

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Preston*, 2021 NSSC 316

**Date:** 20211115

**Docket:** *Halifax*, No. 498703

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Kyle James Preston

**Restriction on Publication: 486.4 cc – Identity of the Complainant**

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**SENTENCING DECISION**

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<b>Judge:</b>	The Honourable Justice Joshua Arnold
<b>Heard:</b>	November 15, 2021, in Halifax, Nova Scotia
<b>Final Written Submissions:</b>	November 10, 2021
<b>Counsel:</b>	Alicia Kennedy and Yan Lu, for the Provincial Crown Matthew Ryder, for Kyle Preston

**Order restricting publication - sexual offences**

**486.4 (1)** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

...

**Limitation**

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

## Overview

[1] Kyle Preston was convicted after trial of sexually assaulting S.B. The sexual assault involved forced, unprotected vaginal intercourse during what began as a consensual “hook-up” while parked behind a recreational center in the early morning hours. Mr. Preston and S.B. were casual acquaintances prior to texting each other and meeting on August 4, 2018. They were both 19 years old at the time of the sexual assault.

[2] Mr. Preston has no prior record and was otherwise a pro-social member of society. Post-conviction he participated in a Comprehensive Forensic Sexual Behaviour Presentence Assessment and a presentence report was also prepared. S.B. filed a victim impact statement and says she continues to suffer psychological trauma.

[3] The Crown recommends a prison sentence of two years in custody, followed by three years’ probation and ancillary orders. Mr. Preston asks for two years in custody, followed by 18 to 24 months’ probation and ancillary orders.

## Facts

[4] The facts of the offence are detailed in the trial decision (*R. v. Preston*, 2021, NSSC 212).

[5] The report of the Comprehensive Forensic Sexual Behaviour Presentence Assessment indicates that Mr. Preston, now 22 years old, withdrew from his employment and educational upgrading after he was convicted in order to manage his stress levels. The report indicates that Mr. Preston’s parents separated when he was two or three years old, and he lived primarily with his mother growing up. The report describes an erratic relationship between Mr. Preston and his father, including at least one extended period where they had no contact, and allegations of anger issues on his father’s part. It appears that there was a contentious relationship between Mr. Preston’s parents. Mr. Preston has several step-siblings, on both sides of his family, but appears to have little contact with them. As to his family history, the report goes on to say:

Mr. Preston denied the experience of childhood neglect, stating that although finances were tight, his basic needs were always met. He described being emotionally abused by his father, stating that when angry his father would often yell at whoever was in closest proximity. He stated being unsure if he was physically abused by his father, describing that his father was physically rough

when annoyed or angered, but could not recall any overt acts that he could decisively state were physical abuse.

Mr. Preston recalled his grandfather was convicted of sexual offences against one of Mr. Preston's paternal stepsisters, and that when Mr. Preston was 4 or 5 years of age that his grandfather also touched him sexually. Mr. Preston was vague in the specifics of this incident, but it appears that at minimum his grandfather touched Mr. Preston's buttocks. Mr. Preston was quick to add that "my grandfather loves me and has done a lot for me" and that "he dealt with a lot of mental issues" in excusing and justifying the experience. Mr. Preston's mother noted that his paternal grandfather was fond of Mr. Preston and would give him lavish gifts. She recalled that around 12 or 13 years of age that Mr. Preston began to become estranged from his grandfather. Mr. Preston does not conceptualize that above event as sexual abuse, reflecting that "I don't think it was meant for me" speculating that his grandfather most likely mistook him for his stepsister.

At the time of the assessment, Mr. Preston said he lives with his mother which he described as "stressful" as "I feel bad for putting her in this situation" relative to the index matters. His mother described a positive relationship between them but expressed a desire for Mr. Preston to gain independence and confidence. He stated that since his arrest he has become more open with talking to his mother about his concerns and seeking support from her when needed. He reported little contact with his father beyond occasional text messages.

...Mr. Preston stated at least one instance of being sexually touched by his paternal grandfather but reported his belief that same was accidental and that his grandfather had meant to sexually touch Mr. Preston's stepsister.

[6] As to his education, Mr. Preston described himself as a good student prior to high school, but said his high school years were marked by truancy and missed course work, until he quit at the age of 20. However, he went on to complete a GED on the first attempt, leading the author to remark that "he can perform well in school when motivated." He had been accepted at the Nova Scotia Community College, but had voluntarily withdrawn twice, due to poor performance. He has had various jobs, generally of short duration, and apparently with generally poor work performance. Mr. Preston attributed weaknesses in his educational and employment performance to mental health issues.

[7] Socially, Mr. Preston reported a small circle of contacts online, in what the author describes as self-imposed social isolation. As to his sexual history, the report states:

In summary, Mr. Preston described being exposed to sexual actions at a young age through his father and grandfather, but not learning about sexual concepts until taught through the official school curriculum. He described a high sexual drive during his adolescence and a moderate-high sexual drive at the present time that is mostly met through masturbation. Despite stating that depressed mood lowers his sexual drive and that his current drive is “low” due to same, his monthly output for masturbation is still high for his age and gender. Mr. Preston also has a high number of sexual partners for his age and described indiscriminate selection of partners within a hook up culture primarily during his teenage years. He noted a monogamous long distance relationship over the previous 30 months and denied infidelity, stating he addresses his sexual drive via solo actions. Mr. Preston did not describe any markers of concerning use of pornography and denied any paraphilias, fetishes, or atypical sexual interests.

[8] The report goes on to address Mr. Preston’s psychiatric/mental health history, and the results of psychological testing:

In summary, Mr. Preston reported childhood onset of anxious type symptoms and adolescent onset of depressive type symptoms. Mr. Preston deflected blame for his life failures onto his mental health status, which is of clinical concern to the undersigned as he is avoiding taking responsibility for problems in his life by attributing them to mental health issues, i.e., factors outside of his perceived control. He has engaged with five therapists, all of whom have applied evidence-based approaches which are appropriate to the symptoms outlined by Mr. Preston. Concerns were apparent throughout Mr. Preston’s intervention history that he has not been engaged in therapy including not completing homework, not trying skills outside of session, and nonattendance. Mr. Preston has trialed many psychotropic medications for anxiety, depression, and most recently ADHD, and reported little improvement from same on his symptomatology. It appears that Mr. Preston is primarily focused on achieving an external method to manage his symptoms through medication rather than on acquiring internal methods through therapeutic approaches. Although Mr. Preston reported increased focus and motivation in therapy at the present time, his treatment notes reflect a continuation of his pattern of low engagement, low homework completion, and cancelling sessions.

### **Psychological Testing Results & Personality Profile**

...

Results of the psychological testing revealed that Mr. Preston responded in such a manner that his symptom profiles were likely exaggerated and overrepresent his areas of psychological concern. Typical explanations for this type of response style are a trait like style to magnify illness, an inclination to complain, and/or feeling extremely vulnerable within their mental health. In relation to Mr. Preston, it appears the best explanation for his heightened profile scores are his feelings of

vulnerability relative to his mental health status along with a tendency to view his symptoms as severe. Taken together, Mr. Preston's profile was interpreted with an understanding that same presents inflated symptoms and may not fully reflect his psychological functioning.

A prominent finding within Mr. Preston's testing was that he has intense feelings of self-doubt, often viewing himself as inferior to other people which links into his apparently low self-confidence. This finding was in line with Mr. Preston's self-report in that he views others as better than himself in most capacities and was quite negative in describing his self-view stating not liking any of his qualities. Congruent with his self-report were test findings that Mr. Preston has a distorted view of other people and their situations, reflecting that Mr. Preston does not view other people clearly, instead viewing them as better than their reality.

...

Mr. Preston's scores indicate that Mr. Preston is shy, emotionally distant from others, and overcontrolled within social situations. Mr. Preston described his social presence as "awkward" and appeared to view himself as socially inept, leading to his current reclusive behaviour (e.g., social isolation) and a generally introverted lifestyle (i.e., rarely leaving his mothers' home, not working or attending schooling).

...

Poor anger and emotion management was noted as an area of concern by Mr. Preston's collateral contacts. Many of them described that Mr. Preston will become irritable and angry over minor concerns ("he gets pretty mad over nothing"), often expressing his anger outwardly such as screaming and punching objects, but that he will quickly regain control over his outburst within minutes and will behave as though nothing had transpired.

...

Treatment for individuals with similar profile scores to Mr. Preston can experience barriers to progress. Energy can be a main barrier to change as his scores suggest he is likely to spend his energy worrying about his problems leaving little resources to work on resolving his areas of concern. His scores suggests that he tends to take on too much blame for his difficulties and this cognitive orientation can result in apathy and low motivation to attempt change due to feeling overwhelmed and pessimistic. His test findings highlighted the chronic nature of his symptoms, and many of his areas of concern appear to have a trait quality rather than a state (i.e., personality disorder rather than mental health disorder). Mr. Preston's results indicate that he is likely to do well within family therapy or group therapy options, especially when addressing his social problems, poor communication patterns, and low assertiveness. Mr. Preston's scores suggest that Mr. Preston wants help for his mental health problems however, based on his past mental health history, he appears to want immediate solutions for his symptoms, and may externalize responsibility or expectation

onto a therapist to “fix” him. This cognitive orientation shows a misunderstanding of the therapeutic process which relies on individuals to work toward their own change and to take the onus of responsibility for their progress. As such, this mindset will need to be addressed before progress within therapy will be observable and sustainable.

[9] Additionally, the report incorporated a clinical analysis of the offence of which Mr. Preston was convicted:

**Client’s Version & Analysis of Offending:**

In summary, Mr. Preston was found guilty of sexually assaulting SB and continues to maintain his innocence within the index matter. At the time of the offence Mr. Preston was single and engaging in casual sexual contacts within a “hook up” culture and was indiscriminate in his selection of sexual partners. Reportedly within messaging with one another previous to their sexual encounter SB stated that she and Mr. Preston should “fuck” and Mr. Preston attended her residence with the goal of engaging in sexual activity. It appears that SB was consenting to sexual interactions with Mr. Preston aside from vaginal-penile intercourse, and she reported clearly stating non-consent to same throughout their interaction. Mr. Preston denied that SB said she was not consenting to penile penetration and he appears to have relied on his interpretation of her body language to determine her ongoing consent rather than focusing on her verbal and physical resistance. Potentially he attributed her actions and statements of resistance to sexual “teasing” rather than boundary setting for their encounter and overt/passive resistance to same. The primary factors within the index matter appear to be male sexual entitlement, viewing women as sexual objects, use of casual sex to cope with negative emotions, misunderstanding of consent, and misinterpreting indicators of overt as well as passive resistance.

**Risk for Recidivism**

**Summary Statement of Risk:**

Overall, a combination of the Static and Stable instruments indicates that Mr. Preston’s baseline for risk for sexual recidivism is the same as that of the average person adjudicated for crossing legal sexual boundaries. With additional consideration of the PCL-R and SORAG, Mr. Preston has some potential to reoffend in a non-sexually violent manner, but non-sexual violence is slightly less likely than sexual reoffence. If Mr. Preston were to reoffend sexually, his history and current assessment results suggest that he is most at risk to offend against a similarly aged female peer to whom he has ease of access through dating contexts.

Consideration of dynamic variables suggests that several criminogenic factors remain active in Mr. Preston’s life and could benefit from intervention. Needs

include poor problem solving, negative attitudes (e.g., entitlement, women as sex objects, consent), coping skills, and lifestyle instability (e.g., employment, finances, schooling). On the positive side, Mr. Preston has access to a prosocial and supportive social network, has perspective taking skills, and has positive life goals. At the present time Mr. Preston's risk is not viewed to be well managed as he is anchoring same on social isolation and withdrawal rather than on directly addressing his areas of criminogenic concern.

[10] The author summarized the findings and set out a prognosis and recommendations:

### **Summary and Prognosis**

...

It is noted that the community-based program appears to be a good fit in dosage for Mr. Preston's risk level, which is actuarially estimated in the moderated range. Risk is hypothesized to be exclusive to adult females known previously to Mr. Preston. Mr. Preston's treatment needs include poor problem solving, negative attitudes (e.g., sexual entitlement, women as sex objects, consent), maladaptive coping skills, and lifestyle instability (e.g., employment, finances, schooling). On the positive side, Mr. Preston has access to a prosocial and supportive social network, has perspective taking skills, and has positive life goals. Note that mental health concerns relative to anxiety and depression are not criminogenic needs, and therefore typically fall outside of treatments targeting risk for reoffending. Treatment prognosis for Mr. Preston is mixed in that he has yet to respond to mental health treatment in his past and present, but he has also yet to be motivated to change and truly engaged in the treatment process. Should Mr. Preston engage in treatment and undertake the responsibility for change within himself then he will likely have the capacity to benefit from same.

### **Recommendations**

**1. Sexual Offence Treatment:** It is recommended that Mr. Preston attend, participate in, and successfully complete a specialized treatment program for persons who have committed a sexual offence at the moderate level of intensity offered by professionals specifically trained in this field, followed by maintenance sessions. Should Mr. Preston receive a community sentence within the province of Nova Scotia it is recommended that he be referred to the FSBP Healthy Lifestyles Program in Dartmouth (a program designed for those who deny having committed a sexual offence) which affords the opportunity to address criminogenic needs and to learn risk management strategies specific to reoffence behaviours.

Treatment groups at FSBP commence in the early fall of each calendar year and continue until completion of 30 sessions (which typically exceeds 30 calendar



weeks, due to breaks and/or periodic weather-related cancellations). Moderate-intensity treatment might be provided within the federal correctional system dependant on resources, however, same is not guaranteed as this system prioritizes treatment for high risk clients. There is no treatment of any intensity available within the provincial jail system of Nova Scotia.

**2. General Mental Health Treatment:** As anxiety and depression are not criminogenic needs, they are not specifically addressed by the program offerings at the FSBP. For Mr. Preston's wellbeing and general mental health, it is recommended that he continue to connect with a mental health clinician to acquire and practice skills to manage his mental health concerns.

**3. Education/Employment/Training:** To increase life stability, aid in financial security, and to create structure to his leisure time, it is recommended that Mr. Preston re-engage in the education sphere to acquire employment training and/or that he seek/attain employment.

**4. Access to Minors:** Risk to children is not specifically predicted and therefore recommendations regarding access to minors are not viewed as necessary from a risk management perspective.

[As appears in original]

[11] Mr. Preston is assessed as a moderate risk to reoffend. In relation to rehabilitation, considering the lack of identified resources in both provincial and federal institutions for offenders like him, the community is the place where Mr. Preston is most likely to obtain relevant treatment. The Crown says that in order for Mr. Preston to receive the 30 session FSBP Health Lifestyles Program in Dartmouth he should be placed on three years' probation. The Defence says two years' probation should be adequate for him to complete the 30-week program.

## **Pre-Sentence Report**

[12] The pre-sentence report did not provide much relevant information beyond what was in the Comprehensive Assessment. However, with regard to Mr. Preston's treatment for mental health issues, the author states:

### **HEALTH AND LIFESTYLE**

The subject expressed he had a car accident in 2019, consequently left with back soreness sometimes, and addresses same by taking over-the-counter pain medication. Kyle Preston disclosed in 2014 he has diagnosed with having anxiety and depression. He elaborated since then he has been taking his Physician, Andrew Humphrey's prescribed medications, Bupropion and Aripiprazole, with each one tablet daily. "To further address my mental health concerns, during the

past three months, I've been counselled by therapist Nicole Parsons, at Capital Health. Previously, I had sessions for six months with a private Counsellor. I find these meetings, along with the medications help me.”

Doctor, Andrew Humphrey verified the subject takes the above medications when contacted for his comments. He added Kyle Preston on August 31, 2021, was prescribed, Concerta for Attention Deficit Hyperactive Disorder (ADHD).

When asked, the subject verbalized he does not feel he has a temper or substance abuse problem. He remarked he does not ingest any Marijuana, illicit drugs, and drinks alcohol about five times yearly on some holidays, special occasions. He added he hopes his depression, anxiety will lessen, and he'll get closure on his pending court matter.

[As appears in original]

## **Victim Impact Statement**

[13] In her victim impact statement, S.B. describes being anxious, fearful and suspicious since Mr. Preston sexually assaulted her. She has had nightmares, intimacy issues, panic attacks, and has trouble controlling her emotions. S.B. has undertaken therapy to try to deal with these issues.

### ***R. v. Friesen***

[14] The Crown suggests that the general principles respecting sentencing for sexual offences against children detailed in *R. v. Friesen*, 2020 SCC 9, should be applied to Mr. Preston's case, notwithstanding that he and S.B. were both similarly aged young adults when the offence occurred. The Crown says in their brief:

...In *R. v. Friesen*, a unanimous Supreme Court of Canada has sent a strong message that sexual offences against children are among the most serious in criminal law and will routinely attract sentences of mid-single digit penitentiary terms and double-digit penitentiary terms.

The *Friesen* directive that sentencing judges adequately consider the harms of sexual violence has been applied in the context of adult victims of sexual assault. In this case, the offence before the Court is one of interpersonal violence that has a profound impact on the victim, her friends and family, and the community at large; it is a violation of bodily autonomy and personal dignity. Mr. Preston bears the sole responsibility for its commission.

[15] On this point, the Defence responds in their brief:

27. If this Honorable Court does accept the Crown submission that principles of *Friesen* have been applied in the context of adult victims of sexual assault, it is also noteworthy that factors *Friesen* directs courts to consider, and which have been outlined in Nova Scotia jurisprudence, include: likelihood to re-offend, abuse of trust and authority, duration and frequency of incident(s), age of the victim, degree of physical interference, and victim participation. Those considerations that might serve to mitigate a potential sentence for Mr. Preston could include reduced likelihood of reoffence, absence of an abuse of trust or authority, brief duration and/or frequency of the assault, and age of the victim.

[16] I agree that the general principles outlined in *Friesen* are applicable to this case.

### **Purpose and principles of sentencing**

[17] Sections 718, 718.1 and 718.2 of the *Criminal Code* state:

**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.

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

**718.2** A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

...

(ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,

...

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[18] The Crown argues that the fact that S.B. was on a first date with Mr. Preston is aggravating in light of s.718.2(a)(ii). I do not agree that this was the intent of that provision. However, as noted in *Friesen*, all sexual assaults are serious and can have long-term repercussions for the victim. And in S.B.'s case, it has. Additionally, as noted, *Friesen* emphasizes a number of general principles that must be considered when sentencing an accused for sexual assault. General and specific deterrence are paramount. Rehabilitation and reformation must be considered, but are not always the primary considerations.

### **Mitigating factors**

[19] Kyle Preston was only 19 years old when he committed this crime. He had not been in trouble before this offence, and stayed out of trouble after this offence while on release conditions. Those who know him say the offence was out of character, although the Comprehensive Assessment indicates that he has poor insight into the issue of consent.

[20] Mr. Preston completed high school. He has worked off and on and has plans for future education, but, like many people convicted of a criminal offence where time in prison is the likely outcome, has found it difficult to stay motivated. He recognized that he has mental health issues and sought treatment long before the

events that gave rise to this matter. However, he has never taken his therapy as seriously as he should. Mr. Preston has a supportive mother.

### **Range of sentence**

[21] The range of sentence for sexual assault is very broad. Forced, unprotected, vaginal intercourse certainly calls out for a jail sentence. Crown and defence both agree, and I conclude, that the proper sentence is two years in prison, followed by probation, for either two or three years.

### **Conclusion**

[22] Kyle Preston will be sentenced to two years in a federal penitentiary. He is not to have any contact or communication with Ms. B. while incarcerated.

[23] The FSBP program is 30 weeks. Between any time spent on parole, and then 24 months on probation, Mr. Preston should be able to comfortably complete a 30-week program. He will therefore be placed on probation for two years. A non-contact provision with Ms. B. for four years is sufficient in this case. There is no indication that Mr. Preston sought any form of contact with Ms. B. after the incident.

[24] The terms of Mr. Preston's probation will include:

- Report to a probation officer within three days of the expiration of this prison sentence and thereafter as directed by his probation officer;
- Participate in the FSBP Healthy Lifestyles Program;
- Have no direct or indirect contact with S.B.;
- Do not be within 25 meters of S.B.'s residence, place of education or place of employment;
- Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer;
- Attend for mental health assessment and counseling as directed by your probation officer;

- Attend for assessment, counseling or program as directed by your probation officer.

[25] Mr. Preston will also be subject to the following ancillary orders:

- Primary DNA Order;
- Order of Prohibition from Communication;
- s. 109 Firearms Prohibition for 10 years following release from imprisonment;
- SOIRA Order for 20 years.

Arnold, J.