

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CRI 2008-055-000573

QUEEN

v

NICHOLAS WILDE

Hearing: 7 July 2009

Appearances: A M Wharepouri for the Crown
D J Blaikie for the Prisoner

Judgment: 7 July 2009

SENTENCING NOTES OF WYLIE J

Solicitors:
Crown Solicitor, P O Box 2213, Auckland
D J Blaikie, P O Box 382, Kaikohe 0

[1] Mr Wilde, you have pleaded guilty to four charges. Two are under the Misuse of Drugs Act 1975 and the other two are under the Arms Act 1983. The charges are as follows:

- a) Possession of the Class A controlled drug methamphetamine for the purpose of supply contrary to s 6(1)(f) of the Misuse of Drugs Act 1975. This offence carries a maximum penalty of life imprisonment.
- b) Possession of equipment, namely laboratory glassware and a portable gas stove, which was capable of being used in or for the manufacture of methamphetamine, intending the equipment to be used for that purpose. This is an offence pursuant to s 12A(2) of the Misuse of Drugs Act 1975 and it carries a maximum penalty of five years' imprisonment.
- c) Possession of a .22 calibre pistol without any lawful, proper and sufficient purpose. This is an offence pursuant to s 45(1) of the Arms Act 1983, and it carries a maximum penalty of four years' imprisonment.
- d) Possession of explosives – namely .22 calibre bullets – except for some lawful, proper and sufficient purpose. Again this is an offence pursuant to s 45(1) of the Arms Act 1983, and it carries a maximum penalty of four years' imprisonment.

[2] Your guilty plea was entered on the morning of the scheduled trial on 18 May 2009, some 17 months following the time of the offending. The guilty plea followed a judgment given by Harrison J on 30 April 2009, where His Honour dismissed a challenge by you to the legality of a search undertaken by the Police, and dismissed an application by you for an order discharging you on various of the counts you then faced.

Relevant background facts

[3] On Sunday 6 January 2008 you and your partner became involved in a heated domestic dispute. Your partner ran to a neighbouring house where she complained to the occupier, who then called the Police.

[4] The Police arrived at your address, and searched the property occupied by you and your partner. The initial search was conducted pursuant to the Arms Act. While conducting a search of out buildings on your property, the Police located a shipping container. That shipping container was entered by the Police, and equipment and chemicals capable of being used for the manufacture of drugs, namely methamphetamine, were found.

[5] In the master bedroom of your house, the Police located a .22 calibre pistol in a leather holster attached to a canvas-type duty belt. The belt also had a pouch attached and had a small sealed case containing live rounds of .22 calibre bullets. The belt and the holster were inside a canvas bowling bag under and at the foot of your bed. A check of the weapon revealed a magazine clip attached and a live round in the chamber. The pistol however was inoperable, because it had a broken firing pin. That pin could have been easily repaired by somebody with basic engineering skills.

[6] Also located in the top drawer of the dresser in the master bedroom was a plastic bag containing approximately .5 of a gram of methamphetamine, and various items of associated drug paraphernalia, and what the Police believe was a tick list.

[7] The Police also located keys to a safe. Inside the safe the Police found a large amount of money amounting to some \$85,750 in \$100, \$50, \$20, \$10 and \$5 notes. The Police contend that that money is the proceeds of crime, and that it is properly subject to forfeiture to the Crown. I am told by your counsel that that money may be forfeited to the Crown through the Inland Revenue Department. It is asserted on your behalf that it came from your business, albeit that no tax or GST has been paid in relation to it.

[8] You were not present during the search, but a few days later you were located at the address, and taken into custody. You declined to give an explanation, and exercised your right to remain silent.

Pre-sentence report

[9] I have received a full and helpful pre-sentence report.

[10] The Probation Officer reports that you are a 37 year old man of European heritage, who started life in Kaitaia with your family. You were the second son in a family of four boys. Unfortunately you lost your mother at a relatively early age, and your father moved the family to Auckland. You report that your father was a “good man”. He sent you and your brothers to board at Dilworth School in Epsom. However you had significant learning issues as a child, and struggled unsuccessfully for years with both reading and writing.

[11] You advised the Probation Officer that you left Dilworth at the end of the 4th Form, and attended a programme for work skills at Onehunga High School. You then began your working life wrecking cars. Over time you acquired skills as a car mechanic.

[12] At a relatively early age you entered into a relationship with your first partner. You had both a son and a daughter from that relationship. That son is now aged 18 years old, and your daughter is 16 years old. You stated to the Probation Officer that you maintain contact with them.

[13] About seven years ago you developed a long term relationship with your current partner, and you and she have two young children.

[14] You have a passion for motorbikes, and some years ago you became involved in a motorbike gang known as the “45s”. More recently you have run a business – known as Honda Car Wreckers – with one of your brothers.

[15] Unfortunately you have a history of illegal drug use, and you have admitted using methamphetamine on a reasonably regular basis. Your brother reported to the Probation Officer that you started using methamphetamine while you were involved with the 45s Motorcycle Club. When you left that club, your brother reported that “tentacles” followed, and that former associates have since interfered in your life.

[16] You have accepted the summary of facts which I have noted above, and as I have also noted, you have pleaded guilty. You did however state to the Probation Officer that the methamphetamine, the subject of the possession for supply charge, was for your own personal use, and not for supply. You have also stated that the pistol belonged to a friend who was in the care of mental health services, and that you had retained it because it was “not the sort of thing you can throw away”.

[17] You told the Probation Officer that, at the time of your offending, you were under stress. Your car wrecking business was not going well, and there were GST issues to deal with. You have also stated that you had been keeping cash from the business to buy drugs, and that you had relationship issues with your partner, in particular over matters financial. The main factors identified as contributing to your offending are your use of methamphetamine, combined with what the Probation Officer called “a sense of entitlement and [an] offending supportive attitude, and involvement with offending supportive associates”. The Probation Officer also reports that you have been identified as having a propensity for violence, given that you had a loaded firearm in your bedroom.

[18] The Probation Officer states that you had difficulty talking about your offending, and doubts you can be said to have a low risk of reoffending. This is because of your admitted use of methamphetamine over a number of years, and your tendency to minimise or shift responsibility when discussing your offending.

[19] On a positive side, the Probation Officer reports that you were polite, and that you gave detailed explanations when asked questions about your offending. The Probation Officer also noted that towards the end of the interview, you stated that you knew that you had messed up, and that you would do whatever it takes. As I understand it, you still have the support of your family and your partner. You have

indicated a preparedness to attend a counselling programme, although you have not as yet taken any active steps in that regard.

[20] I have also received a helpful letter from your elder brother. He has detailed the strains that you were under, particularly following your mother's death. He records that you lack essential communication tools and social skills, and that you struggle to communicate without being misunderstood. He reports that you are a loyal person to those that you love, and that you have been searching to find a place that you consider home, and where you can fit in. In recent times, you have resided with your brother at his home in Northland. This seems to have had a positive effect on you. Your brother observed that you were happy and healthy, and that your highs became natural, and not substance induced highs. Your brother expresses the hope that with the support of your family, you will be able to face the issues and overcome the obstacles that you face. He reports that you are well aware of the bad judgments you have made in the past, and that you regret those decisions.

Submissions received

[21] I have received helpful submissions from both Mr Wharepouri for the Crown, and from Mr Blaikie on your behalf.

[22] Both counsel accepted that the lead offence for sentencing purposes is that of possession of methamphetamine for supply. Both referred to the decision of the Court of Appeal in *R v Fatu* [2006] 2 NZLR 72, where that Court discusses and sets sentencing guidelines for those involved in the manufacture, supply and importation of methamphetamine. Both submitted that your offending fell within what is known as Band 1 in *Fatu*. Band 1 offending deals with low level supply – less than 5 grams – and suggests that a starting point for such offending falls between 2 and 4 years' imprisonment.

[23] I note that *Fatu* does not directly consider the offence of possession for supply, but it can be extended to cover that situation – see *R v Conway* CA275/04, 23 March 2005.

[24] Mr Wharepouri for the Crown emphasised ss 7.1(b), 7.1(e) and 7.1(f) of the Sentencing Act. He also referred to s 8. He suggested that the purposes of the Act could not be achieved by any sentence other than one of imprisonment, and that no other sentence would be consistent with the principles set out in the Act.

[25] He submitted that there were three aggravating factors – first, commerciality, secondly, the presence of a firearm and ammunition, and thirdly, a previous conviction you have for being in an unlawful possession of a firearm. He accepted that I must have regard to mitigating factors, and acknowledged that you are entitled to a credit for your guilty plea. He suggested that the appropriate discount for that plea was 10%, given that it was entered at a very late stage. He referred to the pre-sentence report, and to a number of authorities he suggested were relevant. He then submitted that you were involved in the supply of methamphetamine for commercial gain. He argued that the large amount of money found in your possession suggested that the supply had been ongoing for some time. He suggested that your culpability should be viewed towards the upper end of Band 1 in *Fatu*, and that a starting point of around 3 years' imprisonment was appropriate. He then suggested that there should be a 6 month uplift for the presence of a firearm and ammunition.

[26] Mr Blaikie on your behalf accepted that a sentence of imprisonment was appropriate. He also accepted that there should be what he called a “discrete” uplift in the starting sentence to which you are subject to reflect the possession of the pistol and ammunition. He argued that there should no further uplift for the possession of equipment charge, on the basis that the guilty plea to that charge have been entered on the understanding the Crown would not be seeking such an uplift.

[27] He submitted that the sentencing should proceed on the basis of the actual offending which has been admitted by you, or which the Crown can prove. In this regard he pointed out that the Crown could not prove any actual sales of methamphetamine, and that you should be sentenced on the basis of possession for supply of .5 grams of methamphetamine only. He submitted that this quantity was at the very lower end of Band 1 in *Fatu*. He drew my attention to [32] in that decision, where the Court accepted that in appropriate cases, a sentencing Judge can go

outside and below the bands suggested in *Fatu*, particularly where the quantity of drug found is small, or where the supply was to be to friends.

[28] He also pointed out that the pistol found in your possession was inoperable.

[29] He submitted that there were no aggravating features, and that you were entitled to a credit for your guilty plea, and for your relative lack of previous offending. He noted that the only relevant previous offence was a conviction for unlawful possession of a firearm in 2008. He noted that at the age of 37, you have no previous drug convictions.

[30] While accepting that personal circumstances do not count for much in relation to drug related offending, he did submit that I should take account of the fact that you had difficulty communicating and relating to other people, and he referred to the letter which I have received from your brother.

Approach to sentencing

[31] I have considered the principles set out in ss 7 and 8 of the Sentencing Act 2002. I have had particular regard to the need to hold you accountable for the potential harm that you could have done to the community by your offending, the need to promote in you a sense of responsibility for, and acknowledgement of that harm, and the need to denounce the conduct in which you were involved. I am also mindful of the need to deter others from committing the same or similar offences. I have taken into account the gravity of your offending, including your degree of culpability. I have considered the seriousness of this type of offence, and the general desirability of consistency with appropriate sentencing levels with similar offenders committing similar offences. I am mindful that I must also impose the least restrictive outcome that is appropriate in the circumstances.

Discussion

[32] As I have noted, *Fatu* is the guideline judgment to be used in relation to methamphetamine related offending.

[33] Having considered the materials before me, and the submissions received from counsel, I accept that your offending falls within Band 1 in *Fatu*. The amount of methamphetamine found in your possession was relatively small – .5 grams. The Crown submits that the substantial sum of money, and other items found in your possession, evidence commercial drug dealing. Mr Blaikie submits that the monies came from your business, which operated on a cash basis, but which was not registered for GST, and which did not pay any other taxes. He pointed out that the summary of facts reflects the fact that while the Crown do not concede that the monies were not derived from criminal activity, it leaves open the possibility they may have come from lawful but untaxed business activities. I am told by Mr Blaikie from the bar that the monies may be referred by the Police to the Inland Revenue Department, and thereby forfeited to the Crown through that agency by way of default assessments and penalties due under the relevant tax statutes.

[34] For present purposes, I accept Mr Blaikie's submissions and acknowledge that you must be sentenced by reference only to the offending which you have admitted, or which the Crown can prove. Nevertheless I note that your plea of guilty was to the charge of possession for supply. While you told the Probation Officer that the drug was in your possession for your own personal use, I am unable to place any weight on that assertion, given that your plea of guilty was to the charge of possession for supply.

[35] I am also mindful of the fact that methamphetamine is a pernicious and evil drug. It is responsible for much criminal activity in society, and those involved in its supply need to be denounced in the strongest terms possible.

[36] In reaching the appropriate starting point, I have had regard to a number of cases dealing with similar quantities of methamphetamine, including those referred to me by the Crown. I have referred to the decision in *R v Hughes* [2007] NZCA 73,

where the Court of Appeal held that a starting point of 3 years was within the range appropriate to possession of .5 grams of methamphetamine. I have also referred to the decision of the Court of Appeal in *R v Conway* CA275/04. This decision predated *Fatu*. The Court of Appeal nevertheless suggested that a starting point of 3 years' imprisonment was appropriate in relation to a charge of possession of .4 grams of methamphetamine for the purposes of supply.

[37] In my view, taking into account the circumstances of your particular case and the submissions made by Mr Blaikie, the appropriate starting point on the charge of possession for supply is one of 2 years and 6 months' imprisonment.

[38] Notwithstanding any agreement that may or may not have been entered into by the Crown, in my view it is appropriate to uplift the starting point to take into account the charge of possession of equipment intending that it be used for the manufacture of methamphetamine. The equipment in question was laboratory glassware and a portable gas stove. In addition, there is the charge of unlawful possession of a firearm. Both of these charges are serious in their own right, and in the circumstances, either could attract a sentence of imprisonment. The firearm was loaded and there were spare rounds of ammunition found with it. I accept that it was not operable, and that it was under your bed. I note the submissions made by Mr Blaikie to the effect that it was you who rendered the pistol inoperable. Nevertheless, the possession of a firearm is a serious aggravating feature in drug cases – see for example *R v Faifua* CA287/05, 27 March 2006.

[39] Considering the matter, in my view the starting point of 2 years and 6 months should be increased by a further 6 months to reflect this additional offending. My starting point on the lead charge of being in possession of methamphetamine for supply is therefore one of 3 years' imprisonment.

Personal aggravating/mitigating factors

[40] The Crown suggested that I should have regard to your previous convictions. While you have some convictions, only one is relevant for present purposes. That is a conviction on a previous charge of being in unlawful possession of a firearm. It

was in 2008 and Mr Blaikie has endeavoured to explain the circumstances. I do note that the sentence imposed by the District Court was relatively light. There are no other relevant convictions. In particular I note that you have no convictions relating to drugs.

[41] You are entitled to a credit for your guilty plea. I have set out above the detail of the timing of that plea. It was entered at a very late stage, but I accept Mr Blaikie's submission that that was not altogether your fault. You apparently had some difficulties with your previous counsel and in the event, you changed counsel at a late stage. Further, you were then awaiting a decision of the Court in relation to the admissibility of evidence against you. I note the Crown's references to *R v Walker* [2009] NZCA 56, and to the comments in that decision at [19]. Normally where there is a very late plea of guilty, the discount that can be expected is in the order of 10% of the sentence that which would otherwise have been imposed. In the particular circumstances of your case, and taking into account the submissions made by Mr Blaikie, I am prepared to allow you a rather more generous discount of 6 months.

Sentence

[42] Mr Wilde, on the lead charge of possession of methamphetamine for supply, you are sentenced to 2 years and 6 months' imprisonment.

[43] On the charge of possession of equipment to be used for the manufacture of methamphetamine, you are sentenced to a term of 12 months' imprisonment, to be served concurrently.

[44] On the charge of unlawful possession of a pistol, you are sentenced to a term of imprisonment of 9 months, also to be served concurrently.

[45] On the charge of unlawful possession of explosives – namely ammunition – you are sentenced to a term of imprisonment of 6 months, also to be served concurrently.

[46] Your effective finite sentence is therefore one of 2 years and 6 months' imprisonment.

Home detention

[47] Mr Blaikie did discuss home detention in the event that I sentenced you to a short term sentence. I have not done so. I observe that the issue of home detention was discussed by you with the Probation Officer, and that you signed an offenders' agreement. No address was provided, and attempts the Probation Officer to contact your partner were unsuccessful. The Probation Officer has recommended imprisonment, and in my view for good reason. Imprisonment is appropriate in relation to the offence of possession of methamphetamine for supply in most circumstances. I would not have been minded to order electronic monitored home detention even had such sentence been available to me.

Forfeiture of monies

[48] Mr Wharepouri does not seek any orders in relation to the monies found on the premises at the present point of time. He has advised that the Crown may in the future seek orders in that regard. Whether that transpires remains to be seen.

Forfeiture/destruction of pistol

[49] Mr Wharepouri has sought an order under s 69 of the Arms Act 1983 that the firearm and ammunition be forfeited to the Crown. There is no opposition to that application by Mr Blaikie on your behalf and accordingly, an order is made under s 69.

Conclusion

[50] Mr Wilde, both the Probation Officer and your brother have highlighted positive aspects of your character. You acknowledge that you have messed up and

that you will do whatever it takes to turn your life around. You wish to attend a counselling course. I express the sincere hope that you will be successful in turning your life around. I trust that, with the support of your family and your partner, and with a positive attitude, you will be successful in that regard, and I wish you well in your endeavours.

Wylie J