

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

Commonwealth of Virginia)	
)	
vs.)	CR20-000061-00
)	CR20-000065-00
Stephen Nathanael Hartley)	
Defendant)	

MEMORANDUM OPINION

In this criminal case the Court is to decide whether to accept a written plea agreement pursuant to the Court's obligation under Virginia Supreme Court Rule 3A:8(c). The Commonwealth's Attorney, the Defendant's attorney and the Defendant asked the Court to accept a suspended one hundred dollar (\$100.00) fine as the ultimate sentence for two serious felonies committed in Arlington County: (1) possession with intent to sell, give or distribute fifty (50) pounds of marijuana and (2) possession with intent to sell, give or distribute four hundred (400) cartridges of hashish oil, a Schedule I controlled substance. In deciding the matter, the entire record, including proffers made by counsel and the presentence investigation report, has been fully considered by the Court.

Stephen Nathanael Hartley, Defendant, a resident of Maryland, was arrested at Reagan National Airport on November 15, 2018 for felony possession with intent to sell, give or distribute a large quantity of illegal drugs he transported on an airline flight into Reagan National Airport.

On January 24, 2020 a grand jury, consisting of citizens of the community, empaneled by the Court, handed down two felony indictments, charging that Stephen Nathanael Hartley: (1) "On or about November 15, 2018, in the County of Arlington, did possess with the intent to sell, give,

or distribute more than five pounds of Marijuana” (Indictment CR20000061-00); and (2) “On or about November 15, 2018, in the County of Arlington, did possess with the intent to sell, give or distribute Hashish Oil, a Schedule I controlled substance” (Indictment CR20000065-00).

The Virginia General Assembly has determined the sentence for each such charge by statute. Possession with intent to traffic more than five (5) pounds of marijuana requires a court to impose on the defendant a sentence within the range of five (5) to thirty (30) years imprisonment in the state penitentiary. If the defendant was not compensated for possessing with intent to sell, give or distribute the marijuana, a circumstance known as an accommodation, then the sentence range can span up to twelve (12) months in jail and a fine up to two thousand five hundred dollars (\$2,500.00), either or both. The Commonwealth’s Attorney and Hartley’s counsel conceded on the record that Hartley was not an accommodator. By statute, Hartley is not entitled to the lower felony sentencing due to the large quantity of marijuana for which he was arrested, and subsequently indicted by the grand jury.

When considering a felony involving possession with intent to sell, give or distribute hashish oil, a Schedule I controlled substance, the Virginia General Assembly has determined that the sentence necessitates the range of five (5) to forty (40) years in the state penitentiary and a fine of up to five hundred thousand dollars (\$500,000.00). Va. Code § 18.2-248.1(a)(3); Va. Code § 18.2-248(C). Pursuant to Va. Code § 19.2-308, a defendant can be ordered to serve multiple sentences either concurrently or consecutively, depending on the seriousness of the offenses and the facts of the matter, in the sound discretion of the court. The court may also, depending on the facts and circumstances of a criminal case, suspend imposed, non-mandatory time and place a defendant on probation for a term, as appropriate.

Procedural History

The Court must either accept or reject a written plea agreement. This matter was taken under advisement and the Court ordered, received and considered a presentence investigation report regarding Hartley. Having considered the entire record, on September 4, 2020, the Court issued its ruling from the bench, as more fully provided herein.

On March 12, 2020, the indicted charges against Hartley were before the Court upon a written plea agreement seeking the Court's approval of the agreement, as required of the Commonwealth and Hartley under Virginia Supreme Court Rule 3A:8. The plea agreement requested that the Court continue the case for two years. Hartley would plead guilty to the two indicted felony charges, thereby admitting to these felonies, and be placed on probation. Upon his compliance with standard terms of supervised probation and completion of two hundred (200) hours of community service, he would at a later date then be able to withdraw his guilty pleas to the two serious felony charges and plead guilty to two misdemeanor charges of possession with intent to distribute marijuana and have a one hundred dollar (\$100.00) fine imposed that would be suspended. At the time of Hartley's offense, under Virginia law a misdemeanor was reserved for possessing with intent to distribute less than one-half ounce of marijuana. Va. Code § 18.2-248.1(a)(1).¹

During the March 12, 2020 hearing, the Commonwealth in its *prima facie* case informed the Court that U.S. Homeland Security investigators passed along to the Washington Area Airports Authority (MWAA) an anonymous tip about Hartley's pending arrival at Reagan National Airport and concerning the contents of Hartley's luggage. According to the Commonwealth's Attorney,

¹ As will be addressed, the Court ultimately learned that Hartley was arrested with fifty (50) pounds of marijuana, equaling sixteen hundred (1,600) half ounces. Va. Code § 18.2-248.1(a)(1) was subsequently amended to permit a misdemeanor conviction for possessing with intent to distribute up to an ounce of marijuana, not fifty (50) pounds of marijuana.

after Hartley arrived at Reagan National Airport, but prior to him retrieving his luggage, a drug detection canine indicated the positive presence of narcotics in Hartley's luggage. Specifically, the Commonwealth's Attorney represented to the Court that: "MWAA then waited for the Defendant to pick up his bag. He did so, and an MWAA officer confirmed with him that it was in fact his bag and he himself packed it The Defendant's bag was taken into custody and subsequently searched pursuant to a search warrant. Inside MWAA officers discovered more than 5 lbs. of marijuana." Hashish oil was also found. Commonwealth Ex. 1, attached and incorporated herein.

While considering the proffered facts, the Court inquired of the Commonwealth's Attorney the exact amount of marijuana in Hartley's suitcase, since that important information was not volunteered and so that the Court could have a complete record. It was then that the Commonwealth first disclosed that the quantity involved was fifty (50) pounds of marijuana. This fact was not disclosed in the Commonwealth's written submission of facts. Commonwealth Ex. 1.

In relation to the Schedule I controlled substance, hashish oil, the Commonwealth's Attorney represented to the Court during the March 12, 2020 hearing that also found in Hartley's luggage were "dozens" of electronic smoking devices filled with a liquid which proved to be hashish oil.² The plea agreement provides that the final disposition for this felony would also be a misdemeanor conviction for possession with intent to distribute marijuana, subject to the same suspended one hundred dollar (\$100.00) fine as for the possession with intent to sell, give or distribute the fifty (50) pounds of marijuana. Under this plea agreement, Hartley would receive no penalty for either of these felonies of flying large quantities of illegal drugs into Arlington, but instead, two misdemeanor convictions and a suspended one hundred dollar (\$100.00) fine.

² While marijuana is a physical constituent of the cannabis plant itself, hashish oil is a concentrated solution of the psychoactive chemicals within the plant, and more potent, thus carrying a sentence mandated by statute of five (5) to forty (40) years. *Id.*; see also 18 U.S.C. Appx. §2D1.1(c)(1); Drugs of Abuse, U.S. Dep't of Justice, D.E.A., 90 (2020).

As noted previously, the Court was unaware of the actual quantity of marijuana Hartley possessed with intent to sell, give or distribute - fifty (50) pounds - until the Court inquired during the March 12, 2020 hearing. As a result, when the case returned to Court on July 17, 2020, after COVID-19 related and required continuances for Hartley's pleas, the Court found it prudent to require the Commonwealth to also provide proper and complete facts surrounding Hartley's transportation of the hashish oil, again, a quantity the Commonwealth's Attorney had described as "dozens" of cartridges. Only then was the Court made aware that Hartley possessed with intent to sell, give or distribute four hundred (400) cartridges of hashish oil. While perhaps four hundred (400) is - somewhat technically - "dozens" (400 equals 33.333 dozen), the word "dozens" elicits a different impression than "hundreds," the actual quantity.³ In considering its decision whether to accept or reject the plea agreement, the Court relied upon the facts now known. After Hartley pled guilty to the two felony indictments on July 17, 2020, the Court ordered a presentence investigation report on Hartley while the Court continued to consider the plea agreement.⁴

The Court is Entitled to Know Material Facts when Deciding to Accept or Reject a Plea Agreement

It is solely the court's responsibility to determine and impose a criminal sentence upon a defendant's plea of guilty. Va. Code § 19.2-295(A). In determining a sentence to be imposed in a criminal proceeding, the court is entitled to know all the facts. *See Smith v. Commonwealth*, 499 S.E.2d 11, 13 (Va. App. 1998). The Commonwealth's Attorney and Hartley's attorney, pursuant to Virginia Supreme Court Rule 3A:8(c), must obtain the Court's approval of an agreed sentence.

³ According to the Commonwealth's Attorney, it is likely Hartley was a "mule," an individual tasked with transporting the illegal drugs. While Hartley may have been a "mule," illegal drugs and the consequences of distribution and use in a community cannot occur without someone transporting those drugs—here, Hartley.

⁴ On August 28, 2020, the Court received the presentence report on Hartley.

Implicit in this requirement is the responsibility of counsel, as officers of the court, to inform the court of material facts for the court to properly judge the issues and render an informed decision. If a court rejects a plea agreement (a contract between the prosecutor and the defendant), neither the prosecutor nor the defendant shall be bound by it, and the defendant shall have the right to withdraw the guilty plea. Va. Sup. Ct. R. 3A:8(c)(1)(C)(4).

Issues to be Decided by the Court

Two threshold questions lie before the Court in deciding whether to accept the parties' plea agreement: Based on the applicable sentencing factors, should the Court accept a plea agreement granting Hartley an ultimate sentence of a suspended one hundred dollar (\$100.00) fine for possessing in Arlington County, with the intent to sell, give or distribute, fifty (50) pounds of marijuana, and should the Court accept a plea agreement granting Hartley the same suspended one hundred dollar (\$100.00) fine for possessing with the intent to sell, give or distribute in Arlington County four hundred (400) cartridges of hashish oil?

Sentencing Considerations

When considering a sentence, a judge is not bound by the prosecutor's recommendation of a sentence, but instead must also consider the actual and complete facts of a case, along with the relevant goals of sentencing. A court is "in no way bound to accept the Commonwealth's recommendation." *Dubois v. Commonwealth*, 435 S.E.2d 636, 639 (Va. 1993). Rather, "[t]he judge should exercise his [or her] discretion and best judgment in arriving at a fair disposition of the case, giving due consideration to any recommendation by the prosecutor as well as all other relevant factors with particular consideration of the public interest." *Johnson v. Commonwealth*, 201 S.E.2d 594, 596-97 (Va. 1974). (emphasis added). It is without question that the process of checks and balances is the keystone of a republic. It is not in the prosecutor's discretion to decide

the punishment. It is the sole responsibility of a court to decide sentencing within the statutory range determined by the legislature, applying accepted considerations, and evaluating, in part, the ability of the sentence to deter future crime or the ability of the sentence to rehabilitate the offender. The three branches of government were designed to work in this way. Critical to this dispositional process is the need for a complete record.

Important sentencing factors include whether the proposed sentence will effectively deter both the offender and society at large from committing like crimes. If accepting the sentence of a suspended one hundred dollar (\$100.00) fine would likely undermine the ultimate sentencing goals, the Court should reject the plea agreement.

The Court should weigh a variety of sentencing factors. “Virtually all [sentencing rationales] are variations of one or more of the following four: (1) deterrence, (2) incapacitation, (3) rehabilitation, or (4) retribution.” Arthur W. Campbell, *Law of Sentencing* § 2:1 (Michelle Evans ed., 3d ed. 2004); accord *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); see also *Brookman v. Commonwealth*, 145 S.E. 358, 361 (Va. 1928) (“The two-fold purpose of the criminal law is to provide a punishment for those who break the law and for that punishment to act as a deterrent to others who are criminally inclined.”).

Virginia jurisprudence has long and consistently recognized deterrence as means for a court to determine an appropriate sentence, no matter the criminal statute violated. Deterrence disincentivizes unlawful behavior both for the individual and for society. “Penal laws are adopted and enforced for the preservation of peace and good order of the state, and violator is made to suffer for his wrong to society and to serve as an example to deter others who may desire to do likewise.” 5B M.J. CRIMINAL PROCEDURE § 70 (2020); See also *Wilborn v. Saunders*, 195 S.E. 723 (Va. 1938). Deterrence takes two main forms: general deterrence and specific deterrence.

See Gilliam v. Commonwealth, 465 S.E.2d 592, 594 (Va. Ct. App. 1996) (quoting *United States v. Morris*, 837 F. Supp. 726, 729 (E.D. Va. 1993)). General deterrence provides incentive to others not to commit the same offense.

As noted earlier, an issue in the plea agreement prepared by the Commonwealth's Attorney and now before the Court is whether a one hundred dollar (\$100.00) suspended fine for possession with intent to traffic fifty (50) pounds of marijuana and four hundred (400) cartridges of hashish oil would deter others from trafficking illegal drugs in Arlington County and the City of Falls Church, the jurisdiction of the Court. The Commonwealth's Attorney did not advance any argument as to how a suspended one hundred dollar (\$100.00) fine for these serious charges of possession with intent to distribute would deter others from like criminality; neither did Hartley's counsel. Moreover, neither the Commonwealth's Attorney nor defense counsel proffered any circumstance which would suggest a departure from a traditional dispositional approach.

Deterrence is a paramount goal and a traditional aim of criminal sentencing, whether for repeat offenders or a new one. *See Gillespie v. Commonwealth*, 636 S.E.2d 430 (Va. 2006); *see also Jordan v. Commonwealth* 809 S.E.2d 622 (Va. 2018). Deterrence protects the community at large. When the Virginia General Assembly determined the sentences for intent to traffic in large quantities of marijuana or hashish oil, it did so by recognizing the impact on society from drugs. While, in its latest session, the legislature amended simple possession of no more than an ounce of marijuana from a criminal violation to a civil infraction under Va. Code §§ 18.2-248.1 and 18.2-250.1, it did not de-criminalize possession with the intent to sell, give or distribute fifty (50) pounds of marijuana or hashish oil under Va. Code § 18.2-248.1.

In *United States v. Sharp*, the United States District Court for the Eastern District of Virginia described the many ways in which the community at large is victimized by drug trafficking:

It hardly necessitates reference to assert that drug offenses are, indeed, serious crimes . . . Clearly, drug dealers create victims. Victims of drug-related crime include those whose homes are robbed by addicts seeking to support their habit. Drug victims are also parents who see the lives of their children destroyed. Drug victims include, indeed, all of us who must bear the enormous cost of law enforcement incurred in the effort to combat the spread of drugs.

463 F. Supp. 2d 556, 567–68 (E.D. Va. 2006).

Due to the corollary serious societal consequences of possession with the intent to traffic illegal drugs in a community, it follows that the impact of such criminality on the community is a necessary consideration by courts as an important factor in sentencing. Possession with intent to sell, give or distribute fifty (50) pounds of marijuana or four hundred (400) cartridges of hashish oil are still considered serious drug charges in Virginia, according to the Virginia Legislature.

The strictness of any sentence is case-specific based on the underlying facts and the applicable sentencing factors. See *Williams v. New York*, 337 U.S. 241, 245 (1949) (“[A] sentencing judge [can] exercise a wide discretion in the sources and types of evidence used to assist him [or her] in determining the kind and extent of punishment.”). Each case is different, and while sentencing guidelines are to be considered by a court, a judge is vested with authority to downwardly depart with a written justification, or upwardly depart, if necessary. Va. Code § 19.2-298.01(B). Here, the sentencing guidelines for Hartley call for a midrange of active incarceration of one (1) year and seven (7) months, with at least the remainder of the minimum statutory sentence of five (5) years being suspended with a period of probation.

In the case at bar, whether Hartley would ultimately receive a sentence of active incarceration is not at issue. Instead, at issue is whether the Court should consider all relevant facts and circumstances to dispose of this serious matter appropriately. The Court must consider whether a suspended one hundred dollar (\$100.00) fine for a defendant possessing with intent to sell, give or distribute fifty (50) pounds of marijuana and four hundred (400) cartridges of hashish oil would sufficiently, if at all, deter others from committing the same felonies in Arlington County or the City of Falls Church.

Separately, when deciding an appropriate sentence, the Court must also determine whether the proposed sentence properly addresses remedial rehabilitation of the offender. At the time of his felonious criminal acts now before the Court, Hartley was on probation for a misdemeanor conviction in Maryland. The plea agreement proposed here would place Hartley on probation with terms regularly considered for and conducive to rehabilitation of first-time offenders charged with simple possession of drugs for personal use. The quantities possessed by Hartley were not for personal use. Letters submitted to the Court by his family and friends demonstrate that Hartley was raised in a supportive family and social environment. The plea agreement does not adequately address the level of rehabilitation needed for a person of Hartley's background who was willing to transport into Arlington County large quantities of illegal drugs.

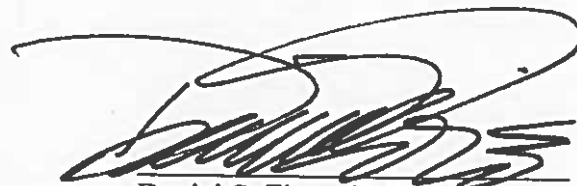
Court's Findings

The Court, after fully considering the complete record, after giving due consideration to the recommendation of the Commonwealth's Attorney, and after applying the appropriate sentencing factors, finds that a suspended one hundred dollar (\$100.00) fine for these felonies would not deter others; thus, the sentence would not meet the general deterrence factor in

sentencing.⁵ Separately, the proposed written plea agreement is inadequate to address rehabilitative opportunities for someone who was willing to possess with intent to sell, give or distribute fifty (50) pounds of marijuana and four hundred (400) cartridges of hashish oil. The Court, on this record, rejects the plea agreement. On September 4, 2020, Hartley was given the opportunity to withdraw his guilty pleas to these felonies, as is his right. Hartley's guilty pleas were withdrawn and amended to pleas of not guilty.

An appropriate order consistent with this Memorandum Opinion will follow.

September 8, 2020

A handwritten signature in black ink, appearing to read 'Daniel S. Fiore, II', written in a cursive style.

Daniel S. Fiore, II, Judge
Arlington Circuit Court

⁵ Compare: Failure to stop one's vehicle at red traffic light can result in a fine of \$350.00, even for someone with a perfect driving record. Va. Code 46.2-833; Changing traffic lanes without first ascertaining safety of the lane change carries a \$100.00 fine. Va. Code 46.2-804(2) and Virginia Supreme Court Rule 3(B)(2).

FILED by Arlington County Circuit Court

07/31/2020

FACTUAL PREDICATE FOR PLEA

To: Circuit Court
From: JDK
Date: 3/12/20
Charge(s): Felony PWID MJ + PWID Hashish Oil
Defendant: Stephen N. Hartley



CR2000061-00

PLEA

FACTS:

On November 15, 2018, the Defendant flew into Reagan National Airport, located here in Arlington County.

Prior to his arrival, Homeland Security Investigations passed along an anonymous tip to the Metropolitan Washington Airports Authority concerning the Defendant's luggage. As a consequence, after the Defendant's arrival but prior to his retrieving his luggage from the baggage area, MWAA conducted a K9 sweep of the Defendant's checked bag. The sweep resulted in a positive indication for the presence of narcotics.

MWAA then waited for the Defendant to pick up his bag. He did so, and an MWAA officer confirmed with him that it was in fact his bag and that he himself had packed it. He acknowledged both.

The Defendant's bag was taken into custody and subsequently searched pursuant to a search warrant. Inside MWAA officers discovered more than 5lbs of marijuana; this was confirmed by forensic testing. The bag also contained dozens of electronic smoking device cartridges that were filled with a golden liquid. These cartridges were tested by the Department of Forensic Science and were determined to be filled with Hashish Oil, a schedule I controlled substance in Virginia.

A VICE detective would have testified that for both substances, the amount possessed was inconsistent with personal use. They would have additionally testified that the 19-year-old Defendant was likely a "mule," an individual tasked with transporting narcotics. This conclusion was based on subsequent discussions with the Defendant as well as his lack of any other "tools of the trade," such as owe sheets, amounts of currency, multiple phones, or even a digital scale.

CR 20-61
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 Comm. Ex. 1
 JDP