SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Smith*, 2014 NSSC 352

Date: 20140903
Docket: CRH 324554
Registry: Halifax

Between:

Her Majesty the Queen

v.

Demarco Smith

Decision as to Parole Ineligibility Date

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	September 3, 2014, in Halifax, Nova Scotia
Written Decision	September 24, 2014
Counsel:	Roland Levesque and Alex Keaveny, for the Crown Laura McCarthy, for the Defence

By the Court:

Background

[1] Casey Downey died on February 7, 2010, as a result of receiving a single stab wound to his chest which wound penetrated into the atrial vein leading to his heart. He died within seconds of receiving the fatal blow. On January 27, 2014, following a trial by judge alone, I found Mr. Smith guilty of the charge that:

> He on or about the 7th day of February, 2010, at, or near North Preston, in the County of Halifax, in the Province of Nova Scotia, did unlawfully cause the death of Casey Marleen Courtnell Downey, and did thereby commit second degree murder, contrary to section 235 of the **Criminal Code**.

[2] In accordance with section 745(c) of the **Criminal Code**, I sentenced Mr. Smith to life imprisonment. That section stipulates that:

> 745. Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be…
>
> > (c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 745.4; and

[3] At the request of then counsel Mr. Atherton, the hearing to determine the date upon which Mr. Smith will be eligible for parole was adjourned to April 14, 2014. At that time Ms. McCarthy appeared for Lyle Howe who was to act as counsel to Mr. Smith. I granted a request that the hearing be adjourned to June 13, 2014. Mr. Howe was not available to act for Mr. Smith at the June appearance and the hearing was further adjourned to today's date.

Materials/Evidence

[4] I have had the benefit of reading a presentence report, the Victim Impact Statement prepared by Pamela Downey, who is present today, and the briefs with supporting case law submitted by counsel. I have also heard oral submissions of counsel today.

Position of the Crown

[5] Crown counsel submits that Mr. Smith should not be eligible for parole for a period of at least 13 to 14 years. The Crown acknowledges that the offender was in pretrial custody from February 9, 2010 to March 3, 2010, as so is entitled to 22 days that should form part of his sentence.

[6] In addition to submitting cases that set out the applicable legal principles, the Crown provided five cases intended to be representative of the range of parole ineligibility dispositions in similar cases; one of these resulted in a period of 14 years and four resulted in a period of 12 years before the offenders were eligible for parole.

[7] In support of its recommendation the Crown points to Mr. Smith's criminal record for aggravated assault as an indicator of his potential for further violent conduct. The Crown also cites the circumstances of the offence, which the Crown argues was a random assault on a total stranger who was at a physical disadvantage by reason of his size, his age and his level of impairment.

[8] The Crown sees no mitigating factors, although they did not have the benefit of a presentence report at the time of submitting their brief.

[9] The Crown seeks ancillary orders:

1. Firearms Prohibition Order pursuant to s.109(1)(a) of the **Criminal Code**. As this is Mr. Smith's second such order, the Crown seeks that the prohibition be for life;
2. They seek a DNA Order pursuant to s. 487.051of the **Criminal Code**. In this case that order is mandatory.

[10] The Crown is not seeking the imposition of a Victim Fine Surcharge given the lengthy period of incarceration that Mr. Smith will serve.

Position of the Offender

[11] Ms. McCarthy, on behalf of Mr. Smith, submits that the offender should be eligible for parole in 11 years. In support of this recommendation she has filed

eight cases, seven of which resulted in parole ineligibility periods of 10 years and one of 12 years.

[12] Ms. McCarthy agrees with the Crown's submission that the offender was in pretrial custody from February 9, 2010 to March 3, 2010, but calculates the pretrial custody period as 23 days not 22.

[13] Counsel has referred me to Mr. Smith's family support, his education, his work history and his hoped for plans to re-locate and find employment upon his release as mitigating circumstances and as evidence that he has the potential and the desire to rehabilitate and to become a productive member of society. As well she notes, at page 3 of her brief, Mr. Smith's expression of remorse. Finally, her submission notes that his criminal record is limited.

[14] No issue has been taken by the offender with the ancillary orders sought by the Crown.

Legal Principles

[15] Section 745.4of the **Criminal Code** guides the court as to the factors that must be considered in determining whether to substitute the 10 year minimum parole ineligibility period with a greater period. That section says:

> 745.4 Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender…may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

[16] In this case there was no jury and so no jury recommendation to consider.

[17] A review of the cases provides guidance as to how these factors are to be construed.

[18] In **R. v. Shropshire** [1995] 4 S.C.R. 227 (at para. 29) the court observed that s. 745(c) contemplates a "broad range of seriousness reflecting the varying degrees of moral culpability" that the circumstances of each case presents.

[19] In more recent years the courts have had the benefit of a statutorily defined set of principles of sentencing to guide them as set out in s. 718 - 718.2 of the **Criminal Code**. The provisions in s. 718 address the fundamental purpose of sentencing: "to contribute to respect for the law and the maintenance of a just, peaceful and safe society." In fulfilling this purpose the court is told to impose sentences that speak to a balancing of the objectives of denunciation, general deterrence, specific deterrence, rehabilitation of the offender, the need for reparations to victims or the community, and the role that sentencing plays in promoting a sense of responsibility in offenders and acknowledgement of the harm caused.

[20] Section 718.1 requires that a sentence be proportionate to the gravity of the offence and the offender's degree of responsibility. Section 718.2(b) states that sentences "should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." Section 718.2(d) requires that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.

[21] Finally, 718.2(a) includes a series of "deemed aggravating circumstances" that a court must consider if present. They are not applicable in the circumstances of this case.

[22] In **Shropshire**, Iacobucci J., after enumerating the three statutorily prescribed factors, held that denunciation can be considered under the criterion "nature of the offence"; and that concerns over the possible future dangerousness of the offender could be considered under the "character of the offender" criterion (para. 19). As parole ineligibility is part of the "punishment" and thereby an element of sentencing policy, deterrence is also relevant in justifying an order under s. 745.4 (paras. 21-23).

[23] Beveridge J.A., writing in **R. v. Hawkins** 2011 NSCA 7 addressed the principles of sentencing in a second degree murder case. At paras 39 and 40 he says:

> 39 The theory of specific or individual deterrence is that the sentence imposed will be sufficiently punitive that the offender will be convinced it is not worthwhile to commit that or any further offences. Any offender convicted of second degree murder is sentenced to life imprisonment.…

> 40 …subject to a grant of clemency, the only way an offender will be released into the community is by the National Parole Board. It is wrong to assume that the Board will not fulfill its mandate to ensure that an offender will only be conditionally released when it is safe and appropriate to do so. Hence, the public is still protected (see *R. v. Nash*, *supra*, at para. 4). I fail to see how concern over individual deterrence would have a role in extending the period of parole ineligibility to segregate this offender from society.

[24] Justice Beveridge accepted that there is a role for setting "an increased period of parole ineligibility to express denunciation and the community's revulsion over the offence" and "some scope for general deterrence" but that deterrence should not be overemphasized as being of paramount significance.

[25] In that case the period set by the sentencing judge was 20 years. In considering the fitness of this disposition, Justice Beveridge held: "...Neither was there any indication of any underlying or persistent danger to re-offend to justify extension of the parole ineligibility period to twenty years." I take this to mean that if such indications of dangerousness are present that they may impact on the period to be set.

[26] Imposition of a sentence that is consistent with others that arise from similar circumstances is a sought for result. It is a difficult task as no two cases are identical. In **R. v. Doyle** (1991), 108 N.S.R. (2d) 1 (A.D.) Chipman J.A. stated at paras 42 and 43:

> [42] …I have examined the cases referred to us by both counsel. Comparisons with other cases is a difficult exercise. Attempts to seek similarities with or differences from other murders committed by other people can be very frustrating and counter productive. We are not dealing with an exercise of reviewing "comparables" such as is done in a property appraisal. In exercising the discretion under s. 744 of the Code, other cases are no more than a rough guide for the sentencing judge in identifying the types of aggravating or mitigating circumstances that other courts have relied on as relevant in applying the guidelines….
>
> [43] While no hard and fast conclusion can or should come from any one of them, a sense of direction definitely emerges from the large number of cases reviewed.…

[27] On the question of similarity, the court in **Hawkins** referred to various authorities which I have reviewed.

Analysis

Nature and circumstances of the offence

[28] Turning at this point to the nature and circumstances of this offence - I have reviewed my decision in preparing for this hearing and so am clear on the circumstances of the commission of the offence. There are some aspects of the facts which I will highlight as relevant and material to this hearing.

[29] During the evening of February 6 and into the early morning hours of February 7, 2010, a birthday party for Rolisha Fraser was underway at the North Preston home of Wanike Fraser. The RCMP received a call at approximately 6:30 a.m. on the morning of the 7th reporting a stabbing at that residence. The RCMP responded and upon determining that Casey Downey had been killed they conducted an investigation leading to the arrest of Mr. Smith.

[30] There is nothing remarkable about the party itself. Those who attended seemed to enjoy themselves. There was no indication of the trouble that was ahead.

[31] Mr. Smith arrived at the party with Jermaine Simmonds, aka "Dee", who invited Casey Downey to enter the party with them. Mr. Smith and Mr. Downey were essentially strangers to each other before that night.

[32] Mr. Smith remained sober throughout the course of the evening. Mr. Downey was impaired by alcohol and drug ingestion. Mr. Smith was 24 years of age, 5'8" tall and around 180 to 183 lbs at the time. He was a little shorter than Mr. Downey who was 5'10" but approximately 45 lbs heavier than Mr. Downey's 136 lbs. Mr. Smith was also approximately 4 years older than Mr. Downey and Mr. Smith, as seen in the video statement that was entered into evidence at trial, appeared healthy and fit at the time.

[33] Mr. Smith had a knife in his possession when he arrived at the party. It is possible that he had a second knife with him as well. Mr. Smith testified that he carries at least one knife as a "habit" but that he had no particular reason to carry one.

[34] Once in the party, Mr. Smith and Mr. Downey had little to do with each other until Neville Provo, who had provided recorded music during the party, started to pack up his equipment in preparation to leave. This was sometime between 5 and 6 a.m.

[35] Mr. Downey became belligerent with Mr. Smith. I have accepted that it may have begun as Mr. Smith testified, with the two of them sitting in close proximity to each other and with Mr. Downey poking at Mr. Smith telling him to help out Mr. Provo, and not accepting Mr. Smith's explanation that he had already offered to do so but was refused.

[36] Mr. Provo exited the house and when he returned he and others observed Mr. Smith and Mr. Downey in an argument. Both men were displaying anger. I accept that Mr. Downey was the aggressor and that Mr. Smith, although vocal, did not attempt to approach Mr. Downey. Mr. Provo restrained Mr. Downey to keep him from going after the accused.

[37] Mr. Downey uttered a threat to "dome" Mr. Smith who then took a knife, probably Exhibit 6, out of his pants and held it by his side. Dee Simmonds joined in the argument. The knife was taken away from Mr. Smith. What is less clear is whether it was returned to him and he used that to stab Mr. Downey, or whether Mr. Smith had a second knife that he later used to stab Mr. Downey.

[38] Neville Provo released Mr. Downey from his grip, in part because he concluded that a fight between Mr. Smith and Mr. Downey was inevitable. This is a view that was offered by a few witnesses – that they expected these two were going to have a fight.

[39] At one point in this argument around the dance floor area Mr. Downey put up his fists as if to fight. There is no evidence that Mr. Downey had a weapon in his possession or that he threatened to use one, or that Mr. Smith had any belief that Mr. Downey was armed. The evidence did not support a conclusion that Mr. Downey had a present ability to carry out the threat to "dome" Mr. Smith, which Mr. Smith interpreted as a threat to kill.

[40] Mr. Smith moved away from the dance floor area to an area closer to the laundry room where the bar had been set up. Mr. Smith was standing near Ashley

Fraser. Mr. Smith pulled out a knife and opened the blade. Almost immediately Mr. Downey came toward him and the two met face to face.

[41] Until that time, Mr. Smith gave no indication that he feared Mr. Downey. To the contrary, the evidence suggested that he welcomed the opportunity to have a physical confrontation with Mr. Downey. Mr. Smith was "mad", he was "loud" and he was verbally aggressive toward Mr. Downey. While he may have had no intention of making the first strike, he was not going to back down either. The accused had ample opportunity to withdraw from this confrontation, but his response was to stand his ground and on two occasions take out a knife in anticipation of Mr. Downey's expected attack. Mr. Smith was not surprised by Mr. Downey's pursuit of him – he expected it and had prepared to greet it while armed with a knife. He had no reason to believe that Mr. Downey would be similarly armed. In the circumstances of the dispute between these two individuals, having regard to their comparative physical builds and levels of impairment, the use of the knife was significantly more than was necessary or reasonable to ward off any threat that might have been posed by Mr. Downey.

[42] When Mr. Downey came face to face with Mr. Smith, the latter stabbed Mr. Downey. The blade of the knife pierced three layers of clothing, then scalloped a rib and continued to follow a path through pulmonary arteries and veins and into the heart chamber.

[43] I concluded that Mr. Smith saw Mr. Downey as disrespectful and aggressive and it made Mr. Smith angry. I also concluded that he prepared himself for the moment when Mr. Downey came after him, which Mr. Smith knew was going to happen. He was essentially lying in wait. Mr. Smith intentionally stabbed Mr. Downey, and caused his death.

[44] Pamela Downey is the mother of Casey Downey. She is present here today. She has presented a Victim Impact Statement which I have read and which Crown counsel has read into the record. She described the overwhelming sense of her loss and that of other family members on the death of her son. Casey has been described as a good friend, brother, son and grandson. He enjoyed life and was a superior basketball player. He had dreams of becoming a dog trainer. All of this was lost with his death. The consequences don't stop with his death. Ms. Downey has suffered psychological problems including depression. She will never see her son again.

[45] This murder was senseless. It took two young men out of the community – one to his grave and one to prison. Ms. Downey, generously, expressed to Mr. Smith's family that she was "sorry" for their loss as well and promises to pray for them. It reminds us that the damage caused by such a crime impacts on everyone around the victim and the offender. Witnesses in the trial spoke of the close relationships and friendships in their community. It was evident as I watched and heard them testify that they too carry emotional scars away from this terrible event.

[46] Bridget Wright, Mr. Smith's mother, was interviewed for the pre-sentence report. I believe she is in court today as well and has been throughout the proceedings and they have been lengthy. She spoke of how upset she was by this event; that upon learning what had happened she "screamed and screamed and screamed" and that it had "tore [her] apart".

[47] It is difficult to understand the mindset of Mr. Smith. He could have left the party and avoided the obvious fight that the impaired Mr. Downey seemed to want. He did not do this. It is probable, as I suggested in the decision as to verdict, that he could have easily handled Casey Downey in a physical fight. Instead Mr. Smith chose to pull a knife and kill Casey Downey. That is a mindset that must be deterred. People, especially young people, must understand that this type of excessively violent response cannot be tolerated in a peaceful community.

Circumstances of the offender

Remorse

[48] I turn now to Mr. Smith's circumstances. Mr. Smith has previously expressed his remorse. It is important to assess whether it is true remorse or a simple incantation offered in hopes of gaining some advantage in the setting of the eligibility date. I was struck in a positive way by Mr. Smith's words and demeanour when he was speaking with Cst. Kirton during the videotaped statement that is in evidence. Although I referred to it in my decision it takes on a different significance in the context of this hearing as it was contemporaneous with the commission of the offence, and even before charges were formally laid.

[49] Beginning at 10:09:34 a.m. of the tape Constable Kirton asked the accused what he would say to Casey Downey's parents if they were present. Mr. Smith said the following:

> 'sorry';… That's the only thing I can say… Capital "S"… Big time… Sorry. What can I say?… The only thing I can say to that family is sorry. (70-71)

[50] Constable Kirton invited Mr. Smith to prepare a written apology to be delivered to the Downey family. Mr. Smith refused saying: "I'd rather do it a different way instead of writing it on paper.…When it's time for me to have a chance to do it I do want to do it on paper."

[51] Then at approximately 10:30 a.m. the following exchange took place:

> Cst. Kirton: ….Shit happened. A mistake happened. You're sorry for it.
> A. Yeah.
> Cst. Kirton: Right…Someone died as a result of it.
> A. Mmm.
> Cst. Kirton: So now whose decision was that that you were going to deal with the family on your own terms? Was that yours or did you get that advice from your parents or someone else?
> A. Me… Mine…
> ……
> Cst. Kirton: So…Do you need any help with that? The apology thing, man? On how you're going to deal with it. You going to need any help with that on your own?
> A. On what?
> Cst. Kirton: On how you're going to deal with it, telling the family. That's all you?
> A. Well…Oh, yeah, but how am I going to tell the family?…
> ……
>
> A. So you know I got some apologies to say. So whatever.
> A. Whatever. It's the same thing that would go down if I was in the position. But everyone ain't the same. Some people might just say, "Whatever. F the family" and go about their business.
> Cst. Kirton: There's a lot of them out there that do that.
> A. So you know? But in this case it's not like that.

[52] I accept that Mr. Smith showed his remorse at an early opportunity. His comments reflect insight to the hurt he caused to the family of Casey Downey.

[53] In his interview for the preparation of the pre-sentence report he states that he accepts responsibility for the situation and that he feels bad that the situation happened. I accept this as genuinely offered.

[54] I do not know if Mr. Smith has ever directly expressed to the family of Casey Downey his regrets for what he did. He had the opportunity to tell them today but he chose not to do that. I hope that if it hasn't happened already that someday very soon you will do what you said you would do some four years ago, Mr. Smith.

[55] However, Mr. Smith also said to the presentence report writer that he felt that he didn't get a "fair chance" and that he "did not believe he should be here" – which I take to mean in jail as a convicted murderer. I do not interpret this as a lack of remorse but rather his unwillingness to accept the verdict I rendered. That is his right. It is not an aggravating factor that he feels that another more favorable to him verdict was more appropriate.

[56] His comments may reflect a lack of insight to the reasons that the law says that what he did, having regard to the facts as I found them, amounted to second degree murder. If, however, it is a reflection of an attitude that what he did in taking Mr. Downey's life was justified, then I fear that he may resort to violence again in the future. The determination of what Mr. Smith's insight is to his behaviour and the impact it might have on future attempts to rehabilitate him is best left to the correctional authorities and the parole officials who will review his case in years to come.

Presentence Report

[57] I have read the presentence report. Mr. Smith was a young man of 24 when he committed this offence. He is about to turn 29. He is likely to have a number of years left in his life during which he can reflect on his crime and his way of life; and possibly to one day return to society to contribute in a positive and in a law abiding way.

[58] His upbringing was largely uneventful. He has a close and loving relationship with his mother. I have noted he has had support throughout the trial. He played basketball in school and he graduated from high school. He has no

alcohol or drug abuse problems. He does take medications for pain associated with a car accident.

[59] He has been single and unattached, with no dependents.

[60] Mr. Smith worked at temp agencies over the years. His account of his employment history is lacking any detail and so it is difficult to assess how he has performed as an employee, for what time periods or what skill sets he may possess.

[61] Persons commenting for the report expressed surprise and concern that DeMarco Smith committed this offence. He is described as a quiet, polite and respectful person. He maintains that he does not have a problem with controlling his temper, but his mother feels that he could benefit from counselling to deal with "emotional management."

[62] On the face of it Mr. Smith would seem an unlikely person to have found himself in this situation. There is, however, one significant aspect of his past which speaks to his manner of dealing with disputes.

[63] On January 8, 2008 he was sentenced to a period of 18 months to be served on conditions in the community. This was in relation to an offence of aggravated assault committed by him on December 5, 2005 (when he was 20 years of age). The conditions included that he attend for substance abuse counselling and refrain from the use or possession of all non-prescribed narcotics or drugs prohibited by the **Controlled Drugs and Substances Act**. His sentence supervisor, Dan Ray, described Mr. Smith as being "compliant and quite easy to deal with" while serving the conditional sentence.

[64] The Crown has set out the facts as found in the sentencing of Mr. Smith upon this earlier charge. They may be summarized as follows:

> On December 5, 2005 at approximately 4 am an Owen Nelson got into a minor argument with Jerese Johnston while they were at the corner of Grafton and Blowers Streets in Halifax. Mr. Johnston punched Mr. Nelson knocking the latter to the ground. While on the ground Demarco Smith kicked Mr. Nelson until a female person jumped on Mr. Nelson to protect him. Mr. Nelson's jaw was broken in 2 places and required surgery. Mr. Smith and Mr. Johnston were strangers to Mr. Nelson.

[65] Let me be clear. Mr. Smith has already been sentenced for that offence and so any comments I make should not be interpreted as imposing a further punishment on him for that offence. What is relevant is that the facts of that offence, when coupled with the facts of this murder, suggest that there is a DeMarco Smith that his family and friends either do not see, or have chosen not to speak about.

[66] These offences run contrary to the public face that Mr. Smith shows. He was calm and controlled throughout many hours of interrogation. His demeanour in court throughout a long trial was polite and respectful, just as he has been described by all of the sources for the presentence report.

[67] Yet this murder took place just 4 months after Mr. Smith completed his sentence for the aggravated assault charge, which is a cause for concern. He has resorted on two occasions in his relatively young life to extremely violent behaviour. In both cases there seems to have been little real cause to act out in that way. This somewhat random resort to extreme violence suggests a capacity to be dangerous in the future.

Range of Sentence

[68] **In R v. Nash** 2009 NBCA 7, Robertson J.A., in discussing the ranges of sentencing imposed in second degree murder cases, observes that (para. 54):

> ...Not only are these cases instructive, they provide support for a general thesis: more often than not, trial and sentencing judges work with three time frames when fixing the period of parole ineligibility: (1) 10 to 15 years; (2) 15 to 20 years; and (3) 20 to 25 years. In practice, the third time frame is reserved for the "worst of offenders" in the "worst of cases". The first is reserved for those offenders for whom the prospects of rehabilitation appear good and little would be served by extending the period of parole ineligibility other than to further the sentencing objectives of denunciation and retribution. The second time frame is reserved for those who fall somewhere in between the first and third. Obviously, these time frames are not cast in cement and represent a basic starting point for analysis.

[69] The submissions of the Crown and of the defence are consistent with the view that the circumstances of this offence and of Mr. Smith place this case in the first of these time frames, that is 10 -15 years. The question is: where does Mr. Smith’s case fall? Is it the 11 years as advocated by his counsel or 13-14 years as

advocated by the Crown. I have considered the various cases presented to me by each party and I have also looked at cases that were cited by Justice Rosinski in **R v. Beaver** 2014 NSSC 10, where he set out a number of cases that had parole ineligibility periods set between 10 – 15 years; that is found at paras. 67 and 68 of the decision.

[70] The Crown has provided me with cases that are similar in the circumstances of the commission of the offence, however as I will point out, in my view, they differ in the circumstances of the offender. I don't intend to go into them in great detail, I will speak very briefly to a couple of things that stood out.

[71] In **R. v. Krasniqi** 2009 CanLII 9372 (affirmed 2012 ONCA 561), the court imposed an ineligibility period of fourteen years. Mr. Kresniki was found by the sentencing judge to have an explosive temper, he falsified his identification to escape apprehension and went to the United States. He had a past history of complaints of being violent that resulted in Peace Bonds under s. 810. The jury, there was a jury recommendation in that case, and five of the jurors recommended fifteen years imprisonment.

[72] Mr. Blandon, **R. v. Blandon** 2012 ONSC 3864, there were two victims, one of whom died: the court characterized his offence as gratuitous violence on a public street with absolutely no provocation. There was an expression of remorse and that he was well behaved prior to this event. The parole ineligibility period was twelve years. The remaining three cases are all twelve year periods.

[73] In **R. v. Song** 2007 ABQB 37 (new trial ordered on unrelated grounds at 2008 ABCA 260), again this case had great similarities in the circumstances of the offence, but in that case the offender had just completed a two year federal prison term for drug offences. He had not surrendered, and was remanded pending the disposition of the murder case. He had breaches of recognizance and while out on parole from the drug offences in 2001 he was convicted of obstructing a police officer. His parole was revoked.

[74] In **R. v. Belance** [2004] O.J. No. 2223 (new trial ordered on unrelated grounds at 2007 ONCA 123): Mr. Belance had no record but when you look at paragraph 23 of the decision the judge referred to the presentence report as "depressing", that there was no remorse; that he did not find any evidence that suggested that Mr. Belance understood the gravity of his offence. He described the

potential for rehabilitation as "complete waste of time". The offender received twelve years parole ineligibility.

[75] My point in this, as has been repeated by many judges in similar circumstances, is that we look to these cases as a guideline only; everybody's case is a little bit different. We try to isolate those factors that aggravate and mitigate and do the best that we can having regard to what the law tells us we must do.

[76] Turning back to Mr. Smith's case, I conclude that Mr. Smith is a person, who has expressed appropriate remorse; who has demonstrated many positive qualities to those who are close to him; and who has the intelligence to learn from this event. There is no evidence that he currently has substance abuse problems and he has been employed in the past.

[77] Mr. Smith surrendered himself into custody. After his arrest and release from custody he complied with the conditions of his release for almost 4 years, which speaks well to his willingness and ability to live in a law abiding and peaceful way and that he can respond positively to court or correctional sanctions. This same point is demonstrated by his compliance with release and sentence provisions associated with his prior criminal offence.

[78] These are positive circumstances that speak well for Mr. Smith and that so many others who have committed this crime have not presented to the court.

[79] Mr. Smith's criminal record has only one prior conviction which would suggest that he has not demonstrated a commitment to a life of crime. However, as I have discussed, there is a serious concern that arises from the nature of the two offences that he has committed and their apparent inconsistency with the Demarco Smith that most of the world appears to see, most of the time. That underlying violent nature is a factor that causes grave concerns for his potential to be dangerous in the future.

[80] This offence occurred quickly and in a charged atmosphere. It is a regrettable fact, but it must be acknowledged that Casey Downey's own aggressiveness played a role in what happened. That does not mean he deserved to die. We can never lose sight of the fact that Casey Downey does not get a second chance to live his life, to undo what happened that morning.

[81] I think there is an important message that can be sent to others of like mind in similar circumstances. Extreme violence is not acceptable as a response to what was in this case no more than a drunken young man with a disrespectful attitude and a wish to have a fist fight. It cannot be tolerated and the message must be that there will be serious consequences for those who use weapons of extreme violence to settle petty disputes.

Conclusion

Parole Eligibility Date

[82] DeMarco Smith has been found guilty of second degree murder and I have sentenced him to imprisonment for life. That is the maximum sentence allowed in our law, I cannot give him a longer sentence. As was pointed out by counsel today he will always be subject to the control of the parole authorities assuming he is released and that is not a sure thing. There are things that Mr. Smith will have to go through while incarcerated to satisfy people that he can be released into the community at some point. So we are not talking about an automatic release by my decision, we are simply saying that there is a point at which based on the circumstances of this offence of Mr. Smith that he should be at least be considered eligible for parole. I have concluded that Mr. Smith will not be eligible for parole for a period of 11.5 years.

[83] The offender was in pretrial custody from February 9, 2010 to March 3, 2010. He is entitled to have that time treated as part of his sentence under s. 746 (a). It states:

> 746. In calculating the period of imprisonment served for the purposes of section 745, 745.1, 745.4, 745.5 or 745.6, there shall be included any time spent in custody between
>
> > (a) in the case of a sentence of imprisonment for life after July 25, 1976, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to imprisonment for life and the day the sentence was imposed;

[84] The credits for days in custody start to run on the day after the offender was taken into custody, but include the date of his release. Therefore the correct credit is 22 days, as submitted by the Crown. Mr. Smith was sentenced on January 27,

2014. Allowing for 22 days in pretrial custody by my calculation having regard to the decision I have made he is not eligible for parole until July 5, 2025.

Ancillary Orders

[85] I order that DeMarco Smith be subject to Firearms Prohibition Order made pursuant to s.109(1)(a) of the **Criminal Code**. As this is Mr. Smith's second such order, I order that the prohibition be for life.

[86] Pursuant to s. 487.051 of the **Criminal Code** Mr. Smith will comply with the terms of a DNA Order.

[87] Finally, as the offence occurred in 2010, prior to legislative changes, there is discretion afforded to the court under s. 737(5) of the **Criminal Code** to exempt the offender from payment of a victim surcharge. Having regard to the lengthy period of incarceration I conclude that it would be a hardship on Mr. Smith or his dependents to make such a payment and so I exempt him for having to do so.

Duncan, J.