SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Chaisson*, 2023 NSSC 144

Date: 20230505
Docket: SAT No. 503668
Registry: Antigonish

Between:

His Majesty the King

v.

Gabriel George Chaisson

SENTENCING

Judge:	The Honourable Justice Scott C. Norton
Heard:	May 5, 2023, in Antigonish, Nova Scotia
Decision:	May 5, 2023
Counsel:	Mark Covan and Scott Millar, for the Crown Johnathan Hughes, for the Accused

NOTE: In reducing to writing the oral decision rendered in this matter, editing has taken place to include omitted citations and quotes from secondary sources and to make changes to format or to grammar for readability. No changes have been made to the substantive reasons for decision.

By the Court (Orally):

Introduction

[1] By decision dated May 13, 2022 and reported at 2022 NSSC 135, I found Mr. Chaisson guilty of one count of possession of 145 grams of Cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c.19 ("CDSA") and two counts of breach of a condition of a release order contrary to s. 145(5)(a) of the *Criminal Code*, specifically that he knowingly breached the conditions of keeping the peace and being of good behaviour; and, possessing a controlled substance.

[2] The circumstances of the offences are set out in detail in my written decision.

[3] Mr. Chaisson is before the Court today for sentencing.

[4] At the outset of the sentencing hearing, the Court heard evidence with regard to the issue of "Duncan" credit dealt with later in this decision. Mr. Chaisson filed and affidavit and was cross-examined by the Crown. The Crown called evidence

from Michelle Lois Bonvie, the Clinical Operations Supervisor at Northeast Nova Scotia Correctional Facility ("NNSCF"). She was also cross-examined.

[5] A conviction under section 5 of the CDSA is subject to a sentence of imprisonment for life.

[6] The Crown's position is the appropriate range of sentence is 6-8 years and that Mr. Chaisson should be sentenced to a custodial term of 8 years in a Federal penitentiary. The Crown submits that 60 days custody concurrent is appropriate for each of the two breach charges. The Crown says that in this case specific deterrence is an issue given Mr. Chaisson's prior related convictions despite the gap in time since the last of these.

[7] Mr. Chaisson asserts that the appropriate range of sentence is 2-6 years and he should be sentenced to 40 months for the CDSA charge and 30 days concurrent for each of the two offences of breach of a release order. He says that he should receive "Duncan" credit of 16 months and the remaining 24 months should be satisfied by his time served. He acknowledges that 40 months was the sentence that he received the last time that he was convicted of a related offence, however notes that offence was effectively a decade ago with no intervening related convictions.

[8] Mr. Chaisson was taken into custody on October 9, 2020 and has been in custody since.

[9] Mr. Chaisson did not request a pre-sentence report.

[10] I have received and considered the written briefs filed by the Crown and Mr. Chaisson on both the appropriate range of sentence and "Duncan" credit, the evidence heard today and the oral submissions of counsel today.

Sentencing Principles

[11] I am instructed on the fundamental purpose and principles of sentencing set out in section 718 of the Criminal Code and following. Denunciation and deterrence are primary considerations for trafficking a Schedule I substance. Further, the sentence to be imposed must be proportional to the gravity of the offence and the degree of responsibility of the offender. The principal of parity mandates that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A sentence must be the least restrictive sanction that meets the fundamental principles and purposes of sentencing.

[12] In addition to these provisions in the *Criminal Code*, section 10 of the *Controlled Drugs and Substances Act*, SC 1996, c.19 ("CDSA"), states:

> **Purpose of sentencing**
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> 10 (1) Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

[13] For over 30 years, the Nova Scotia Court of Appeal has emphasized general deterrence as a primary concern when sentencing drug traffickers, particularly when "hard" drugs are involved. In *R. v. Sparks*, 1993 NSCA 214, the Court stated, at p. 4:

> The evils of the drug trade have been denounced by this court and other courts over and over again. In so doing it has been made abundantly clear that the primary consideration in sentencing for drug trafficking must be deterrence. Trafficking in cocaine is particularly serious, as has been emphasized in such cases as *R. v. Byers*, (1989) 90 N.S.R. (2d) 263 where Hart, J. A. speaking for the court said at p. 264:
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> > "I would point out that the courts of this country have repeatedly made reference in recent years to the need to suppress a narcotic as dangerous as cocaine. It is a highly addictive substance and unfortunately has lately dropped in price to the point where it is one of the commonest drugs marketed on the North American continent. Its ease in handling and transportation results in greatly increased profits to the traffickers who deal in cocaine and some of its derivatives. One has only to look at the daily reports in the press to observe the extent of its presence and the increase in many types of crime in the places where it is found.
> >
> > In my opinion the time has come for this court to give warning to all those greedy persons who deal in the supply and distribution of the narcotic cocaine that more severe penalties will be imposed even when relatively small amounts of the drug are involved. Nor should the lack of a criminal record stand in the way of a substantial period of imprisonment. No one

> today can claim to be so naive as to think that trafficking in cocaine can be conducted without serious damage to our social structure."
>
> As was pointed out in *R. v. Huskins* (1990), 95 N.S.R. (2d) 109 at 113 rare indeed is the case where less than federal time should be imposed for trafficking in cocaine.

More recently, see *R. v. Oickle*, 2015 NSCA 87; *R. v. Chase*, 2019 NSCA 36. In *Chase*, Justice Saunders stated:

> [48] From all of this it can be said with certainty that nothing has changed this Court's repeated and consistent warning that deterrence and denunciation will continue to be the primary objectives when sentencing persons who choose to traffic in cocaine, and that convictions will normally attract a federal prison term. However, that does not mean that in an appropriate case, depending upon the particular circumstances of the offence and the offender, a lesser sentence cannot be imposed.

[14] In *R v Leblanc*, 2019 NSSC 192, Justice Rosinski prepared a summary of sentencing decisions throughout "the cocaine trafficking hierarchy". In summarizing that case law, Justice Rosinski said at para 22 (footnotes excluded):

> [22] To recap, in my opinion, the normal range of sentences for possession of cocaine for the purpose of trafficking or trafficking in cocaine appear to be:
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> • as I concluded in *Murphy*, for a petty retailer the range is from approximately 18 to 30 months in custody;
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> • for small scale retailers (with cocaine up to 1/3 kilogram available for further distribution), such as Messrs. LeBlanc and Benoit, the range of sentence is from 2 to 6 years in custody;
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> • for medium scale retailers/small wholesalers (distributing more than 1/3 kilogram and up to lower single digit kilograms) the range of sentence is from 5 years to 8 years;
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> • for larger wholesalers and large scale retailers (distributing higher single digit, double digit or more multi-kilogram quantities), the range of sentence is from 8 to 15 years in custody;
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> • for importers (double digit or more multi-kilogram quantities) the range of sentences is from 12 to 20 years in custody.

[15] This range was reaffirmed in *R. v. Green*, 2020 NSSC 222, where Justice Arnold accepted a joint recommendation for four years in custody for possession of cocaine for the purpose of trafficking, possession of a prohibited firearm, and possession of a prohibited firearm with ammunition (four years and three years respectively, concurrent). Mr. Chaisson notes that in *Green*, the amount of cocaine involved was over 1,000 grams, almost ten times the amount in this case. There was also a large amount of cash seized and forfeited - $268,999, suggesting a much larger trafficking ring.

[16] Mr. Chaisson also points to there being evidence of personal use in this case. That is correct but it is also correct to say that there was no evidence of addiction being the purpose of his trafficking.

[17] I have considered *R v MacKinnon*, 2022 NSPC 12, wherein Judge Russell provided an extensive summary of case law considering the relevant principles for sentencing individuals found guilty of possession of cocaine for the purpose of trafficking.

[18] In the present case, I accepted the expert testimony of Cpl. David Lane of the RCMP that the volume of cocaine seized from Mr. Chaisson's home was more

consistent with a mid-level dealer, while the scales and “dime bags” were more consistent with street level trafficking (para 72).

Aggravating and Mitigating Factors

[19] Aggravating factors include:

(a) The nature of the drug – cocaine – Schedule 1 CDSA

(b) The quantity of the drug – 145g ($14,500 street value)

(c) Mr. Chaisson has prior related offences, albeit the most recent being in 2012.

[20] Mitigating factors include:

(a) The gap in time since Mr. Chaisson’s last offence;

Fit and Proper Sentence

[21] Considering the legal principles and all of the circumstances it is my opinion that a fit and proper sentence for the offence contrary to section 5 CDSA is 5 years. This reflects my finding that the circumstances of Mr. Chaisson’s offence fall between the high end of the range of sentence for a street-level dealer and the low end of the range of sentence for a mid-level dealer. With regard to the two breach

offences, I find that a sentence of 30 days custody for each offence, to be served concurrently to the 5 years, is a fit and proper sentence. 5 years is a sentence of 1825 days.

Credit for Pre-sentence Custody

[22] In 2009, the *Truth in Sentencing Act*, S.C. 2009, c.29, was enacted and governed enhanced credit for offenders who have spent time in custody prior to sentencing as described by s.719(3) and s.719(3.1) of the *Criminal Code*. These provisions express the Parliamentary intent of allowing 1 :1 credit for time spent on remand prior to sentencing, and caps enhanced credit at a ratio of 1.5:1.

[23] In 2014, the SCC again addressed credit for pre-sentence custody in *R v Summers*, 2014 SCC 26. There, the Court held that granting credit is decided based on quantitative and qualitative reasoning. The "quantitative rationale for the practice of granting enhanced credit is to ensure that the offender does not spend more time behind bars than if he had been released on bail. "(para 23). It assists in balancing the principles of parity and proportionality. The *Summers* credit also takes into account the difficult and restrictive circumstances that defendants often encounter in pre-sentence custody, and statutorily caps the calculation at 1.5:1. In that sense, it has an element of "qualitative" assessment. According to the decision

in *R. v. Marshall*, 2021 ONCA 344, it is a "deduction from what the trial judge determines to be the appropriate sentence for the offence."(para 51). It is not a mitigating factor.

[24] In this case, the Crown agrees that the Court may take into account the defendant's period of pre-sentence custody.

[25] Credit beyond the 1.5:1 ratio is frequently referred to as "*Duncan*" credit following the Ontario Court of Appeal decision of that name (*R. v. Duncan*, 2016 ONCA 754). It may be granted on sentencing where there is evidence of particularly difficult and punitive presentence custody conditions and that these conditions had an "adverse effect" on the defendant over and above that which is contemplated in Summers. Mr. Chaisson asserts that he should receive a *Duncan* credit over at a ration of 0.5:1 and above and beyond the *Summers* credit for a total credit of 2:1 on the entire period of his pre-sentence custody.

[26] Mr. Chaisson suffers from asthma and is prescribed a significant dosage of the cortico-steroid, salmeterol, otherwise commonly known as Ventolin, at a dosage of 500mg.

[27] Notwithstanding the protocols in place, Mr. Chaisson says that he has contracted COVID-19 on two separate occasions that he is aware of – at least one

instance from his cellmate when the institutions were double bunking the cells. The evidence of Ms. Bonvie was that there was only a record of one positive test of Mr. Chaisson for COVID-19.

[28] Most significantly, he says, has been the limited access to his family. Mr. Chaisson resided with his elderly mother in Goshen and maintained a very close relationship with her. Unfortunately, due to the protocols put in place at the correctional facilities, he has not been able to have any in person visits with her, and is limited to speaking with her on the telephone. Her health has been in steady decline, to the point that his siblings intend to return her to New Jersey by the end of the summer to assist in caring for her. The prospect of not seeing his mother before she returns to the United States has had a significant impact on Mr. Chaisson. Mr. Chaisson asserts that cumulatively, each of these conditions that he has been subjected to, can only be described as harsh.

[29] Mr. Chaisson also gave evidence that he broke one of his teeth in November 2022. He requested dental care through the health clinic at NNSCF. Ms. Bonvie acknowledged receiving his request and passing it along to the only dentist serving the correctional facilities in Nova Scotia, who is located at Central Nova Scotia Correctional Facility in Dartmouth. She has not heard anything in response except

that the dentist was "away" for December, 2022 and January and February 2023, resulting in a significant backup.

[30] Although Mr. Chaisson did not testify of any significant pain and suffering or infection resulting from this broken tooth, the Court finds that this length of delay in receiving appropriate dental care is unreasonable and unacceptable.

[31] The Crown asserts that: the defendant has not discharged the evidentiary and persuasive burden to show that he is entitled to enhanced credit beyond the *Summers* 1.5:1 ratio; the existence of COVID-19 protective measures, without more, is insufficient to justify enhanced pre-sentence custody credit beyond the 1.5:1 ratio; and, while there is little- doubt that COVID-19 has impacted life inside of institutions, there is no evidence that enhanced credit beyond the *Summers* 1.5:1 ratio is called for.

[32] The Crown further says that:

(b) the courts cannot assess the impact of COVID-19 protective measures within correctional facilities without considering the broader societal impact of COVID-19;

(c) this context is essential;

(d) the virus has impacted all lives globally;

(e) every Canadian has lived through lock-downs and restrictions on their liberty;

(f) access to family members who are resident within care homes, or simply elderly with underlying risk factors, has been controlled and, in many cases, prohibited;

(g) access to recreational facilities and activities has been controlled and limited;

(h) medical care has been limited and appointments with specialists and specialist treatment have been curtailed;

In this sense, the Crown argues, some of Mr. Chaisson's complaints mirror those of society more generally and, to the extent that the institutional COVID-19 protective measures should be considered by this Court in imposing sentence, they are accommodated within the *Summers* ratio of 1.5:1 and no further credit is justified.

[33] The decision in *R. v. Hearns*, 2020 ONSC 2356, provides helpful guidance and reminds us that courts must take a balanced approach in the assessment of COVID-19 protective measures within an institution when imposing sentence. Justice Pomerance held, at paras 15-17, that:

> ... the pandemic does not do away with the well-established statutory and common law principles. However, the pandemic may impact on the application of those principles. It may soften the requirement of parity with precedent. The current circumstances are without precedent. Until recently, courts were not concerned with the potential spread of a deadly pathogen in custodial institutions.
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> COVID-19 also affects our conception of the fitness of sentence. Fitness is similar to proportionality, but not co-extensive with it. Proportionality dictates that the sentence should be no more than is necessary to reflect the gravity of the crime and the moral blameworthiness of the offender. Fitness looks at a broader host of factors. A sentence may be fit even it is not perfectly proportionate. Fitness looks, not only at the length of a sentence, but the conditions under which it is served. As a result of the current health crisis, jails have become harsher environments, either because of the risk of infection or, because of restrictive lock down conditions aimed at preventing infection. Punishment is increased, not only by the physical risk of contracting the virus, but by the psychological effects of being in a high-risk environment with little ability to control exposure.
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> Consideration of these circumstances might justify a departure from the usual range of sentence.

[34] The Nova Scotia Court of Appeal in *R. v. Dawson*, 2021 NSCA 29, commented on the relationship between established sentencing principles and COVID-19. In that case, the Court allowed a Crown appeal against a conditional sentence of two years less a day, substituting sentences of 36 months' and 42 months' incarceration on the two accused. According to the decision, the need to denounce the seriousness of the crime, a complex government contracts fraud, and deter others from committing the offences outweighed COVID-19 considerations. In other words, COVID-19 can inform but not infect the sentencing process. This includes determining when a "COVID-19 reduction" for pre-sentence custody may be appropriate. The following reasons of Justice Derrick are, in my view, equally applicable when considering credit for pre-sentence custody:

> [104] That said, I would join other Canadian appellate courts that have declined to reduce otherwise fit sentences due to the pandemic (see, for example: *R. v. Lariviere*, 2020 ONCA324,at paras. 13-18; *R. v. D.B.*, 2020ONCA 512; *R. v. Thompson*, 2020 ONCA 361; *R. v. Morgan*, 2020 ONCA 279, at paras. 8-12; *R. v. S.C.C.*, 2021 MBCA l; *R. v. El-Kaaki*, 2020BCCA 183).
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> [105] The pandemic has not eliminated carceral sentences. Sentencing during C0VID must still respect sentencing imperatives. Thoughtful consideration of the impact of the pandemic on the principles of sentencing is found in *R. v. Hearns*, 2020 ONSC 2365, which includes the following statement:
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> > [23] ...I am not suggesting that the pandemic has generated a "get out of jail free" card. The consequences of a penalty - be they direct or collateral - cannot justify a sentence that is disproportionately lenient, or drastically outside the sentencing range. It cannot turn an inappropriate sentence into an appropriate one or justify dispositions that would place the public at risk...

[35] In summary, I find that the impact of COVID-19 protective measures within an institution may be considered when determining a fit sentence, but the Court must be satisfied that there is evidence of an impact on the defendant beyond what is already accounted for under the *Summers* 1.5:1 ratio.

[36] In this case, Mr. Chaisson has not met his evidentiary and persuasive burden with regard to COVID-19. The presence of measures to protect inmates and their family members from COVID-19 inside correctional institutions, without more, is insufficient to justify pre-sentence custody credit beyond the "*Summers*" ratio of 1.5:1. These COVID-19 protective measures were prevalent throughout society - not just in correctional institutions - and were put in place for public health reasons. These measures were not punitive. They were preventative and protective.

All Canadians, including the defendant, ultimately benefited from these public health measures by limiting the scope and spread of COVID-19.

[37] Sentencing is an individualized process. The Court has broad discretion to consider the circumstances of the offence and the offender. On the facts of this case, any limits or impacts experienced by the defendant as a result of COVID-19 protective measures within the institution are compensated for adequately by the 1.5:1 ratio. No further credit is justified. See *R. v. G.P.W.*, 2021 NSSC 192.

[38] However, on the same analysis, the Court finds that the lack of appropriate dental care for Mr. Chaisson is a condition that demands consideration in determining the fitness of the sentence and the appropriate additional credit not contemplated by *Summers*. As stated by Justice Pomerance in *Hearns*, supra, at para 16:

> Fitness looks at a broader host of factors. A sentence may be fit even if it is not perfectly proportionate. Fitness looks, not only at the length of sentence, but the conditions under which it is served. As a result of the current health crisis, jails have become harsher environments, either because of the risk of infection or, because of restrictive lock down conditions aimed at preventing infection. Punishment is increased, not only by the physical risk of contracting the virus, but by the psychological effects of being in a high-risk environment with little ability to control exposure.

[39] In my view, applying similar reasoning, it would have been reasonable for Mr. Chaisson to be seen by a dentist by the end of 2022. Accordingly, I find that

he is entitled to "Duncan" credit from January 1, 2023 to today (a period of 124 days) at a ratio of 0.5 days per day credit for an additional credit of 62 days.

[40] To summarize, I sentence Mr. Chaisson to 1825 days (5 years) in custody. The parties agree that Mr. Chaisson has been in custody for 908 days and is entitled to credit of 1363 days (3 years, 268 days) for his pre-sentence custody calculated at a rate of 1.5 days credit for each day served. I have determined he is entitled to a further "Duncan" credit of 62 days. This leaves the balance of the sentence going forward to be 400 days (1 year, 35 days).

[41] In addition, I endorse the following ancillary orders:

(a) A lifetime weapons prohibition pursuant to section 109 of the *Criminal Code*.

(b) A secondary DNA Order pursuant to section 487.05 of the *Criminal Code*.

(c) Forfeiture of the items as agreed upon by counsel. The Crown to present an appropriate form of Order.

Norton J.