

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Weare*, 2020 NSSC 62

Date: 20200211

Docket: CRH 473277

Registry: Halifax

Between:

Her Majesty the Queen

v.

Theodore Floyd Weare

SENTENCE DECISION

PUBLICATION BAN: s. 517(1) and s. 539(1) of the *Criminal Code*

Judge: The Honourable Justice Jamie Campbell

Heard: January 3, 2020, in Halifax, Nova Scotia

Oral Decision: February 11, 2020

Written Decision: February 19, 2020

Counsel: Rick Woodburn, for the Crown
David Hirtle, for the Defence

By the Court (orally):

[1] There is often a debate at the time of sentencing an offender about the extent to which the sentence should reflect rehabilitation as a primary purpose as opposed to denunciation and deterrence sought to be accomplished through a period of incarceration. In this case, the Forensic Sexual Behaviour Pre-sentence Assessment notes that the offender's risk of sexual recidivism is three to four times that of an "average person" and that he presents a high risk to reoffend in a non-sexually violent manner. Because of that risk rating he is best suited for a specialized treatment program for sexual offenders at the high level of intensity. That programming is available only within the federal penitentiary system. The report says that he is not a suitable candidate for a community-based treatment program, because the offence for which he is being sentenced took place just after he had completed such a program. No treatment is available in the provincial jail system.

[2] So, the only way that the offender can access the kind of rehabilitative programs that the Crown says he requires is if he is sentenced to a term of incarceration within the federal penitentiary system. That raises the spectre of risk being treated like a disease with a sentence being imposed as a curative measure. Offenders are not sentenced until they are "cured" of a criminal disposition. Sentencing involves the consideration of a number of factors within the full context of the offence and the offender and those factors, principles and purposes, are often in tension. The tension is significant here because the principle of rehabilitation is often argued to support a shorter or more community-based sentence and not for a period of federal custody.

Facts

[3] After a trial heard on April 23 to 25, 2019, Mr. Weare was convicted of committing an indecent act and of a breach of the terms of his probation. The offences took place on August 29, 2017. Mr. Weare was observed masturbating in his car while driving next to the car being driven by the complainant in this matter. He was convicted of the offence under s. 173(1) of the *Criminal Code*.

[4] At the time he was subject to the terms of a probation order, to keep the peace and be of good behaviour. By committing that act, he breached that term of the probation order and was found guilty of an offence under s. 733.1(1)(a) of the *Criminal Code*.

Reports

[5] A Pre-sentence report was prepared, and a Forensic Sexual Behaviour Pre-sentence Assessment was undertaken as well. The latter was prepared by Dr. Michelle St Amand-Johnson who is a clinical and forensic psychologist in the Sexual Behaviour Program at the Nova Scotia Hospital. The two reports provide substantial insights into Mr. Weare's personal background and mental health. For the purposes of this sentencing there is no benefit to summarizing that information in great detail. It is however important to read the full documents to get the full context for the findings and recommendation that are made.

[6] Theodore Weare is now 29 years old. As of the date of the reports he has been in a common law relationship for about 7 years. The couple has 2 children, ages 5 and 2. Mr. Weare reported that relationship to be fairly stable and functional. He had been employed at a construction company but lost his job because of the house arrest conditions relating to these offences. The family relies on his partner's income. Mr. Weare graduated from high school and has some further training related to his work. Those would be things like safety courses and machinery operator courses.

[7] He has no history of sexual abuse or exploitation. His father at times engaged in some sexually inappropriate behaviours and made sexualized comments to strangers. But Mr. Weare himself was not sexually abused.

[8] Mr. Weare has been seen by a number of mental health professionals since he was a child. In 2014 he was noted as having symptoms of adult ADD with secondary anxiety/depression which was then in remission. He was given medication. Some of that medication was to inhibit his compulsive sexual urges.

[9] Mr. Weare was originally referred to the Forensic Sexual Behaviour Program in 2011. That followed his first conviction for committing an indecent act. The diagnoses at that time included Antisocial Personality Disorder, Adult Antisocial Behaviour and a "query for Exhibitionism". The actuarial risk assessment indicated "moderate" risk for sexual recidivism and a high risk for domestic violence based on his previous behaviours in intimate relationships. His risk was deemed to be "guardedly managed". There were deficits in impulse control and anger management noted and Mr. Weare appeared to be poorly equipped to effectively manage the symptoms of depression and anxiety.

[10] Mr. Weare was referred for treatment, but his sentence order expired. He declined to attend on a non-mandated basis.

[11] He returned to the Forensic Sexual Behaviour Program after being charged again for committing an indecent act in June 2014. He was on probation for theft and breach charges when he sexually reoffended. There was also then a domestic assault charge outstanding. It was reported that Mr. Weare believed that attending the program would “look good” when he attended court. Mr. Weare eventually was accepted into a group program in Kentville with caveats that his risk level was higher than ideal for the intensity of that program and that treatment motivation was in response to external pressures.

[12] He attended the group from November 2015 until July 2016. The discharge summary noted that he had increased participation in group discussion as he gained comfort over time and took responsibility for his behaviours. Toward the end of the program he showed some difficulty in managing his strong sexual drive and fantasies. He was triggered by sexual interest from a coworker and regressed in endorsing cognitions supportive of crossing his own sexual boundaries. That provided insight into “the magnitude of Mr. Weare’s drive when activated, and the need to institute intervention immediately for the greatest chance of success”. The overall conclusion was that he had made good to excellent progress in treatment. His status was considered to be consistent with a moderate level of “dynamic risk” but his rehabilitation was expected to be a long term process. It was recommended that he attend a follow-up maintenance group. He did not follow through with that.

[13] In December 2015, while still attending the treatment group Mr. Weare was referred to Dr. Grainne Nielson. Dr. Nielson diagnosed Exhibitionism and Antisocial, Anxious and Dependent personality traits. His sexual drive was quite high and included a strong compulsion to expose. She recommended pharmaceutical intervention and prescribed medication. He was to follow up with his family doctor. The prescription was renewed with six refills, but Mr. Weare said that he never filled the prescription because he was too busy working.

[14] On September 26, 2017 Mr. Weare once again contacted the Forensic Sexual Behaviour Program to request a medication consult with Dr. Nielson. The next day a referral was received from his family doctor, indicating that Mr. Weare had reoffended and would like to resume services. That was with respect to the offence for which he is now being sentenced. Given Mr. Weare’s lack of follow through

on treatment recommendations he would not be automatically reinstated. He was motivated by the external pressures of being back before the court.

[15] The Forensic Behaviour Pre-sentence Assessment summarizes Mr. Weare's interaction with mental health services in this way.

[16] In sum, Mr. Weare had mental health service contact as a child, related to acting out associated at least in part with circumstances in his home life. As an adult, he has accessed professional help when in trouble with the law but has shown poor follow-through on interventions once immediate crises or mandates have passed, suggesting that motivation has largely been external despite Mr. Weare's verbalizations of knowing that he has issues that he needs to address. He currently has a prescribing psychiatrist and reported compliance with prescription fluoxetine. However, compliance with medication intended to lessen sexual drive has historically been variable, despite it being identified as an important (but not sole) strategy in his risk management.

[17] The risk of reoffending was determined in Mr. Weare's case by considering a measure of psychopathy, actuarial risk assessment measures and empirically derived instruments that inform a structured clinical judgement. Both static and dynamic variables were considered. The measure of psychopathy indicated a moderate risk for violence. Based on actuarial risk measurement involving static or historical variables, Mr. Weare was placed in the high range of risk for future violence relative to other men who have been convicted of sexual offences. His scores placed him as being well above average risk for being charged or convicted of another sexual offence. Individuals at the levels scored by Mr. Weare would be expected to have three to four times the rate of recidivism as an average individual convicted of a sexually motivated offence. The dynamic risk measurement instrument provided a score for Mr. Weare that placed him in the moderate density range of criminogenic needs. Overall the combination of the static and stable instruments indicated that Mr. Weare's baseline risk for sexual recidivism is three to four times that of an average person adjudicated for crossing legal sexual boundaries. He was also assessed as posing a high risk to reoffend in a non-sexually violent manner, particularly in a domestic context based on past behaviour. He was noted as being most likely to engage in exhibitionistic behaviour targeting an adult female.

[18] The report notes that given his current rating, Mr. Weare would be best suited for a specialized treatment program for sexual offenders at the high level of

intensity. Dr. St Amand-Johnson says that the programming is only available through the federal penal system. He was noted as not being a candidate for a community-based treatment program which is designed to target low-to-moderate risk and that was clearly insufficient to create the long term change in Mr. Weare given his reoffending after completing that program with the Forensic Sexual Behaviour Program. Dr. St. Amand-Johnson said that Mr. Weare could not be accepted into the Forensic Sexual Behaviour Program and it would be unethical for her to allow him to be treated in that program given his risk assessment.

Criminal Record

[19] Mr. Weare has an extensive criminal record for a relatively young man. He was convicted in 2010 of a break and enter offence and wearing a face mask while committing that offence. He served an 18-month conditional sentence and 2 years of probation.

[20] In April 2011 he was convicted of committing an indecent act and was sentenced to a 2-month conditional sentence.

[21] In 2013 and 2014 he was convicted of failing to comply with an undertaking. Later in 2014 he was convicted of theft under \$5,000, failure to comply and breach of probation. He was sentenced to 15 months of probation. In 2015 he was convicted of assault and a failure to comply with an undertaking. The assault was against his common law partner. He was sentenced to a 2-month conditional sentence for the failure to comply and a 4 month conditional sentence for the assault. He also received 18 months of probation.

[22] In 2016 he was convicted again of committing an indecent act. He was sentenced to probation for 24 months.

[23] In 2017 he was convicted of firearm offences, resisting a peace officer and failure to comply. That related to an incident involving hunting. He was sentenced then to a 6-month conditional sentence and a 10 year firearms prohibition.

[24] The first conviction for an indecent act involved public exposure and masturbation. He was in the Cookville Circle K store, walking around with his penis in his hand. He had two cans of pop in one hand and his penis in the other when he was approached. He said that he was looking for chips then went to the back of the store and started to masturbate. Mr. Weare acknowledged that he had done something similar at an Irving station as well.

[25] The second conviction of that kind, in 2014, involved exposing himself to a woman near Fall River Road. The complainant in that case said that he followed her, ran past her, then approached her with his hands down his pants. He then pulled out his penis and started shaking it.

[26] The offence for which Mr. Weare is being sentenced now, is the third time he has been convicted for the same offence. Neither the treatment nor the sentences he has received have served to deter him from what has become a pattern of behaviour.

Sentencing Purposes and Principles

[27] Despite the presence of mandatory minimum sentences for some crimes, sentencing remains a highly individualized process. Offences are not sentenced. People are sentenced. They are sentenced in all their complex individuality and having regard to the unique circumstances of each offence. The same crime is never committed twice. No two offenders are the same. That uniqueness provides for a scope of discretion, but that discretion has to be applied in a principled way. The principles themselves are broad and like most good principles can appear to function in a kind of tension.

[28] The “fundamental purpose” of sentencing is to protect society and to contribute to the respect for law and the maintenance of a just, peaceful and safe society by imposing just sanctions. The protection of society and the maintenance of a just peaceful and safe society are not coded terms for harshness. The protection of society can be brought about in a number of ways that do not necessarily involve longer periods for incarceration. More jails do not create safer or more just societies. The just sanctions imposed have one or more objectives.

[29] The sentence can be used to denounce unlawful conduct and the harm done to victims and the community. Denunciation can be the way in which a society defines for itself the limits of tolerable conduct. Justice must have a place for retribution. That should not be confused with vengeance. Retribution has to be measured and restrained.

[30] A sentence may deter others from committing offences. The deterrent effect of specific sentences may well be minimal. It is unlikely that anyone dealing with the kinds of issues that Mr. Weare has and is dealing with, in the moments before exposing himself would have regard to the sentence imposed in this case. It must be said however that if sentences in general are perceived as being inconsequential

potential offenders can be emboldened. To be respected the law must be seen as imposing sentences that provide for meaningful consequences.

[31] Sentences can separate offenders from society where necessary. That should not be the first option. It can become a more likely option when an offender has consistently shown an unwillingness or inability to respond to other measures.

[32] Sentences can assist in the rehabilitation of offenders. People are changed by going to jail. Some return to society as better people and some, despite the best efforts of the authorities come out more criminally hardened. People can be rehabilitated. But jail is not a hospital. People become involved in crimes for a multitude of intersecting reasons and society cannot be deluded into believing that everyone who commits a crime is an unfortunate victim of biology and the circumstances of their environment. Jail can provide treatment that may assist a person in his or her rehabilitation. It does not cure people.

[33] In this case, the best chance for Mr. Weare to access the treatment that he needs, is in a federal penitentiary. People are not simply sentenced until they are somehow cured of their criminal behaviours. A custodial sentence for rehabilitative purposes has to be measured against the risks that any period of incarceration involves. There is no guarantee that a person will come out of the system “cured” and there are risks the he will adapt to the culture to which he has been exposed. Furthermore, a length of sentence imposed must be otherwise appropriate.

[34] A sentence can provide reparations for harm done to victims and to the community. There are crimes for which an offender can be ordered to provide financial compensation for the victims of the crime. This is not one of those. “Doing time” is not a form of reparation. In this case the victim provided a victim impact statement. The matter has caused her considerable stress and worry. She has felt nervous about being out alone and anxious in the areas where the offence happened. Being involved in a court case is stressful in itself. Having to report what happened, to recount it a number of times and to have to face Mr. Weare in a courtroom as a witness was not something that she has simply been able to forget.

[35] Having him go to jail would have little value to her. No money he could ever pay her would make a difference. His actions have cost her something and he can never repay it. His actions have had consequences for a perfect stranger. She did nothing to deserve what she has had to endure. Nothing. She only did the right thing, which was to report it. To talk about reparations for her is in a way to insult her.

[36] Sentences can promote a sense of responsibility in offenders and provide an acknowledgement of the harm they have done to victims and the community. Again, for some offences that is an important consideration. In Mr. Weare's case that understanding will only come with counselling and treatment.

[37] It is a fundamental principle of sentencing that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. It must be consistent with the sentences imposed upon other offenders who have committed similar crimes in similar circumstances. That does not involve the search for the identical case. There is none. It does mean that generally, people should be treated consistently. A sentence should be within a reasonable range of sentences.

[38] Those purposes and principles exist in tension with each other. Here, the protection of the public would be best achieved by making efforts to have Mr. Weare receive treatment to limit the chances of him offending again. Mr. Weare's best chance of being rehabilitated is if he is forced to receive treatment within the federal penal system. He has not shown any willingness to engage with treatment unless he is under some compulsion. Treatment provided in that environment would also promote the sense of responsibility that he otherwise lacks. It serves the purpose of keeping him out of the community for a period of time and limits the risk that he will offend in the short term.

[39] That solution sounds elegant enough. But it can only be imposed if the length of the sentence is not outside the range of sentences that similar offenders receive in similar circumstances. Mr. Weare cannot be imprisoned until he is "cured".

[40] Sentences imposed in these kinds of cases fall within a broad range. A first-time offender may be treated very leniently in the hope that an encounter with the criminal justice system might in itself be an incentive to seek treatment on a voluntary basis. For more repeat offenders, different considerations arise. Mr. Weare has done this three times. He shows no sign of stopping. How many other people have to go through this before he is forced to stop?

Parity

[41] If Mr. Weare were sentenced to federal penitentiary, he would have to be sentenced to a period of incarceration of 2 years or more. The Crown noted that he would be sent to Renous Institution which is the maximum security penitentiary in

which the program for sexual offenders is offered. Even having regard to his criminal record, it is significant to note that he would be sentenced to serve a federal sentence for an offence in which he exposed his penis while driving his car.

[42] The offence is a particularly troubling one given the pattern of behaviour and the potential for repeated offending sexual behaviour. But this is generally not the kind of criminal behaviour that results in people being sent to jail for periods of more than two years. The Crown did not provide caselaw to indicate the range of sentences that are imposed on similar offenders. Mr. Weare's counsel, Mr. David Hirtle, provided some cases that indicate that a two-year sentence of incarceration would be well beyond what is usually imposed.

[43] In *R. v. Wickstrom* 2016 BCCA 103 the British Columbia Court of Appeal dealt with a sentence of three month's imprisonment followed by three years of probation for a person who had been observed sitting at a slot machine exposing himself and masturbating while people walked by. His criminal record included 12 prior convictions for committing indecent acts. He was on a conditional sentence at the time of the offence and was described in an assessment as being at a moderate to high risk to reoffend. The court accepted the trial judge's reasoning that the offender had sought to minimize his responsibility for the offences.

[44] In *R. v. Burgar* 2005 BCSC 1709, the accused was convicted of masturbating in a public place, in that case on the bank of a river with other people present. He had an extensive record involving indecent acts. He was sentenced to 6 months in jail and 2 years of probation.

[45] In *R. v. Hui* 2004 BCPC 211, the offender was convicted of three offences involving exposing his genitals. He had been convicted previously of three other offences of the same kind and was on probation for those when the three offences for which he was being sentenced had been committed. The offender had received treatment however. When the treatment ended, he offended again. His treating psychiatrist noted that he had been compliant with treatment when it resumed and appeared to be making progress. He was described by the psychiatrist as being at a low risk to reoffend over the short term. Over the long term, while not subject to supervision, his risk was moderate to high. The court was satisfied that a jail sentence was called for but given the progress that the offender had made it should be in the form of a conditional sentence, for a period of 6 months.

[46] In *R. v. Nieuwejaar* 1996 CarswellBC 2279, the accused plead guilty to four counts of committing two indecent acts. Two of them involved children under the

age of 14. He had a number of convictions over the years for offences of that kind and resisted treatment. He was sentenced to four consecutive sentences of 6 months each. The court of appeal held that the accused was a threat to the community and needed to be imprisoned to receive proper treatment. The Court of Appeal upheld the sentence.

[47] There are not a great number of reported cases dealing with people who repeatedly engage in the kind of behaviour that has led to Mr. Weare's convictions. The nature of the behaviour is such that without treatment it tends to be repeated. It is acknowledged by courts as being more than a nuisance and calling for a sentence that reflects the level of concern and anxiety caused to those who witness the behaviour. A jail sentence is certainly within the range of sentences that can be imposed. A federal prison term of two years or more would be the maximum sentence that could be imposed and would be reserved for the worst offenders. In Mr. Weare's case, he did not directly confront the victim. The victim was not a child. The effect on her was considerable, as noted from her victim impact statement, but he was in a moving car and she was in a moving car. It is Mr. Weare's third such offence, but he has not reached the stage of being a serial offender.

[48] Jail is very much an option in this case, but a federal term is not within the range of reasonable sentences that should be imposed.

[49] That conclusion is significant because of what it means for potential treatment options. Without a federal sentence Mr. Weare cannot access the kind of intensive treatment that he may require. He cannot be accepted into treatment at the Forensic Sexual Behaviour Program. A few months of jail may serve as punishment, but it would not advance his treatment in any way. It would serve to disrupt the treatment that he is getting now from his own psychiatrist.

Dr. Andrew Ashley-Smith

[50] Dr. Andrew Ashley-Smith has been Mr. Weare's treating psychiatrist since December 2017. He was originally consulted about impulsive behaviours which appeared to be a result of adult Attention Deficit Disorder. In February 2018 Mr. Weare told Dr. Ashley-Smith about his sexual urges and resulting impulsive behaviours and that he had been charged with exposing himself. Dr. Ashley-Smith tried to treat Mr. Weare with two different medications and neither appeared to work. He then started Mr. Weare on a drug known as Androcur, which he described as a last resort medication. Mr. Weare tried the oral preparation then

switched over to the injectable form of the drug. The injections were reported by Mr. Weare as not being as effective as the oral form.

[51] Dr. Ashley-Smith says that the oral form of the drug appears now to be suppressing Mr. Weare's thoughts and he could easily manage his impulsive behaviours. Monitoring of compliance with the regime of oral medication can be done by randomly testing blood levels of testosterone.

[52] Dr. Ashley-Smith reported that Mr. Weare had been compliant with all his treatment recommendations, has attended appointments as specified and engaged willingly and enthusiastically with treatment. He has taken ownership of his condition and the need for treatment.

The Sentencing Compromise

[53] There is no ideal and risk-free solution in these circumstances. The best protection for the public will be achieved when Mr. Weare accepts the need for ongoing treatment with respect to his condition. If he is untreated, or if his treatment lapses, he will be very likely to offend again. The only way to get intensive treatment in an environment in which Mr. Weare has straightforward and immediate incentives to comply is to have him committed to a federal penitentiary. Sending someone to jail for two years for committing the offence of exposing his penis while driving his car is excessive, even having regard to the fact that this is his third offence of the same kind.

[54] A shorter jail sentence would act as a symbolic nod to deterrence. Without treatment though, spending a few months in a provincial institution, would only have the effect of separating him from Dr. Ashley-Smith, who appears to be his best and perhaps only hope of achieving a normal life.

[55] To date, Mr. Weare has shown a disturbing pattern of behaviour in which he becomes compliant with treatment only when subject to external pressures from the court. It is important that those external pressures continue to be applied until Mr. Weare has shown that he has the insight to accept responsibility himself for his own treatment.

[56] Mr. Weare needs to understand that if he does not continue with his treatment, he will find himself back before the court again. He will then have used up every chance that could be given to him. The goal will then be simply to remove him from the community for as long as legally possible in order to protect

the community from him. He has a choice to make and he will have to make it almost every day.

[57] Mr. Weare has had conditional sentences before. He has breached the conditions. Now, there is some reason to believe that with Dr. Ashley-Smith's help he can comply. If he does not, he will almost certainly be facing a longer time in jail than might have been considered appropriate had he simply received the sentence today. Mr. Weare is not a danger to the community when he is undergoing a course of treatment. If he gives up on treatment a period in jail becomes the only option.

[58] Mr. Weare will be on a conditional sentence order for two years less one day. The terms of that conditional sentence order will be to keep the peace and be of good behavior, attend court as and when directed, to have no contact, directly or indirectly with Ms. A.M., and to not be within 50 meters of any place known to him to be the residence or place of employment of Ms. A.M. He is to report to a conditional sentence supervisor by February 15, 2020. He is to remain in Nova Scotia unless written permission is obtained from the court or from his supervisor. He is to notify the court or his supervisor of any change of name or address and to promptly notify the court or his supervisor of any change of employment or occupation. He is to comply with the directions of his conditional sentence supervisor. My expectation is that the conditional sentence supervisor will require that he remain under the treatment of Dr. Ashley-Smith and comply with all treatment and monitoring recommendations made by Dr. Ashley-Smith. At the conclusion of the conditional sentence order, Mr. Weare will be required to be on probation for a period of 2 years. The terms of the probation order will be the same as the terms of the conditional sentence order except that the report will be to a probation officer not to a conditional sentence supervisor. The conditional sentence order does not contain provision for house arrest or a curfew. He has been subject to release conditions for some time already. The terms of the order are limited and that is for a purpose. Mr. Weare must understand that his obligation is to seek and comply with treatment. If he fails to do that he will be in breach of a conditional sentence order. That will land him in jail.

[59] Mr. Weare needs to understand that he was very close to spending an extended time in jail. Dr. Ashley-Smith's willingness to treat him and to monitor that treatment has provided a compromise that allows him one last chance. If he fails to comply, as he has in the past, time in a federal institution may be the only remaining option. Mr. Weare you need to understand this in the clearest possible

way. I could tell just from watching you in court that you fear going to jail for a long time. You should. Remember how it felt when you were that scared.

Remember the horrible vision of spending 2 years locked up with sex offenders. If you don't take this seriously that is what is going to happen to you. The choices you make almost every day for the next few years will set the way your life goes. If you make the wrong choices as you have before, you will be locked up, in that place, with those people.

[60] I want to explain clearly that you will be subject to two orders. The first two years is a conditional sentence. That means you would be sentenced to two years less one day, but because of Dr. Ashley-Smith's involvement, you can serve it in the community. If you mess up, that community sentence collapses and you'll find yourself in jail. It's not like probation where you get charged for a breach, or the condition of a release, where you get another charge. For the next two years think of yourself as being almost in jail.

[61] I hope you don't end up there.

Campbell, J.