NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Kleykens*, 2020 NSCA 49

Date: 20200624
Docket: CAC 490734
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Michael Dean Kleykens

Respondent

Judge:	The Honourable Justice Jamie W.S. Saunders
Appeal Determined on the record:	**Filing Dates** Appellant's Factum- January 27, 2020 Respondent's Factum- March 2, 2020 Respondent's Supplementary Submissions – April 17, 2020 Appellant's Supplementary Submissions – April 29, 2020
Subject:	*Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Possession of cocaine, marihuana, and cannabis resin, for the purpose of trafficking. Standard of review. Sentencing principles. Proportionality. Parity. Binding judicial precedent. Aggravating circumstances. Protection of society. Denunciation and deterrence. Levels or tiers of drug trafficking. Determining a fit and proper sentence. COVID-19. Entering a judicial stay.
Summary:	Following a guilty plea to possession of cocaine, marihuana, and cannabis resin for the purpose of trafficking, the accused was sentenced in Provincial Court to 90 days' custody intermittent and 3 years' probation. The Crown appealed.
Held:	Leave granted, appeal allowed, trial judge's sentence set aside, and a new sentence of two years' imprisonment (less

the 90 days already served intermittently) is imposed, but a judicial stay of the sentence is decreed.

The original sentence is flawed by serious errors in principle, which led to a sentence that is obviously unfit. The approach taken virtually ignored the many aggravating features of the case, as well as decades of binding authority in this province. Characterizing the accused as a "petty retailer" for the purposes of sentencing was patently unreasonable, as it ignored incontrovertible evidence as to the nature and extent of the drug-dealing operation. This mischaracterization led to a failure to properly apply both the principles of proportionality and parity. A proper application of those principles in sentencing those persons convicted of participating in the trafficking of "hard drugs" requires as its principal objective the protection of society, such that the primary emphasis must always be placed on the principles of deterrence and denunciation.

Given the circumstances of this offence and this offender, a fit and proper sentence ought to have been two years in a penitentiary. But for the crisis, lethality and uncertainty surrounding the COVID-19 pandemic, the accused would have been re-incarcerated to serve such a sentence.

However, given the very real risk such reincarceration would impose to the accused and others, such reincarceration is no longer in the interests of justice. Accordingly, the sentence is stayed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 27 pages.

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Judges:	Farrar, Saunders and Bourgeois, JJ.A.
Appeal Determined on the Record:	**Filing Dates** Appellant's Factum- January 27, 2020 Respondent's Factum- March 2, 2020 Respondent's Supplementary Submissions – April 17, 2020 Appellant's Supplementary Submissions – April 29, 2020
Held:	Leave to appeal granted and appeal allowed per reasons for judgment of Saunders, J.A.; Farrar and Bourgeois, JJ.A. concurring.
Counsel:	Paul B. Adams, for the appellant Stanley W. MacDonald, Q.C. and J. Paul Niefer, for the respondent

Reasons for judgment:

[1] Mr. Kleykens pled guilty to possession of cocaine, marihuana, and cannabis resin, for the purpose of trafficking. In a decision dated August 7, 2019 and reported at 2019 NSPC 28, The Honourable Judge Del Atwood of the Nova Scotia Provincial Court sentenced him to 90 days' custody intermittent and three years' probation.

[2] The Crown's appeal, originally scheduled to be heard in this Court on April 1, was postponed to June 16 as a result of the virtual shutdown of court facilities due to health and safety concerns related to the COVID-19 crisis.

[3] The panel assigned to hear the appeal determined and directed that it ought to be decided based upon the entire record in the court below as well as the parties' written submissions. The panel gave counsel for the Crown and the respondent an opportunity to file additional written briefs so as to augment their initial arguments as well as indicate their respective positions as to the impact, if any, the Court's recent decision in *R. v. White*, 2020 NSCA 33 ("*White*"), had in this case.

[4] Counsel seized that opportunity and each provided comprehensive and very helpful briefs.

[5] The Crown says the decision manifests a variety of critical mistakes and that in any event, the sentence is demonstrably unfit.

[6] I agree. Respectfully, the judge's analysis is marred by serious errors in principle, which led to a sentence that is obviously unfit.

[7] For the reasons that follow I would grant leave, allow the appeal, set aside the sentence imposed by the trial judge, impose a new sentence of two years imprisonment (less the 90 days served intermittently), but would enter a judicial stay of that sentence.

[8] I will begin by providing a brief summary of the background, adding such further detail as may be required during my consideration of the issues on appeal.

Background

[9] On September 21, 2016, police executed a search warrant at a boarding house owned by the respondent, Michael Dean Kleykens, in Stellarton, Nova

Scotia. Police found the respondent in his room in the residence. After opening the secure door to his room, police immediately detected the strong odor of cannabis. The respondent, together with his then girlfriend who was present in the room at the time of the search, were both arrested and taken into custody.

[10] Mr. Kleykens' residence was subsequently searched and police seized the following items:

- 8.25 kilograms of cultivated and packaged cannabis marihuana
- 144.5 grams of cocaine
- 56.6 grams of cannabis resin
- $5,975.00 in cash (including $4,000.00 banded by elastics into four bundles and then banded together as one bundle).

[11] Other property seized during the search of the residence included a score sheet, a Triton T2 digital scale, and a Royal Sovereign RBC-3200-CA money counter. I will refer to this property collectively as the "paraphernalia evidence" and will refer to it in more detail, later in these reasons.

[12] The respondent was 28 years of age, with no prior criminal convictions. At the time of his arrest, Mr. Kleykens was employed fulltime as a foreman with a construction company, where he had worked for 10 years. He was described as a "very good worker" with a positive work ethic. He earned $56,000 annually with the construction company, and an additional $20,000 per year in rental income as the owner/operator of the boarding house.

[13] After his arrest for these offences in September, 2016, the respondent obtained his release on bail, secured by a Recognizance. He was convicted of breaching his Recognizance while on bail pending trial on these charges. Almost two years later, on August 15, 2018, the respondent pled guilty to possession of cocaine, cannabis marihuana and cannabis resin, for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the *Act*).

[14] Some eight months later, at the respondent's sentencing hearing on April 23, 2019, the Crown recommended a sentence totalling two years in a federal penitentiary. The respondent's counsel requested a suspended sentence or, in the alternative, a 90-day intermittent jail sentence with probation. Judgment was

reserved. Counsel were directed to file further post-hearing written briefs, with sentencing adjourned until June 7, 2019. On that date the case was adjourned again with a direction that counsel file their briefs on July 2, and that the sentence hearing would resume on July 9.

[15] On that date, Atwood, P.C.J. imposed sentences totalling 90 days' imprisonment to be served intermittently, plus three years' probation.

[16] On appeal to this Court the Crown says the trial judge's analysis was fundamentally flawed by his failure to properly characterize the seriousness of the respondent's crimes and his role in their commission. In its factum the Crown argues:

> 25. … He also had a digital scale, a score sheet and perhaps most telling, a money counter. The police seized almost $6000 in cash, with $4000 of it being bundled together. This was without question a well-established commercial operation that undoubtedly generated handsome profits for the Respondent. …

[17] This serious mischaracterization was then compounded by the judge's reliance upon judicial precedents which in the Crown's view:

> 28. … are not remotely comparable to the level of the Respondent's criminality. They were all legitimately categorized as "petty retailers". By contrast, the Respondent ran a substantial commercial enterprise. Characterizing him as a "petty retailer" reveals a fundamental misconception of the seriousness of his offences.

[18] For his part, the respondent seeks to justify the sentence, putting it this way in his factum:

> 68. Mr. Kleykens' sentencing was a critical juncture (*sic*) in his life. Judge Atwood was surely permitted, in his broad discretion, to avoid the cookie cutter approach of simply handing out the usual sentence of incarceration and craft a sentence with a shorter period of incarceration, along with a lengthy period of probation, in a way that satisfied the goals and principles of sentencing. ….

Issues

[19] In its Notice of Appeal the Crown raised the following grounds:

> 1. The Trial Judge erred in principle in the imposition of sentence by:

a. Failing to properly interpret and apply the principles of proportionality, given the gravity of the offence and the degree of responsibility of the offender;

b. Failing to give due emphasis to the applicable principles and objectives of sentencing, particularly denunciation, deterrence and protection of the public and by over-emphasizing the personal circumstances of the Respondent;

c. Failing to properly interpret and apply the principle of parity.

2. The sentence imposed is demonstrably unfit and/or manifestly inadequate, given the circumstances of the offence and the offender.

3. Such further and other grounds as counsel may advise and the Court may permit.

[20] The Crown asks that leave be granted, and that "the existing sentence be vacated and replaced with a penitentiary sentence".

[21] I prefer to address the merits of this appeal by distilling the various grounds and submissions into four discrete questions:

(i) Did the judge err in his consideration of the principle of proportionality, and did that error have an impact on the sentence imposed?

(ii) Did the judge err in his consideration of the principle of parity, and did that error have an impact on the sentence imposed?

(iii) Having regard to the circumstances of this offence and this offender, what is a fit and proper sentence?

(iv) Should that fit and proper sentence be judicially stayed?

Standard of Review

[22] The well-settled legal principles to be applied during appellate review of a sentence, were described in detail in this Court's recent decision in *White*, at ¶19-24, and I need not repeat them here.

[23] They are the principles I will now apply in considering the merits of this appeal.

Analysis

[24] As noted earlier, we invited counsel to file additional briefs stating their respective positions on the impact, if any, of our decision in *White* in this case.

[25] In its supplementary brief the Crown described how the directives in *White* were relevant to virtually all of the issues arising in this case.

[26] Whereas, the respondent took the position that "….the Court's decision in *R. v. White* has no particular effect on Mr. Kleykens' case" saying:

> **The Effect of *R v White***
>
> 2. The Nova Scotia Court of Appeal's recent decision in *R v* White, 2020 NSCA 33, provides important guidance for sentencing courts dealing with drug offences involving fentanyl, but it is submitted that the decision otherwise changes nothing for drug offences involving powdered cocaine. While the Court overturned a sentence for possession of cocaine for the purpose of trafficking, the facts in *R. v. White* are readily distinguishable from the circumstances in Mr. Kleykens' case, such that *R v White* is of little value in determining whether Mr. Kleykens' sentence is demonstrably unfit.
>
> […]
>
> 4. The difference between Mr. White and Mr. Kleykens is stark. The Court identified several distinguishing factors that apply to Mr. Kleykens at para 102 of *White*:
>
>> [102] … Respectfully, I find the cases relied upon by the respondent to be easily distinguishable for a variety of reasons. For example, **some involved first-time offenders; or accused persons who had pled guilty**; or who had **demonstrated very positive prospects for rehabilitation**; or the sentence followed a joint recommendation; or where **the offender was a low-level operator**; or was selling to support an addiction to fentanyl; or where the accused had cooperated with the police and agreed to testify against others at great personal risk; or where **genuine remorse and other positive steps toward rehabilitation were found to be significant mitigating circumstances**. None of those features are present in this case.

[Emphasis added by the respondent in his brief]

[27] While these points are well taken, I do not find them persuasive. In my view, there are many more similarities than differences, which should leave no doubt that our judgment in *White* is highly relevant in any case involving the trafficking and possession for the purpose of trafficking so-called "hard drugs".

[28] While it is true the judge did not have the benefit of this Court's decision in *White*, that does not excuse the flawed approach taken in this matter where, in sentencing Mr. Kleykens, the judge virtually ignored the many aggravating features of this case, as well as decades of binding authority in this province.

[29] What this Court directed in *White*:

> [76] In Nova Scotia there developed a long tradition of recognizing that the severity of a sentence should match the dangerousness of the drug involved, all other factors being equal. As our judicial understanding of the danger of "hard drugs" evolved, so too did the approach taken in sentencing those convicted of participating in their distribution. Using very explicit language, this Court has repeatedly directed that the approach to be taken in sentencing those convicted for trafficking, and possession for the purpose of trafficking, in so-called "hard drugs" requires as its principal objective the protection of society, such that our primary emphasis must be placed on the principles of deterrence and denunciation. The majority of these pronouncements have been made in relation to cocaine trafficking, and only a few need to be referred to here.

was expressed in *R. v. Byers*, [1989] N.S.J. 168 at ¶3; *R. v. Huskins*, [1990] CanLII 2399 (NSCA) at p. 4; and *R. v. Scott*, 2013 NSCA 28 at ¶113.

[30] Recalling such well-established sentencing objectives and principles provides context for my assessment of the trial judge's failure in this case to both properly address proportionality by considering the gravity of the offence and the respondent's culpability in its commission, as well as his failure to address parity by considering sentences in comparable circumstances.

[31] I will deal first with proportionality. Then I will address parity. Then I will determine what I consider to be a fit sentence in these circumstances. Finally, I will decide whether that sentence ought to be stayed.

(i) Did the judge err in his consideration of the principle of proportionality, and did that error have an impact on the sentence imposed?

[32] The "fundamental purpose" of sentencing is found in s. 718 of the *Criminal Code* which reads:

> **Purpose and Principles of Sentencing**
>
> **Purpose**

> **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[33] In furtherance of this essential purpose of sentencing, Parliament has directed that proportionality is the fundamental principle of sentencing. Section 781.1 provides:

> **Fundamental principle**
>
> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[34] In satisfying their obligation to address the "fundamental principle" of proportionality, trial judges must ensure that the sentence be proportionate to the gravity of the crime and the offender's culpability in committing it. The gravity of the offence and its consequences will be informed by the range of sentence prescribed in the applicable legislation. In drug cases, the dangerousness of the particular drug, as well as the quantity of drugs seized, will also be important considerations when addressing both gravity and moral culpability (*White*, ¶32).

[35] It is obvious that in order to be "proportionate", a sentence must be based upon an accurate assessment of the seriousness of the offence and the offender's degree of culpability. In my view, by any measure, Mr. Kleykens' crimes were extremely serious and his degree of responsibility was very high. However, as I will explain, in sentencing the respondent, the judge mischaracterized and diminished the seriousness of his offences and his degree of responsibility, in a number of ways.

[36] In *R. v. Fifield*, 1978 CanLII 812 (NSCA), this Court described the general categories of drug traffickers as "the isolated accommodator of a friend, the petty

retailer, the large retailer or small wholesaler or the big-time operator," Those falling within the "large retailer or small wholesaler" category "must be punished and, hopefully deterred by materially larger sentences than those imposed on the petty retailers".

[37] In *R. v. Knickle*, 2009 NSCA 59, Roscoe, J.A. observed at ¶17:

> [17] … this Court has consistently categorized drug traffickers, based on the type and amount of drug involved and the level of involvement in the drug business, to assist in placing them within the range.

[38] Rather than properly reflecting upon the danger, type and quantity of drugs seized from Mr. Kleykens and then comparing those very serious circumstances to a host of binding and comparable decisions of this Court, the trial judge instead began his analysis by citing his own decisions which have subsequently been overturned by this Court. For example, he said:

> ***Seriousness of the offences***
>
> [7] In situating the seriousness of these offences, I shall refer to a number of recent PPT cocaine cases out of this judicial centre as comparators: *R v Livingstone*, 2019 NSPC 62 (*Livingstone*), *R v Terris*, 2019 NSPC 11 (*Terris*) and *R v Scott*, 2019 NSPC 19 (*Scott*). The prosecution has applied for leave to appeal from sentence in *Terris* and *Livingstone*.
>
> [8] Mr Kleykens was found in possession of the following quantities of cocaine and cannabis: 144.5 g of cocaine, 8.25 kg of cultivated cannabis and 56.6 g of resin. The court was not provided with information on the value of these substances. The measures here are far greater than the 36 g of cocaine seized in Livingstone and the 52 g of cocaine seized in *Terris*. Mr Terris and Mr Livingstone possessed cocaine only; neither one was involved in trafficking cannabis.
>
> [9] In *Terris* and *Livingstone*, the court imposed suspended sentences.
>
> [10] The controlled substances seized in this case are over double the Schedules I and II quantities in *Scott*, a case decided last month in this judicial centre which resulted in the court going along with a jointly recommended two-year penitentiary term. Just as Mr Kleykens, Mr Scott had no prior record, and had pleaded guilty. A major distinction is that Mr Scott was found with a significant treasury: $111,559 of Canadian currency, admitted as being proceeds of crime; this was circumstantial evidence of a prolonged and well developed drug-dealing operation, which elevated significantly the seriousness of Mr Scott's offence, such that the joint recommendation was well justified. In contrast, Mr Kleykens was found with $5975, and there is no suggestion of there being untraceable proceeds as to engage $462.37(3) of the *Code*. I would note again that the court was not

> provided with evidence of the value--street or otherwise--of Mr Kleykens' inventory. …

[39] Later, in his decision, the judge referred to certain factors which appear to have convinced him that Mr. Kleykens was nothing more than a "petty retailer". For example, he said:

> [10] … I would note again that the court was not provided with evidence of the value--street or otherwise--of Mr Kleykens' inventory. …This court cannot lift specialty findings of fact from other cases … Accordingly, I have no way of telling how much Mr Kleykens stood to be enriched by his stash.
>
> […]
>
> [16] Police did not find any weaponry. I consider this significant, … That aggravating element is not in evidence in this case.
>
> [17] …If there were greater evidence against Mr Kleykens of a deeply embedded secret life--say, higher-value proceeds of crime, drug-retail paraphernalia, intercepted communications, score sheets and the like, … however, that sort of elevated incriminating evidence is not before the court.
>
> […]
>
> [24] … The quantity of contraband seized would suggest a level of involvement in the drug trade in the mid-to-upper reaches of petty retailing as categorised in *R v Fifield* …
>
> […]
>
> [30] Whatever the precise category, it would seem to me that Mr Kleykens was not a big player in the illegal trade in controlled substances. I assess his lower moral culpability based on that finding.

[40] With respect, the judge's findings betray a misapprehension of the nature and extent of Mr. Kleykens' illegal enterprise.

[41] It will be recalled that at the time of his arrest police also seized a scoresheet, a Triton T2 digital scale, and a Royal Sovereign RBC-3200-CA money counter. There is some disagreement between the parties as to whether this "paraphernalia evidence" was properly before the court in the Crown's case against Mr. Kleykens. For example, in his factum, Mr. Kleykens says:

> *Forfeiture Order not in Evidence*
>
> 19. The Appellant points to the Order of Forfeiture to say that there was evidence of a money counter, bundled cash, a digital scale, and a score sheet that

> the judge failed to properly consider. However, the draft order was not in evidence before the court for sentencing. Nor did the Crown make any reference to the items contained in the order during submissions. …
>
> 20. Given that the draft order was not put into evidence, Judge Atwood could not consider it for the purpose of sentencing …

[42] I respectfully disagree. While it is true that the Crown did not read aloud in open court the contents of the Forfeiture Order, this does not end the matter. Judge Atwood was obviously well aware of the evidence. He specifically asked defence counsel about it, and queried whether there was any challenge to its accuracy as being offence-related property. Mr. Kleykens' lawyer explicitly gave that assurance. From the transcript we see this exchange:

> **SUBMISSIONS BY MS. DUFFY ON SENTENCE**
>
> **MS. DUFFY:** Subject to any questions of Your Honour, those and my … and my written submissions are the respectful submissions of the Crown, Your Honour. In terms of corollary orders, I would suggest that Section 109 applies for 10 years and for life of prohibited weapons. I am asking for a Section 16 forfeiture and I'll follow up later with a … with a paper Order signed by both of us. I'm asking for a secondary designated DNA Collection Order on the cocaine count and only the cocaine count, and I have no comment on the victim surcharge.
>
> **THE COURT:** So, Ms. Duffy, would the … does the Section 16 comprehend the forfeiture of the … of the seized cash, or?
>
> **MS. DUFFY:** Yes.
>
> **THE COURT:** And is that controversial, Mr. MacDonald?
>
> **MR. MACDONALD:** It's not, Your Honour. We .. we don't take issue with that, Your Honour.

[43] It is therefore clear that counsel for the accused was given the explicit opportunity to object to what was contained in the order for forfeiture and did not do so. Defence counsel had a period of months between the time Judge Atwood offered the accused the opportunity to object to the order for forfeiture, and the time he was sentenced. By taking "no issue" with the contents of the forfeiture order on the record, the accused conceded that the items contained therein were used in the commission of the offences, as forfeiture orders only apply to offence-related property.

[44] With respect, the respondent's reliance upon *R. v. Craig*, 2009 SCC 23 is over broad. *Craig* does not impact the trial judge's ability to consider the paraphernalia evidence contained in the forfeiture order, nor does it affect this

Court's ability to do so. *Craig* is clear that the legal analyses for sentencing and orders for forfeiture must be distinct, so that individuals with more assets are not given a "discount" on sentence. That is not the situation here.

[45] In light of these circumstances, Judge Atwood was clearly entitled to take this evidence into account in determining the level and extent of Mr. Kleykens' drug trafficking operation. And so are we. See for example, *R. v. J.N.*, 2019 NLCA 65 at ¶22-25; *R. v. Tkachuk*, 2009 BCSC 835 at ¶13 and ¶19; *R. v. Evaglok*, 2010 NWTCA 12 at ¶14; *R. v. Meisner* (1981), 46 N.S.R. (2d) 456 (NSCA) at ¶4-5; and *R. v. Knittel*, [1983] S.J. No. 49, 22 Sask. R. 101 (Sask. C.A.).

[46] In categorizing the respondent's offences, the judge centered his analysis on several cases he had recently decided, including *Lungal, Livingstone,* and *Terris, supra* in which he granted suspended sentences for Schedule I drug trafficking offences. The Crown launched an appeal in all three instances. In our decision *R. v. Livingstone; R. v. Lungal; R. v. Terris*, 2020 NSCA 5, this Court granted leave, dismissed the Crown's appeal in *Lungal*, and overturned the sentences imposed by Judge Atwood in both *Livingstone* and *Terris*, substituting 18 months' imprisonment in both instances, but ordering a stay of those sentences.

[47] Respectfully, the offences in *Lungal* (103 methamphetamine pills), *Livingstone* (36 grams cocaine), and *Terris* (52 grams cocaine) are not remotely comparable to the level of the respondent's criminality here. They were all legitimately categorized as "petty retailers". By contrast, Mr. Kleykens ran a substantial commercial enterprise. Characterizing him as a "petty retailer" reveals a fundamental misconception of the seriousness of his offences.

[48] The trial judge also considered his own decision in *R. v. Scott*, 2019 NSPC 19, where the offender had 24 grams of cocaine and 480 grams of marihuana for the purpose of trafficking. The judge noted that the quantity of drugs Mr. Kleykens had was "over double" the amounts in *Scott.* That was a gross understatement. In fact, Mr. Kleykens had six times the amount of cocaine and over seventeen times the amount of marihuana. Notably, in *Scott*, Judge Atwood endorsed a joint recommendation for a total of two years in federal penitentiary.

[49] The totality of the evidence in this case leaves no doubt that Mr. Kleykens' crimes were at least at the level of Mr. Scott's, if not higher, in terms of gravity. There is no possible basis for placing them in entirely different categories for sentencing purposes.

[50] Compounding the judge's failure to properly situate the respondent's offences in the hierarchy of drug trafficking crimes was his failure to consider any number of leading cases in Nova Scotia involving offenders whose trafficking crimes went beyond "petty retailing" and fell within the "larger retailer or small wholesaler" category. Simply to illustrate the point I refer to:

- *R. v. Fifield*, 1978 CanLII 812 - 7 pounds of hashish, 8 pounds of marihuana - wholesaler or large retailer - related prior record - 2 months increased to 2 years imprisonment;
- *R v. Carvery*, 1991 CanLII 2475 (NSCA) - 6.5 ounces/184g of cocaine - high level retailer - no prior record - 3 years increased to 5 years imprisonment;
- *R. v. O'Toole*, 1992 CanLII 2610 (NS CA)- 2043g cannabis resin (estimated street value $140,000) - "quantity of cannabis resin seized is far in excess of that which would classify the respondent as a petty retailer. The quantity bespeaks that of a wholesaler or a retailer on a large scale …" - no prior record - 12 month sentence increased to 2 years imprisonment;
- *R v. Smith*, 1992 NSCA 73 - 28.75g crack cocaine, 372g powder cocaine - "upper end of the scale as a retailer" - minor unrelated prior record - 2.5 years increased to 5 years imprisonment;
- *R v. Stokes,* 1993 NSCA 195 - sold approximately 6 ounces of cocaine to undercover officers - "more than a petty retailer" - lengthy prior record - 7 years imprisonment;
- *R. v. McCurdy*, 2002 NSCA 132 - 500 plant marihuana grow-op - "commercial distributor" - dated unrelated prior record - 18 month conditional sentence increased to 3 years imprisonment;
- *R. v. Jones*, 2003 NSCA 48 - 4.6 kg marihuana - large retailer or small wholesaler - "the typical range of sentences for small wholesalers or large retailers, the people on the third of the four rungs of the ladder identified in *Fifield*, is two to five years' incarceration." - related prior record - 18 month conditional sentence increased to 3 years imprisonment;
- *R v. Steeves*, 2007 NSCA130 - 77g cocaine, 100 ecstasy pills - "amounts in his possession were ….sufficient to take him outside the

lower categories of drug traffickers described in *R v. Fifield*" - minor unrelated prior record - 2 year conditional sentence increased to 2.5 years imprisonment;

- *R. v. Knickle,* 2009 NSCA 59 - approximately 11 ounces of cocaine - "placed in the higher retail level of the *Fifield* categories" - no prior record - 2 year conditional sentence increased to 3.5 years imprisonment;
- *R. v. Conway*, 2009 NSCA 95 - 103g crack cocaine, 264g marihuana - "mid to high level retailer" - 65 year old with no prior record - 2 year conditional sentence increased to 2.5 years' incarceration;
- *R. v. Leblanc*, 2019 NSSC 192 - 210g (7 ounces) cocaine - street value of between $16,800 - $21,000, over $6000 cash seized - "firmly within category 3 *Fifield* (large retailer) - related prior record - 5 years imprisonment;
- *R. v. White*, *supra* – mid-level drug trafficker – lengthy prior record – combined weight of cocaine and crack cocaine was 6.5 ounces – four years for cocaine possession increased to 5 years imprisonment (and 6 years for the fentanyl conviction increased to 8 years, to be served concurrently).

[51] The amount of cocaine alone (over 5 ounces) seized from Mr. Kleykens, comfortably places him within level 3 of the *Fifield* categories. When combined with over 8.3 kg of marihuana and resin, the respondent rises to the mid-to-upper end of that category.

[52] Besides the significant quantity of multiple controlled substances, Mr. Kleykens also had a digital scale, a score sheet and a money counter. The police seized almost $6,000 in cash, with $4,000 of it being bundled together. He was not addicted. He was not selling drugs to support his own habit. He was gainfully employed, earning a significant annual income in construction and as a landlord. Other than greed and the chance to profit from a commercial operation selling illicit and dangerous drugs, there was nothing in Mr. Kleykens' personal circumstances which might explain his decision to traffic.

[53] In *Scott*, the accused had $111,000 in proceeds of crime which, for this trial judge, was a "major distinction" between Scott's offences and those committed by Mr. Kleykens in terms of their respective seriousness. Respectfully, I do not

consider the difference in the amount of money seized to be as significant as did the trial judge, especially when one accounts for the other aggravating features of this case.

[54] Drug trafficking operations are fluid. The amount of money on hand at any given point in time can vary significantly. The nature and extent of the operation cannot be determined on that basis alone. As noted earlier, Mr. Kleykens had almost $6,000 in bundled cash, together with a money counter and exponentially more drugs than Mr. Scott. The fact that there was not more cash on hand at the time of the police intervention does not change the obvious fact that Mr. Kleykens too had "a prolonged and well-developed drug-dealing operation" from which he stood to profit significantly. It certainly did not transform a mid-to-high level drug retailing operation into "petty retailing".

[55] In his decision the judge declared at ¶54:

> … it would be unsafe to draw inferences about community impact absent the calling of aggravating-fact evidence by the prosecution" … findings I have made in earlier cases about community impact might have gone beyond reasonable inference, or proper judicial notice, and strayed into the realm of speculation. …

[56] There is nothing speculative about the devastating societal damage caused by trafficking drugs like cocaine, and the grave threat it represents to public safety. Over 30 years ago, this Court said explicitly that no one could be so naïve as to think otherwise. At this stage, there is no need to require the Crown to prove the deadly and devastating consequences of cocaine trafficking – a fact that has been recognized by courts across Canada for decades.

[57] The judge also sought to diminish the seriousness of the respondent's crimes by comparing cocaine and marihuana to opioids in terms of their respective societal harm. He said at ¶53 that he would rank cocaine and marihuana "a number of rungs down the ladder from medical opioids." Whether or not that is true, it hardly diminishes the severity of risk and ruin caused by drugs like cocaine. The harm the judge associates with opioids – physical and mental suffering; the loss of jobs, housing, families; the commission of crime to support dependencies – applies equally to cocaine as this Court has stated repeatedly for many years. Attempting to lessen the severe consequences of cocaine trafficking by comparing it to opioids, misses the point. Both belong on the highest rungs of the ladder.

[58] The judge also appears to confine his assessment of the societal consequences of drug trafficking to the particular community in which he presides. In my view, the prevalence of cocaine trafficking or the extent of its impact in a particular community at any given time does not diminish the seriousness of the offence or the offender's moral culpability in its commission. The potential for harm is the same.

[59] The fact that the Crown at trial chose not to introduce expert evidence of the "street" value of the drugs in question is not a proper basis for characterizing Mr. Kleykens as merely a "petty retailer". The quantity and type of drugs, the cash and manner in which it was bundled, and the other paraphernalia seized were all important pieces of evidence from which the extent of the accused's trafficking operation could be assessed. And comparing those features to other cases where sentences were imposed in similar circumstances, is precisely what a proper parity analysis requires.

[60] Finally, the judge also erred by apparently considering the lack of an aggravating factor – namely, the absence of weaponry – as a significant mitigating factor. As this Court recently confirmed in *Livingstone*, *supra*, at ¶47,79, the absence of an aggravating factor does not mitigate the seriousness of an offence.

[61] In conclusion on this point, the respondent was in the business of trafficking multiple controlled substances. He had all the tools of the trade. He was solely responsible for the enterprise. He was not an addict selling to support a dependency. His only motive was profit. His offences required considerable premeditation and planning. The evidence establishes that the respondent was actively involved in trafficking on a commercial scale.

[62] A proper assessment of the record unquestionably places the respondent's crimes well within the third of the four *Fifield* categories. Such offences must attract a "materially larger sentence" than those imposed on "petty retailers" if the primary sentencing objectives of denunciation and deterrence are to be adequately addressed.

[63] The various errors in the judge's analysis combined to mischaracterize the respondent as a "petty retailer" and to diminish the gravity of his offences. This led directly to the disproportionately lenient sentence imposed. Respectfully, a 90-day intermittent jail sentence in no way corresponds to the seriousness of Mr. Kleykens' crimes or the degree of his moral culpability in their commission.

(ii) Did the judge err in his consideration of the principle of parity, and did that error have an impact on the sentence imposed?

[64] In *White*, at ¶67-69, we said:

> [67] All Canadians, no matter where they reside in this country, are subject to the same criminal law as enshrined in the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Of course the sentencing process is highly contextual and meant to address the specific circumstances of the offence and the offender. Yet consistency in sentencing is also an important objective. Accordingly, after taking into account all of the features of a particular case, similar offences and similar offenders should be treated alike at sentencing, whether the conviction arose in Vancouver or Winnipeg, Halifax or Charlottetown. This is the principle of parity mandated in s. 718.2(b) of the *Criminal Code*:
>
>> a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
>
> [68] One of the functions of parity is to ensure fairness and guide our responsibility as judges to impose a sentence that is just and appropriate:
>
>> **§2.31** This principle of parity has developed to preserve and ensure fairness by avoiding disproportionate sentences among convicted persons where, essentially, the same facts and circumstances indicate equivalent or like sentences. ...
>
> See for example, Ruby, C.C., Chan. G.C. & Hasan, N.R., *Sentencing*, 9th Edition (Toronto: LexisNexis, 2012) at §2.31 & §2.35).
>
> [69] In conducting a parity analysis, sentencing judges are required to focus on both the "fundamental principle" of proportionality and the "secondary" principle of parity (*Lacasse*, paras. 53-54). Judges must also understand that while the proportionality and parity analyses are separate and distinct inquiries, there will always be a connection and interplay between the two. That is because proportionality not only involves a consideration of the individual features of an accused and his or her crime(s) but also a comparison with sentences for similar offences committed in much the same circumstances. As Wagner, J. directed in *Lacasse*:
>
>> [53] ...Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. <u>Individualization and parity</u>

> of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code* ...
>
> [Underlining in original]

[65] Respectfully, I see no indication that the judge undertook any meaningful reconciliation inquiry in sentencing Mr. Kleykens.

[66] As I have previously demonstrated, this Court has consistently and repeatedly emphasized that protection of the public, denunciation and deterrence are the paramount sentencing objectives in cases involving trafficking in Schedule I drugs, particularly at the level in which the respondent was engaged. While consideration of an offender's prospects for rehabilitation will always be a factor in sentencing, that important goal will have a reduced impact in sentencing those participating in the trafficking of "hard drugs".

[67] The Crown provides a helpful and accurate summary of this Court's approach to sentencing in drug cases at ¶53-56 of its factum:

> 53. To adequately address these primary sentencing objectives, this Court has emphasized that "even minor traffickers" should expect significant periods of incarceration.
>
> 54. Beginning with *R.v.Byers*, 1989 CanLII 200 (NS CA) the Court has consistently warned of the "severe penalties" that will be imposed for cocaine trafficking, even when relatively small amounts of the drug are involved. In *R. v. Huskins*, 1990 CanLII 2399, the Court stated, "Rare indeed will be the case where less than federal time should be considered as a proper sanction for such offence." In *R. v. Dawe*, 2002 NSCA 147, Justice Hamilton noted that, "Possession of cocaine for the purposes of trafficking typically results in sentences of two years or more…" In *R. v. Steeves*, 2007 NSCA 130 the Court stated that "time served in a federal penitentiary is the norm…" In *R. v. Butt*, 2010 NSCA 56, the Court underlined that "Involvement in the cocaine trade, *at any level*, attracts substantial penalties." (emphasis added)
>
> 55. In *R. v. Oickle*, 2015 NSCA 87, the Court reaffirmed that trafficking cocaine will "consistently attract sentences of imprisonment in the range of two years even for first time offenders." More recently in *R. v. Chase*, 2019 NSCA 36 the Court reiterated that "nothing has changed this Court's repeated and consistent warning that deterrence and denunciation will continue to be the primary objectives" and that cocaine trafficking "will normally attract a federal prison term."
>
> 56. Both *Chase* (6g cocaine) and *Oickle* (11g cocaine, 23 morphine pills) were "petty retailers". As outlined previously, the established sentencing range

> for offenders who traffick cocaine, marihuana or, as in the Respondent's case, both, at a higher level is broadly between 2 and 7 years imprisonment. The advent of the *Cannabis Act* has not changed the equation for offenders at the higher levels of marihuana trafficking.

[68] As we explained in *White*, these longstanding pronouncements are consistent with and echoed by the Supreme Court of Canada. For example, in *R. v. Lacasse*, 2015 SCC 64, Justice Wagner (as he then was) stated:

> [6] While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases, in the instant case, as in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society.

[69] Later, in his reasons, Wagner, J. went on to explain how lengthy prison terms are necessary in order to achieve denunciation and deterrence. He referred with approval to the decision of the Quebec Court of Appeal in *R. v. Brutus*, 2009 QCCA 1382, noting:

> 75 Along the same lines, the Quebec Court of Appeal said the following in *Brutus*:
>
>> [TRANSLATION] In closing, it should be borne in mind that the courts have long been sharply critical in discussing the commission of driving offences of this nature and have asserted that the objectives of denunciation and deterrence must be emphasized in order to convey their wish to give expression to society's condemnation of such crimes by means of exemplary sentences, particularly in cases (like this one) involving serious consequences for the victims. Society's condemnation may be reflected in longer terms of imprisonment, which have a deterrent effect both on the offender and on all those who might be tempted to imitate the offender. The sentence imposed in this case is not unreasonable in light of this objective, nor is it unreasonable in light of all the circumstances of the case. [para. 18]

[70] While the above commentary from *Lacasse* deals with impaired driving rather than drug offences, the Supreme Court has also identified drug trafficking as a serious offence meriting denunciation and deterrence. In *R. v. Kang-Brown*, 2008 SCC 18, Justice LeBel stated at ¶184:

> [184] The objective being pursued by the police was an important one, because trafficking in illegal drugs is a serious criminal offence. As has already been mentioned, the offence in issue in this case carries a maximum punishment of life

> imprisonment. Drug trafficking leads to other crimes. Illegal hard drugs such as cocaine are widely recognized to be a serious problem in our society. Their use not only fuels organized crime, but can also destroy lives. …

[71] Respectfully, the judge's approach in this case ignored such pronouncements from the Supreme Court of Canada as well as this Court's longstanding jurisprudence founded on the belief that lengthy terms of imprisonment are necessary to effectively protect the public from the devastating individual and societal consequences of drug trafficking. Those principles ought to have guided the judge in sentencing Mr. Kleykens for conducting a mid-to-high level multi-commodity drug trafficking enterprise. Instead, the judge reasoned:

> [56] … I am sorely pressed to recall any (*sic*) when I felt that a person had returned to court much improved by the experience of long-term imprisonment …
>
> [57] … Notwithstanding the norm that regards actual custody as a punishment of last resort …
>
> [60] … However, a penitentiary term would, given Mr. Kleykens' very good prospects for rehabilitation, not be required. …
>
> [63] …Not so for Mr. Kleykens, who is unlikely to return to court again. …

[72] In my respectful view, the judge's approach ignored binding precedent and instead purported to discount what should have been the primary sentencing objectives by relying upon his previous decisions in *Livingstone* and *Terris*, which this Court reversed on appeal. While the judge acknowledged in his reasons that his comments regarding the effectiveness of incarceration did not allow him to "rewrite the law of sentencing" (at ¶56), that is the effect of his decision regarding Mr. Kleykens.

[73] The judge's perception of the frequency of drug trafficking offences and the extent of resulting harm in the particular community in which he presides cannot justify altering or ignoring the established sentencing range. This point was expressed very well by the Alberta Court of Appeal in *R. v. Arcand*, 2010 ABCA 363 at ¶83:

> [83] Morever (*sic*), courts of appeal hear appeals province/territory-wide and can see when and where problems are arising. It is one thing to recognize that a local judge may be more familiar with the prevalence of certain crimes in a community and therefore more closely connected to the needs of that community. But it is another thing entirely to leave inequities in sentencing entrenched in certain communities. Local judges are not entitled to invent their own standards in criminal sentencing isolated from national or provincial/territorial standards. This

> would necessarily create differential pockets of legal authority, leading inevitably to significant inequities.

[74] In conclusion, the judge's mischaracterization of the seriousness of the respondent's offences; the undue weight he gave to the respondent's chances for rehabilitation; his failure to account for the type, quantity and dangerousness of the drugs seized; his unjustified depreciation of their devastating societal impact; and his over reliance upon his perception of the extent of the problem in his particular community, necessarily distorted the application of the parity principle. As a result of these errors, the applicable sentencing range of 2-7 years' imprisonment for comparable drug retailers was never properly considered.

[75] As noted by Wagner, J. at ¶58 of Lacasse, *supra*:

> [58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. …

Judge Atwood made no finding of any unique circumstances as justification for the sentence imposed, nor would such a finding have been sustainable. On the record here, there is nothing about the respondent's crimes, his motives for committing them, or his personal circumstances, which would be capable of justifying such an extraordinarily lenient sentence.

(iii) Having regard to the circumstances of this offence and this offender, what is a fit and proper sentence?

[76] An offender's personal circumstances and prospects for rehabilitation are important sentencing considerations. However, their influence on the ultimate disposition must remain in balance with other applicable principles and objectives of sentencing, if the resulting sentence is to satisfy the fundamental requirement that it be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[77] In my view, the judge's unjustifiably narrow focus on Mr. Kleykens' personal circumstances and rehabilitation contributed to the disproportionately lenient sentence he imposed.

[78] The respondent was employed full-time as a construction foreman which provided good income. He had worked for the same employer for approximately

10 years and was described as having a strong work ethic. This is to the respondent's credit, but two things must be factored in when assessing its weight for sentencing purposes.

[79] First, whether or not Mr. Kleykens would have lost his job as a result of the imposition of a substantial period of incarceration, that consideration must not displace the paramount sentencing objectives of deterrence and denunciation.

[80] Second, Mr. Kleykens was gainfully employed when he made the deliberate decision to traffic multiple illicit substances at a commercial level. His offending behaviour had nothing to do with addiction or financial need. His employment and rental income was evidently not enough to satisfy the respondent. His only motive was greed and to profit from his drug operations, with no regard to the consequential damage his actions undoubtedly caused the members of his community. Other than apparently deciding to get out of the drug dealing business after he got caught, Mr. Kleykens' situation remained the same both before and after his arrest.

[81] At his sentencing hearing, the respondent also produced a series of reference letters suggesting that the offences were out of character. As I see it, having five ounces of cocaine and over 18 pounds of cannabis for the purpose of trafficking is hardly the result of an isolated or momentary lapse in judgment. Rather, it is the result of a pre-meditated and prolonged course of action that suggests entrenched involvement in the illegal drug trade. This cannot be dismissed as simply "out of character". The reference letters provide a decidedly one-sided and obviously incomplete picture of Mr. Kleykens' character. It would appear the authors of those reference letters did not fully appreciate all facets of Mr. Kleykens' character. It is the nature and extent of the offences themselves that provide the most reliable reflection of the respondent's character.

[82] The trial judge attached considerable weight to these letters as justification for the lenient sentence he imposed. In doing so, the judge indicated that he would have been "constrained to discount" the character evidence if there had been greater evidence of "a deeply imbedded secret life" such as "higher-value proceeds of crime, drug retail paraphernalia, intercepted communications, score sheets and the like …". In fact, there was such evidence. Mr. Kleykens had a money counter, bundled cash, a digital scale, a score sheet and a very large stash of various illicit drugs. The judge simply failed to properly consider this important evidence.

[83] The respondent made a considered and deliberate choice to break the law, willing to risk getting caught, for the chance of personal financial gain. Evidently, the individual and societal damage caused by his actions were of no concern. Mr. Kleykens should have been sentenced in accordance with established precedent, wherein drug trafficking offences at the level of the crimes he committed, have consistently attracted substantial federal penitentiary sentences. The judge erred by focusing on the respondent's personal circumstances and rehabilitation, at the expense of addressing denunciation and deterrence in any meaningful way. These errors produced a disproportionately lenient sentence, completely out of line with the applicable sentencing range established by this Court over the past 30 years.

[84] The respondent deliberately engaged in a business which leads to destroyed lives. The discrepancy between his sentence and those imposed on similar offenders for similar offences is simply too large to ignore. In my view, a proper application of the paramount principles and objectives of sentencing required a federal penitentiary sentence. I accept the Crown's submission that a sentence of two years' imprisonment – while at the lowest end of the range of sentences based on the level of the respondent's trafficking operations – would remain proportionate to the gravity of his crimes and his high degree of moral culpability in their commission.

[85] I will turn now to a consideration of whether the sentence I would impose ought to be judicially stayed.

(iv) Should that fit and proper sentence be judicially stayed?

[86] In cases like *R. v. Best*, 2012 NSCA 34 at ¶34-35, and more recently in *R. v. Livingstone et al., supra* at ¶54-56, this Court has considered the rare cases "where, despite the initial inadequate sentence, it is no longer in the interests of justice to re-incarcerate" the offender. Deciding against doing so "represents an exceptional form of relief". Our communities are entitled to expect that criminals like the respondent are actually obliged to serve the sentence this Court deems fit for the serious crimes that have been committed, absent exceptional circumstances. This expectation is important in maintaining public confidence in the administration of justice. Staying a sentence imposed should be the exception, not the rule.

[87] The test to be applied is broadly stated; that being whether it is "in the interests of justice to incarcerate or re-incarcerate the offender". While not an

exhaustive list, factors typically taken into account in applying that test are such things as:

- the passage of time since the arrest and whether the offender has served his or her original sentence, either entirely or in part;
- the extent to which incarceration will adversely affect the stability of the offender's current circumstances and ultimate rehabilitation;
- whether the offender has been compliant with the conditions of his or her release and the extent to which the offender has lived a law-abiding lifestyle since his or her conviction;
- whether the principles of denunciation and deterrence can be adequately served without re-incarcerating the offender.

[88] Were these the only criteria to be applied to this case, I would have no hesitation in rejecting the request for a stay, and ordering Mr. Kleykens to report to prison to serve the sentence that ought to have been imposed following his conviction.

[89] As to the first criteria, while Mr. Kleykens was "in jeopardy" for a considerable period, there is no evidence of any specific hardship experienced by him over the course of these proceedings. Other then evidently deciding to get out of the drug dealing business after getting caught, Mr. Kleykens' employment and personal circumstances have remained largely unchanged throughout. I would add the observation that the respondent was arrested on September 21, 2016. He did not plead guilty until August 15, 2018, almost two years later. He was not sentenced until July 9, 2019, almost three years after being charged. While neither side raised any issue with respect to delay, it does strike me as odd to see such time pass between the respondent's initial arrest and his being sentenced. I find it hard to imagine why such delays would arise in what could only be described as a straightforward drug prosecution. While generally a guilty plea is considered to be a mitigating factor, such an assertion loses much of its weight where, as here, a change of plea is only entered practically two years after the charges were laid.

[90] As to the second criterion, requiring the respondent to serve the sentence imposed would not disrupt any rehabilitation program or treatment he has undertaken. This is not a case where the offender is or has participated in counselling or treatment to address the underlying cause(s) of his criminality. What motivated the respondent's criminal enterprise was the opportunity for

substantial financial gain, without any regard for the lives and well being of the members of the community. Mr. Kleykens has simply returned to the life and employment he enjoyed prior to his arrest.

[91] It is true Mr. Kleykens violated his bail conditions. That factor works against him when his sentence and compliance with court orders are considered on appeal. But at this late stage in the proceedings, his breach of conditions is not especially worrisome. The facts indicate that Mr. Kleykens was arrested while on house arrest when he was found sitting in the lobby of an automotive shop getting the oil changed in his truck. This was not an errand he was allowed to run according to the list of exceptions contained in either of his recognizances, and he did so outside the hours he was permitted to leave his house for personal tasks. For that bail violation Mr. Kleykens was sentenced - on a joint recommendation from defence and the Crown - to one day, deemed to be time served by his appearance in court.

[92] As to denunciation and deterrence, I fail to see how those paramount objectives could be adequately achieved without re-incarcerating Mr. Kleykens, for all of the reasons I have already provided.

[93] There is, however, a new factor that must be addressed, that being the impact of the COVID-19 pandemic in determining whether it is in the interests of justice to re-incarcerate the respondent.

[94] While it is true that Mr. Kleykens did not file evidence to show he was particularly vulnerable to the effects of the virus, there are consequences well beyond the potential risk to Mr. Kleykens' health personally, which must be taken into account. Given the startling number of deaths seen around the world over the last four months, one can take judicial notice of the critical importance of personal hygiene and social distancing, the wearing of personal protective equipment, the prohibition or limiting of people gathering, and the many other precautions ordered by government officials and health care professionals, which are deemed absolutely necessary to reduce the risk of exposure and transmittal to others. The very real, heightened and urgent need to minimize the likelihood of exposure to and transmittal of the virus, is reflected in the cooperative effort seen over the last several weeks on the part of judges, Crown Attorneys and defence lawyers to reduce current prison populations by arranging the release of certain inmates, upon strict terms, who are deemed to be little or no threat to the public.

[95] Requiring the re-incarceration of Mr. Kleykens would, in my opinion, disregard those important safeguards by exposing prison staff, correctional

officers, other inmates, and the respondent to unnecessary risk. Those risks outweigh the importance of obliging Mr. Kleykens to complete a prison sentence that properly fulfils the primary objectives of denunciation and deterrence.

[96] The Agreed Statement of Facts prepared and filed by the respondent, with the consent of the Crown, as part of his supplemental written submissions, provides a strong evidentiary basis for concluding that Mr. Kleykens completed his intermittent sentence; has been fully compliant with the requirements of his probation order; has completed some of his community service work hours, the balance of which are "on hold as a result of the COVID-19 situation"; that he was not referred for any programming or treatment as it had "been determined by Probation Services that Mr. Kleykens does not require these programs"; and that there has been no indication the respondent has possessed or consumed any controlled substances.

[97] There is no hint of violence in Mr. Kleykens' past. There is nothing in the record to suggest that he needs to be locked up in order to protect the lives and safety of people in his community.

[98] One can reasonably expect that advances and discoveries within the medical and scientific communities will halt the spread of the coronavirus and that the COVID-19 crisis will not last forever. Accordingly, what weight, if any, will be accorded this factor in subsequent appeals can be decided by future panels of this Court on a case-by-case basis.

[99] After careful consideration of the facts of this case, I have reached the conclusion that the problems currently presented by COVID-19, when viewed in light of the circumstances of this particular offence and this particular offender, martial in favour of keeping Mr. Kleykens out of jail. It would not be in the interests of justice to re-incarcerate him. I would, therefore, stay the sentence I have imposed.

Conclusion

[100] The respondent has not identified (nor am I aware of) any case in this jurisdiction in which a multi-commodity, high volume trafficking business comparable to the respondent's has been categorized as "petty retailing". Characterizing the respondent as a "petty retailer" for the purposes of sentencing was patently unreasonable. Such a characterization ignored incontrovertible evidence as to the nature and extent of Mr. Kleykens' drug-dealing operation. The

sheer volume and variety of dangerous drugs involved, together with the significant amount of cash seized, along with other drug-related paraphernalia and accessories, elevated his crimes beyond anything which would reasonably be described or treated as "petty retailing" for sentencing purposes. His mischaracterization of Mr. Kleykens' culpability lay at the root of the judge's failure to properly apply both the principles of proportionality and parity. Those serious errors had a direct impact upon the sentence imposed.

[101] A proper application of those principles in sentencing those convicted of participating in the trafficking of "hard drugs" requires as its principal objective the protection of society, such that the primary emphasis must always be placed on the principles of deterrence and denunciation.

[102] Given the circumstances of this offence and this offender, a fit and proper sentence ought to have been two years in a penitentiary. But for the crisis, lethality and uncertainty surrounding the COVID-19 pandemic, the respondent would have been re-incarcerated to serve such a sentence.

[103] However, given the very real risk such re-incarceration would pose to the health of the respondent and others, such re-incarceration is no longer in the interests of justice. Accordingly, the sentence should be stayed.

Saunders, J.A.

Concurred in:

Farrar, J.A.

Bourgeois, J.A