. Summers did not provide any explanation regarding the nature or extent of his involvement in the venture. Neither did he explain what happened to the drugs. It can be assumed that at least some were sold for profit on the street.

[7] Mr. Summers submits that the range of sentence for breaking into a commercial building is nine to twelve months imprisonment, and that this range applies equally to a pharmacy and the theft of drugs.

The Range of Sentence

[8] The break and entry into a pharmacy and theft of drugs was considered by this Court in *R. v. Penney*, 2005 NLCA 31, 247 Nfld. & P.E.I.R. 333. The Court was unanimous that a sentence of twenty-four months was appropriate in the circumstances. Rowe J.A. concluded:

[21] In light of the foregoing and having regard to the sentencing principles set out in s. 718 *et seq* of the *Criminal Code*, a fit sentence for this offence is 24 months. (Thus, by a different route, I have come to the same destination as did the Trial Judge.) This sentence might well have been longer had Mr. Penney not assisted the police in retrieving all the stolen pharmaceuticals and pleaded guilty.

(Emphasis added.)

[9] In reaching this conclusion, Rowe J.A. emphasized the costs to society resulting from the use of and trade in illegal hard drugs. Further, because pharmacies store quantities of narcotics, they require special protection against this type of offence, a concern which should be reflected in the sentence. Taking these factors into account, it follows that breaking into a pharmacy and stealing narcotics is significantly more serious than breaking into a commercial building to steal items, such as electronics, to sell for money. (I make no comment on Mr. Summers' submission that the appropriate range of sentence for the latter is nine to twelve months imprisonment.)

[10] In sentencing Mr. Summers, in his oral decision, the trial judge explained:

... The mitigating factors include the guilty plea and the fact that the accused has been in custody for the past 326 days. The aggravating factors include the loss of \$5,000.00 worth of drugs and the damage to the pharmacy in the amount of \$1,500.00 to \$2,000.00. The most aggravating factor is the extensive criminal record of the accused as it is outlined in Consent 3. From 2004 to 2012 the convictions are as follows: robbery, armed robbery, disguised with intent, carrying a concealed weapon, resisting or obstructing a police officer. In addition to these serious criminal offences, the accused was found guilty of the following repeated criminal offenses: fourteen convictions for fraud under \$5,000.00, five convictions for possession of stolen credit cards, four convictions for possession of property obtained by a crime and nine convictions for a breach of either a probation order, undertaking or recognizance. ...

[11] The judge referred to *Penney* to conclude that:

... The court considered a theft of drugs from a pharmacy to be a very serious crime and especially in the case of narcotics because the sale and distribution of such drugs in the community is very destructive to our society.

[12] The judge distinguished *Penney* on the bases that Mr. Penney cooperated with the police in the recovery of the drugs, the drugs were not narcotics, Mr. Summers' criminal record was "much more extensive" than Mr. Penney's, and Mr. Summers' offences here involved "a great deal of planning" involving three individuals whereas Mr. Penney acted alone.

[13] Taking into account the mitigating and aggravating factors, Mr. Summers' age (thirty-two years), the *Penney* decision, and the relevant principles of sentencing, the trial judge imposed a term of imprisonment of three years. There is no basis on which to conclude that this sentence falls outside an appropriate range or is otherwise unfit.

Disposition

[14] I would grant leave to appeal, but would dismiss the appeal.

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

M. F. Harrington J.A.